IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S211 of 2014

BETWEEN:

Jeffery Raymond McCloy
First Plaintiff

McCloy Administration Pty Ltd
Second Plaintiff

North Lakes Pty Ltd
Third Plaintiff

and

State of New South Wales
First Defendant

Independent Commission Against Corruption
Second Defendant

ANNOTATED SUBMISSIONS OF THE FIRST DEFENDANT

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Filed by:
John McDonnell, Acting Crown Solicitor
Level 5, 60-70 Elizabeth Street
SYDNEY NSW 2000
DX 19 SYDNEY

Tel: (02) 9224 5249
Fax: (02) 9224 5255
Ref: T05 Sasha Lowes

Part I: Publication of Submissions

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

Part II: Issues in the Proceedings

2. The issues raised in the proceedings are the questions stated in the Special Case ("SC"):

    1. Is Division 4A of Part 6 of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ("the Act") invalid (in whole or in part and, if in part, to what extent) in its application to the plaintiffs because it impermissibly burdens the implied freedom on governmental and political matters contrary to the Commonwealth Constitution?

        Answer: No.

    2. Is Division 2A of Part 6 of the Act invalid (in whole or in part and, if in part, to what extent) in its application to the plaintiffs because it impermissibly burdens the implied freedom on governmental and political matters contrary to the Commonwealth Constitution?

        Answer: No.

    3. Is s 96E of the Act invalid in its application to the plaintiffs because it impermissibly burdens the implied freedom on governmental and political matters contrary to the Commonwealth Constitution?

        Answer: No.

    4. Who should pay the costs of the special case?

        Answer: The plaintiffs.

Part III: Notice

3. Notice has sufficiently been given under s 78B of the Judiciary Act 1903 (Cth).

Part IV: Material Facts

4. The first defendant (hereafter "the defendant", noting that the second defendant has filed a submitting appearance (SCB V1 p 20)) agrees that the material facts are set out in the Special Case.

5. Contrary to the plaintiffs' contention that the facts in the Special Case substantiate their standing to challenge Division 4A as a whole (SC [1]-[7], SCB V1 p 64-66), there are no facts which provide a basis on which they could have standing to challenge Division 4A in so far as it applies to tobacco industry business entities and liquor or gambling business entities (see Defence [13], [14], [28]-[29], SCB V1 p 42-44).

Part V: Constitutional and Legislative Provisions

6. The first defendant accepts the plaintiffs' statement of applicable provisions and adopts the plaintiffs' practice of referring to the version of the Act in effect on 28 July 2014 (being the date on which these proceedings were commenced).

Part VI: Argument

The Election Funding, Expenditure and Disclosures Act

7. The implied freedom of political communication operates as a constraint on legislative power: Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 ("Lange") at 560; see also APLA Ltd v Legal Services Commissioner (NSW) (2005) 224 CLR 322 ("APLA") at [27], [56], [381]; Hogan v Hinch (2011) 243 CLR 506 at [92]; Unions NSW v New South Wales [2013] HCA 58; (2013) 88 ALJR 227 ("Unions NSW") at [36]. Accordingly, "in deciding whether the freedom has been infringed, the central question is what the impugned law does": APLA at [381]; Hogan v Hinch at [5], [50]; Monis v The Queen (2013) 249 CLR 92 at [62].

8. The purpose of the Act is to regulate electoral funding and expenditure in a transparent manner, with a view to securing and promoting the actual and perceived integrity of the Parliament of the New South Wales, the government of New South Wales, and local government bodies within New South Wales. Although the objects provision in s 4A of the Act postdates the enactment of the impugned provisions (Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014, Sch 2 item 4), the section serves to confirm the legislative purpose which is otherwise apparent from the Act's provisions, of maintaining the integrity of the State political institutions, inter alia through the creation of a transparent system that seeks to prevent corruption and undue influence. The regulatory regime by which the Act achieves that purpose is complex and multi-faceted, and includes:

   a. In Part 6 of the Act:

      i. the imposition of restrictions on political donations, in terms of amounts of donations (Div 2A), certain types of donation (Div 4), and donations from persons associated with certain kinds of businesses (Div 4A);

      ii. the imposition of limitations upon electoral communication expenditure, in particular during the months leading up to a general State election (Div 2B); and

      iii. the imposition of disclosure requirements with respect to both political donations and electoral expenditure (which includes electoral communications expenditure (see s 87)) (Div 2); and

   b. In Part 5 of the Act, a regime of public funding for parties, members and candidates in relation to State elections.

Restrictions on political donations

9. Part 6 of the Act applies to both State elections and elected members of the State Parliament, and to local government elections and elected members of local councils, save that Divisions 2A and 2B apply only to State elections: s 83.

10. A "political donation" covers gifts made (directly or indirectly) to or for the benefit of a party, elected member, candidate or group of candidates (s 85(1)); amounts paid by persons as a contribution, entry fee or other payment to entitle a person to participate in or otherwise obtain any benefit from a fund-raising venture or function (s 85(2)); an annual or other subscription paid to a party by a member of the party or a person for affiliation with the party (s 85(3); dispositions of property to the NSW branch of a party from the federal or another State or Territory branch of the party, or to a party from an associated party (s 85(3A)); and uncharged interest on a loan to an entity or

other person (s 85(3B)). Gifts made to individuals in a private capacity for the individual's personal use and that he or she has not used, and does not intend to use, solely or substantially for a purpose related to an election or to his or her duties as an elected member, are excluded from the definition (s 85(4)). However, if any part of such a gift is subsequently used to incur electoral expenditure (as defined in s 87), that part of the gift becomes a political donation (s 85(5)).

11. Section 95A(1) of the Act, in Division 2A, imposes a cap on the amount of political donations that can be made per person per financial year for the benefit of a registered party ($5,000), an unregistered party ($2,000 – thus encouraging registration), elected members ($2,000), a group ($5,000), a candidate ($2,000) and a third party campaigner ($2,000). These amounts, like other relevant monetary amounts in the Act, are indexed (s 95A(5)) although it is convenient and sufficient to refer to the amounts set out in the Act. For the purposes of the donation caps, a party subscription (as defined in s 95D(2)) is to be disregarded, provided it does not exceed the maximum subscription (as defined in s 95D(3): eg, $2,000 for membership of a party). Section 95A includes a number of aggregation provisions the purpose of which is to ensure that a person cannot circumvent the cap by making more than one donation in a financial year (s 95A(2)), or by making more than one donation to elected members, groups or candidates of the same party (s 95A(3) and (6)).

