

Members present

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

Dated: 20 October 2008

Decision Number: 2008-38

Initiated by

ELECTORAL COMMISSION on receipt of
information volunteered by the Party

In relation to

Annual returns of party donations
NEW ZEALAND FIRST

Findings and Determination

Donations made to New Zealand First in the 2005, 2006 and 2007 years were not included in New Zealand First's annual returns of donations for the relevant years. No offence committed by the Party Secretary in respect of the 2007 annual return as the Secretary had no intention to file a false return and took all reasonable steps to ensure it was accurate. New Zealand First is required to file amended returns for the 2005 and 2006 years.

Although the 2007 return was materially false, no offence committed under section 214G(3) or 214G(4) of the Electoral Act 1993 as the Party Secretary had no intention to mis-state or conceal the facts and took all reasonable steps in the circumstances to ensure that the information in the return was accurate. In respect of the 2005 and 2006 returns, the statutory time limit for any prosecution has expired. Correction of the public record is of principal concern.

The determination is in respect of the actions of the Party Secretary for New Zealand First only, as considered under Part 6 of the Electoral Act.

This headnote does not form part of the decision.

Subject

The Electoral Commission received unsolicited communications from New Zealand First's Auditor, President, and past President providing varying accounts of donations that were omitted from the Party's annual returns for the years 2005, 2006 and 2007.

The Electoral Commission requested amended returns of annual donations for those years along with an explanation of the reasons the donations were omitted and the systems in place to ensure proper records of donations are kept. An amended return was filed, along with the explanations sought, for the 2007 year only.

Issues raised

The Electoral Commission considered whether a return was filed that was false in any material particular and, if so:

- in respect of the return for the 2007 year:
 - whether the Party Secretary failed to keep proper records as required by section 214G(2) and, if so, whether there was any reasonable excuse for failing to keep

- proper records; and
 - whether the Party Secretary filed a return that is false in a material manner and, if so, whether the Party Secretary filed the return knowing it was false, or whether the Party Secretary had no intention to mis-state or conceal the facts and took all reasonable steps in the circumstances to ensure that the information in the return was accurate
- in respect of returns for previous years, what action might be appropriate in light of the statutory timeframe for potential prosecutions having expired.

Electoral Act 1993

Section 214F of the Electoral Act (the Act) defines party donation to include a donation of money, the equivalent of money, or goods and services, received by or on behalf of the party by a person or body of persons involved in the administration of the affairs of the party, where the value of the donation exceeds \$10,000.

Section 214G(1) of the Act requires party secretaries to file a return of donations each year, on a form provided by the Electoral Commission, which sets out the name and address of each person who made a donation and the amount of the donation as well as the details of anonymous donations.

Section 214G(2) requires party secretaries to keep proper records of donations received by parties.

Section 214G(3) provides that it is an offence for a party secretary to fail, without reasonable excuse, to comply with the requirements of section 214G(1) or (2).

Section 214G(4) provides that it is a corrupt practise for a party secretary to file a return knowing it to be false in any material particular, and in any other case it is an illegal practise unless the party secretary proves that he or she had no intention to mis-state or conceal the facts and took all reasonable steps to ensure the return was accurate.

Section 226 (and the Summary Proceedings Act) limits the time for prosecutions of such offences to 6 months from the date the offence was committed.

Section 214J obliges the Electoral Commission to maintain a record of all party donations and to make that record available for public inspection. The obligation continues under the Electoral Finance Act.

Section 149 of the Electoral Finance Act saves the Electoral Act regime for the purposes of the 2007 returns.

Comments from the Secretary of New Zealand First

The Secretary of New Zealand First provided an amended return for the 2007 year. She also provided written explanations in respect of the 2007 return, personally and through counsel.

Counsel suggested that as the relevant provisions of the Electoral Act were repealed, the Electoral Act regime does not apply to party donation returns for the 2007 year. He explained that systems are in place to ensure that large donations are identified and processed properly, but that in the case of the donations in question they were omitted due to reliance on a legal opinion sought by the auditor.

The Secretary explained that the omission of the \$80,000 donation was as a result of a misinterpretation of the Act. Legal advice received indicated that the Spencer Trust was "a body of persons involved in the administration of the affairs of the party" and as such when donations were made to the Spencer Trust those equated to donations to New Zealand First and the payment of the money from the Trust to the Party did not amount to another donation. All the relevant donations to the Spencer Trust were for less than \$10,000 and, as donations are only required to be reported if they exceed \$10,000, a nil return was filed.

Before filing the return the Party Secretary made enquiries with the Spencer Trust about any donations exceeding \$10,000 and was provided a draft statement of account indicating all donations were for less than \$10,000.

The auditor believed the payment from the Spencer Trust was not a donation to New Zealand First.

Electoral Commission's Determination

The Electoral Commission has considered the requirements of the Electoral Act along with the items listed as exhibits (below).

