



25 January 2007

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Dear Helena

Anonymous donations to political parties: section 214G Electoral Act 1993
Our Ref: ELE232/54

Thank you for your letter dated 6 December 2006 requesting advice concerning the status of anonymous donations to political parties.

Your questions

1. Your letter asks two questions:
 - 1.1 Is a donation anonymous under the definition within the Electoral Act if it is made to a trust but party officials know the identity of the donor?
 - 1.2 Is a party return of donations that lists a donation as from a trust accurate if the party secretary knows the identity of some of the people who made donations to that trust?

Background

2. You received a letter from Dr Russell Norman, co-leader of the Green Party asking that the Electoral Commission undertake an investigation into the National Party donations return for 2005. Dr Norman refers to alleged supporting evidence in Nicky Hager's book *'The Hollow Men: A study in the politics of deception'*. This book alleges that senior National Party people, including MPs, were aware of the identities of big donors to the party whose names were not listed in the party's declaration of election year donations to the Electoral Commission.
3. The book alleges that the party appears to have breached both electoral laws and Parliamentary Spending Rules, and that known donations were converted into "anonymous donations" by the use of private trusts.

Summary of advice

4. Under the Electoral Act 1993 a donation to a political party is “anonymous” if it is a donation that is made in such a way that none of the party candidates or persons involved in the administration of the party knows the identity of the donor. If a secretary of a party made a return stating that a donation was anonymous when the secretary or party officials knew who made the donation that would likely constitute a corrupt or illegal practice under s214G of the Act.
5. However, unlike some other jurisdictions, New Zealand electoral law does not prevent trusts from making donations to political parties. If a donation to a party is made by a trust, and is identified in the party’s return to the Electoral Commission, then that is not an “anonymous donation” as defined under the Electoral Act. There is no requirement to identify the source of the Trust’s funds.
6. It follows that even if party officials know who provided funds to the trust to make the donation in question that does not mean that the return is false or constitutes a breach of the Electoral Act.
7. I note in any case that a prosecution against a person for a corrupt or illegal practice under the Electoral Act must be commenced within 6 months after the alleged offence was committed. That period expired on or about 31 October 2006.

Mr Hager’s book

8. Dr Norman’s complaint is based on the recently published Nicky Hager book *The Hollow Men: A study in the politics of deception*. Dr Norman’s letter claims that the book presents evidence that former National Party leader Dr Brash stated the names of several individuals who contributed substantial funds to the party but did so through a trust rather than through direct donations. Dr Norman refers specifically to a 17 February 2005 National Party board meeting at which the party president allegedly communicated to the rest of the party board the names of the ten major donors to the party.
9. Dr Norman alleges that the book’s contents establish that the National Party has not followed the provisions of section 214G of the Electoral Act, on the basis that the leader of the Party and other Party officials knew the names of major Party donors, most of whom appear to have donated anonymously. Dr Norman alleges that the report sent to the Electoral Commission by the party secretary was therefore unlikely to be thoroughly accurate and the party should be subject to a fine.
10. Mr Hager alleges in his book that a dozen or so big donors had supported National in the 2005 electoral campaign but that their donations had gone to National via the legal channel of lawyers’ trust accounts and other special anonymising trusts that ensured secrecy¹.

¹ The book identifies (at pages 223 and 224) eight alleged ‘high value donors’ and ‘four other probable high value donors’. The book further alleges that senior National Party people, including MPs, were aware of the identities of the big donors and talked openly about donor negotiations. The book states that later, when the Party’s declaration of election year donations was provided to the Electoral Commission, none of those names were listed. The book alleges that the Party was not only secretive and deceptive about its election finances; some of its activities appear to

11. The book alleges that only 7% of the National Party declared donations in 2005 came from “known donors”. It alleges, at page 234, that minutes of a National Party December 2004 Board meeting record that the board members were briefed on:

“... the HQ’s streamlined procedures of maintaining relationships with donors, including sending flowers, letters of appreciation and Christmas cards.”

12. The book further states:

“To convert known donations into anonymous donations National used private trusts – in particular the Waitemata Trust. This trust received money from National supporters during 2005 and then sent a cheque for \$1,254,845 to the National Party, meaning that only this ‘Waitemata Trust’ donation was shown on the Party’s official donation declaration, not the people who actually gave the money. Some other donors got their lawyers to send the cheques from their law firm trust funds. All this is legal, but the reason for passing the money through these trusts is apparently to keep the donors’ identities secret from the public”.²

13. At page 237, Mr Hager states, “It is legal to avoid declaring donors and secrecy helps political fundraising. This is obviously an unhealthy situation: the only solution is to put an end to both anonymous donations and anonymising trusts.”
14. For the purposes of this opinion I have assumed that the allegations within the book are capable of being proven.

