IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B35 of 2018

BETWEEN:

GARY DOUGLAS SPENCE
Plaintiff

and

STATE OF QUEENSLAND
Defendant

HIGH COURT OF AUSTRALIA
FILED
25 FEB 2019
THE REGISTRY CANBERRA

10 **INTERVENER'S SUBMISSIONS –**
ATTORNEY-GENERAL FOR THE AUSTRALIAN CAPITAL TERRITORY

Part I: Publication

1. These submissions are in a form suitable for publication on the internet.

Parts II & III: Basis and Scope of Intervention

2. The Attorney-General for the Australian Capital Territory (**ACT**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the Defendant in relation to Question (a) of the Amended Special Case (**Special Case**).[1]

Part IV: Argument

20 3. The ACT contends that the amendments made to the *Electoral Act 1992* (Qld) (**Electoral Act**) by Part 3 of the *Local Government Electoral (Implementing Stage 1 of Belcarra) and other Legislation Amendment Act 2018* (Qld) (**Amending Act**) do not, in whole or in part, impermissibly burden the implied freedom of communication on government and political matters, contrary to the Commonwealth Constitution.

4. It is submitted that the amendments made to the *Electoral Act* place an indirect and insubstantial, albeit discriminatory, burden on the implied freedom here in question.

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[1] Special Case [114(a)], Special Case Book (**SCB**) 162.

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5. The question is whether the object of those amendments is legitimate, and, if so, whether the burden so placed is justified in light of that object.

6. The evidence in the Special Case demonstrates a risk of actual and perceived corruption by virtue of political donations made by developers to political parties and candidates for election, which poses a broader risk of undermining the integrity of the electoral process and of government.

7. The evidence demonstrates a gradation of possible measures to address that risk. The question is whether the measure embraced by the Amending Act is justified in the sense that it is compatible with the system of representative and responsible government provided for in the Commonwealth Constitution. The measure is a prohibition on donations from property developers (and their close associates), which is a more targeted measure (than, for example, general disclosure of, or a cap on, donations).

8. In order to answer the question, it is necessary to examine: (i) the amendments made to the Electoral Act; (ii) the object of those amendments; (iii) the nature and scope of the implied freedom of political communication (and the corresponding limitation on legislative power); (iv) whether and to what extent a burden is placed on that freedom; (v) whether or not the purpose of so doing is legitimate; and (vi) the justification of that burden.

(1) The amendments to the Electoral Act

9. The ACT adopts the summary of the relevant amendments to the Electoral Act provided in the Plaintiff's Submissions (**PS** at [9]-[15]).

(2) The stated object of the amendments

10. The Explanatory Notes to the Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 (**Amending Bill**) provide, relevantly, that:

> The policy objective of the [Amending Bill] is to implement the Government's response to certain recommendations of the Crime and Corruption Commission's (CCC) report *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government* (the Belcarra Report) to:

1. reinforce integrity and minimise corruption risk that political donations from property developers has potential to cause at both a State and local government level;
2. improve transparency and accountability in State and local government.[2]

11. The Belcarra Report was tabled in the Legislative Assembly on 4 October 2017. The CCC initiated 'Operation Belcarra' in order to, *inter alia*, examine practices that may give rise to actual or perceived corruption.[3] Recommendation 20 of the Report recommends legislative change so as to prohibit candidates, third parties, political parties and councillors from receiving gifts from property developers, and in that regard, to reflect the New South Wales provisions as far as possible.[4]

12. The Belcarra Report identifies a risk of corruption when donations are made with the expectation that the recipient will, in return, make decisions that deliver a benefit to the donor. Importantly, the Report notes an "inherent potential" for donations to adversely affect public confidence in local councils, especially where donors have private interests that are significantly impacted by council decision-making.[5] The Explanatory notes to the Amending Bill state that the provisions are justified given that, as the CCC noted (emphasis added):

> ... allegations of the nature of those made in the Operation Belcarra investigations have been repeatedly examined in major inquiries in Queensland and other Australian jurisdictions over the last 25 years; highlighting the **inherent potential** of donations to lead to perceptions of corruption.[6]

