IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

No. B 35 of 2018

BETWEEN:

GARY DOUGLAS SPENCE
Plaintiff

and

STATE OF QUEENSLAND
Defendant

PLAINTIFF'S SUBMISSIONS

ClarkeKann
Level 23
240 Queen Street
Brisbane Qld 4000

Phone 07 3001 9222
Fax 07 3001 9299
Email s.williamson@clarkekann.com.au
Ref Shane Williamson
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PART I: PUBLICATION ON THE INTERNET

1. This submission is in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2. This case concerns whether Queensland legislation which prohibits the making of donations by property developers is invalid. It is invalid on three grounds.

3. First, Part 3 of the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018* (Qld) ("**Amending Act**") is inconsistent with the implied constitutional freedom of communication on government and political matters. Part 3 restricts the funds available to political parties and candidates to meet the costs of political communication; does not have a legitimate end in that there is nothing to show that donations to political parties, members or candidates for election to the Legislative Assembly of Queensland have had any effect upon the integrity of the political process of that State; and in any event is not reasonably appropriate and adapted to achieving any such end. *McCloy* is distinguishable.

4. Secondly, each of Parts 3 and 5 of the Amending Act are invalid insofar as they do not differentiate between donations for, on the one hand, the election of members of the Legislative Assembly and election of local councillors, and on the other, the election of members of the houses of the Commonwealth Parliament. The Commonwealth has exclusive power to regulate the election of members to its Parliament, and the law destroys or weakens the legislative authority of the Commonwealth over the election of members to that Parliament.

5. Thirdly, each of Parts 3 and 5 are invalid under s 109 of the Constitution as being inconsistent with the *Commonwealth Electoral Act 1918* (Cth) ("**CE Act**").

PART III: SECTION 78B NOTICES

6. Notices have been issued under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: REASONS FOR JUDGMENT BELOW

7. This proceeding is brought in the Court's original jurisdiction.

PART V: MATERIAL FACTS

8. The material facts are set out in the amended special case.

PART VI: PLAINTIFF'S ARGUMENT

The amendments

9. Parts 3 and 5 of the Amending Act commenced by proclamation on 2 October 2018,

applying retrospectively from 12 October 2017.[1] Part 3 of the Amending Act inserted a new Part 11 Division 8 Subdivision 4 into the *Electoral Act 1992* (Qld) ("**Electoral Act**").[2] Part 5 of the Amending Act inserted a new Part 6 Division 1A and Part 9 Division 5 into the *Local Government Electoral Act 2011* (Qld) ("**Local Government Electoral Act**"). Both Parts of the Amending Act ban the making of donations by developers to political parties. Under Part 3, the prohibition is also directed to donations to members or candidates for election to the Legislative Assembly. Under Part 5, the prohibition is also directed to donations to local councillors or candidates for election to that office. The legislation is similarly worded, and it is convenient to focus on the provisions in the *Electoral Act*. Although the amendments have commenced, as the challenge in this case is to the amendments, it is also convenient to continue to refer to Parts 3 and 5. However, the section numbers referred to below are to the relevant sections of the Electoral Act as amended.

10. Section 275 of the Electoral Act makes it unlawful for:[3]

(a) a prohibited donor to make a political donation;

(b) a person to make a political donation on behalf of a prohibited donor;

(c) a person to accept a political donation that is made (wholly or in part) by or on behalf of a prohibited donor;

(d) a prohibited donor to solicit a person to make a political donation;

(e) a person to solicit, on behalf of a prohibited donor, another person to make a political donation.

11. Breach of the provision is a criminal offence (s 307A).[4] The Amending Act provides for the recovery of prohibited donations by the State as a debt (with those who knowingly accepted prohibited donations having to pay twice the amount of the relevant donation), and if the recipient is an unincorporated political party, it is the party's agent who must repay (s 276).[5]

12. Section 273(1)[6] defines "prohibited donor" as a "property developer" or "an industry

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1 By the insertion of s 427 into the Electoral Act; see the Amending Act, s 20 and the insertion of s 212 into the Local Government Electoral Act; see the Amending Act, s 34.

2 Amending Act, s 13.

3 The equivalent new section in the Local Government Electoral Act is s 113B.

4 The equivalent new section in the Local Government Electoral Act is s 194A.

5 The equivalent new section in the Local Government Electoral Act is s 113C.

6 Subject to exclusions made under s 277 of the Electoral Act. The equivalent new section in the Local Government Electoral Act is s 113D.

representative organisation, a majority of whose members are property developers". The term "property developer" is defined in s 273(2) to include a corporation (or a "close associate" thereof) engaged in a business that "regularly involves the making of relevant planning applications by or on behalf of the corporation "in connection with the residential or commercial development of land and with the ultimate purpose of the sale or lease of the land for profit". A relevant planning application is defined in s 273(5) to mean applications or requests (as the case may be) under the *Planning Act 2016* (Qld), the repealed *Sustainable Planning Act 2009* (Qld), the *State Development and Public Works Organisation Act 1971* (Qld) or the *Economic Development Act 2012* (Qld).[7]

13. A "close associate" of a corporation is defined in s 273(5) to mean a related body corporate (within the meaning of the *Corporations Act 2001* (Cth)); a director/officer; a person with more than 20% voting power in the corporation or a related body corporate; a spouse of a person in these two categories; any stapled entity; anyone holding more than 20% in a unit trust of which the corporation is a trustee, manager or responsible entity; and any beneficiary if the corporation is a trustee, manager or responsible entity of a discretionary trust.

