

[2] The plaintiff alleges that at various times in 2008, the New Zealand Labour Party has published and distributed a pamphlet entitled: “We’re making a difference for everyone”. The publication is alleged to have occurred by the distribution of copies of the pamphlet at a club day at Waikato University on 27 February 2008. The pamphlet was referred to the Commission by a complainant, by a letter dated 19 March 2008. The letter enclosed four examples of what the complainant alleged was election advertising, which appeared to the complainant to be outside the law because they did not have the authorisation required under the Act. One of the examples was the pamphlet.

[3] I record that there is limited evidence before the Court on the allegation that the booklet was published by the New Zealand Labour Party. When this proceeding was the subject of a first case management conference before me on 22 April, the parties were agreed that it was appropriate for the proceedings to be served on the New Zealand Labour Party, and that was done. A memorandum was subsequently filed on behalf of the New Zealand Labour Party indicating that it did not wish to take part in the proceedings. A finding of fact on that allegation is not necessary for a decision on the issues in this proceeding. In the light of the limited evidence, and the possibility that the question may arise elsewhere, I make no finding of fact on that allegation.

[4] I further record that, because the New Zealand Labour Party did not take a part in these proceedings, the Commission very helpfully adopted a more active part than it would otherwise have considered appropriate in its position as the decision maker whose decision is under review. In addition to filing affidavits setting out the relevant facts, counsel made full submissions on the issues, so that the Court would have the benefit of full argument on both sides. That stance has been of considerable assistance.

[5] If the pamphlet is an “election advertisement” as that term is defined in s 5, it is subject to the general rules governing election advertisements in Part 2 Subpart 6, and in particular to s 65 which provides:

[65] **Requirements for election advertisements that promote parties or candidates**

- (1) A promoter must not publish, or cause or permit to be published, an election advertisement that encourages or persuades, or appears to encourage or persuade, voters to vote for a party unless the publication of the advertisement—
 - (a) is authorised in writing by the financial agent of the party; and
 - (b) contains a statement that sets out the name and address of the promoter of the advertisement.
- (2) A promoter must not publish, or cause or permit to be published, an election advertisement that encourages or persuades, or appears to encourage or persuade, voters to vote for a candidate unless the publication of the advertisement—
 - (a) is authorised in writing by the financial agent of that candidate; and
 - (b) contains a statement that sets out the name and address of the promoter of the advertisement.
- (3) A promoter must not publish, or cause or permit to be published, an election advertisement that encourages or persuades, or appears to encourage or persuade, voters to vote for 2 or more candidates unless the publication of the advertisement—
 - (a) is authorised in writing by the financial agent of each of those candidates; and
 - (b) contains a statement that sets out the name and address of the promoter of the advertisement.
- (4) Every promoter is guilty of an illegal practice who wilfully contravenes any provision of this section.

[6] The particular issue which had been identified by the complainant in respect of all four items, including the pamphlet, was that they did not contain a promoter statement as required by s 65. A wilful contravention of that provision constitutes an illegal practice under subs (4). That brings into play s 143 which provides:

[143] **Punishment for illegal practice**

Every person who is guilty of any illegal practice is liable on conviction on indictment to a fine not exceeding—

- (a) \$40,000 in the case of a person who is—
 - (i) a financial agent; or
 - (ii) a party secretary; or
- (b) \$10,000 in the case of any other person.

[7] The duties of the Commission, if it believes that an offence may have been committed in relation to an election advertisement, are set out in s 70 which provides:

[70] **Duties of Chief Electoral Officer and Electoral Commission**

If either the Chief Electoral Officer or the Electoral Commission believe that any person has committed an offence against this subpart, the Chief Electoral Officer or the Electoral Commission, as the case may be, must report the facts upon which that belief is based to the New Zealand Police, unless the Chief Electoral Officer or the Electoral Commission, as the case may be, considers that the offence is so inconsequential that there is no public interest in reporting those facts to the New Zealand Police.

The Commission's decision

[8] The Chief Executive of the Commission placed the items referred to in the letter on the agenda for the Commission's next meeting on 2 April 2008. She prepared an agenda item paper, with the relevant papers. The agenda item paper noted that the four items, including the pamphlet, had been referred as breaching s 63(2) of the Act because they did not contain a promoter statement, and that the issue in each case was whether or not the item was a party advertisement (in which case it would be an election advertisement). The Commission had, prior to receipt of the complaint, sought legal advice, in general terms, on a number of points under the Act, including the Commission's duties under s 70. That advice was received on 31 March, and was available to the Commission at its meeting.

[9] The matter was discussed at the meeting on 2 April. The minutes of that meeting record the discussion and outcome as follows:

- [4] Alleged breach of Electoral Finance Act – absence of promoter statement:

- “We’re Making a Difference” – a Labour pamphlet. The booklet is an election advertisement and it was published. Decided not to refer this matter to the police using the discretion in section 70. legal opinion lists a number of instances where this discretion may apply. One such instance is that the commission is satisfied that there are alternatives (for example, educational initiatives) that will be as effective in checking the behaviour. In keeping with its general practice, the Commission will seek compliance in the first instance. As the law is new and this is the first case where the Commission has found that a promoter statement was missing from an election advertisement, the appropriate course of action is to use this example as an educational reminder to all parties, and more broadly to promoters.