13. The risk is heightened when donors have business interests that are affected by government decisions.[7] The Report notes that donors from other sectors did not demonstrate the same risk,[8] and that the "...continued public concern about the influence of property developer donations on council decision-making demands a stronger response than transparency alone".[9]

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[2] Explanatory Notes, Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 (Qld) (**Explanatory Notes to the Amending Bill**), 1.
[3] Explanatory Notes to the Amending Bill, 1.
[4] Special Case, Annexure J, Belcarra Report, p 78 (SCB 375).
[5] Special Case, Annexure J, Belcarra Report, p 76 (SCB 373).
[6] Explanatory Notes to the Amending Bill, 4.
[7] Explanatory Notes to the Amending Bill, 3.
[8] Special Case, Annexure J, Belcarra Report, pp 78-79 (SCB 375-376).
[9] Special Case, Annexure J, Belcarra Report, xii, p 78 (SCB 349, 375). See also Queensland, *Parliamentary Debates*, Legislative Assembly, 6 March 2018, 189 (Stirling Hinchliffe).

14. While the Belcarra Report was limited in its terms of reference to conduct at the local government level,[10] the report noted that the "Queensland Government may consider it appropriate to also adopt these recommendations at the state government level".[11]

15. In circumstances "where the State has a significant role in Queensland's planning framework",[12] and in order "to address the risk of corruption and undue influence that political donations from property developers has the potential to cause at a local government and a State government level",[13] the Government sought to apply Recommendation 20 to the State government level and the Queensland Parliament chose to apply it.

16. The prohibition on property developer donations is modelled on ss 96GA and 96GB of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (**EFED Act**).[14] These provisions were the subject of consideration in *McCloy v New South Wales* (2015) 257 CLR 178 (***McCloy***).

17. On the basis of the extrinsic material identified above, and the provisions of the Amending Act identified below, the ACT submits that the objects of Part 3 of the Amending Act are consistent with the broader purposes outlined at subparagraph 39(b) of the Amended Defence (SCB 79). The Plaintiff submits that only one of those purposes could support differential treatment, and that the other claimed objectives "are not advanced by banning donations from, and political participation of, one particular type of person" (PS [32]). The ACT submits that those claimed objectives: (a) should not be viewed in isolation; they reinforce one another; and (b) are advanced by Part 3 of the Amending Act, which does not ban or impermissibly impede political participation by property developers.

(3) The implied freedom of political communication

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[10] Special Case, Annexure J, Belcarra Report, xii (SCB 349). See also Special Case, Annexure K, p 3 (SCB 393); Queensland, *Parliamentary Debates*, Legislative Assembly, 6 March 2018, 189 (SJ Hinchliffe).
[11] Special Case, Annexure J, Belcarra Report, xii (SCB 349).
[12] Explanatory Notes to the Amending Bill, 3. See also, Queensland, *Parliamentary Debates*, Legislative Assembly, 6 March 2018, 190 (Stirling Hinchliffe).
[13] Explanatory Notes to the Amending Bill, 4.
[14] Special Case, Annexure J, Belcarra Report, 78 (SCB 375). Explanatory Notes to the Amending Bill, 2-3. The Government's response to the Belcarra Report was tabled on 10 October 2017, a copy of which is available at: http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2017/5517T1960.pdf

18. The freedom of political communication is an implication derived from the Constitution, which provides for a system of representative and responsible government, and which system is informed by the imperative of exercising a 'free and informed choice' as to the election of representatives.[15] Corruption or undue influence at any stage of the electoral process assails both aspects of that choice. As a consequence, the actual and perceived risk of corruption presents a cognate threat to that system.

19. The freedom is not a personal right conferred on individuals.[16] It is a negative implication that operates as a constitutional restriction on legislative power, invalidating laws so as to create an area of constitutional immunity in which the freedom can be enjoyed.[17] In that regard, it is not absolute. Legislative incursions on the freedom may be permissible.

20. An analytical framework for determining whether legislation impermissibly burdens this freedom may be stated in terms of three questions:[18]

    a. Does the law effectively burden freedom of political communication?

    b. Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of government?

    c. Is the law reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government?