12. It is unlawful for a person to accept a political donation to a party, elected member, group, candidate or third-party campaigner if the donation exceeds the applicable cap (s 95B(1)). However, that prohibition is subject to a number of exceptions, including:

    a. if the donation (or the part exceeding the cap) "is to be paid into (or held as an asset of) an account kept exclusively for the purposes of federal or local government election campaigns" (s 95B(2)); and

    b. if a donation exceeds a cap because of the aggregation of political donations made to other persons and the person who received the donation did not know and could not reasonably have known of the political donations made to the other persons (s 95B(5)).

13. Division 4 of Part 6 contains prohibitions on making and/or accepting certain political donations. The donations are proscribed by reference to either:

    a. their source: see s 96EA (donor is a party, or elected member or candidate endorsed by a party and the candidate or group of candidates is not endorsed by that or any other party), and s 96F (donor does not identify his or her name or address to the person accepting the donation);

    b. their nature: s 96E (indirect campaign contributions such as provision of office accommodation or full or part payment for electoral expenditure for advertising or other purposes to be incurred by a party, elected member, group or candidate); or

    c. the conditions of their receipt: s 96G (receipt of a reportable loan other than from a financial institution without recording the terms and conditions of the loan and the name and address of the person making the loan).

14. Division 4A of Part 6 is titled "Prohibition of donations from property developers or tobacco, liquor or gambling industries". The proscribed categories of donor are defined with more precision in s 96GB and are collectively defined as "prohibited donors" in s 96GAA. A "property developer" is defined for the purposes of the division as each of the following persons:

a. "a corporation 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, with the ultimate purpose of the sale or lease of the land for profit"; and

b. "a person who is a close associate of a corporation referred to in paragraph (a)".

15. A "relevant planning application", which is defined by reference to s 147 of the Environmental Planning and Assessment Act 1979 (NSW) ("EPA Act"), covers a broad range of planning-related applications that may be made under that Act, including: to initiate the making of an environmental planning instrument; to request that development on a particular site be declared as State significant development or development to which the (now repealed) Part 3A of the Act applies; and for approval of a concept plan or major project under Part 3A or for development consent under Part 4 of the Act.

16. The term "close associate" is defined in s 96GB(3) to mean each of:

a. a director or officer of the corporation or the spouse of such a director or officer;

b. a related body corporate of the corporation (see Corporations Act 2001 (Cth) s 50);

c. a person whose voting power in the corporation or a related body corporate is greater than 20% or the spouse of such a person, with "voting power" having the same meaning as in the Corporations Act (see ss 9, 10-17 and 610 of the Corporations Act);

d. if the corporation or related body corporate is a stapled entity in relation to a stapled security – the other stapled entity in relation to that stapled security;

e. if the corporation is a trustee, manager or responsible entity in relation to a trust – a person who holds more than 20% of the units in the trust (in the case of a unit trust) or is a beneficiary of the trust (in the case of a discretionary trust).

17. Pursuant to s 96GA it is unlawful for a prohibited donor, or someone on behalf of a prohibited donor, to make a political donation (s 96GA(1) and (2)); and it is unlawful for a prohibited donor to solicit another person to make such a donation (s 96GA(4)). It is also unlawful for a person to accept a political donation that was made (wholly or partly) by a prohibited donor or by a person on behalf of a prohibited donor (s 96GA(3)), or to solicit a person on behalf of a prohibited donor to make a political donation (s 96GA(5)).

18. A person who does any act that is unlawful under, relevantly, Divs 2A, 4 and 4A is guilty of an offence "if the person was, at the time of the act, aware of the facts that result in the act being unlawful": ss 96HA(1) and 96I(1). The maximum penalty for an offence is 200 penalty units (for a party) or 100 penalty units (for persons other than a party): ss 96HA(2), 96I. A penalty unit is $110: Crimes (Sentencing Procedure) Act 1999 (NSW), s 17.

19. Where a person accepts a political donation that is unlawful because of a provision of Part 6, s 96J provides that the amount of the donation is payable to the State by the person who accepted it and may be recovered by the Election Funding Authority of NSW (from 1 December 2014 the NSW Electoral Commission but described below as

the "EFA") as a debt due to the State. If the person knew it was unlawful at the time of acceptance, the amount of the donation is doubled.

Disclosure requirements

20. The disclosure and publication regime in Division 2 of Part 6 applies not only to parties, elected members, groups of candidates and individual candidates, but also to major political donors (as defined in s 84) and third-party campaigners (defined in s 4). The Division requires relevant persons to disclose political donations and/or electoral expenditure during the "relevant disclosure period", being each 12-month period ending on 30 June (s 89; for the disclosure requirements see s 88(1)). Major political donors are required to disclose reportable political donations (ie those exceeding $1000 – see s 86) made during that period: s 88(2). Third-party campaigners are required to disclose electoral communication expenditure incurred in a capped expenditure period during the relevant disclosure period and political donations it receives for the purposes of incurring that expenditure: s 88(1A). The EFA is required to publish on its website the disclosures of reportable political donations and of electoral expenditure: s 95.

Caps on electoral communication expenditure

21. Division 2B of Part 6 imposes caps on electoral communication expenditure, which apply only to such expenditure during a "capped expenditure period" (see s 95H). The expenditure is taken to be incurred "when the services for which the expenditure is incurred are actually provided or the goods for which the expenditure is incurred are actually delivered": s 95J. Section 95F of the Act imposes electoral communication expenditure caps, including:

    a. on parties fielding in more than 10 Assembly seats, the cap applies at a rate of $100k per seat (s 95F(2)-95F(4));

    b. for parties fielding only in the Council, or in 10 or less Assembly seats, up to $1.05m (s 95F(3) and (4));

    c. for independent candidates in the Assembly or in the Council, $150k (s 95F(7) and (8));

    d. for party candidates in the Assembly, $100k, but their party may spend (within the party's overall cap) an additional amount of $50k directed specifically to that seat (s 95F(6) and (12)-(13)); and

    e. in by-elections, $200k for all candidates (s 95F(9)).

22. Like Division 2A, Division 2B contains provisions designed to avoid circumvention of the electoral communication expenditure cap: see s 95G.

Public funding of State election campaigns

23. Part 5 of the Act makes provision for the public funding of State election campaigns through the Election Campaigns Fund established under s 56 (the **EC Fund**). Registered parties and candidates are entitled, subject to certain eligibility requirements, to receive a percentage of their "actual expenditure" during the capped expenditure period, which is "the total actual electoral communication expenditure incurred by a party, irrespective of whether it was incurred in connection with an Assembly general election or with a periodic Council election or with both of those elections": s 58(1). That expenditure is calculated by reference to the applicable expenditure cap under Part 6 Div 2B: s 58(1).