14. A "political donation" is defined in s 274 to mean: (a) a gift[8] made to or for the benefit of a political party, an elected member, or a candidate in an election; (b) a gift made to or for the benefit of another entity to enable the entity (directly or indirectly) to make such a gift; or (c) a loan from an entity other than a financial institution that, if the loan were a gift, would be a gift within the other meanings.[9]

15. The term "political party" is defined in s 2 of the Electoral Act to mean "an organisation whose object, or 1 of whose objects, is the promotion of the election to the Legislative Assembly of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part".[10] An "elected member" is a member of the

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7 The equivalent new section in the Local Government Electoral Act is s 113.

8 A reference to a gift includes an amount paid as a subscription for a person's membership or affiliation with a party to the extent that the total amount of a person's payment in a calendar year exceeds $1,000.00: s 274(5).

9 The equivalent new section in the Local Government Electoral Act is s 113A, except it refers to a gift to a prohibited party, councillor of a local government and candidate for election.

10 The term "political party" in the Local Government Electoral Act means "an organisation or group whose object or activity, or 1 of whose objects or activities, is the promotion of the election of a candidate or candidates endorsed by it, or by a body or organisation of which it forms a part, to an office of councillor of a local government": see the Dictionary.

Legislative Assembly (s 197), and a "candidate" in an election is someone whose nomination for such has been accepted (ss 2, 93(3)).

16. The prohibition introduced by the Amending Act is widely drawn. Section 275[11] applies to donors and recipients, including political parties (and/or those acting on their behalf), elected members and candidates. It is a prohibition regardless of the purpose of the donation, other than being for the benefit of the party/member/candidate (save that if the gift is made by a person "in a private capacity to an individual ... for the recipient's personal use and the recipient does not intend to use the gift for an electoral purpose", then it is not a political donation when made, though it may become such if any part of it is used for such a purpose (s 274(2)).[12] The prohibition is otherwise not limited to donations for electoral purposes. It would capture, for example, bequests to a party made by a person who fell within the broad notion of property developer.

17. The notion of "property developer" captures a range of persons/entities, many of whom may have little connection to property development, such as any beneficiary of a discretionary trust where the trustee company is a property developer, thus potentially capturing numerous relatives of, say, a home builder who runs their business through a family trust.

18. It applies to such persons regardless of the capacity in which they act. Thus a person who is a "property developer" (eg because they are a director of a company which regularly submits relevant planning applications) and who is also an officer of a political party (as the plaintiff was)[13] would breach the Electoral Act by seeking donations on behalf of the party.

19. There are no other classes of prohibited donors than those outlined above, although donations of foreign property (ss 267-270) and anonymous donations above certain thresholds (s 271) may not be accepted. Apart from New South Wales, no other Australian jurisdiction has banned donations from specific industries.[14] There are no caps in Queensland on either donations or electoral expenditure.[15] There is no requirement that donations be paid into, or held in, any particular account/s, nor that

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11 The equivalent new section in the Local Government Electoral Act is s 113B.

12 The equivalent new section in the Local Government Electoral Act is s 113A(2).

13 Further amended statement of claim, 1-3 [3], [5]-[8]; amended special case, 1 [1]. His resignation cited the effect of the impugned laws: amended special case, Annexure OA, 61.

14 Amended special case, 47 [105].

15 Cf the position in other jurisdictions: amended special case, 44-45 [94]-[96], 46 [99]-[100].

there be specific campaign accounts.[16] There is such a requirement for candidates and groups of candidates under the Local Government Electoral Act.[17] However, neither the Electoral Act nor the Local Government Electoral Act contain any recognition that donations may be made to a registered political party for federal purposes.

Ground 1: Infringement of the implied freedom of political communication

20. The plaintiff's challenge with respect to the implied freedom is limited to Part 3 of the Amending Act, concerning the prohibition on donations by developers at the State (as opposed to local) government level.

The burden

10 21. The State admits in its amended defence 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 that it will effect".[18] However, it pleads that the burden is "indirect and insubstantial".[19] The claim ignores the fact that the freedom is not confined to communications between electors and elected representatives, candidates or parties,[20] but extends to communications intended to influence others to a political viewpoint, even by persons who are not themselves electors.[21] This necessarily includes attempts by political parties and candidates to seek to influence persons or entities, as this in turn contributes to discourse about matters of politics and government.[22] Campaigning is an essential
20 part of political communication.[23] A restriction on the availability of funds will substantially diminish the extent of political communication.[24]

22. As with the legislation considered in *Unions No.1*,[25] the Amending Act restricts the funds available to political parties, members and candidates to meet the costs of political communication by restricting the source of those funds by reference to a particular type of potential donor. It thereby burdens the freedom. While public

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16 Cf the position in NSW, Victoria and South Australia: amended special case, 48 [109]-[113].
17 Local Government Electoral Act, ss 126-127.
18 Amended defence, [31(b)].
19 Amended defence, [31(c)].
20 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (*ACTV*), 139 (Mason CJ).
21 *Unions NSW v NSW* (2013) 252 CLR 530 (*Unions No.1*), 551 [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ, hereafter referred to as the plurality).
22 *Unions No.1*, 552 [30] (the plurality).
23 *Unions No.1*, 574 [121] (Keane J).
24 *Unions No.1*, 574 [121] (Keane J).
25 *Unions No.1*, 554 [38] (the plurality); *McCloy v NSW* (2015) 257 CLR 178 (*McCloy*), 201 [24], 203 [31] (French CJ, Kiefel, Bell and Keane JJ, hereafter referred to as the plurality); *Brown v Tasmania* (2017) 261 CLR 328, 426 [123] (Kiefel CJ, Bell and Keane JJ).

funding is available to political parties,[26] it does not meet the electoral expenditure needs of major political parties and candidates.[27] The availability of public funding under the Electoral Act is "not equivalent to the amount which may be paid by way of electoral communication expenditure".[28]

23. The burden does not only impact fundraising for political communication expenditure. Part 3 restricts the types of people who may be officers of, or otherwise participate in the affairs of, political parties. To restrict such participation is to restrict political communication by that means, where political parties have long been a critical means of political engagement.[29] Any person who falls within the broad definition of prohibited donor (eg by being the spouse of a person who holds 20% voting power of a related body corporate of a developer) may not participate in the fundraising activities of a political party, because to do so would be a breach of s 275(4).