[10] An addendum to those minutes was prepared, following the issue of these proceedings, recording in more detail the Commission’s discussion and decision relating to the booklet. That reads:

There was extensive discussion. The Crown Law opinion recently received was kept in mind. The meeting proceeded on the basis the Labour Party had distributed the pamphlet. It was agreed it was an election advertisement, and there was no promoter statement. The question was whether the discretion should be applied. The meeting was conscious of Crown Law advice to err on the side of reporting and discretionary factors which could be considered. The general implications of reporting and not reporting were considered. The meeting agreed to approach this matter on the basis it could have been anyone who did it. The discretionary decision was recognised as a close one. It was noted the pamphlet had been produced before the Act was in force, it was a first offence, and could be approached on a basis the legislation was new and the Commission should educate at this stage, with a one-off warning, and take a hard line later when publishers could not say they were unaware. There was no evidence of adverse consequences referred to. The decision by consensus was that the situation meet statutory criteria for exercise of the discretion and it should not be reported to the police.

[11] The minutes and addendum were subsequently confirmed at the Commission’s meeting on 19 May.

The grounds of challenge, and the parties’ submissions

[12] The plaintiff challenges the Commission’s decision on two grounds. The first is that the Commission made an error of law. The second is that the Commission took into account irrelevant considerations in reaching its decision.

[13] As to the first ground, the plaintiff submits that the defendant's decision not to refer the booklet to police pursuant to s 70 was an error of law. In particular, the plaintiff says that the defendant erred in law when it determined impliedly (if not expressly) that the offence in question was so inconsequential that there was no public interest in reporting the facts to police. In support of that submission, Mr Kiely draws attention to a number of other sections in the Act where there is a reference to matters being "so inconsequential that there is no public interest in reporting those facts to the New Zealand Police". He notes that a similar phraseology is used in the recent amendments to s 59 of the Crimes Act 1961. Counsel further notes that the words have not been considered judicially. Counsel says "the Oxford reference dictionary defines "inconsequential" as "unimportant"". Counsel submits that a purposive approach to the Act is required, and notes that one of the purposes of the Act is to "provide greater transparency and accountability on the part of candidates, parties, and other persons engaged in election activities in order to minimise the perception of corruption" (s 3(d)). Counsel submits that, adopting that purposive approach, the publication and distribution of the pamphlet was not "inconsequential". Counsel suggests a number of examples of what might be considered inconsequential but submits that the failure to include a promoter statement is not inconsequential as it undermines the objective of the transparency, which is fundamental in terms of the purpose of the Act. In dealing with the words "public interest" counsel notes that those words appear in a number of statutes and submits that the Courts have tended to adopt a case by case basis of what would be in the public interest. He submits that, in the light of the objective of transparency, it is in the public interest that the requirements of the Act regarding promoter statements are properly adhered to and enforced. He submits that at the very least it is in the public interest that the defendant should refer this matter to the police for them to make the necessary inquiries.

[14] In support of the second ground of challenge, the allegedly irrelevant considerations said to have been taken into account may be summarised as:

- (a) Reliance on legal advice to "err on the side of reporting";
- (b) Taking into account considerations that police would consider in making a decision whether or not to prosecute for an offence; and

- (c) Failing properly to take account of relevant considerations namely whether the offence was in fact inconsequential or that it was not in the public interest to report the relevant facts to police. Counsel submits that there is no evidence that the Commission turned its mind to the actual criteria as set out in the Act and the Commission has thereby failed to take into account considerations that are not only relevant but in fact mandatory to the exercise of its decision making power.

[15] Mr Gunn for the Commission draws attention to the Commission's principal functions and submits that the standing and responsibilities of the Commission justifies a conservative approach to interference with its functions. He places considerable reliance upon the comments of the Court of Appeal in *Electoral Commission v Cameron* [1997] 2 NZLR 421 at 432-433 in this regard. Counsel further points out that the considerations to be taken into account under s 70, and the criteria against which inconsequentiality is to be assessed, are not stipulated in s 70. There are no guidelines as to the factors to be taken into account in relation to either inconsequentiality or the public interest. He contrasts that with other statutes where detailed guidelines are provided and submits that where a statute does not set out the factors which are relevant to the exercise of a discretion the exercise of the power will be vulnerable only if the decision maker "so uses his discretion as to thwart or run counter to the policy and objectives of the Act". (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030). He draws attention to the recent application of that principle by the Supreme Court in *Unison Networks Limited v Commerce Commission* [2008] 1 NZLR 42 where it said:

- [55] Often, as in this case, a public body, with expertise in the subject matter, is given a broadly expressed power that is designed to achieve economic objectives which are themselves expansively expressed. In such instances Parliament generally contemplates that wide policy considerations will be taken into account in the exercise of the expert body's powers. The courts in those circumstances are unlikely to intervene unless the body exercising the power has acted in bad faith, has materially misapplied the law, or has exercised the power in a way which cannot rationally be regarded as coming within the statutory purpose.