24. In the case of parties, the eligibility criteria are that it have at least one candidate elected, or alternatively that its candidates satisfy a 4% threshold of first preference votes (being 4% of the total number of first preference votes in all electoral districts in which the candidates were duly nominated in the Assembly general election, or 4% of the total number of first preference votes in that election in the case of a periodic Council election): s 57. Candidates are subject to a similar requirement, namely election to the Assembly or Council or achievement of the 4% threshold of first preference votes: s 59(3). The relevant proportions payable under the Act are as follows:

10 a. for parties, up to 75% of their electoral communication expenditure cap: s 58;

b. for party candidates for the Assembly, up to 30% of their cap: s 60;

c. for independent candidates for the Assembly, up to 45% of their cap (ibid);

d. for all candidates for the Council, up to 75% of the applicable cap (ibid).

25. In addition to the EC Fund, Part 6A of the Act makes provision for the reimbursement of administration and operating expenses, on a calendar year basis, to eligible registered political parties and independent members of Parliament through the establishment of the Administration Fund. Registered parties are eligible for payments from the Administration Fund if they have endorsed at least one candidate who was elected at a State election and continues to be their member or representative
20 (s 97E). An elected member of Parliament is eligible if he or she was not an endorsed candidate of any party at the State election and is not a member or representative of any party (s 97F). Expenditure for which payments may be made does not include electoral expenditure but otherwise includes conferences, seminars, meetings or similar functions at which the policies of the eligible party or elected member are discussed, providing information to the public or a section of the public about the eligible party or elected member, and providing information to members and supporters of the eligible party or elected member (see s 97B).

26. If there is only one elected member endorsed by the party, the maximum amount that can be distributed from the Administration Fund is $200k (s 97E(3)(a)). The same
30 amount is payable to an independent under s 97F (s 97F(3)). Accommodating economies of scale, where a party has 3 or more elected members the maximum amount payable is $450k plus $83,000 for each elected member in excess of three members up to a maximum of 25 members (s 97E(3)(c), (d)). In the case of the major political parties the amounts paid from the Fund are substantial (see SC [40]-[43], SCB V1 p 73).

27. Where a party is not eligible for payments from the Administration Fund, provided it is registered and the EFA is satisfied that it operates as a genuine political party, it is entitled to receive payments from the Policy Development Fund established under s 97H of the Act (s 97I). A party so eligible may receive payments for the amount of
40 actual policy development expenditure incurred during the relevant calendar year, which excludes electoral expenditure but includes expenditure on providing information to the public about the party or to its members and supporters, and for conferences, seminars, meetings or similar functions at which the party's policies are discussed (s 97C(1)). The maximum rate payable is 25c per first preference vote at the previous State election (s 97I(4)). Newly registered parties can receive $5k for their first 8 years: s 97I(5).

Division 4A of the Act as it relates to property developers

The nature of the burden on the protected freedom

28. Section 96GA of the Act prohibits a property developer from making political donations, and prohibits a person from accepting political donations from that source. In imposing those prohibitions, s 96GA restricts the funds which are available to political parties and candidates to meet the costs of political communication: Unions NSW at [38]. Accordingly, and to that extent, the first limb of the Lange test is satisfied, as the defendant has admitted: Defence at [50]-[51], SCB V1 p 45-46.

29. In so far as the plaintiffs contend that the first limb of the Lange test is also satisfied because s 96GA imposes a restriction on the means by which members of the community may choose to engage with political affairs and thereby express their support for, and lend support to the expression by others of support for, political positions and objectives (PS [42]-[43]), the Court should reject that contention.

30. The implied freedom of political communication protects the free and informed exercise by the people of the Commonwealth of the political choices required by ss 7, 24 and 128 of the Constitution: Unions NSW at [36], [103], [112]; see also ACTV v Commonwealth (1992) 177 CLR 106 ("ACTV") at 187; Lange at 557, 560. It does not "create a personal right akin to that created by the First Amendment to communicate in any particular way one might choose": Unions NSW at [109]-[111], see also at [36]; see also Lange at 560; Mulholland v AEC (2004) 220 CLR 181 at [107]-[109], [184]; Monis at [266].

31. Section 96GA of the Act does not directly restrict political communication. It does not directly touch upon that "indispensable incident" of the constitutional system, being communications concerning government or political matters between electors and legislators and the officers of the Executive, and between electors themselves, on matters of government and political matters: note Lange at 559-560; Aid/Watch Inc v Federal Commissioner of Taxation (2010) 241 CLR 539 at [44]. The provision does not constrain a prohibited donor from voicing support for, or otherwise publicly associating themselves with (or disassociating themselves from) a party or candidate and/or the policies of the party or candidate. It does not constrain them from advocating or communicating as they wish, subject to the general expenditure caps (the validity of which is not in dispute). It "proscribes the making of donations" as opposed to "publicising the support which the making of donations might be taken to imply": cf Unions NSW at [112].

32. The mere fact of making a donation communicates no content to electors. It does not even necessarily communicate support for the recipient's policies, for it may be made to support the political process generally (business donors may donate to more than one party), or to garner influence, or for other reasons. The fact of a donation does not illuminate the choice for electors at federal elections. If any particular message is meant to be communicated by the donor this could be – and would need to be – expressed by words. The act of donation is performed, of itself, in the private sphere. Although the communicative aspect is enhanced by the public disclosure requirements in the Act, details of donations over $1,000 are only required to be made public within eight weeks of the end of June each year (see ss 89, 91, 95). That regulatory requirement for transparency does not elevate the past act of making a donation into some significant action of communication to electors.

Legitimate object of section 96GA

33. In order to satisfy the second limb of the Lange test, the first condition s 96GA must satisfy is that the object or end that it serves is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government: Lange at 561-562; Wotton v Queensland (2012) 246 CLR 1 at [25], [77], [82]; AG (SA) v Corporation of the City of Adelaide ("Corporation of the City of Adelaide") (2013) 249 CLR 1 at [131]; Unions NSW at [46]. That condition directs the inquiry to the purpose of the impugned provision as disclosed by its text, context and history.

34. Section 96GA prohibits the making and acceptance of political donations from "prohibited donors", a term which is defined in s 96GAA by reference to corporations which conduct particular types of business, and "close associates" thereof. The first type of business that the Parliament so proscribed, and the relevant one for the purposes of these proceedings, is that of "property developer" (see the Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009 (NSW)). The business of a corporation must have the following features in order to be so described (s 96GB(1)):

    a. the business has to regularly involve the making of applications of the nature specified in s 147(2)(a) to (e) of the EPA Act by or on behalf of the corporation: s 96GB(1); and

    b. those applications have to be in connection with the residential or commercial development of land with the ultimate purpose of the sale or lease of the land for profit: s 96GB(1).