Relevant statutory provisions

15. Donations to New Zealand political parties are regulated by ss 214F and 214G of the Electoral Act 1993.
16. Section 214F defines the term “party donation”. The term includes a donation (whether of money or of the equivalent of money or of goods or services or of a combination of those things) which is received by or on behalf of the party by any person or body of persons involved in the administration of the affairs of the party; and which, either on its own or when aggregated with all other such donations made in the same year by the same person exceeds \$10,000 in sum or value (inclusive of goods and services tax).
17. Section 214G(1) provides that every secretary of a political party must ensure that the Electoral Commission receives by 30 April in each year a return (on a form provided by the Commission) setting out the name and address of each person who made a party donation in the year ending with the immediately preceding 31 December and the amount of each such donation; and the amount of each anonymous party donation made in the year ending with the immediately preceding 31 December.

have breached both the electoral laws and the Parliamentary spending rules, and it seems to have been a party to others’ breaches of the election legislation. (*Hollow Men* page 233.)

² *Hollow Men* at page 234.

18. Section 214G(2) requires every secretary of a political party to keep proper records of donations received by the party.
19. Under s 214G(3), every secretary of a political party who fails, without reasonable excuse, to comply with ss 214G(1) or (2) commits an offence and is liable on summary conviction to a fine not exceeding \$20,000. Further, every secretary of a political party who forwards a return that is false in any material particular to the Commission, knowing that the return is false in any material particular, is guilty of a corrupt practice and is liable on conviction on indictment to imprisonment for a term not exceeding 1 year or to a fine not exceeding \$20,000, or to both. In any other case of a false return, the secretary is guilty of an illegal practice and is liable on conviction on indictment to a fine not exceeding \$20,000, unless the secretary proves that he or she had no intention to mis-state or conceal the facts; and that he or she took all reasonable steps in the circumstances to ensure that the information in the return was accurate.
20. “Anonymous” is defined in section 3 of the Act, by way of an amendment enacted in 2002. An anonymous party donation is a donation that is made in such a way that none of the candidates of the party to which the donation is made or any of the persons involved in the administration of the affairs of that party knows who made the donation.
21. Finally, the provisions of section 226 of the Act are relevant. This section provides that, in general, a prosecution against any person for a corrupt practice or an illegal practice shall be commenced within 6 months after the offence was committed.

Purpose of the legislation

22. In New Zealand electoral candidates’ election expenses have had to be disclosed since enactment of the Corrupt Practices Prevention Amendment Act 1895. In 1986 a Royal Commission on the electoral system³ concluded that it was perfectly legitimate and, indeed, highly desirable that those interested in the political process raise and spend money to further their political objective. However, the Commission concluded, such activity should not be completely uncontrolled. Resources, it said, should not be used in a way which is unfair or likely to distort the proper working of a democracy. In order to enable the electoral process to be fair and enable voters to make informed judgments, therefore, the Commission believed it was important that the electorate be fully informed both about significant sources of political finance and about the uses to which it is put. The Commission observed that, whether or not improper practices occur in the absence of disclosure and requirements, disclosure ensures public confidence in the integrity of the system. (Summary of the Commission’s report taken from *Electoral Commission v Tate* [1999] 3 NZLR 174 at paragraphs [54] and [55].)
23. At paragraph 8.23 the Commission concluded that “the amount of any disclosable donation to a political Party should be revealed and/or disclosable records be available for public inspection. To minimise the avoidance of these measures by way of donations made anonymously or through “front” organisations, only donations received from named individuals, companies or incorporated societies should be

³ Report of the Royal Commission on the Electoral System “Towards a better democracy” December 1986.

accepted by political parties or candidates. Any disclosable donations which are anonymous or received from other sources should be returned to the donor if practicable, and if not, passed to the Electoral Commission and used to offset costs of their office.”

24. The Commission’s proposals were subsequently inquired into and reported on by a parliamentary electoral law committee (1988) AJHR I 17B. For the most part the Commission’s recommendations in relation to sources of political finance were adopted. The Electoral Act was amended and since 1 April 1996 registered political parties have been required to disclose the names and addresses of donors who make sizeable contributions to their party.

Was section 214G breached in this case?

25. The complaint from Dr Norman alleges that National Party officials knew the names of major party donors, that most of those donors appear to have donated anonymously and that it therefore seems unlikely the party’s report to the Commission was thoroughly accurate. Dr Norman accepts that the donations in question may have been made through a trust. His argument seems to be that if party officials know the identity of the persons who made a donation to a trust, and the trust later makes a donation to a political party, the officials concerned breach the provisions of the Electoral Act unless they disclose the identity of the original donors.
26. I do not agree with the above interpretation of the Electoral Act. In my opinion a donation made by a trust and declared as such is not an anonymous donation. Although a trust is not a legal entity distinct from its trustee⁴, trustees of a trust constitute a “person” for the purposes of s 214G(1) of the Electoral Act. I rest this conclusion on s 29 of the Interpretation Act 1999 (which states that “person” includes a corporation sole, a body corporate and an unincorporated body), and on general principles of trust law.
27. Accordingly, irrespective of whether the trust is an unincorporated body of trustees or an incorporated entity, it will still constitute a “person” for the purposes of s 214G. It follows, therefore, that a donation made by a known trust cannot be an anonymous donation in terms of the Electoral Act.
28. Thus, even if National Party officials knew the identity of persons contributing to the Waitemata Trust before the 2005 General Election, a return that did not disclose the identity of those persons would not breach s 214G(4). The short point is that the Electoral Act does not prevent a trust making a donation to a political party. Section 214G requires the secretary of such a party to identify the name and address of the trust but does not require the secretary to identify persons contributing to the trust.