21. Where the first question is answered 'yes', and either of questions two or three are answered 'no', the law is invalid.[19]

(4) The nature and extent of the burden (Question 1)

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[15] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***), 560; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (***ACTV***) per McHugh J at 232.
[16] *Lange* at 560. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions NSW (No 1)***) at [30] and [36] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, and [144] per Keane J.
[17] *Cunliffe v Commonwealth* (1994) 182 CLR 272 (***Cunliffe***) at 326-327 per Brennan J.
[18] The test was originally established as a two-step analysis in *Lange* at 567-568, and modified in *Coleman v Power* (2004) 220 CLR 1 at [95]-[96] per McHugh J, [196] per Gummow and Hayne JJ, and [211] per Kirby J. The Court's reformulation of the test in *McCloy* at [2] has recently been refined in *Brown v Tasmania* (2017) 261 CLR 328 (***Brown***), see especially at [156] per Gageler J.
[19] See *Brown* at [156] per Gageler J.

22. The first question entails an enquiry as to whether the freedom has been impeded as a result of the legal or practical operation of the impugned provision because the effect of the law is to prohibit, or put some limitation on, the making or content of political communications.[20]

23. The ACT submits, and the Defendant concedes,[21] that the *Amending Act* imposes a burden on communication upon government and political matters for political parties and candidates as a result of the restriction upon the source of funds to meet the cost of political communication that it will effect.[22] As much has been accepted by this Court in relation to a restriction on the source of funds available to political parties and candidates to meet the costs of political communication, in particular, arising from prohibitions on political donations from property developers.

24. The burden may be *direct* (where content or actions that amount to political communication are prohibited or restricted) or *indirect* (where restrictions or conditions are imposed on the means by which political content is or can be communicated).

25. The ACT submits, and the Defendant accepts,[23] that the burden is indirect and insubstantial. It has been accepted that the act of donation is not itself a political communication.[24] By comparison, a cap on electoral expenditure is a more direct burden on political communication.[25] Furthermore, as the plurality in *McCloy* concluded with respect to a ban on political donations in New South Wales, the provisions do not affect the ability of any person to communicate with another about matters of politics and government nor to seek access to or to influence politicians in ways other than those involving the payment of substantial sums of money (at [93]). It is accepted that making a political donation is a means of expressing ideas about politics and government.[26] However, there is no reason why those ideas cannot be

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[20] See *McCloy* at [126]-[127] per Gageler J, and *Unions NSW (No 1)* at [119] per Keane J, both referring to *Monis v The Queen* (2013) 249 CLR 92 (***Monis***) at [108] per Hayne J.
[21] Amended Defence [31(b)]; SCB 67.
[22] See *Unions NSW (No 1)* at [38] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; *McCloy* at [24] per French CJ, Kiefel, Bell and Keane JJ.
[23] Amended Defence [31(c)]; SCB 67.
[24] *McCloy* at [25] per French CJ, Kiefel, Bell and Keane JJ.
[25] *McCloy* at [93] per French CJ, Kiefel, Bell and Keane JJ, and [367] per Gordon J.
[26] *McCloy* at [239] per Nettle J.

expressed otherwise, and in a manner that does not present a risk of actual or perceived undue influence.

26. In that regard, the amendments made to the Electoral Act by virtue of Part 3 of the Amending Act impose only a slight burden on the freedom: "*McCloy* provides an example of such a law".[27] The amendments effect a discriminatory burden, but they are not invalid on that basis alone.

27. The Plaintiff's submission that the law: (a) impacts "fundraising for political communication expenditure"; (b) restricts the "types of people" who may be officers of, or otherwise participate in the affairs of, political parties; and (c) has the effect of "greatly impeding" the ability to establish a party or group, or pursue a candidature, which is especially focused upon promoting the interests of developers or communicating political ideas which such persons might favour (PS [23]-[24]), is vague and unsubstantiated. Furthermore, it is not evident that the limitation outlined by the Plaintiff is one of political communication, and the Plaintiff gains no further traction as a matter of an implied freedom of association.[28]

28. Given that a burden exists, however, it is incumbent upon the defender of the law to justify that the burden is not undue.[29]