24. Part 3 also 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. It is entirely legitimate and well-precedented in our constitutional system of government for a group/party or candidate to primarily advocate for one particular issue or interest (eg protecting the environment; banning poker machines; promoting shooting and fishing). Yet any such candidate, group or party could not engage in fundraising insofar as the individuals concerned were prohibited donors themselves, nor could they seek or receive funds from the very types of person whose interests they were seeking to promote, and who would naturally constitute their support base.

25. The State's claim[30] that "the direct effect of the Amending Act is to enhance freedom of political speech generally by levelling the playing field" is incorrect. The Amending Act imposes a discriminatory burden with respect to one disfavoured group of persons. Part 3 thus distorts the political battlefield. It restricts, in significant ways, the means of communication of the sorts of issues and interests this type of person may wish to promote or pursue in the broader community. It thus burdens, in turn, the promotion of information and ideas to electors. Such targeting represents a very

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26 Amended special case, 5-6 [22]-[24].
27 Amended special case, 6 [26].
28 Quotation from *Unions No.1*, 554 [38] (the plurality).
29 Note eg *McKenzie v Commonwealth* (1984) 57 ALR 747, 749 (Gibbs CJ); *Day v Australian Electoral Officer for the State of South Australia* (2016) 261 CLR 1, 13-14 [23]-[24] (the Court).
30 Amended defence, [31(c)(ii)].

significant distortion of the potential for free communication about, and political participation in relation to, political and government matters.

26. The core textual foundation of the freedom is the requirement in ss 7 and 24 of the Constitution that the Senate and House of Representatives be composed of persons "directly chosen by the people". The freedom exists "in order to ensure that the people of the Commonwealth may 'exercise a free and informed choice as electors".[31] It is a guarantee which protects democratic *processes*. It is necessarily and inherently neutral about achieving any particular political outcomes. To privilege or disadvantage within the political process any particular persons, groups, interests, ideas or issues is antithetical to the freedom. The "great underlying principle is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power";[32] "[e]quality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our Constitution".[33]

27. That is not to suggest that there is a right to donate or to seek influence by donating.[34] Rather, a law which seeks to restrict the ability of certain persons or interest groups to communicate and participate freely, and on equal terms, in the democratic process (including by promoting their views through the means of a political party) imposes a substantial burden. The fact that a law is discriminatory may be a factor leading to its invalidity.[35] This was an important consideration in the decision of the Court in *ACTV*.[36] Such a law distorts the flow of political communication.[37]

28. The facts in this case illustrate and confirm the distortion. In the three years prior to the Amending Act taking effect, the Liberal National Party "received a materially greater amount of donations than the other major party, the Labor Party (Queensland), from entities that are involved in the development of property (or persons or entities closely associated with such entities) and which may meet the definition of a 'property developer' in the Amending Act".[38] It may be inferred that this reflects the policies

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31 *Lange v ABC* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ).

32 Harrison Moore, *The Constitution of the Commonwealth of Australia* (1st ed, 1902), 329, quoted in *ACTV*, 139-140 (Mason CJ).

33 *McCloy*, 207 [45] (the plurality); see also *Unions NSW v NSW* [2019] HCA 1 (*Unions No.2*), [40].

34 Cf *McCloy*, 202 [28]-[30] (the plurality).

35 Note *Brown*, 361 [92] (Kiefel CJ, Bell and Keane JJ), 389 [199] (Gageler J).

36 *ACTV*, 132 (Mason CJ), 171-4 (Deane and Toohey JJ), 237 (McHugh J).

37 *ACTV*, 174 (Deane and Toohey JJ); *Unions No.1*, 578 [137] (Keane J); note also *McCloy*, 272 [66] (Nettle J, in dissent); *Unions No.2*, [207] (Edelman J).

38 Amended special case, 6 [27].

the Liberal National Party seeks to promote to electors, reflecting, in turn, its objects.[39]

29. The plaintiff does not suggest that such a burden can *never* be justified. It was found to be justified on the facts in *McCloy*. But such a substantial, distorting burden imposed directly on political communication/activities requires a clear and compelling justification.[40] The onus is on the State, as defender of the burden, to make out its justification including by establishing any facts upon which the claimed justification depends.[41] Unless the Court is persuaded a burden is justified, the law fails.

30. In *McCloy*, the majority held that the singling out of developers for differential treatment was justified by the potential for corruption and undue influence posed by donations from developers. But that finding was based on specific evidence; "a problem has been identified in New South Wales and Div 4A is one means to address it".[42] Eight adverse reports by ICAC since 1990 provided a factual basis for that justification.[43] Those reports included actual findings of corrupt conduct by elected and non-elected local government officials in relation to planning decisions. As discussed below, no such history or factual basis exists in Queensland. A law of this kind cannot be justified by reference to law made at a different time in a different State with a different history. Nor can a law which imposes such a significant and distorting burden on the protected freedom be justified as merely being prophylactic. Such a burden requires clear justification if it is to give due weight to the freedom, to be suitable to achieving some legitimate goal, and to be adequate in its balance.

31. On the facts in this case the State cannot demonstrate that the claimed purpose of the law is compatible with the maintenance of the constitutionally prescribed system of government, and that the law is reasonably appropriate and adapted to advance that object in a manner that is compatible with the maintenance of the constitutionally prescribed system of government.[44] It is appropriate to approach the latter issue by reference to the tripartite analysis set out by the plurality in *McCloy*,[45] whilst noting that different approaches may be taken, with the same result (invalidity) in this case.

