

1 August 2022

The Chairperson
Commerce Commission
Wellington

MATTER NO: 1331.3
OUR CONTACT: Stephen Franks

By email: contact@comcom.govt.nz

Dear Ms Rawlings

INVOLVEMENT BY CONSULTANTS IN MISLEADING OR DECEPTIVE CONDUCT

1. On the instructions of our client the New Zealand Taxpayers' Union we ask the Commission to investigate and if feasible, prosecute certain people who have made or assisted in the making of misleading or deceptive claims that territorial authorities and communities will have ownership of the Three Waters "entities" under the 'Three Waters' scheme for New Zealand water infrastructure.
2. The New Zealand Taxpayer's Union is an association which campaigns for fiscal conservatism and transparency under the mission statement - *Lower Taxes, Less Waste, More Transparency*. It reports having more than 195,000 registered members and supporters, and being funded by more than fifteen thousand donors. It says that approximately five percent of its income is from membership dues and donations from industry bodies.
3. We attach a legal opinion that details the Claims and explains why they breach the prohibition in section 9 of the Fair Trading Act 1986 against "conduct that is misleading or deceptive, or is likely to mislead or deceive".
4. As explained in the opinion it appears that the Commission has jurisdiction, because their conduct was "in trade", to pursue all or any of:
 - a) Doug Martin, Chairperson of the Working Group on Representation, Governance and Accountability of New Water Service Entities, established by terms of reference dated 8 November 2021;
 - b) any other members of that Working Group who were engaged to provide professional or other services in their role on that committee;
 - c) Local Government of New Zealand Association Inc (which states on its website that it trades as Local Government New Zealand) providing advice, research, advocacy and other services to its members and others.
5. It appears to us that some or all of those persons may also have breached sections 12A (unsubstantiated representations) 13 (false representations about characteristics etc) and 14 (misleading in relation to land). The likelihood that offences were being committed emerged from a review of Cabinet Papers and propaganda for the Three Waters scheme. It does not depend on the Water Services Entities Bill 2022, though the express words of the Bill are consistent with and confirm what had been indicated before tabling of the Bill that is presently before a the Finance and Expenditure Select Committee.

6. We refer to your website statement of the factors that affect the exercise of your enforcement discretion, and address each pertinent listed factor in turn.

Extent of detriment

7. Deception in public discourse can be contagious, especially if it is blatant, and appears to be successful. That is the core insight behind the 'broken windows' policing policy. People set their conduct standards not by reference to law, but by what is actually punished. Only consequences establish the norms for "what goes on round here". The norms are defined by what is actually acceptable in practice. Norms can have little to do with what the law says, or what is claimed by authorities. Perceived norms depend on seeing who gets away with what, on how prominent people behave.
8. The Ministers' claims appear to us to be dishonest. Perhaps the contractors and LGNZ may establish that they did not understand the degree of misrepresentation and deception in their related statements. But that does not diminish the importance of identifying falsehood, and the need for care under the Fair Trading Act, to avoid misleading conduct. Conspicuous dishonesty by leaders is particularly corrosive of the commercial honesty/high trust society that is to be protected by the Commission's powers under the Fair Trading Act.
9. We submit that even single instances of prominent unpunished misleading or deceptive conduct by leading professionals or senior officials and agencies, can undermine and nullify the deterrent and standard setting effect of thousands of hours of patient enforcement work by the Commission.
10. Accordingly, the detriment may be incalculable if you choose not to investigate and to report on the misrepresentation detailed in the attached opinion. It went on over many months. It was repeated many times. The pay-off for success is high (expropriation of \$billions worth of public/community property with confused, ill-informed and ineffective political resistance)
11. Professional complicity in helping politicians get away with deception may justify public mistrust of the genuineness of business commitment to the standards embodied in the fair dealing provisions of the Fair Trading Act. The law loses credibility if it is thought that deceptive conduct may get a blind eye when even unsubstantiated though honest claims by business small fry can attract substantial liability. Business cynicism can develop into resigned tolerance of dishonesty. Scepticism about the motives of authorities can grow into widespread tacit (if not active) involvement in law breaking – 'if you can't beat them, join them'. It promotes opportunism - 'why not, if you can get away with it', and eventually shelters corruption - 'with the right friends you can do anything'.

Loss of property?

12. If the government succeeds with this expropriation, Councils and ratepayers all across New Zealand will lose their property, while being told they retain it

Are the more vulnerable targeted by the behaviour?

13. The Claims targeted all those entitled to assume that the fine print would not comprehensively negate the headline claim.

Is the behaviour likely to have significant adverse national or regional impact?

14. The impact is nationwide. In addition, it telegraphs internationally the willingness of the New Zealand government to lie without conscience to its own people. That will be noticed by rating agencies. It may be reflected in their perceptions of country risk. Those who become fully informed

on the scheme will learn that it has been promoted with government lies about ownership. Their investment will depend on the government ensuring councils and communities cannot exercise owner powers or otherwise interfere with enforcement of bond issue terms.