(5) Legitimacy of purpose (Question 2)

29. The second question involves identifying the purpose of the law through ordinary principles of statutory interpretation,[30] noting that a law may have multiple purposes,[31] and that the intended purpose of a law is different from its foreseeable consequences or effect.[32]

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[27] *Brown* at [94] per Kiefel CJ, Bell and Keane JJ.
[28] See *Tajjour v New South Wales* (2014) 254 CLR 508 (***Tajjour***) at [46] per French CJ, [95] per Hayne J, [136] per Gageler J, and [242] per Keane J.
[29] *Unions NSW v New South Wales (No 2)* [2019] HCA 1 (***Unions NSW (No 2)***) at [45] per Kiefel CJ, Bell and Keane JJ; [93] per Gageler J; [117] per Nettle J; [151]-[152] per Gordon J.
[30] *Unions NSW No 1* at [50] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; *Unions NSW No 2* at [169]-[171] per Edelman J.
[31] *Unions NSW (No 2)* at [168] per Edelman J.
[32] *Unions NSW (No 2)* at [170] per Edelman J; see also *McCloy* at [40] per French CJ, Kiefel, Bell and Keane JJ; *Brown* at [99] per Kiefel CJ, Bell and Keane JJ, [209] per Gageler J, and [322] per Gordon J.

30. The purpose of the law is not simply to prevent the conduct which it prohibits (namely, political donations from property developers and close associates).[33] Rather, the law seeks to address the potential consequence of that conduct.

31. It is clear from the stated policy objectives of the Amending Bill that the aim is to minimise the risk of actual and perceived corruption that emanates from political donations by property developers, and thereby reinforce the integrity of the electoral process, and more generally of the government, at both the local and State level.

32. That aim is clearly discerned from provisions which contain the relevant prohibitions. Those provisions limit the kind of donation that is proscribed to those directed to the benefit of a political party, elected member or candidate in an election (s 274 of the Electoral Act). They make it unlawful to make, accept or solicit such donations (s 275). The obligation lies not only on the donor, but also on the potential donee. Furthermore, "property developer" is defined by reference to a business that places the corporation (or "close associate") in "regular" contact with those responsible for planning decisions relating to the residential or commercial development of land (s 273(1)(a); (2)(a)).

33. Clearly, the law is intended to address the risk of undue influence that emanates from regular interaction with government where permissions and approvals are sought. The context of that interaction is that favours given to or for the benefit of political parties or electoral candidates may give rise to an expectation (on the part of the donor), a sense of obligation (on the part of the donee), and ultimately a perception (on the part of the public) of reciprocity.[34] Clearly, it is the risk, and not the actuality of corruption, that is intended to be addressed by the pre-emptive nature of the law.

34. Legislative regulation of the electoral process directed to the protection of the integrity of the process is *prima facie* legitimate.[35]

35. Like Division 4A of the EFED Act, which was the subject of consideration in *McCloy*, and on which the provisions of the Amending Act are modeled,[36] the

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[33] See *Unions NSW (No 2)* at [174] per Edelman J. See also *Monis* at [73]; *Unions NSW (No 1)* at [51]-[52] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

[34] This aim is consistent with the purposes of Part 3 of the Amending Act stated in the Amended Defence [39(b)] (SCB 79).

[35] *McCloy* at [42] per French CJ, Kiefel, Bell and Keane JJ, [183]-[184] per Gageler J.

[36] Queensland, *Parliamentary Debates*, Legislative Assembly, 6 March 2018, 189 (SJ Hinchliffe).

purpose of the Queensland provisions is to reduce the risk of undue or corrupt influence in an area relating to planning decisions, where such risk may be greater than in other areas of official decision-making.[37] That purpose is legitimate.

36. If the purpose of the law is illegitimate, the enquiry ceases; the law impermissibly burdens the implied freedom.

37. The Plaintiff claims in the Further Amended Statement of Claim [40] (SCB 50) that the purpose of part 3 of the Amending Act is not legitimate in the sense that it is not compatible with the maintenance of the constitutional prescribed system of representative and responsible government. The question of compatibility (of the *manner* of achieving the laws' purpose) is appropriately addressed in the context of an assessment of the justification of the law.[38]

(6) Appropriate and adapted/Justification (Question 3)

38. The analytical tool employed to answer the third question has been expressed differently amongst members of the Court.[39] It is not a difference of constitutional principle.