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39 As to which, see amended special case, 2 [3].
40 *Brown*, 367 [120] (Kiefel CJ, Bell and Keane JJ].
41 *Unions (No.2)*, [45] and [53] (Kiefel CJ, Bell and Keane JJ), [93]-[96] (Gageler J), [117]-[118] (Nettle J), [146]-[153] (Gordon J); *McCloy,* 201 [24] (the plurality); see also analogously *Communist Party* (1951) 83 CLR 1, 223-225 (Williams J), 244 (Webb J), 275-6 (Kitto J).
42 *McCloy*, 208 [49] (the plurality), 233 [134]-[137] (Gageler J), 293 [359] (Gordon J).
43 *McCloy*, 208 [50] (the plurality).
44 Eg *Brown,* 364 [104] (Kiefel CJ, Bell and Keane JJ).
45 *McCloy*, 194-195 [2] (the plurality).

Suitability / not adequate in its balance

32. The State claims in its amended defence that the purposes of Part 3 are: (a) "to secure, promote and protect the actual and perceived integrity of the Parliament and government of Queensland;" (b) "to help prevent corruption and undue or hidden influence in the government"; (c) 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" (emphasis added); and (d) to "improve transparency and accountability in State elections and in State government".[46] Of these, only (c) is specific to developers, and only it could support differential treatment. The other claimed objectives are not advanced by banning donations from, and political participation of, one particular type of person.

33. The explanatory notes for the Amending Act stated its "policy objective" was:[47]

> 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...

34. The Minister's second reading speech similarly claimed that the Bill "implements the government's response to recommendations 20 and 23 to 26 of the Belcarra report".[48] Recommendation 20 is the only one of these recommendations that relates to banning donations from developers.

35. Part 3 of the Amending Act cannot be characterised as implementing the government's response to recommendation 20. The Belcarra Report was produced as a result of an investigation conducted by the Crime and Corruption Commission ("**CCC**") into whether candidates for the Gold Coast, Ipswich, Morteon Bay and Logan councils had committed offences under the Local Government Electoral Act.[49] Recommendation 20 was that "the Local Government Electoral Act, the Local *Government Act* [*2009* (Qld)] and the *City of Brisbane Act* [*2010* (Qld)] be amended

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46 Amended defence, [39(b)].

47 Explanatory Notes, *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018*, 1 (citations omitted).

48 Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs, Hansard, 6 March 2018, 189.

49 Amended special case 36-38 [79(g)].

to prohibit candidates, groups of candidates, third parties, political parties, associated entities and councillors from receiving gifts from property developers".[50] Other than stating that, "[t]he Queensland Government may consider it appropriate to adopt these recommendations at the state government level",[51] the Belcarra Report did not recommend any changes to the law in respect of State elections.[52] A recommendation to *consider* making changes is not a recommendation to do so, nor does it constitute a *justification* for doing so. The CCC later stated that the reform departed significantly from the intended function of recommendation 20 by also banning donations from developers for the purpose of State elections; that its Belcarra Report arose out of a "detailed consideration of facts and matters relevant to the specific local government context and purpose of the Inquiry"; and that it "did not contemplate that the proposed reforms [ie at State level] would be introduced without preliminary review to identify and mitigate corruption risks in state elections and decision-making".[53]

36. Nor do earlier reports of the CCC (or its predecessors) support the existence of a need to implement Part 3. There is no support for a conclusion that the legislative and political processes at the State level in Queensland are prone to corruption at the hands of developers. Since the establishment of the Criminal Justice Commission ("**CJC**") by the *Criminal Justice Act 1989* (Qld), no recommendation has been made by the CCC (or its predecessors) for the prohibition of the making of donations by developers to members or candidates for election to the Legislative Assembly.[54] Relevant recommendations of the CCC (and its predecessors),[55] the Fitzgerald Inquiry[56] and the Electoral and Administrative Reform Commission[57] related to the desirability of the disclosure of donations. There is now a sophisticated disclosure regime in place.[58]

37. The explanatory notes for the Amending Act refer to three previous investigations by the CCC (or its predecessors) into conduct involving candidates for election to the local councils at the Gold Coast and Ipswich in 1991, 2006 and 2015.[59] Those inquiries, like the Belcarra Report, concerned local governments in a particular part of

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50 Amended special case 38 [79(g)(x)(A)].
51 Amended special case 38 [79(g)(xi)].
52 Amended special case 38 [80].
53 Amended special case 39 [81], referring to Annexure K at 258-259; quotations are from 259.
54 Amended special case, 25 [77(c)].
55 Amended special case, 27, 29, 30 [79(a)(i), (xiii), (xvii)], 31 [79(b)(ii)], 35 [79(f)(i)].
56 Amended special case, 23-24 [76(c), (d)(iii)].
57 Amended special case, 26-27 [78(c)(iii), (iv), (v)].
58 Amended special case, 6 [28]-[29], 43-44 [89]-[90], 45 [97].
59 Explanatory Notes, *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018*, 3.

the State, namely the southeast corner (excluding Brisbane).[60] No finding of corrupt conduct was made in the reports that resulted from these inquiries.[61] This is to be distinguished from the position in New South Wales where findings of corrupt conduct were made;[62] a matter which was important to the decision in *McCloy*.[63]

38. The CJC investigations into allegations made against the "Legislative Assembly/Parliamentary Service" during the 1990s, as referred to in the State's amended defence,[64] represented less than approximately 1% to 2% of the complaints made to the CJC.[65] These allegation were described as "corruption/favouritism", including in relation to zoning and development, but allegations did not necessarily result in action being taken by the CJC and various complaints were not actioned because of the absence or insufficiency of evidence, the absence of jurisdiction or because the complaints were vexatious or frivolous.[66]

39. Investigations by the Crime and Misconduct Commission ("**CMC**") in 2009 and 2012, also referred to in the State's amended defence,[67] did not result in any recommendation by the CMC with respect to a prohibition of developers making donations.[68]

40. Insofar as the justification is said to relate to the nature of planning powers, and the degree to which economically important decisions may turn on the use of such powers, the same risk exists in other areas where the government plays a significant regulatory and allocative role, such as approvals for licenses (eg liquor[69] and casino licenses[70]); grants of mining leases;[71] funding grants (eg to the arts); the giving of directions as to the conduct of particular industries (eg racing[72] and the theatre[73]).