35. In s 96GB(2), the legislature has carved out any activity that a corporation engages in for the dominant purpose of providing commercial premises at which the corporation or a related body corporate will carry on business – that activity will be disregarded for the purposes of determining whether the corporation is a property developer (unless that business involves the sale or leasing of a substantial part of the premises). Further, a person may apply to the EFA for a determination that the applicant or another person is not a prohibited donor for the purposes of Division 4A: s 96GE(1). If the EFA is satisfied, on the basis of the information provided by the applicant alone, that it is more likely than not that the person is not a prohibited donor then it is authorised to make the determination: s 96GE(2). Any such determination is "conclusively presumed to be correct in favour of any person for the purposes of a political donation that the person makes or accepts": s 96GE(4).

36. As a matter of context, s 96GA is part of a larger suite of measures in the Act the purpose of which is closely to regulate political donations. By regulating what and how donations may be made, the legislative regime is evidently directed to seeking to address the potential for persons and entities to exercise – or to be perceived to exercise – undue, corrupt or hidden influence over the Parliament of New South Wales, the government of New South Wales and local government bodies within New South Wales, together with their members and processes.

37. Division 4A moves beyond this general concern to prohibit donations by a particular type of business, and associated persons – relevantly, property developers. The point in dispute here is that the plaintiffs contend that there is no rational connection between the operation of Div 4A in this application and the achievement of the identified purpose: PS [53]-[75]. They assert that there "is nothing different or special ... about property developers as a class of persons, or their business", as regards

seeking "to encourage social or regulatory change in his or her own interest by participating in public political affairs": PS [63].

38. The defendant submits to the contrary. Property developers are sufficiently distinct to merit specific regulation in light of the nature of the business activities, the nature of the public powers which they may seek to influence in their self-interest, as illustrated by history in NSW. This specific regulation reflects concerns about the actual and perceived susceptibility of members of State and local government to influence from property developers.

39. One of the distinctive features of land development is that the value of the land is peculiarly tied to governmental decisions relating to such matters as zoning and whether or not particular development applications are approved. The degree of dependence on, and potential value of, governmental decisions and approvals distinguishes it from other sectors of the economy. Further, those decisions are voluminous. As the plaintiffs say at PS [68], it "is perhaps impossible to quantify in any useful manner the vast number of property developments which have occurred" in the State over the last two and a half decades. Those decisions occur on a daily basis across the State. As the plaintiffs put it at PS [68], "[e]veryday experience indicates that property development activities are as widespread as the State's entire economy".

40. Decisions as to the permissible development of land in New South Wales, are made at both the State and local government level (see eg the definition of "consent authority" in s 4 of the EPA Act). Whilst most development applications are considered by local councils, it is commonplace for State departments/Ministers to be consulted about such proposals: see eg the requirement in s 91A of the EPA Act to obtain general terms of approval from approval bodies for integrated development. Provision is made in Division 4.1 of Part 4 of the Act for the Minister to determine applications for State significant development (defined to mean development declared under s 89C(1) to be State significant development; see also the see the former Part 3A of the EPA Act and the State Environmental Planning Policy (Major Development) 2005), and in Part 5.1 for the Minister to determine applications for State significant infrastructure.

41. In relation to matters of broader planning policy, it is the Minister who is responsible for making Local Environmental Plans, which contain the zoning and development controls in relation to land for particular local areas: see Division 4 of Part 3 of the EPA Act. State Environmental Planning Policies, which are made by the Governor but on the recommendation of the Minister, may make provision "with respect to any matter that, in the opinion of the Minister, is of State or regional environmental planning significance": see s 37 of the EPA Act.

42. Decisions in relation to the broader planning framework, and at the level of individual development applications, can enrich or destroy a developer, and thereby provide a strong incentive to obtain a favourable outcome by any means. In one of the earliest reports of the Independent Commission Against Corruption (**ICAC**), in relation to the land development on the North Coast of New South Wales, Mr Roden QC made the following observations (Report on Investigation into North Coast Land Development, July 1990, SC Annexure 13, SCB V2 pp 565-6):

> A lot of money can depend on the success or failure of a lobbyist's representations to Government. Grant or refusal of a rezoning application, acceptance or rejection of a tender, even delay in processing an application that must eventually succeed, can make or break a developer. And decisions on the

really mammoth projects can create fortunes for those who succeed. The temptation to offer inducements must be considerable.

43. A series of subsequent reports of ICAC and other bodies have made findings of corrupt conduct or other misconduct in the context of the handling by members and officials at the local government level of applications relating to property development: see SC [52], SCB V1 pp 75-77. The plaintiffs derogate the concern by arguing that the defendant has pointed to "only eight" such instances since 1990: PS [68]. Eight adverse reports over that period is no small matter, and there is good reason to think it is but the disclosed tip of a much larger problem.

10 44. A substantial proportion of complaints received by ICAC – as summarised in the annual reports for 2005-2006, 2006-2007 and 2007-2008 – related to local government and, in particular, to building/development applications: SC [57], SCB V1 p 78. This may be taken not only to reflect a significant degree of public concern about the susceptibility of public officials to influence from developers, but to suggest the existence of a real problem. The degree of public concern regarding the potential influence property developers may seek to exercise over State and local government members and officials is consistent with the potentially broad impacts of planning decisions, which commonly extend beyond the boundaries of any particular piece of land and, in so doing, may be to the considerable benefit or detriment of other
20 landholders.

45. The New South Wales Parliament's Select Committee on Electoral and Political Party Funding (**2008 Select Committee**), in its report on Electoral and Political Party Funding in New South Wales, identified concerns that some of the higher profile investigations, both in New South Wales (an example of which is that concerning Wollongong City Council) and elsewhere, had damaged public confidence in the councils which had been the subject of investigation ("regardless of the outcome of the investigation") and had adversely impacted the reputation of local government as a whole (SC Annexure 25 at [2.10], SC V2 p 824). The Committee identified similar concerns which had arisen at a State level in the context of land dealings at Badgerys
30 Creek, as to which no adverse findings were ultimately made (SC Annexure 25 at [2.14], SCB V2 p 825; see also [7.56], [7.57]-[7.67], [7.108], SCB V2 p 843-845, 852).

46. The perception of compromised integrity is antithetical to the proper conduct of representative and responsible government, and can tend to undermine public confidence in that form of government. As Mr Roden observed in his 1990 report (SCB V2 p 569), it is "impossible to expect people to have confidence in a system which allows public officials to receive money or benefits, directly or indirectly, from people with whom they are dealing in an official capacity". Half of the submissions the 2008 Select Committee received advocated either a complete ban on political
40 donations or a partial ban on donations from certain sources such as corporations or property developers (SC Annexure 25 at [2.3], SC V2 p 820).