39. Not every law which effectively burdens freedom of political communication in pursuit of a legitimate purpose demands the same degree of justification, and concomitantly not every law which imposes such a burden needs to be subjected to the same intensity of judicial scrutiny. The measure of the justification needs to be "calibrated to the nature and intensity of the burden".[40]

40. For the reasons outlined above, the law in this case is indirect and insubstantial, thus warranting commensurate judicial scrutiny. It is acknowledged that there must be an identifiable basis for the discriminatory nature of the law, although the Court's findings on 'underinclusiveness' indicate that the assessment in that regard is not one of ascertaining an equitable distribution of the burden.[41]

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[37] *McCloy* at [53] per French CJ, Kiefel, Bell and Keane JJ.
[38] See *Brown* at [102] per Kiefel CJ, Bell and Keane JJ, with reference to *McCloy* at [66].
[39] See *McCloy* at [2] and [74] per French CJ, Kiefel, Bell and Keane JJ; cf. *Brown* at [158]-[159] per Gageler J.
[40] *Brown* at [118] and [128] per Kiefel CJ, Bell and Keane JJ, and [164] per Gageler J, citing *Tajjour* at [151] (per Gageler J); see also *McCloy* at [150] per Gageler J. Another way of viewing this 'calibration' is that laws which directly burden the implied freedom of political communication are more difficult to justify than laws that impose incidental burdens: *McCloy* at [253] per Nettle J.
[41] See *McCloy* at [197] per Gageler J, [234] per Nettle J, and [333]-[334] per Gordon J.

41. The Plaintiff submits that the law does not have a rational connection to its purpose (PS [46]); that there are reasonably practical and less restrictive means of achieving the claimed objects of Part 3 (PS [47]); and that Part 3 is not adequate in its balance or justifiable overall (PS [46]).

(i) A rational connection

42. It is apparent from the text and context of the Amending Act that the prohibition on political donations from property developers is rationally directed to dealing with corruption and undue influence, and the perception of it, arising as a result of such donations.[42]

43. It is not evident on what basis the Plaintiff asserts that Part 3 "distorts the political battlefield", or how the law significantly restricts the means of communication of the "sorts of issues and interest" this "type of person" may wish to promote or pursue in the broader community (PS [25]). As indicated above, the act of donation is not itself a political communication. It is a restriction on the source of funds to meet the cost of political communication. In that regard, the relevant restriction (on political communication) acts more directly on the donee in potentially limiting its capacity to communicate. The same cannot be said of the donor. In that (relevant) regard, the donor is not disadvantaged, and there is no basis upon which to say that they cannot participate freely, and on equal terms, in the democratic process (cf. PS [26]-[27]).[43] In fact, the contrary was acknowledged in *McCloy*, where it was accepted that provisions concerned with the removal of the risk and perception of corruption can in fact support and *enhance* the system of representative government which the freedom protects.[44]

44. Furthermore, there is an identifiable basis for the discriminatory nature of the burden (cf. PS [31]),[45] both in terms of the perceived risk of corruption or undue influence in an area relating to planning decisions, and in terms of historical corruption in New South Wales, as acknowledged in *McCloy*.[46]

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[42] See *McCloy* at [56] per French CJ, Kiefel, Bell & Keane JJ, [232] per Nettle J, and [355] per Gordon J.
[43] Cf. *McCloy* at [239] and [266] per Nettle J.
[44] *McCloy* at [93] per French CJ, Kiefel, Bell & Keane JJ.
[45] See *McCloy* at [222] per Nettle J.
[46] See *McCloy* at [53] per French CJ, Kiefel, Bell & Keane JJ, [191]-[194], [197] per Gageler J, [233] per Nettle J, and [354] per Gordon J.