41. It is also important to take account of the particular planning regime in Queensland, and the limited extent in law and practice to which planning decisions are made at State level. The great preponderance (96.95%) of planning decisions in Queensland

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60 Amended special case 27 [79(a)]; 30 [79(b)]; 35 [79(f)]; 36 [79(g)].
61 Amended special case 27 [79(a)]; 30 [79(b)]; 35 [79(f)]; 36 [79(g)].
62 Amended special case, 39-42 [82].
63 *McCloy,* 208 [50]-[51] (the plurality), 250 [194] (Gageler J).
64 Amended defence, [37(d)].
65 Amended special case 25 [78(a)].
66 Amended special case 25 [78(b)].
67 Amended defence, [37(f), (g)].
68 Amended special case, 32 [79(d)(iv)]; 34 [79(e)(xiii)].
69 *Liquor Act 1992* (Qld), s 119A.
70 *Casino Control Act 1982* (Qld), s 18
71 *Mineral Resources Act 1989* (Qld), s 234.
72 *Racing Act 2002* (Qld), s 44.
73 *Queensland Theatre Company Act 1970* (Qld), s 15.

are made by local governments.[74] The chief executive of the Department of State Development, Manufacturing, Infrastructure and Planning is the assessment manager for certain environmentally sensitive developments,[75] but the number of those decisions is limited.[76] Another senior statutory officer, the Coordinator-General, approves major developments,[77] but again the number of decisions is small.[78]

42. The Minister for State Development, Manufacturing, Infrastructure and Planning may give directions to local governments about planning instruments and to referral agencies, but the power is constrained[79] and is used very infrequently.[80] The Minister is entitled to direct assessment managers as to how they are to exercise their functions,[81] and call in an application that relates to a State interest,[82] but the Minister is required to report the use of those powers to the Legislative Assembly (enabling transparency) and has used those powers on only a few occasions.[83]

43. The Minister for Economic Development Queensland may declare areas of economic and community benefit to be development areas and accordingly be responsible for the assessment of development undertaken within those areas,[84] but the number of declarations is similarly small.[85]

44. Many of the decisions made by either of the Ministers, the chief executive or the Coordinator-General have no relevance to the ambit of the Amending Act.[86] Part 3 is directed towards donations from corporations who regularly make applications in connection with "residential or commercial development of land" (s 273). Decisions at the State level with respect to public works, large scale heavy industry and mining and energy resources are of a different character.

45. Whilst the monetary value and economic significance of planning decisions is not revealed by the data available,[87] the confined nature and number of planning decisions made at the State government level in Queensland shows that the State is not involved

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74 Amended special case, 7-9 [35]-[40], 21 [74 (items 1-4)].
75 Amended special case, 6-7 [33], 9-10 [41]-[44].
76 Amended special case, 7-8 [34], 11 [45], 21 [74 – items 5, 6].
77 Amended special case, 15-19 [51]-[64], 22 [74 – items 11, 12, 13, 14].
78 Amended special case, 16 [53], 17 [56], 18 [60], 19 [64], 22 [74 – items 11-14].
79 Amended special case, 12 [46(a), (c)], 21-22 [74 – items 7, 9].
80 Amended special case, 12 [46(a), (c)], 21-22 [74 – items 7, 9].
81 Amended special case, 12 [46(b)].
82 Amended special case, 12 [46(d)].
83 Amended special case, 12 [46(b)], 13 [46(d)], 21-22 [74 – items 8, 10].
84 Amended special case, 21-21 [65]-[73].
85 Amended special case, 19 [67], 21 [73], 22 [74 – item 16].
86 Amended special case, 22 [75].
87 Amended special case, 22 [75].

in planning decisions to any substantial extent.

46. In this context, no sufficient, compelling justification can be made out by the State. Part 3 is not suitable because it does not have a rational connection to its purported purpose of reducing the risk of undue/corrupt influence in an area where, it is said, such risk *may* be greater than in other areas of official decision-making. Such differential risk is not made out by the evidence. Similarly, Part 3 is not adequate in its balance, nor justifiable overall. Its purported purpose cannot justify the quashing of all donations by a particular class of persons, whether corrupt or not, given the substantial consequential burden the ban effects (as outlined above). Put another way, Part 3 does not have a legitimate end in that there is nothing to show that donations to political parties, members or candidates for election to the Legislative Assembly have had any effect upon the integrity of the political process of the State.

Necessity

47. There are also reasonably practicable and less restrictive means of achieving the claimed objects of Part 3. The defendant says the Amending Act is directed at promoting transparency. However, the Electoral Act has for some time required the disclosure of donations,[88] and since 1 March 2017 that disclosure has been required to be made within 7 days of the donation.[89] In practice there is now real time disclosure.[90] The requirement is more onerous than the requirements of the other States.[91] It discourages donations being made to seek or achieve influence. Mandatory disclosure is consistent with the requirement for ministerial decisions relating to planning matters to be disclosed.