Counsel submits that, with the substitution of the word “electoral” for the word “economic” in that paragraph, that principle applies here.

[16] Counsel submits that the factors which might be taken into account by a prosecutor are relevant to the Commission’s role under s 70. Counsel further submits that the decision has properly considered and applied the statutory test. Counsel submits that the fact that the law is new, and the educative role of the Commission, were both relevant matters which were able to be taken into account by the Commission. Counsel further submits that the failure to record a promoter statement is not in itself so inherently serious that the failure to include such a statement could never come within the exception provided for in s 70. Counsel also points out that the Commission is not a prosecuting authority in respect of offences against the Act, that there is no barrier to others making a complaint to the police, and that in fact a complaint has been made to police.

Decision on the issues

[17] The Commission has found that this was an election advertisement and that there was no promoter statement. Those findings necessarily meant s 70 was engaged, as the Commission clearly recognised. It was accordingly required to report the facts known to it to the police unless it considered “that the offence is so inconsequential that there is no public interest in reporting those facts to the New Zealand Police”. Inconsequentiality is to be measured having regard to the public interest. On both aspects of the test, namely the nature and extent of the public interest concerning the matter in issue, and the level of seriousness involved in the concept of ‘inconsequential’, a value judgment is called for. That value judgment is one for the Commission, not the Court. The Court cannot, on judicial review, substitute its own value judgment. Its role is limited to determining whether the Commission has applied the proper test in reaching that value judgment. Here, the Commission clearly did apply the correct test. The minutes record discussion of matters which clearly fall within the ambit of the public interest, and there is a specific reference to there being no evidence of adverse consequence (an aspect clearly falling within the word “inconsequential”). The Commission described the

decision as a close one. Determination of the side of the line on which the case falls is a question for the Commission, not the Court.

[18] As to the submission that the absence of a promoter statement could never fall within the “inconsequential” exception to the s 70 obligation to report, it is not for the Court to impose such a gloss on the words of the statute. If this Court were to so hold, that would involve the making of a value judgment which, as I have said, is not properly the function of the Court. It would also involve doing so in the abstract, and without regard to the facts of a particular case. That would not be a proper exercise by the Court of its function of interpreting s 70. Accordingly, the submission that the Commission has erred in law in the test which it applied in relation to s 70 must fail.

[19] I turn to the ground of challenge that the Commission took into account irrelevant considerations. The section contains no prescription, beyond the words of the statutory test itself, of the considerations which may, or must, or must not, be taken into account in exercising the discretion. The case is one where, as in *Keam v Minister of Works and Development* [1982] 1 NZLR 319 (CA) at page 327, per Somers J: “The considerations or criteria upon which the decision is to be reached are not expressly stated. They are to be found in the objects of the Act as ascertained from the whole of its provisions”. I consider the matters raised as allegedly irrelevant against that test.

[20] The first allegedly irrelevant consideration was the legal advice “to err on the side of reporting”. The clear indication from the way in which that is recorded in the Commission’s minutes is that the Commission took the view that if there was doubt as to which side of the line the case fell on, that doubt should be resolved in favour of reporting. That approach was one which the Commission could properly take, and in taking cognisance of that advice the Commission did not take into account an irrelevant consideration. The second allegedly irrelevant matter is that the proposition that the Commission erred by taking into account the same factors as the police would consider in deciding whether to prosecute. The Commission’s minutes do not indicate that that consideration played a significant part in the decision making process. But, if it did, those factors were not irrelevant. The decision

whether to refer the matter to police is not the same as a decision by the police whether to prosecute. But there is a sufficient analogy, and degree of similarity, between the two questions that the Commission could properly reach the view that it might take into account similar considerations. As to the submission that the Commission failed to take into account relevant considerations in that it failed to consider the actual criteria in s 70, I have already held that the Commission did consider those criteria.

[21] The final matter which it is necessary to address is the Commission's view that the better course was to deal with the issue by an educative process rather than by reporting to the police. As appears from the minutes, the Commission took into account that the legislation was new, the pamphlet had been produced before the Act was in force, and an approach which would increase awareness of its requirements might assist if a hard line became necessary later. Having regard to the broad functions of the Commission with respect to the Act, the effectiveness of means other than prosecution to raise awareness of the requirements of the legislation so as to assist in promoting compliance with it was a matter on which the Commission was entitled to take into account. The Commission could properly form the view that that would be a better way of serving the public interest in the performance of its functions.

[22] For these reasons, the contention that the Commission's decision was reached on the basis of irrelevant considerations must also fail. The consequence is that the application for review must be dismissed.

[23] That makes it unnecessary to address issues of relief. Only one brief comment is needed. The only remedy which could properly have been granted, if the plaintiff's grounds of review had succeeded, would have been to direct the Commission to reconsider its decision not to report the facts to police. There is evidence that the matter has been referred to police, by some complainant other than the Commission. That was not (or at least not known to be) the case when this proceeding was commenced. But it does mean that whatever public interest there may be in having the matter investigated by police will be served.

[24] In accordance with the request of both counsel, costs are reserved. Counsel may submit memoranda if necessary.

“D MacKenzie J”

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