45. The Plaintiff submits that the ICAC reports, which were the subject of the prohibition considered in *McCloy*, included actual findings of corrupt conduct by elected and non-elected local government officials in relation to planning decisions, and that no such history or factual basis exists in Queensland (PS [30]). The difficulty with the Plaintiff's submission is that: (a) it does not acknowledge that those reports exposed an "inherent potential" of political donations by developers to lead to the perception of corruption; and (b) it requires the governments of other States and Territories to find corruption (that is, instances where the risk has been realised) within their geographical boundaries, at both a local and State level, before being able to address that risk.

46. The ACT submits that they should not be so required in order to respond to that risk. The legislatures of the States and Territories are entitled to respond to "inferred legislative imperatives" in order to protect the integrity of their electoral systems.[47] That is the way in which those legislatures can deal prophylactically with matters of public concern.

47. The Plaintiff submits that Part 3 of the Amending Act cannot be characterized as implementing the government's response to Recommendation 20 of the Belcarra Report (PS [35]), and that evidence does not support the existence of a need to implement Part 3 (PS [36]). Both submissions are apt to mislead.

48. The policy objective of the Amending Act is to implement the Government's response to certain recommendations, including Recommendation 20 (as distinct from implementing the recommendations themselves). That response was a suggested prohibition on property developer donations modeled on ss 96GA and 96GB of the EFED Act.

49. Whether or not the Government's response goes beyond the terms of the recommendation has no bearing on the question whether the purpose of the law is legitimate. Furthermore, to accept that law is rationally connected to a legitimate end is to accept that the *means* adopted by the law are *capable* of realizing that end, and it is neither possible nor appropriate to attempt an assessment of the efficacy of

[47] See *McCloy* at [233] per Nettle J.

the impugned law in realizing the desired end.[48] In any event, there is no cause for this Court to examine the "intended function" of the recommendation (cf. PS [35]).[49]

50. Furthermore, there is no cause to examine "the existence of a need to implement Part 3" (cf. PS [36]). There is an important, albeit fine, distinction between examining the need to implement legislation (which is a legislative choice) and examining whether the law is reasonably and appropriately adapted (which is a proper function of the Court in its supervisory role). As a matter of the separation of functions, that distinction must be zealously guarded. The inquiry does not entitle the courts to substitute their own assessment for that of the legislative decision-maker.[50]

10 51. The distinction is brighter where the law said to burden the freedom does so in an indirect and insubstantial manner. The law does not permit a corporation engaged in a business that regularly involves the making of relevant planning applications to support a candidate or political party by way of political donation. The law restricts the source of funds by which a party or candidate funds its campaign. The law otherwise leaves untouched the ability of both the donor and donee to express their ideas about politics and government. It is not a substantial incursion on the freedom.

(ii) 'Necessary' means

52. The question of 'necessity' is not a free-ranging enquiry as to whether the legislature should have made different policy choices. There must be alternative means of
20 achieving the same object, and those means must be obvious and their practicability compelling.[51]

53. The Plaintiff submits that there are less restrictive means of achieving the claimed objects of Part 3, including disclosure of donations; caps on donations; caps on expenditure and tightening the law dealing with bribery (PS [47]-[50]). There is an inherent and paradoxical[52] assumption that wider, more general, less targeted prohibitions have a lesser impact on the freedom.

54. It was acknowledged in *McCloy* that:

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[48] *Tajjour* at [81]-[82] per Hayne J, cited in *McCloy* at [234] per Nettle J.
[49] With reference to Special Case [80]-[81] (SCB 151-152), Annexure K, pp 258-259 (SCB 392-393).
[50] *McCloy* at [89]-[92] per French CJ, Kiefel, Bell and Keane JJ.
[51] *Brown* at [139] per Kiefel CJ, Bell and Keane JJ.
[52] See *Brown* at [427] per Gordon J.

a. disclosure could not be said to be as effective as capping donations in achieving the anti-corruption purpose of the law;[53]

b. caps do not prevent the interaction between property developers and political actors that may give rise to 'clientelism' corruption,[54] nor do they meet the systemic problem of the corrupting influence that inequality of access based on money may have on the pursuit of public duties by elected public officials;[55] and

c. the difficulties inherent in detecting and proving bribery, and the fact that the law does not address perceived threats to the integrity of the system, do not make it a reasonable alternative.[56]