48. It may be accepted that large donations are most likely to affect influence or be used to bring pressure to bear upon recipients.[92] A reasonably practical means of avoiding the impact that donations might have on decision-making is to impose monetary caps on donations, as has been done in New South Wales, Victoria, the United States, Canada and New Zealand,[93] and a number of other European countries with systems of representative government.[94] Such a law applies neutrally as between all types of persons. It is "a means that does not impede the system of representative government

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88 Amended special case, 44 [90].
89 *Electoral (Reporting Periods) Amendment Regulation 2017* (Qld).
90 Amended special case, 6 [29].
91 *Electoral Act* 2002 (Vic), s 217I; *Electoral Act 1907* (WA), s 175N.
92 *Unions No.1,* 558 [53] (the plurality).
93 Amended special case, 44-45 [94]-[96].
94 Amended special case, 45 [96]; *McCloy,* 208 [46] (the plurality).

for which our Constitution provides",[95] but in fact preserves and enhances it.[96] Yet the State has eschewed this approach, opting to prevent one type of donor donating to a materially greater extent to one side of politics.

49. A practical means of reducing the need for donations is to cap expenditure. This has been the approach adopted elsewhere in Australia, Canada, New Zealand, the United Kingdom and the United States.[97] Again, it has not been adopted in Queensland.

50. If the intention of the legislature was to prevent or deter corruption, then a further way to accomplish the task would be to tighten the laws dealing with bribery and the sanctions that apply following conviction. No change to the existing laws at State level occurred;[98] though the Amending Act did alter the law relating to the disqualification of councillors who have previous convictions for integrity offences.[99]

Ground 2: Exclusive power of the Commonwealth / intergovernmental immunity

51. The second and third grounds of challenge to both Parts 3 and 5 of the Amending Act arise from the following characteristic of the State's scheme. The term "political party" is defined in s 2 of the Electoral Act to mean "an organisation whose object, or *1 of whose objects*, is the promotion of the election to the Legislative Assembly of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part" (emphasis added). Similarly, the term "political party" in the Local Government Electoral Act means "an organisation or group whose object or activity, or *1 of whose objects* or activities, is the promotion of the election of a candidate or candidates endorsed by it, or by a body or organisation of which it forms a part, to an office of councillor of a local government" (emphasis added). These definitions designedly capture parties which have other objects, including the object of electing senators or members of the House of Representatives. The Electoral Act thus makes no attempt to differentiate between donations received for State and federal electoral purposes, for example by legislating for separate accounts (in contrast to other jurisdictions).[100] Parts 3 and 5 therefore prevent political parties seeking and receiving donations from developers in Queensland, regardless of whether such donations might be intended or

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95 *McCloy*, 208 [46] (the plurality).
96 *McCloy*, 208 [46] (the plurality), 290 [344] (Gordon J).
97 Amended special case, 46 [99]-[100].
98 See *Criminal Code*, ss 59-60; *Parliament of Queensland Act 2001* (Qld), s 64(2)(c), (d), (6); note *Electoral Act*, s 2.
99 Amending Act pt 2, s 7B inserts s279 into the *City of Brisbane Act 2010* (Qld); Amending Act Pt 4, s 25B inserts s 327 into the *Local Government Act 2009* (Qld).
100 See eg New South Wales, Victoria and South Australia: amended special case, 48 [109]-[113].

directed for use for federal electoral purposes.

52. That legal operation has substantial effect in practice. All political parties which have members in the Legislative Assembly have members in the Commonwealth Parliament.[101] The following significant parties in Queensland are registered under both the Electoral Act and the CE Act: the Liberal National Party, the Australian Labor Party (Queensland Branch), Katter's Australia Party, Pauline Hanson's One Nation and the Queensland Greens.[102] Pursuant to Parts 3 and 5, those parties may not seek/receive donations from developers whether or not for federal electoral purposes.

53. By this operation, Parts 3 and 5 intrude impermissibly into an area of exclusive federal power and/or infringe an intergovernmental immunity. Parts II, III and IV of Chapter 1 of the Constitution contain a range of provisions relating to the election of members to, and grants of power to, the Commonwealth Parliament. Notably, ss 10 and 31 provide that, "until the Parliament otherwise provides" (bringing into play the legislative power in s 51(xxxvi)), and subject to the Constitution itself, the laws for each State relating to the elections of the more numerous House of Parliament of that State would, as nearly as practicable, "apply to elections" of senators and members of the House of Representatives. The effect of the Constitution was thereafter to give power to the Commonwealth Parliament to make laws with respect to the election of its members.[103] This power to enact laws providing for and regulating federal elections has been said to amount to a "plenary power over federal elections",[104] subject to the Constitution. That power extends to the regulation of political parties and candidates (in that capacity) who seek to participate in the federal electoral process[105] as well as the donations they may accept and expend for federal electoral purposes.

54. A number of judgments have stated that this power is exclusive to the Commonwealth.[106] Whilst they are not expressly stated in the Constitution to be exclusive, so much is implied in the nature of the powers. To a significant extent, it is

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101 Amended special case, 3 [9], 4 [17], 4 [19], 5 [20]-[21].

102 Amended special case, 1-5 [2], [13], [19], [20], [21].

103 Constitution, s 51(xxxvi), see also ss 8, 9, 14, 16, 24, 27, 30, 34.

104 *Smith v Oldham* (1912) 15 CLR 355 (*Oldham*), 363 (Isaacs J); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 (*Rowe*), 14 [8] (French CJ).

105 Note *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 194 [26] (Gleeson CJ), 207-210 [66]-[70] (McHugh J), 231-233 [140]-[143] (Gummow and Hayne JJ), 253-255 [208]-[214] (Kirby J).

