

ADMINISTERING THE ELECTORAL FINANCE ACT 2007

Dr Helena Catt, Chief Executive, Electoral Commission

The Electoral Commission

Established by section 4 of the Electoral Act 1993, the Electoral Commission came into being in 1994. Additional roles were specified in the Electoral Finance Act 2007. It is an Independent Crown Entity responsible for supervising parties and third parties' compliance with their statutory responsibilities, and for education and information on electoral matters.

The Electoral Act 1993, as amended in 2007, specifies the principal functions of the Electoral Commission —

- To carry out such duties in relation to the registration of political parties and political party logos as are prescribed by Part 4 of this Act
- To supervise political parties and third parties' compliance with the financial disclosure requirements of this Act
- To carry out such duties in relation to Parliamentary election programmes as are prescribed by Part 6 of the Broadcasting Act 1989
- To supervise political parties and third parties' compliance with the requirements of the Electoral Finance Act 2007
- To promote public awareness of electoral matters by means of the conduct of education and information programmes or by other means
- To consider and report to the Minister or to the House of Representatives on electoral matters referred to the Electoral Commission by the Minister or the House of Representatives.

The Electoral Commission has four members and is assisted by a staff of three to four. The Commissioners are:

- The President, who must be a current or retired judge: Hon Justice Andrew McGechan
- The Secretary for Justice, ex officio: Ms Belinda Clark
- The Chief Judge of the Māori Land Court, ex officio: Chief Judge Joe Williams
- The Chief Executive, who is appointed to the full-time role by the Governor General: Dr Helena Catt

As an independent crown entity we are required to act independently in carrying out statutory functions and exercising statutory powers. The Commission is funded through Vote Justice and the 'responsible minister' is the Minister of Justice, or a delegated Associate Minister.

In March 2002 guiding principles of electoral administration were adopted and in 2004 these were supplemented with our other core working values. In 2007 the State Service Commission standards of integrity and conduct were incorporated. The guiding principles' main headings are listed with the full text available on our website (www.elections.org.nz): *Creativity, Ethic of Care, Fair, Impartial, Independence, Neutrality, Outcome focused, Professionalism, Public Service, Recognition of obligations under the Treaty, Responsibility and accountability, Responsible, Responsiveness, Service to voters, candidates and parties, Trustworthy.*

Most decisions are made at a commission meeting attended by at least two, and usually four, commissioners. Decisions are reported publicly. Some non-controversial decisions are taken by all four commissioners signing a written resolution.

The Electoral Finance Act – Impact on day to day operations

Passage of the Electoral Finance Act 2007 in December 2007, with new election campaign regulation from 1 January 2008, resulted in substantial changes to the workload of the Electoral Commission members and staff in terms of both type and volume of work.

The new administrative roles relating to listing third parties and receiving donations protected from disclosure are analogous to current roles and are not onerous.

The new role of overseeing compliance relating to promoter statements and election advertisements is of a different nature to the roles under the Electoral Act 1993. The relevant regulation extends for nearly a year and covers third parties and members of the public as well as those contesting the election.

The commission has had to develop administrative and decision-making processes to ensure proper handling and due process. These have evolved with experience over the six month period since commencement as the volume and nature of complaints, and the environment surrounding them, have become apparent.

Meeting the requirement of this role has meant an increase in the legal staff from a half-time position to two full-time positions and a greatly increased incidence of seeking outside legal opinion. Given the heightened public and media interest in election campaign regulation there is also an increased possibility of judicial review or legal action involving the commission. The additional roles have necessitated a big shift in emphasis from education work to compliance work.

The new legislation was enacted on 19 December 2007 with commencement the following day, and the regulated period commencing on 1 January 2008. This meant implementation planning and process development had to begin while the shape of the final legislation was unclear. The significant changes to the Bill at select committee, and a lack of time between enactment and commencement also meant that interpretive and practical implications could not be worked through in advance of the law being in force. A lack of broad political consensus through the passage of the bill and since has resulted in difficult law delivered into a litigious environment.

Planning with certainty is hard because we have no way to predict how many third parties will list, how many complaints we will have to consider, the range of queries we will receive and the number of contested or absent legal interpretations that we will need to address.

Parties, candidates and third parties (listed or not) have had to come to terms with the implications of the new legislation also. It is clear that having uncertainty remaining within the regulated period has had a chilling effect on the extent and type of participation in political and campaign activity. Participants have also been caught out with new administrative requirements, for instance for accounting for party donations exceeding \$20,000 gained through accumulation. We do acknowledge the hard work and goodwill of party secretaries and financial agents in their approach to the changed environment and in their dealings with us.

Interpretation of the EFA

The meanings of significant sections of the legislation are obscure. This situation has required – and will require – constant legal advice to assist with interpretation, imposing a burden beyond the resource demands which government helped us address with supplementary funding.

Issues are taking time, expense, and fine judgement to resolve using processes and rubrics developed to meet the new requirements and environment. We have been unable to be as fast or definitive in our actions or guidance as would be desirable. We are also (and have been), rightly, open to challenge. The commission is not confident that it will be able to reach informed positions on the interpretation of some provisions within the election period, and notes that the situation is exacerbated by the legal reality that it cannot finally determine questions of whether, for instance, an item is an election advertisement.

Commission staff have been kept busy since 1 January handling inquiries and complaints relating to alleged election advertising in breach of the Electoral Finance Act 2007.

A lot of early complaints originated from political factions within the online discussion community (the "blogosphere") and related to interpretation of the election advertising exemption for expression of personal political views online.

The most common complaint for non-online matters has been that something alleged to be an election advertisement is missing a promoter statement. In some cases the breach was remedied before formal consideration of a complaint was scheduled.

Significant interpretative challenges considered by the commission include:

- application of the tests in the definition of "election advertisement" to a wide range of items put before it;
- whether communicating with the news media is to "publish";
- in what circumstances a report by a third party on the policy stances of a range of parties may be considered to be an election advertisement;
- if archival material on the web relating to a previous election can be seen as an election advertisement in a current regulated period;
- what activity is included within the exemption from publishing relating to non-commercial expression of individual views on the internet;
- subtle but potentially significant definitional differences between the Electoral Finance Act 2007 and the Broadcasting Act 1989;
- the matters that commissioners could or should take into consideration when determining whether offending is so inconsequential that there is no public interest in reporting it to the police; and
- what is, and when is, a person deemed to be involved in the administration of the affairs of a political party.

Many of the above issues could not be resolved on a generic basis, with each relevant instance needing to be considered on its own facts going forward.

A range of interpretative challenges will be considered during the remainder of the election period and during consideration of party election expense and donation returns in 2009. Some such challenges have already been identified in relation to election activities that are not included in expense returns; in particular which activity by members of parliament meets the "capacity as an MP" expense exemption.

The commission is determined to continue to perform its functions with the impartiality and independence guaranteed by its statute and amplified by the principles of electoral administration to which we subscribe.

Electoral Commission EFA-related decisions are published on www.elections.org.nz