55. Queensland law does not provide for capping of donations or electoral expenditure.[57] However, even in the context of the capping of donations, there is no basis on which it could be concluded that the total prohibition on property developers making any political donations does not continue to make a material contribution to the prevention of (actual and perceived) corruption and undue influence in the government of the State, and does not continue to be reasonably necessary.[58]

56. The Plaintiff contends for the "limited extent" to which planning decisions are made at the State level (PS [41]-[45]). That submission equates influence with quantity.[59] Even if that submissions were accepted, it does not demonstrate the absence of an imperative to extend the prohibition on political donations to the State level. Within the confines of their operation, the imperative lies. Furthermore, even if the candidate to whom a donation is made does not occupy a (relevant or an ultimate) decision-making role, that does not militate against the actuality and perception of access to influence.

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[53] *McCloy* at [61] per French CJ, Kiefel, Bell and Keane JJ, [187] per Gageler J, and [331] per Gordon J.
[54] *McCloy* at [36] per French CJ, Kiefel, Bell and Keane JJ.
[55] *McCloy* at [186] per Gageler J.
[56] *McCloy* at [62] per French CJ, Kiefel, Bell and Keane JJ, and [330] per Gordon J.
[57] This is inferred from the Special Case at [94]-[96], [99]-[100] (SCB 157-157, 159). See the *Electoral Act*.
[58] *McCloy* at [196] per Gageler J.
[59] See the submission of the Mayor of Moreton Bay Regional Council, Cr Allan Sutherland, that any ban on donations be equally applied to State election candidates, on the basis that the potential for conflicts of interest also exist at the State level where: "All council town plans, amendments to those plans, and the Planning At are all approved and passed by the State Government": Special Case, Annexure J, p 252 (SCB 385).

57. Furthermore, the Plaintiff does not suggest any relevant point of distinction with the planning regime in New South Wales, which was the subject of the law in *McCloy*, and which was found to be valid with respect to donations to State political parties.

58. It was accepted that there is a "strong factual basis" for the perception of a risk of corruption in New South Wales (as a consequence of several ICAC reports identifying corruption and other misconduct in the handling of property development applications since 1990).[60] Public concern was based on inference drawn from cases the subject of the inquiries, rather than direct evidence of widespread corruption by property developers. There is no reason to suggest that this inferred concern is peculiar to the New South Wales political landscape or planning regime. The Plaintiff has not demonstrated any idiosyncrasy of that landscape or regime that explains, and distinguishes, that public concern. The risk of actual and perceived corruption, which is the subject of the concern, is "inherent" in circumstances that pertain irrespective of geographical boundaries and the particular planning regime.

59. The legislature of a State or Territory should be permitted to make a legislative choice when presented with clear evidence of a risk to the system of representative and responsible government arising from the perception of corruption, and it is artificial to draw a line around geographical boundaries and to suggest that the identified risk does not permeate that line. The risk cannot be ignored, nor the lesson unlearned.

(iii) Adequate in balance

60. The Plaintiff submits that Part 3 is not adequate in its balance, nor justifiable overall (PS [46]). It is not evident that the basis of this submission goes beyond that in relation to the first and second aspects of this (third) question.[61]

61. Nevertheless, the ACT submits that the limitation on the freedom is not undue.[62] It is both appropriate and necessary to address the risk, which, if realized, assails the effective operation of the system of representative and responsible government, which the freedom protects.

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[60] *McCloy* at [233] per Nettle J; see also per Gageler J at [194].
[61] See *McCloy* at [145] per Gageler J.
[62] See *McCloy* at [86] per French CJ, Kiefel, Bell and Keane JJ.