106 *Oldham*, 358 (Griffith CJ), 360 (Barton J), 365 (Isaacs J); *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545 (*Nelungaloo*), 564 (Dixon J); *McGinty v Western Australia* (1996) 186 CLR 140, 231 (McHugh J); *Rowe*, 14 [8] (French CJ); *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 112-113 [261] fn 326 (Gordon J).

a topic on which there cannot be a multitude of legislative voices, for it practically permits of the application of only one system of law. Variable State legislation would undermine the national character of the system of government established by the Constitution. It is an issue which goes to the very nature of the polity itself, and, at its core, is a matter "in which the States as such have no concern".[107]

55. No doubt there are limits on this exclusivity. The imperatives of exclusivity do not require that the States be precluded from regulating all matters which might *affect* the conduct of federal elections and the provision of information to federal electors, including laws as to defamation or generally expressed criminal prohibitions (eg on assault, bribery, malicious damage, trespass). That is so even though it is likely that the Commonwealth could regulate such matters insofar as they are incidental to the conduct of federal elections.

56. The exclusivity must be shaped by the textual and structural implications of the Constitution. For present purposes, it may suffice to take guidance from structural implications relating to intergovernmental immunities, for the unique interest of the Commonwealth in its own constitution and functioning is a common element of each. In any event, the plaintiff invokes both the exclusivity of power and the immunity. As regards the immunity restriction on the Commonwealth, it has been said:[108]

> The question presented by the doctrine ... requires assessment of the impact of particular laws by such criteria as 'special burden' and 'curtailment' of 'capacity' of the States 'to function as governments'. These criteria are to be applied by consideration not only of the form but also 'the substance and actual operation' of the federal law. Further, this inquiry inevitably turns upon matters of evaluation and degree and of 'constitutional facts' which are not readily established by objective methods in curial proceedings.

57. It is unnecessary here to determine the limits to the Commonwealth's immunity from State laws. In the present context it would be at least as extensive as that which applies to protect the States.[109] The constitution of a legislature and government, and the electoral process by which that is achieved, go to the heart of the creation,

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107 (1912) 15 CLR 355, 358 (Griffith CJ); see similarly *Nelungaloo*, 564 (Dixon J).

108 *Austin v Commonwealth* (2003) 215 CLR 185, 249 [124] (Gaudron, Gummow and Hayne JJ; citations omitted); see also *Clarke v Commissioner of Taxation* (2009) 240 CLR 272, 298-299, [32]-[34] (French CJ), 305-307 [61]-[66] (Gummow, Heydon, Kiefel and Bell JJ), 312 [90], 312-313 [93]-[95] (Hayne J).

109 Note *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (*Melbourne Corporation*), 81-83 (Dixon J); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 443 (Dawson, Toohey and Gaudron JJ), 451, 457-8 (McHugh J), 507-8 (Kirby J, dissenting), cf 426 (Brennan CJ). Note also Zines' view: *The High Court and the Constitution* (5th ed, 2008, Federation Press), 488-9, 501.

operation and functioning of a democratic polity. Subject to contrary constitutional provision, it is not for the integers in the federation to interfere in a material manner with each other's electoral processes.[110]

58. *Local Government Association of Queensland (Inc) v Queensland*[111] concerned Queensland legislation which provided that a local government councillor ceased to be such if they were declared to be a candidate for an election under the CE Act. A majority of the Court of Appeal held the provision in question invalid, as infringing the area of exclusive Commonwealth power.

59. Here, Parts 3 and 5 of Amending Act interfere in the federal electoral process by prohibiting the solicitation, provision or receipt of donations by parties which are registered under both the State and federal Acts and which are engaged at both levels (capturing all significant parties). The burden is significant, as outlined above for ground 1. The connection of Parts 3 and 5 to the exclusive Commonwealth power is not so insubstantial, tenuous or distant as not to be a law relating to election of members to the Commonwealth Parliament.[112] Rather, without any attempt to quarantine, the State has legislated in a way that impairs the Commonwealth's autonomy and ability to function.

Ground 3: Inconsistency with the CE Act

60. Parts 3 and 5 of the Amending Act are also invalid under s 109 of the Constitution as they alter, impair and detract from the operation of the CE Act. The CE Act does not prohibit developers from making donations for the purposes of federal elections.

61. The provisions of the CE Act which regulate donations to parties and candidates are contained in Divisions 3A, 4 and 5A of Part XX. Division 3A, and other changes, were introduced by the *Electoral legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* ("**2018 Federal Amending Act**"), the relevant provisions of which commenced on 1 January 2019.

62. Under the CE Act, "political party" is defined in s 4 as "an organization the object or activity, or one of the objects or activities, of which is the promotion of the election to the Senate or to the House of Representatives of a candidate or candidates endorsed by it". "Registered political party" is defined in s 4 as "a political party that is registered

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110 Note *ACTV*, 162-4 (Brennan CJ), 241-4 (McHugh J).
111 [2003] 2 Qd R 354, 364 [12] (McMurdo P), 377-378 [70] (Williams J); cf 369 [33]-[35] (Davies J).
112 Quotation from *Melbourne Corporation*, 79 (Dixon J).

under Part XI". A "State branch of a political party" is defined in s 287 of Division 1 of Part XX as "a branch or division of the party that is organized on the basis of a particular State or Territory".

63. Divisions 3A, 4 and 5A of Part XX of the CE Act regulate the giving and receipt of donations in various ways. Section 302D, for example, provides that it is unlawful for an agent of a political entity,[113] or a financial controller of a political campaigner, to receive a gift exceeding $1,000 made by, or on behalf of a foreign donor, to or for their benefit unless acceptable action[114] is taken in relation to the gift before the end of 6 weeks after the gift was made.

10 64. These provisions indicate that the Commonwealth Parliament has addressed and regulated the use of donations for federal electoral process, including by State branches of political parties. Relevantly, subject to such requirements as s 302D, the provisions of Divisions 3A, 4 and 5A of Part XX of the CE Act contemplate and permit persons, including developers, to make donations to a State branch of a political party for the purpose of a federal election.