Overseas legislation supports conclusion that no breach has occurred here

29. The Australian Commonwealth Electoral & Referendum Act (No.1) 1999 was enacted as a result of concerns in that country that existing legislation did not require disclosures of donations to political parties made through a trust or foundation. There was concern that a public company could donate funds to a trust or

⁴ *Wilmott v Johnson* [2003] 1 NZLR 649 at paragraph [32].

foundation and if that trust or foundation then used those funds to make a donation to a political party, the source of the original donation (the public company) would not have to be disclosed.

30. The Electoral & Referendum Amendment Act now provides that the return lodged by a person or organisation which specifies the donations made to a political party must also include details of all donations received by that person or organisation, being donations used to make the donation to the political party.⁵
31. The United Kingdom Political Parties, Elections & Referendums Act 2000 provides that payments to political parties must not be accepted if the person by whom the donation would be made is not at the time of its receipt by the party a "permissible donor" (as defined) or if a party is unable to ascertain the identity of the donor (section 54(1) Political Parties, Elections & Referendums Act 2000).
32. The UK legislation further provides that, in general, donations received by a registered party from a trustee of any property shall (with certain limited exceptions) be regarded as a donation received by the party from a person who is not a permissible donor. Under the legislation donations from impermissible or unidentifiable sources are liable to be forfeited.
33. The existence of the above provisions in the similar jurisdictions of Australia and the United Kingdom, and the absence of equivalent provisions in New Zealand, reinforce my conclusion that the New Zealand Electoral Act does not proscribe the making of donations to political parties by trusts, or impose any additional reporting requirements on such donations beyond those applying to donations generally.

Support for conclusion from other sources

34. I am supported in the above conclusions by a range of other sources. As I have noted above, Mr Hager's book itself concludes that the use of trusts to make donations to political parties is legal. That conclusion is also supported by an article by Andrew Geddis, Senior Lecturer, Faculty of Law, University of Otago, in a paper entitled *'Regulating the funding of election campaigns in New Zealand: A critical overview'* (Otago Law Review 2004) Volume 10, No.4. The paper concludes, at page 592, that the 2002 Electoral Act amendment does nothing to prevent the making of "faceless donations" to a political party through a conduit body (such as a trust). The paper states:

"In such case the law still requires that the party only list the conduit body as the source of the donation, even if the recipient fully knows that the trust has been used to pass along another person's donation."

35. The conclusions I have reached are also consistent with advice contained in a Crown Law Office opinion to the Electoral Commission dated 15 May 2001. At paragraph 9 of that opinion (entitled "Disclosure of donations made to registered Political Parties under the Electoral Act 1993"), Andrew Butler concluded that if a donation is made by way of a single cheque signed by a particular individual, trust or company on behalf of the aggregated donors, there is a good argument to be made

⁵ Commonwealth Electoral Act 1918, section 305B 3A cited in *Political Donations by Australian Companies* Ian Ramsay, Geof Stapledon, Joel Vernon, 29 Fed.L.RREV. 179 2001 at p 199.

that the cheque would be classed as a donation from the person, trust or company in whose name it was signed.

36. Finally, as you will appreciate, the Electoral Commission's own website deals with the question of anonymous donations. The definitions it advances are consistent with the views expressed above.

Conclusion

37. I conclude that a donation made to a political party by a trust is not an anonymous donation as defined by ss 3 and 214G(1)(ii) of the Electoral Act.
38. This means that if the secretary to a political party sets out the name and address of any donating trust or trustees, and the amount of the donation in a return to the Electoral Commission, no breach of s 214G(1) of the Electoral Act is likely to have been committed.
39. This conclusion applies even if party officials know who made the donation to the trust that enabled the trust to make the donation to the party. That is because a donation made by a named trust or trustee is not an anonymous donation.
40. For completeness I note that the time for lodging a prosecution alleging a corrupt or illegal practice in respect of returns received in respect of the 2005 General Election has now expired (see s 236 Electoral Act).
41. I trust that the above advice is helpful to you. Please do not hesitate to contact me if you have any further questions.

Yours sincerely



Cheryl Gwyn
Deputy Solicitor-General