47. The plaintiffs attack the prohibition on the basis that the definition of "property developer" could have been differently formulated, including so as to capture a broader class of property developer: PS [57]-[61], [69]. No doubt the relevant lines could have been drawn somewhat differently. That is true of any such prohibition. The fact the lines have been drawn as they are does not establish that there is no rational connection between the class of persons to whom the definition applies and the end sought to be achieved (cf PS [57]-[60]). Section 96GB(1) captures

corporations which engage in the prescribed type of business, along with persons who are close associates of such a corporation, by reason, inter alia, of a relationship with the corporation which entails the person's involvement in the affairs of the corporation, be that as a director or other officer, or as a holding company, or by reason of voting power, etc. The sufficiency of the link between the terms of s 96GB and the legitimate end sought to be achieved by s 96GA is not weakened because it could have been even more comprehensively formulated.

48. The plaintiffs point to the fact that the prohibition does not extend to individuals or partnerships engaged in property development (PS [50]). Insofar as such persons are close associates of relevant corporations, they may be caught. And in drawing the borders of the prohibition, in the 21st century, it was not irrational for the Parliament to consider it likely that any significant property developer would be incorporated: cf Work Choices Case (2006) 229 CLR 1 at [121]-[122].

49. Nor does the fact that the definition in s 96GA includes both corporations and "close associates" of those corporations create any relevant analogy as between s 96GA and s 96D, as declared invalid in Unions NSW (cf PS [56]). The focus of the Court's criticism of the defendant's argument in that case was that it sought to characterise s 96D as serving the general purpose of the Act by reference to corporations, generally, being a justifiable target, in circumstances where the prohibition in the section also included individuals who were not enrolled as electors, and other entities: see [54]-[59] and [141]-[147]. By reason of the connection between "close associates" and the corporations which are the primary subject of the prohibition, s 96GA is not susceptible to the same criticism in so far as property developers are concerned.

50. To the extent that the plaintiffs' complaints about gaps in the definition in s 96GB amount to a complaint about the efficacy of the prohibition, that is irrelevant to the ultimate question, which is one of legislative power: "In deciding that question, the Court cannot, and will not, assess whether the relevant law has in fact achieved, or will achieve, that object. The relevant inquiry is about how the law relates to the identified end or object and about the nature and extent of the burden the law imposes on political communication": Tajjour v New South Wales [2014] HCA 35; (2014) 88 ALJR 860 ("Tajjour") at [82].

51. The plaintiffs seek to make something of the regulation of other types of prohibited donor: PS [64]-[65]. But they do not have standing to challenge that regulation, and regulation of the different types of prohibited donors is severable.

52. The plaintiffs argue that the historical evidence of a problem relating to property developers relates substantially to the local, not State, level of government: PS [70]-[71]. However, as noted above, significant planning and development powers also exist at the State government level, and concerns have been expressed about the exercise of powers at that level. Even if local councils might be more susceptible to actual or perceived corrupting influences, it cannot be said to be irrational to consider that the problem and threat may not be limited to that level.

53. The plaintiffs argue that the State has inferred the existence of a general problem from particular instances: PS [73]-[74]. To do so is neither novel nor irrational, especially given both the significance of the evidence of a problem, and the particular governmental context which makes the existence of such a problem unsurprising (ie the substantial economic benefits available from particular, regular government decisions).

54. The prohibition in s 96GA relating to property developers is rationally directed to serving a legislative end that is compatible with the maintenance of representative and responsible government and the freedom of communication which is its indispensable incident: note Unions NSW at [46], [50]; Tajjour at [77].

Section 96GA is reasonably appropriate and adapted to achieving the legitimate end

55. The second condition of the second limb of Lange is whether s 96GA is reasonably appropriate and adapted to achieving that legitimate object or end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government: Lange at 561-2; Coleman v Power (2004) 220 CLR 1 ("Coleman") at [93], [95]-[96]; Corporation of the City of Adelaide at [131]. The question is whether the means chosen by the legislature are proportionate to the purpose pursued: Tajjour at [113].

56. Answering that question involves consideration of whether there are alternative, reasonably practicable and less restrictive means of doing so: Monis at [347]; Unions NSW at [44]. To qualify as a true alternative for this purpose, a hypothetical provision must be as effective as the impugned provision in achieving the legislative purpose: Tajjour at [114]. That the alternative means must be "obvious and compelling" ensures that consideration of the alternatives remains a tool of analysis in applying the required proportionality criterion: Tajjour at [36], [115]. Courts "must not exceed their constitutional competence by substituting their own legislative judgments for those of parliaments": Tajjour at [36]; note also ACTV at 159; Cunliffe v Commonwealth (1994) 182 CLR 272 at 325; Coleman at [100]; Monis at [347]; Corporation of the City of Adelaide at [65].

57. The plaintiffs have not identified any material distortion of the constitutional system resulting from the prohibition on property developers (as defined) making political donations to parties or candidates, and on parties and candidates accepting such donations. In so far as they rely upon the absence of any equivalent provision in other jurisdictions as indicating a legislative assumption that property developers are not "inherently inclined to corruption" (PS [77]), that assumption, well-founded or otherwise, says nothing about whether the means in s 96GA are proportionate to the purpose the provision pursues. To the extent that the plaintiffs are intending, by such reliance, to suggest there should be no regulation of property developers, that is neither an obvious nor a compelling alternative.

58. Whatever the position in other Australian jurisdictions, New South Wales has the particular history referred to above. The State Parliament is entitled to legislate in the context of that history. The constitutional freedom does not mandate some lowest common denominator approach to regulation of such issues.

59. The plaintiffs' concerns with an alleged temporal ambiguity in the definition of "property developer" (PS [80]) are answered by s 96GE. Although the plaintiffs describe this provision as only partially dissipating the "chilling effect" they contend is created by the use of the present tense in s 96GB(1)(a), it is significant that the only information upon which the EFA can rely in making a determination under s 96GE(2) to exclude a person as a prohibited donor is the information that person provides with the application under s 96GE(1). Any legal error in the EFA's exercise of the discretion in s 96GE(1), or the discretion to revoke under s 96GE(3) (upon provision of written notice) would be amenable to judicial review. In any event, that there may be some uncertainty in judging cases at the borderline does not go to constitutional validity. Such uncertainty is commonplace in complex statutory schemes.

60. The only hypothetical alternative that the plaintiffs advance is a formulation of the prohibition in s 96GA which is "confined to the making of political donations with some form of intention corruptly to solicit favour" (PS [79]). The plaintiffs add, correctly, that the "longstanding secret commissions legislation contains exactly that, as does the common law on bribery" (ibid, citations omitted). The measures referred to in those sentences deal with the aftermath of the problem rather than attempting to prevent its occurrence, and that is why it is unsurprising that the problems have nevertheless become manifest. And, as outlined above, those problems have become manifest. That is perhaps unsurprising given the difficulties of establishing breach of such laws to the requisite standard, and given the voluminous and high-value nature of the governmental decision-making involved. In this context, it was entirely open to the Parliament to conclude that some more restrictive measure was required to address the problem – both because of the reality of the problem, and because of the damage that public recognition of the problem does to public confidence in the electoral and governmental system.