65. The regulation imposed in these divisions is limited in comparison to, say, the scheme in New South Wales. That reflects the choice of the Commonwealth Parliament. This limited form of regulation manifests an "area of liberty designedly left"[115] by the CE Act. The CE Act constitutes a complete statement of the laws relating to donations for
20 federal electoral purposes. There is an implicit negative stipulation that that area of liberty is not to be intruded upon by State laws. The subject matter regulated by the CE Act, is by its nature, one that "practically permit[s] only one system of law and one system of administration".[116]

66. That position has now been made expressly clear with the introduction of s 302CA, in new Div 3A. Section 302CA(1) permits, "despite any State or Territory electoral law", a person to give and the relevant recipient to receive and retain, a gift to or for

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113 "Political entity" is defined in s 4 (as amended) to include a State branch (within the meaning of Part XX) of a registered political party.

114 "Acceptable action" is defined in new s 302B as any of the following (a) an amount equal to the amount or value of the gift is transferred to the Commonwealth for the purposes of this Division; (b) the gift is returned to the donor or the person who made the gift; (c) an amount equal to the amount or value of the gift is transferred to the donor or the person who made the gift.

115 *Dickson v The Queen* (2010) 241 CLR 491, 504 [25] (the Court); *Wenn v A-G (Vic)* (1948) 77 CLR 84, 120 (Dixon J); *Momcilovic v R* (2011) 245 CLR 1, 190 [479] (Heydon J), 240-241 [660] (Bell J).

116 *The Karariki* (1937) 58 CLR 618, 638 (Evatt J) (re bankruptcy, patents and trademarks), 628 (Starke J) (re regulations for preventing collisions at sea).

the benefit of (relevantly) a registered political party or a State branch of such,[117] so long as, first, Div 3A does not prohibit the giving, receiving or retaining of the gift, and, secondly, the gift is required to, or may, be used for the purpose of incurring "electoral expenditure or communicating electoral matter" (either because the terms of the gift expressly require or allow this to occur, or the giver did not set terms relating to the purpose for which the gift might be used – s 302CA(2)). "Electoral matter" means, in essence (with certain exceptions), matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in a federal election. "Electoral expenditure" means, in essence (with certain exceptions), expenditure incurred for the dominant purpose of creating or communicating electoral matter.[118]

67. A State or Territory electoral law is one that "deals with electoral matters (within the ordinary meaning of that expression)".[119] Parts 3 and 5 of the Amending Act fall within this definition. They, like Part XX, regulate incidents of the electoral process.

68. Section 302CA, does not apply if the person providing the gift explicitly requires the gift (in whole or part) to be used for State or Territory electoral purposes, or the gift (in whole or part) is kept or used only for State or Territory electoral purposes (either because it is kept or identified separately pursuant to a State or Territory electoral law, or because the recipient keeps or identifies it separately).[120]

69. Section 302CA thus allows developers to make gifts to federally registered political parties (including State branches thereof) and permits them to receive/retain those gifts for the purposes of federal elections. In contrast, Parts 3 and 5 of the Amending Act prohibit such donations to federally registered parties (including State branches thereof) who also have, as an object, the election of candidates to the Legislative Assembly or Queensland local governments. In practice, the ban extends to all significant political parties which operate in Queensland (being parties which are registered under and operate within both State and federal systems). Parts 3 and 5 purport to regulate the same subject matter as the CE Act.[121] They alter, impair or

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117 See the definition of "political entity" in s 4 (as amended), and the definition of "gift" in s 287(1).
118 See definitions in, respectively, new ss 4AA and 287AB.
119 Section 287(1) (as amended).
120 As to keeping or identifying it separately, see further s 302CA(6).
121 Cf eg *Viskauskas v Niland* (1983) 153 CLR 280, 295 (the Court); *Commonwealth v ACT* (2013) 250 CLR 441, 468-469 [59]-[60] (the Court).

detract from the operation of the CE Act in a way that is direct and significant.[122] They are, thus, invalid under s 109.

70. The invalidity arises not only from the legal operation of the two Parts, but from their practical effect,[123] which is to prevent existing, significant political parties from soliciting or receiving donations in Queensland from developers even if they are to be used for federal electoral purposes, where such receipt expressly is permitted by federal law.

71. The State asserts that the section is invalid on three bases. This will be addressed in reply, save to say the following about the intergovernmental immunity argument. Where Parts 3 and 5 make no attempt to limit their operation to State electoral purposes, Division 3A of the CE Act carefully carves out an area in which s 302CA does not apply, such that State electoral laws may continue to apply with respect to donations for State purposes. It regulates donations for federal electoral purposes. That it may override inconsistent State law is simply a consequence of s 109. It does not create a burden to such a nature or degree that requires it to be invalid.

PART VII: ORDERS SOUGHT

72. The plaintiff submits that questions (a) to (c) and (g) to (h) set out in the amended special case should be answered, *"yes, in whole"*. Questions (d) to (f) should be answered "*no*". The defendant should be ordered to pay the costs of the amended special case if the plaintiff succeeds on any question which leads to invalidation of Parts 3 or 5 of the Amending Act.

PART VIII: ORAL ARGUMENT

73. The plaintiff requires some 3.5 hours in chief, and 30 minutes in reply.

29 January 2019

J K Kirk SC
T: 02 9223 9477
kirk@elevenwentworth.com

P A Hastie QC
T: 07 3229 6737
phastie@qldbar.asn.au

M Forrest
T: 07 3333 9940
mforrest@qldbar.asn.au

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122 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 525 [41]-[42] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ); *Bell Group v Western Australia* (2016) 260 CLR 500 (*Bell Group*), 521 [51] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

123 Note *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 399-400 [202]-[206] (Gummow J), cited in *Bell Group*, 521 [51] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).