62. The factual substratum of the justification advanced by the Defendant for this legislative measure is apparent not only from the reports of corruption in New South Wales,[63] but also from the history of inquiries in Queensland that preceded the enactment of the legislation.[64]

63. It is not necessary for each inquiry to have resulted in a recommendation of prohibition of political donations from property developers in order for those inquiries to be instructive. The course of inquiry in Queensland demonstrates:

a. a history of investigated allegations of non-commercial favours by developers to councilors and members of Parliament in planning decisions, and favours arranged for those developers, including recommending legislative amendments, rezoning of land and development approvals;[65]

b. expert evidence (accepted by the Criminal Justice Commission) of a clear link between the making of donations and subsequent behaviour of the donees;[66]

c. public concerns about uneven financial competition emanating more frequently from donations by large businesses, especially property developers.[67]

d. that the risk of corruption, especially at the local government level, is particularly associated with property developers;[68]

e. that planning decisions by councils represent a high proportion of complaints to ICAC, and that soliciting bribes from developers goes to the core of the integrity of the planning process;[69]

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[63] One report indicates that the prohibition of donations from property developers in New South Wales addresses a concern that is "specific to the jurisdiction". As the footnote to this comment indicates, this is no more than an indication that the prohibition follows upon a number of ICAC investigations in New South Wales (Special Case, Annexure H, p 195 (SCB 317)).

[64] See *Unions NSW (No 2)* at [117] per Nettle J.

[65] For example, Special Case, Annexure C, pp 106-107 (SCB 223-224), which resulted in a recommendation of a public register of political donations; Annexure R, pp 387-389, 391-394 (SCB 528-530, 532-535), resulting in a recommendation that all civic offices in relation to Tweed Shire Council be declared vacant.

[66] Special Case, Annexure E, pp 153-159 (SCB 272-278), in which the recommendations extended to compulsory disclosure.

[67] Special Case, Annexure J, pp 230-231 (SCB 363-364), resulting in the consideration of schemes to cap electoral expenditure.

[68] Special Case, Annexure J, p 240 (SCB 373); Annexure U, p 415 (SCB 559).

[69] Special Case, Annexure P, p 369 (SCB 508).

f. irrespective of empirical evidence of preferential treatment or actual influence, and noting the opportunity of establishing relationships of reciprocity with politicians, a public perception that donors expect and do receive something in return;[70]

g. that the "systemic issues" identified through Operation Belcarra, and "continued public concern", demands a stronger response than transparency;[71]

h. a recommendation of legislative amendment prohibiting local election candidates from receiving gifts from property developers;[72]

i. in light of the "systemic issues", and potential disparity in the obligations relevant to state and local government, acknowledgment from the CCC that the Queensland Government may consider it appropriate to adopt the recommendation at the State government level;[73]

j. acknowledgement from the CCC that, albeit in the absence of a detailed consideration of facts and matters specific to state government, a similar risk of corruption and undue influence emanates from the state's significant role in Queensland's planning framework.[74]

64. These findings operate incrementally, and they are reinforced by the ICAC inquiries in New South Wales.

65. As acknowledged in *McCloy*,[75] the public interest in removing the risk and perception of corruption is evident. That risk, and that perception, has been identified in relation to political donations from property developers. That risk, and the public concern, has been acknowledged as warranting a safeguard beyond transparency. That safeguard has the additional benefit of enhancing equality of access to government. As such, the restriction on the freedom is more than balanced by the benefits sought to be achieved.

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[70] Special Case, Annexure J, pp 241-242 (SCB 374-375).
[71] Special Case, Annexure J, pp 216, 241-242 (SCB 349, 374-375).
[72] Special Case, Annexure J, p 242: Recommendation 20 (SCB 375).
[73] Special Case, Annexure J, p 216 (SCB 349).
[74] Special Case, Annexure K, pp 258-259 (SCB 392-393).
[75] *McCloy* at [93] per French CJ, Kiefel, Bell and Keane JJ.

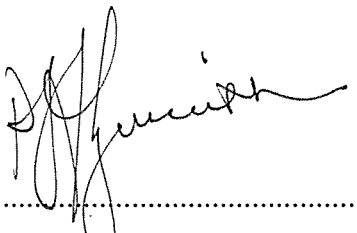
(7) Conclusion

66. The ACT contends that Question (a) of the Special Case should be answered: "No".

Part V: Estimate of time for oral argument

67. The ACT estimates that 45 minutes will be required for presentation of oral argument.

Dated: 25 February 2019



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