Counsel suggested that the Electoral Act regime does not apply to party donation returns for the 2007 year. Section 149 of the Electoral Finance Act saves the Electoral Act regime for the purposes of the 2007 returns, notwithstanding the repeal of sections 213 to 214L of the Electoral Act (section 149(5)).

Section 214F of the Act defines party donation to include a donation of money, the equivalent of money, or goods and services, received by or on behalf of a party registered under the Act and which has a value in excess of \$10,000. The Electoral Commission has considered all the information provided in respect of the 2007 return and come to the conclusion that the original return filed for the 2007 year was false in a material particular in that it omitted a donation of \$80,000 from the Spencer Trust.

Section 214G(4)(a) provides that it is a corrupt practise for a party secretary to file a return knowing it to be false in any material particular. The Electoral Commission accepts the Party Secretary's explanation as to the reason why the donation was omitted, in that she had relied on auditor's advice (and, through him, legal advice) as to the nature of a donation made to the Spencer Trust, and is therefore of the view that the Party Secretary did not file the return knowing it to be false.

Section 214G(4)(b) provides that in any other case it is an illegal practice unless the party secretary proves that he or she had no intention to mis-state or conceal the facts and took all reasonable steps to ensure the return was accurate. The Electoral Commission accepts that the Secretary had no intention to mis-state the facts in respect of the return of party donations. The Commission also considers that under the circumstances it was reasonable for the Secretary to rely on what she had been told by the Party and by the Auditor, who is a professional and also relied on legal advice, in respect of the classification of the donations in question. The information relied in respect of donations to the Spencer Trust included a draft statement of account from the Trust, which confirmed that none of the donations received by the Trust exceeded \$10,000. In the circumstances, the Commission is satisfied that the Party Secretary took all reasonable steps to ensure the 2007 return was accurate.

The Electoral Commission is also satisfied that the Party Secretary kept proper records of the donations received by the Party, in accordance with section 214G(2). The error was not in maintaining records of the donations but in determining which of those recorded donations ought to be reported in the return.

As a result, it is the view of the Electoral Commission that in respect of the 2007 return the Party Secretary did not commit an offence for the purposes of section 214G.

The Electoral Commission received correspondence from a range of individuals associated with the Party containing inconsistent accounts of donations made to New Zealand First in the 2005 year and omitted from the return of donations, and indicating that donations in the 2006 year were likewise omitted from the 2006 return. The Electoral Commission notes that the time limit for prosecuting any potential offence in respect of the years 2006 and prior has expired. The Commission also notes that there have been changes in Party Secretary in the intervening period. Under such circumstances, and in light of the Commission's responsibility under section 5(b) to supervise political parties' compliance with the financial disclosure requirements of the Act, the Commission considers the matter of principal interest is ensuring the accuracy of the public record of political parties' donations. Therefore the Commission requires New Zealand First to file amended annual returns of party donations, on the form provided by the Commission and accompanied by auditor's reports, for the 2005 and 2006 years.

The matters the Electoral Commission was required to consider are governed by sections 214F to 214L of the Electoral Act. Those provisions apply in respect of the obligations and actions of the Party Secretary only. As a result the Commission has considered, and this decision pertains to, the actions of the Party Secretary only.

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

- **the Secretary for New Zealand First did not file the 2007 return of donations in a manner amounting to the commission of an offence for the purposes of section 214G of the Electoral Act 1993**
- **New Zealand First is required to file amended annual returns of party donations, on the form provided by the Commission and accompanied by auditor's reports, for the 2005 and 2006 years**

Signed for and on behalf of the Electoral Commission



Dr Helena Catt
Chief Executive and Commissioner
New Zealand Electoral Commission

23 October 2008¹

Exhibits

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

1. letter 10 September letter 2 September 2008 from the Party's Auditor
2. letter 4 September 2008 from the Party President
3. letter 5 September 2008 to the Party President
4. letter 8 September 2008 to the Party Secretary
5. letter 02 September 2008 from Dail Jones
6. letter 16 September 2008 to Dail Jones
7. letter 19 September 2008 from Dennis Gates (counsel for Party Secretary)
8. letter 25 September 2008 responding to Dennis Gates
9. letter 29 September 2008 from Party Secretary accompanied by return for 2007 but no auditors report
10. fax 30 September 2008 from Dennis Gates
11. letter 30 September 2008 responding to Dennis Gates and providing copies of information requested
12. letter 2 October 2008 from Dennis Gates providing explanation for 2007 return with letter from the auditor attached
13. Options paper and attachments
14. NZ First annual returns for the 2005, 2006 and 2007 years as originally filed
15. File provided by Serious Fraud Office

¹ Publication of the decision, other than the outcome, was withheld in order to avoid potential prejudice to a continuing police investigation