61. Further, a prohibition of the kind that the plaintiffs suggest does not achieve the regulatory end to the same extent, and is thus not a true comparable alternative for the purposes of constitutional analysis: cf Monis at [347]; Tajjour at [113]-[114].

62. The plaintiffs argue at PS [81] that "a person who happens to be the owner of a company which is a prohibited donor would be effectively prevented from using his company's assets to finance his election campaign". If the plaintiffs mean to refer to that person running as a candidate themselves, then the point may be true in form, but is incorrect in substance. In so far as the candidate received payment of wages or dividends from the company, then that money would belong to him/her in a personal capacity. To use it then in support of the person's own political campaign to be elected would not involve any "gift" within the meaning of s 84(1) – for that requires a transfer from one person to another – and thus would not be a "political donation" within s 85, and thus would not fall within s 96GA.

63. The plaintiffs contend that the prohibitions restrict a person's ability "to participate in political affairs whatever their motivation": PS [82]. That contention is essentially the same as the plaintiffs' extended suggestion made in relation to the first limb of Lange (PS [42]-[43]), to the effect that political donations are themselves a form of political communication. It should be rejected for the reasons outlined at [30]-[31] above.

64. Finally on this issue, even if the plaintiffs' arguments were to be accepted, that would invalidate only Div 4A in its application to "property developers", not the other types of prohibited donors. The plaintiffs only have standing to challenge that aspect of the scheme. They themselves state at PS [46] that "the plaintiffs challenge Div 4A only in its application to them". This aspect of Div 4A can readily be severed by holding s 96GAA(a), and consequently 96GB(1)-(2), invalid. In this context, were the Court to be against the defendant on the validity of Div 4A in this regard, the appropriate answer to Question 1 in the Special Case would be "Yes, subsections 96GAA(a) and 96GB(1)-(2) are invalid".

Section 95B(1) of the Act – donation caps

The nature of the burden

65. Section 95B(1) of the Act operates to impose a limit upon the amount of political donations that may be accepted from any one person. The defendant accepts that in so doing, it effects a restriction upon the funds which are available to political parties and

candidates and, accordingly, imposes a burden on the implied freedom: see Defence [60]-[61] (SCB V1 p 48).

66. The contention that the section imposes a restriction on the means by which members of the community may express their support for, and lend support to the expression by others of support for, political positions and objectives (PS [42]-[43]) should be rejected for the reasons stated above in relation to s 96GA (at [30]-[31]).

Legitimate object of sections 95A and 95B

67. Sections 95A and 95B of the Act operate to impose a cap upon the amount of political donations that may be made for State government purposes by reference to the nature of the recipient. The provisions operate across the board so as to limit the amount of political donations that may be accepted from any one person.

68. The donation caps have the following effects:

a. They remove the need for, and ability to make, large-scale political donations to a party or candidate. In so doing, they reduce the risk to the actual and perceived integrity of governmental processes. That is so because it is self-evident that the larger the donation provided or obtained, the greater the influence the donor is likely to have, and/or be seen to have, in relation to those processes.

b. By imposing a uniform limit on the amount that can be obtained from any one source, they reduce the extent to which those persons or entities with more money have, and are perceived to have, greater political influence than others who do not have such substantial funds.

69. The plaintiffs assert that the provisions have no rational connection with any legitimate end. In relation to the first point just made, they do not appear to dispute the legitimacy of the end of reducing the risk to the actual or perceived integrity of government processes, but appear to argue that the provisions cannot rationally be seen to achieve that objective. In relation to the second point, they appear to dispute its legitimacy, that is to say, its compatibility with the system of representative and responsible government established by the Commonwealth Constitution.

70. As to the first point, the plaintiffs undermine their own argument, for they argue:

a. that the "inevitable consequence" of Div 2A is that it "prevents any person from gaining political influence by way of the making of political donations" (at PS [90]);

b. that "realistically, a political party or candidate will not be materially influenced by every 'rank and file' donor; rather, donors of large amounts will tend to stand out" (ibid); and

c. "[h]aving political influence does not mean purchasing specific outcomes; it only entails an increased chance of being heard" (PS [89]).

71. Thus they accept – indeed, assert – that political donations are a way of gaining political influence, and that larger donations are more likely to gain such influence. It is of course true that "the making of even a very large donation [does not] necessarily entail[] any kind of quid pro quo": PS [89]. But that does not alter the fact that large donations are likely to buy increased influence, and will be seen to do so.

72. These propositions are neither radical nor novel. The existence of potential threats to governmental integrity by the need for political parties to raise large sums, and doing

so by seeking donations, has not generally been doubted: see eg ACTV at 129-130 and 144-5, 159-61, 175, 239. The imposition of some caps on donations is commonplace around the world: SC [63]-[65], SCB V1 pp 79-80.

73. The perception of corruption in the political system was one of the community concerns which was identified to the New South Wales Parliament's Joint Standing Committee on Electoral Matters, in its Report on Public Funding of Election Campaigns (March 2010 – Annexure 31, found at SCB V3 p 984), in relation to the level and type of political donations. Other community concerns which were communicated to the Committee included (note SC [61], SCB V1 p 79):

10 a. "through large donations, donors purchase access that is not available to ordinary citizens or to smaller, particularly not-for-profit organisations that have only limited resources, and this access can result in actual or the perception of undue influence";

b. "reliance on private donations can create a conflict of interest for parties and candidates and can influence them to make decisions that keep donors on side, rather than serve the public interest"; and

c. "negative impact on grass-roots democracy both within parties and with the broader community".

74. In this context, the plaintiffs' argument that the donation caps do not rationally serve
20 the end of reducing the risk to the actual and perceived integrity of governmental processes cannot be supported. As the joint judgment put it in Unions NSW (at [53], citation omitted; see also Keane J at [136]):

> By contrast, the connection of the other provisions of Pt 6 to the general purposes of the EFED Act is evident. They seek to remove the need for, and the ability to make, large-scale donations to a party or candidate. It is large-scale donations which are most likely to effect influence, or be used to bring pressure to bear, upon a recipient. These provisions, together with the requirements of public scrutiny, are obviously directed to the mischief of possible corruption.

30 75. These arguments directed to the first point raised by the plaintiffs suffice to establish that the necessary rational connection to a legitimate end has been made out. But the plaintiffs' arguments on the second point are also misdirected.

