

Members present

Hon Andrew McGechan (President)
Acting Chief Judge Wilson Isaac – *ex officio* (Maori Land Court)
Ms Belinda Clark – *ex officio* (Secretary for Justice)

Dated: 13 October 2008

Decision Number: 2008-36

Initiated by

DAVID FARRAR ON 9 SEPTEMBER 2008

In relation to

**Election advertisement
DB BREWERIES LIMITED**

Findings and Determination

Tui billboards “When Winston says no he means no” are not election advertisements within the meaning of section 5 of the Electoral Finance Act 2007.

This headnote does not form part of the decision.

Subject

Tui billboard captioned: “When Winston Peters says no, he means no - Yeah right”. The billboard is displayed in a number of locations throughout the country, including Tauranga.

The billboards do not contain promoter statements and DB Breweries Ltd is not a listed third party.

Issues raised

The Electoral Commission considered whether the billboard is an election advertisement 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 DB Breweries Limited

DB Breweries Ltd provided substantial submissions.

DB Breweries suggests that the billboard is not an election advertisement and differentiated between the Electoral Commission’s decision 2008-25 in respect of the Employers and Manufacturers’ Association advertisement and the style and format the Tui advertisements take. Tui advertisements often focus on prominent public figures, particularly those who have erred in some way or otherwise conducted themselves in a manner that merits commentary and public exposure. They seek to communicate with consumers in an entertaining but socially responsible manner, and DB Breweries goes to great lengths to ensure compliance with relevant codes or legislation.

DB Breweries also referred to the New Zealand Bill of Rights Act and submitted that the Electoral Commission should interpret the Electoral Finance Act in a manner that does not amount to an unjustified limitation on the fundamental right to freedom of expression.

Electoral Commission's Determination

The Electoral Commission has considered the requirements of the Electoral Finance Act 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. Such approach is consistent with the aims of the New Zealand Bill of Rights Act.

DB Breweries stated that it had no intention to attempt to influence voters, and suggested the billboard under consideration could be distinguished from the Employers and Manufacturers' Association advertisement which was the subject of Electoral Commission decision 2008-25. In that determination the Commission indicated that the impact of an item is a primary consideration in determining whether the item is an election advertisement, and such impact can outweigh the intention of the promoter.

The content of an advertisement contributes to the overall impact of the item. In the view of the Electoral Commission the Employers and Manufacturers' Association advertisement contained a direct political urging – a call to action – whereas the Tui advertisement does not urge any such action.

Context is another important factor in weighing whether an item can be reasonably regarded as encouraging or persuading voters to vote or not to vote in any particular manner. This is a special case. The Electoral Commission accepts that the Tui advertisements have become a familiar advertising device using New Zealand life, events and personalities to deliver a "yeah right" ironic response in order to build Tui's brand; and people are used to glancing at them and being amused. While there is no exemption for humour as such, because of the long-standing and unique background of the Tui advertisement series, the Commission does not consider that the billboard in question is likely to have an abiding impact on the thinking of members of the public.

As a result the Electoral Commission formed the view that the billboard in question sits just outside of what could reasonably be regarded as encouraging or persuading voters to vote or not to vote in a particular manner, and is therefore not an election advertisement for the purposes of the Electoral Finance Act.

For the above reasons it is the view of the Electoral Commission that the Tui billboard in question does not contravene the Electoral Finance Act 2007 as it is not an election advertisement within the meaning of section 5 of the Act

Signed for and on behalf of the Electoral Commission



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

23 October 2008

Exhibits

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

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