Seriousness of conduct

Is the conduct deliberate, reckless or very careless?

15. The conduct is clearly deliberate

Is the conduct repeat or ongoing behaviour?

16. It has continued over many months

Is there a serious departure from expected lawful commercial behaviour?

17. You will recognise from the schedule of statements that no prudent investment promoter or ordinary business would risk being so misleading

Is the conduct/information difficult to detect by businesses or consumers?

18. The statements clearly misled business and political journalists, who reported the claims as if they answered the critics who feared loss of community and council ownership. We only established just how egregious the false claims were, by carefully searching the Cabinet Papers and the Bill for residual elements of ownership, to find none.

Can the conduct be undone?

19. Prominently published corrections could be useful. But more importantly they would signify that such deceit is not officially endorsed, that it will not go unpunished or uncorrected.

Is there likely to be a contravention of a per se provision?

20. Section 9 and other relevant provisions of the Fair Trading Act are effectively per se provisions

Public interest

Is there likely to be widespread public interest in the issue?

21. Yes, and that is why it should be made clear that the Commission will enforce the law without fear or favour

Would a decision not to commence or continue enforcement action likely undermine public confidence in the law?

22. See above

Is it more appropriate for the Commission, rather than another agency or an affected party, to address the issue?

23. We have carefully considered the Financial Markets Conduct Act and the jurisdiction of the Financial Markets Authority. We think the so-called shares offered to Councils are not in fact “shares” or

indeed securities at all. The involvement of professionals in providing services that facilitate and add apparent authority to deceitful claims justifies Commission attention to their involvement.

24. With regard to the LGNZ involvement, we see no reason why the Commission should not establish that peak bodies and their secretariats, are bound in serving their members and communicating with the public, to abide by the same standards of commercial honesty as other service providers.

Are there any mitigating or aggravating features involved?

25. No mitigating circumstances. Guilty persons may argue some kind of “superior orders” mitigation. We submit that the immunity of their political superiors makes it all the more important that contractors and consultants and “Working Group” members recognise that they do not get immunity. If they engage their personal reputations built up in the commercial environment which is conditioned by law upholding honesty, they should not feel able to apply them in support of political duplicity without fear of the normal consequences of being misleading. The reputation of all such workers is traduced if there is no penalty for service that makes political lying more believable.

Is there a significant need to clarify the law?

26. In our opinion the law is clear. The novelty in this action is that the misrepresentation or deceit is in service of breathtakingly dishonest claims by politicians, that may be written into a statute.

Is it necessary to reinforce the application of the legislation?

27. Yes, to sustain respect for the law, and a climate of commercial honesty generally.

Are the issues timely?

28. Yes, if the Commission acts promptly, Parliament will be on notice that it should enquire more closely into what submitters and Councils understand about the proposed scheme

What interest does the NZ Taxpayers’ Union have in this matter?

29. The Taxpayers’ Union is concerned about waste of taxpayer money. It appears from research it has seen, commissioned by a number of local authorities, that the Three Waters scheme is grotesquely expensive. It is expressly designed to transfer money from some ratepayers to benefit others. It could waste billions of dollars in money borrowed from international lenders, on works and administration that may be designed at least in part to facilitate disguised transfers and pay-offs to co-governors with no qualifications other than racial inheritance.
30. Our client knows that the Commission spends scarce resource in detecting, pursuing and deterring misleading and deceptive conduct. And in educating business people about the law. The Taxpayers’ Union regards that as taxpayer money well spent. They are anxious to see an application of Commission powers to reinforce norms of honesty in the public service and among the contractors and consultants that feed off it. The standards expected should be at least equal to those enforced on other business people.
31. Accordingly our client asks the Commission to investigate and to report on the prospects of a salutary prosecution. It would make it clear that business people and professionals will be judged on the normal standards that apply to them, without a de facto exception for when they are collaborating with and enabling political deceit. Our client hopes that you will enhance the reputation and moral authority of the Commission by showing that you apply the law without fear or favour.

Urgency

32. If the people liable for the misrepresentation were obliged to issue a prompt and clear corrective statement, that could substantially mitigate the damage of their involvement in the Ministers' deceit. That remedy would reduce the risk of continued uninformed reliance on the misrepresentation. The Prime Minister may be among those misled. Over the weekend on the TV programme Q & A she assured people "*The ownership of these entities sits with local bodies and government so it is not changing the ownership structures?*" The sooner the Commission moves to require corrective statements the better.
33. People will be submitting orally to the Finance and Expenditure Committee of Parliament over the next several months. They should be able to do that without being misled by false claims with apparent authority, about what clause 15 really means.
34. Our clients ask that you let us know within three weeks if you are not likely to seek such a correction, so that they can decide on other ways to mitigate the damage from the false statements. The Select Committee deadline for submissions was 22 July 2022. The Committee's report is due on 11 November 2022 but it will have finished hearings months before that date.

Yours faithfully

FRANKS OGILVIE

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