76. The plaintiffs' argument on this issue comes down to the proposition that it is illegitimate – that is, inconsistent with the constitutional system of representative and responsible government – to reduce the influence of "wealthy donors" relative to others (to use the label employed at PS [101]). This is said to be so because there are a range of inequalities amongst political participants and this one (wealth) should not be singled out (PS [93]-[97]); and because political participants "can, and do, use aggregated wealth to advance an agenda which may entail views which have little
40 public support", but this is a proper part of free political debate (PS [99]).

77. It is this law which falls to be judged, not some other law, dealing with other types of possible distortion or inequality. And in relation to this law, there is nothing in the text or structure of the Commonwealth Constitution which requires that wealthier entities or persons are entitled to use that wealth to buy greater political influence. To suggest otherwise is to mistake the constitutional freedom for a personal right of the kind guaranteed by the First Amendment in the United States.

78. The nature and extent of the freedom is governed by the necessity which requires it. The ultimate constitutional imperative is that the ability of the Australian people to make an informed electoral choice is protected. The effect of ss 1, 7, 8, 13, 24, 25, 28 and 30 of the Constitution is to ensure that the Parliament of the Commonwealth will be representative of the people of the Commonwealth: Lange at 557. Political communication "within the federation is free in order to ensure the political sovereignty of the people of the Commonwealth, who are required to make the political choices necessary for the government of the federation and the alteration of the Constitution itself": Unions NSW at [104], note also [17]. The underlying principle of the Constitution is that citizens have "each an equal share in political power": ACTV at 139-140 per Mason CJ, quoting Harrison Moore.

79. The constitutional freedom does not require that wealthy entities or persons may gain more political access and influence by the making of political donations. On the contrary, the caps "can be seen to be appropriate and adapted to ensure that wealthy donors are not permitted to distort the flow of political communication to and from the people of the Commonwealth": Unions NSW at [136], citing Harper v Canada [2004] 1 SCR 827 at [62]. That end or object is plainly compatible with the maintenance of the system of representative government of the Australian people that is established and maintained by the Constitution.

80. As addressed above, the effect of the donation caps is uniformly to limit donations of all persons and entities; it is not to limit the ability of those persons to engage in political communication, whether to governments, electors, or others. In that light, the submission at PS [102] relating to the claimed constraint on political actors to bring about social change is misconceived. Further, that paragraph appears to rely upon the mere fact of a burden on the freedom as being relevant to this part of the analysis, but establishment of the first limb of Lange has never been sufficient to invalidate an exercise of legislative power.

Sections 95A-95B are reasonably appropriate and adapted to achieving the legitimate ends

81. The plaintiffs have not advanced any hypothetical provision that would be as effective as ss 95A and 95B in achieving the legislative purposes: cf Tajjour at [114].

82. The plaintiffs appear to dispute that the *perception* of undue or corrupt influences is relevant to the constitutional analysis: PS [104]-[106]. Yet such perceptions themselves tend to bespeak an underlying reality. Further, it cannot plausibly be said that maintenance of public confidence in the system of representative and responsible government established by the Constitution is irrelevant to the constitutional analysis. A loss of public confidence in the integrity of government processes would involve a loss of trust in the efficacy and trustworthiness of those processes. An alienation between governments and the governed is not consistent with the constitutional system of government which is responsible to, and representative of, the Australian people.

83. Thus the submission that Div 2A goes too far because it "fails to target only actual instances of corruption" (PS [105]) postulates an alternative law which does not achieve the identified legislative objectives. It is not an obvious or compelling alternative to ss 95A and 95B, which legitimately target both actual and perceived threats to the integrity of the system of representative government.

84. In any event, the argument at PS [105] that the end achieved "really amounts to preventing the *perception* that wealthy donors *may* be *capable* of procuring more

influence than others, solely through the use of their funds", is inconsistent with the earlier correct acceptance by the plaintiffs that large donations increase political influence (PS [89]-[90]).

85. The plaintiffs also suggest that public disclosure requirements could achieve the identified ends (PS [106]). No doubt the sunlight of publicity is an important scourge of corruption, and it is one of the tools employed in Part 6 of the Act. That fact does not establish that it is a sufficient tool of itself to achieve the identified ends. The widespread international use of donation caps suggest that these have commonly been deployed as a useful means to those ends. And again, the plaintiffs' submissions on this point are undercut by their own earlier assertions about the influence that may be obtained by making large political donations.

86. In so far as the plaintiffs contend that the provisions do not achieve the stated legislative objective "comprehensively" (PS [107]-[109]), that contention proceeds on the same reversal of the orthodox analysis which the plaintiffs advanced in relation to s 96GA. That the Parliament might have gone further does not establish lack of proportionality in what they have done. Engaging with that contention risks involving the Court in questions of legislative judgment which form no part of the analysis of the second limb of Lange: see [56] above. The justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice: note, albeit from a different constitutional context, Grain Pool of Western Australia v Commonwealth (2000) 202 CLR 479 at [17] (the final proposition); Burton v Honan (1952) 86 CLR 169 at 179.

87. The plaintiffs argue at PS [110]-[111] that Div 2A imposes a burden "on political communication in a discriminatory way", first by "singling out those kinds of donors who might otherwise have wished to make donations in amounts above the applicable caps", and secondly by having "an unequal practical effect upon the *recipients* of those donations".

88. The first variant of the argument amounts to no more than the self-evident proposition that the law affects those whom the law affects. The legitimacy of having those effects has already been addressed.

89. The cap provisions in s 95A and s 95B operate in a uniform manner as between all donors and all recipients, regardless of what parties, members, candidates or causes donors wish to support. To the extent that these facially neutral provisions have a greater impact upon certain donors who would wish to make large donations – and to the extent that the notion of discrimination is relevant here – it may be recalled that a law "is also discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, if it treats equally things that are unequal": Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436 at 478 per Gaudron and McHugh JJ. Here, as identified above, Div 2A is addressed in part to the inequality of political influence that results from large political donations, in favour of wealthy entities or persons. The Parliament was entitled to take the view that that inequality should be addressed.

90. As for the second variant of the argument, the actual claimed distorting effect on recipients is not developed by the plaintiffs. The closest they come to doing so is in footnote 103, which on one reading hints at a discriminatory effect on the NSW ALP. Yet such a distorting effect is not established by the evidence there referred to. It may also be recalled that Div 2A was introduced by a State Labor government. And, in contrast to the last case on this topic in this Court, no Labor-connected entities from

New South Wales have appeared in this case to identify or complain of any such claimed distortion. The point is without substance.

Section 96E – indirect benefits

The nature of the burden

91. Section 96E of the Act makes it unlawful to make indirect campaign contributions of the following four kinds:

    a. the provision of office accommodation, vehicles, computers or other equipment for no consideration or inadequate consideration for use solely or substantially for election campaign purposes (s 96E(1)(a));

    b. the full or part payment by a person other than the party, elected member, group or candidate of electoral expenditure for advertising or other purposes incurred or to be incurred by the party, elected member, group or candidate (or an agreement to make such a payment) (s 96E(1)(b)); and

    c. the waiving of all or any part of payment to the person by the party, elected member, group or candidate of electoral expenditure for advertising incurred or to be incurred by the party, elected member, group or candidate (s 96E(1)(c)), and

    d. any other goods or services of a kind prohibited by the regulations – of which there are presently none (s 96E(1)(d)).

92. Section 96E(3) sets out certain matters not included in the prohibition, being:

    a. provision of volunteer labour or the incidental or ancillary use of vehicles or equipment of volunteers or other things that the EFA authorises;

    b. anything provided or done by a party for the candidates endorsed by the party in accordance with arrangements made by the party or agent or the party;

    c. anything provided or done whose value as a gift does not exceed $1,000, subject to aggregation of all things provided or done over the same financial year;

    d. a payment under Part 5 (public funding) or Part 6A (administrative funding); and

    e. any other thing of a kind prescribed by the regulations.

93. As is apparent from their collective description as "indirect campaign contributions" in s 96E(1), the making of each of the contributions identified in s 96E is not as readily detectible as political donations. Further, in each instance listed in s 96E(1) there is a particular character required. Category (a) involves the provision of certain goods/services for no/inadequate consideration and for use solely/substantially for election campaign purposes. Categories (b) and (c) involve expenditure, or waiver of payment, for electoral expenditure for advertising for the party/member/candidate (or, in the case of (b), also electoral expenditure for other purposes).

94. Each of the three categories involve the provision of something of value. A person wishing to benefit the party/member/candidate in the relevant way could instead do so in money, to equivalent effect.

95. The defendant accepts that those constraints operate as a burden on the implied freedom: Defence [68]-[69] (SCB V1 p 49-50). That is so because, and only to the

extent that, they operate as a partial limit on the ability of parties/members/candidates to raise funds, or equivalent benefits, which might be used by those recipients to engage in political communication. However, given that equivalent benefits could otherwise be provided – subject to the donation caps, which are separately in issue, and which have been addressed above – the additional burden is slight and incidental. It is only a restriction on the form in which donations may be made.

Legitimate object of section 96E

96. Section 96E prohibits indirect campaign contributions (subject to the exclusions), thus directing the provision of benefits into a monetary form. In so doing the provision aids the disclosure requirements in Div 2 of Part 6, by enabling the ready expression of benefits in monetary terms. For the same reason, it also aids the efficacy of the caps, cutting off a possible route of circumvention where detection may be difficult. As the Minister stated in the second reading speech for the amending Act which introduced s 96E, "[i]n-kind donations, such as the provision of offices and cars to candidates for little or no payment, create particular problems in terms of transparency": Second Reading Speech to the Election Funding Amendment (Political Donations and Expenditure) Bill 2008, Hansard, Legislative Council, 18 June 2008 at 8576. That is so because of the potential difficulty in valuing such donations. In contrast, the value of money is clear. It is also relevant that, in general, political donations are required to be paid into a specific campaign account: Part 6 Div 3.

97. Thus, viewed in the context of the suite of legislative measures in the Act which are aimed at the transparent regulation of political donations and expenditure, s 96E rationally can be taken to further the purpose of minimising the risk to the actual and perceived integrity of the State Parliament and the institutions of local government. The purposes of s 96E are legitimate within the context of the constitutional system of government for the same reason that the disclosure and donation cap provisions are.

98. The plaintiffs argue that there is no express link between s 96E and the disclosure provisions in Div 2 (PS [118]-[119]) and, further, that in any event the donation caps in Div 2A were only introduced later and so any congruence of operation between them "is sheer happenstance" (PS [121]). It is not necessary for the provision to refer expressly to the other Divisions to draw the conclusion that because the provision *does* aid the other Divisions, that can be taken to be a purpose of the provision.

99. The amendments are to be read together "as a combined statement of the will of the legislature": Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd (1995) 184 CLR 453 at 463; note also Plaintiff S297/2013 v Minister for Immigration and Border Protection (2014) 88 ALJR 722 at [25]. The Parliament can be taken to have been aware of s 96E, and the role it could play in assisting the operation of the donation caps, when Div 2A was enacted. The purposes cannot be segregated on the historical basis that the plaintiffs suggest.

100. The plaintiffs also argue that the Act separately provides a mechanism for valuing in-kind donations and that, in this context, an argument supporting s 96E of the kind just made "rests ... upon an assumption of executive indolence" in implementing those mechanisms (PS [122]). Section 84(4) of the Act provides that "the amount of a donation or expenditure consisting of a disposition of property other than money is taken to be the amount equal to the value of the property disposed of", and that value "may, if the Authority so requires, be determined by valuers appointed or approved by the Authority in accordance with the regulations". But categories (b) and (c) in s 96E do not involve the disposition of property, and category (a) does not necessarily do so

(accommodation, vehicles or computers may simply be loaned or leased, not given). Moreover, that it might be possible to obtain an independent valuation of the goods/services provided does not make it efficient or simple to do so. Thus the availability of such another mechanism does not make it irrational to provide as s 96E does.

Section 96E is reasonably appropriate and adapted to achieving the legitimate end

101. As noted above, the burden imposed on the constitutional freedom is incidental and slight.

102. The only alternative that the plaintiffs advance is that there could be a requirement for either the donor or recipient of an indirect campaign contribution to provide "a reliable valuation" (PS [126]). Such a requirement would impose a potentially significant transaction cost on those concerned. It would raise issues as to what was sufficient evidence of a reliable valuation. And it would also raise potentially complex definitional issues. For example, if a printer did some free printing for a party, would it be permissible to value the service at the rates given to favoured customers, or wholesale rates, or only retail rates (if there were any simple retail rates)? If a business loaned office accommodation which would not otherwise have been used in that period, would that be valued by reference to opportunity-cost (none) or at some market rate?

103. It cannot be said that the proferred alternative is an obvious and compelling means of achieving the same end as s 96E.

Part VIII: Time estimate

104. The defendant estimates that it will require some 2.5 hours to present its argument.

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M G Sexton SC SG
Ph: (02) 9231-9440
Fax: (02) 9231-9444
Michael_Sexton@agd.nsw.gov.au

J K Kirk SC
Ph: (02) 9223-9477
Fax: (02) 8028-6060
kirk@wentworthchambers.com.au

A M Mitchelmore
Ph: (02) 9223-7654
Fax: (02) 9221-5604
amitchelmore@sixthfloor.com.au