IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S211 of 2014

BETWEEN:

JEFFERY RAYMOND MCCLOY
First Plaintiff

MCCLOY ADMINISTRATION PTY LIMITED
Second Plaintiff

NORTH LAKES PTY LIMITED
Third Plaintiff

and

STATE OF NEW SOUTH WALES
First Defendant

INDEPENDENT COMMISSION AGAINST CORRUPTION
Second Defendant

PLAINTIFFS' SUBMISSIONS

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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. The issues of principle in this case concern whether legislation which sets out to prohibit the making of political donations by particular persons, or of particular amounts, or particular kinds, is compatible with the Constitution.

3. The plaintiffs say the provisions of Divs 2A and 4A of Pt 6, and s 96E in Div 4 of Pt 6, of the *Election Funding, Expenditure and Disclosure Act* 1981 (NSW) ("EFED Act") impermissibly detract from the constitutionally mandated system of representative and responsible government, in particular because they infringe the freedom of communication on political or governmental matters implied in the Constitution. The first limb of the test deriving from *Lange v Australian Broadcasting Corporation*[1] is not in contest (although the burden on the protected freedom requires definition). What is in issue is whether those provisions have a rational connection with any "legitimate end", and if they do, whether they are reasonably appropriate and adapted to achieving that end in a manner compatible with the maintenance of the constitutional system of government.

4. Division 4A, in its application to the plaintiffs, makes unlawful political donations from persons of classes into which the plaintiffs may fall. It is contended that, on their proper construction, those provisions serve no purpose other than to prohibit persons of those particular classes, without any other qualification, from making political donations. The purpose and effect of that prohibition have no rational connection with the integrity of the political process generally. Setting out to prohibit a class of persons from participating in the political process does not serve a legitimate end.

5. Furthermore, even if an imputed legislative inference that property developers as a class are particularly prone to exert pernicious influence is accepted as founding a legitimate end, the application of a blanket prohibition on donations from such persons is disproportionate to that end. Significant in this respect is the untargeted and amorphous core definition of "property developer" in s 96GB(1) of the EFED Act, with an extended but inexplicably limited application to certain "close associates".

6. Division 2A makes unlawful the giving of political donations in amounts above prescribed caps. The plaintiffs contend that, again, properly construed, Div 2A serves no end other than the prohibition of donations from persons who otherwise would donate amounts in excess of the caps. The consequence is to prevent accumulation of political influence by means of making political donations. Nothing in these provisions connects them with any purpose described so generally as preserving the integrity of the political process. They do not serve a legitimate end, and thus infringe the implied freedom. Further, even if Div 2A is thought to serve a legitimate end of preventing corruption or some other perceived misuse of power, the provisions are disproportionate to that end.

7. Finally, s 96E of the EFED Act makes unlawful the provision of particular forms of material but non-pecuniary support to a political party or candidate. The plaintiffs contend that s 96E serves no end other than to achieve the prohibition of those in-kind donations. In particular, it does not serve the ends of enhancing transparency of donations generally, or consolidating the donation caps regime. Further, if it serves one of those ends, it is disproportionate to the proper achievement of that end.

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[1] (1997) 189 CLR 520 ("*Lange*").

PART III: SECTION 78B NOTICES

8. The plaintiffs have issued amended notices under s 78B of the *Judiciary Act* 1903.

PART IV: REASONS FOR JUDGMENT BELOW

9. This proceeding is brought in the Court's original jurisdiction pursuant to s 30(a) of the *Judiciary Act* and s 76(ii) of the Constitution.

PART V: MATERIAL FACTS

10. The special case sets out background facts which substantiate the standing of the plaintiffs to challenge each of Divs 2A and 4A and s 96E of the EFED Act.[2] While those facts need not be restated, some of those facts are further relied upon below to illustrate the operation of the impugned provisions.[3]

PART VI: THE PLAINTIFFS' ARGUMENT

The implied freedom of discussion of government and political matters

11. These proceedings invoke the principles developed by this Court in decisions leading up to and including *Unions NSW v New South Wales*[4] and *Tajjour v New South Wales*.[5] There will be no dispute that the present matter is to be decided within the framework of the test applied in those decisions, which was first laid down by the unanimous decision in *Lange*[6] and later modified in *Coleman v Power*.[7]

12. Because ss 7, 24 and 128 in particular of the Constitution (together with provisions of Ch II including ss 62 and 64) entrench provisions amounting to a system of representative and responsible government, there is necessarily implied in the Constitution a freedom to discuss government and political matters.[8] That freedom is not absolute.[9] A law will be invalid if, in its legal or practical operation, it imposes a burden on the required freedom of communication (the first *Lange* question); and (if it does) if the law is not "reasonably appropriate and adapted, or proportionate" to achieving a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government (the second *Lange* question).[10]

13. The decision in *Unions NSW* is important to the resolution of the present controversy. That decision related to other provisions of Part 6 of the EFED Act, one of which imposed a prohibition of a kind similar to, if broader than, the provisions impugned in this case.[11] There are four aspects of the reasoning in *Unions NSW* which are of particular relevance.

14. First, *Unions NSW* confirms that the implied freedom may operate so as to invalidate a State law, owing to the inseparability of communication on State and federal political and governmental matters.[12] That is not in dispute in this case.

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[2] Special Case paras 1 to 7. Locus standi is not in issue on the special case.
[3] See in particular paragraph 80 below.
[4] (2013) 88 ALJR 227 ("*Unions NSW*").
[5] (2014) 88 ALJR 860 ("*Tajjour*").
[6] (1997) 189 CLR 520 ("*Lange*").
[7] (2004) 220 CLR 1 ("*Coleman*").
[8] *Lange* (1997) 189 CLR 520 at 557-562.
[9] *Unions NSW* (2013) 88 ALJR 227 at 232-233 [18]-[19]; *Tajjour* (2014) 88 ALJR 860 at 881 [50].
[10] *Unions NSW* (2013) 88 ALJR 227 at 236-237 [35], [44]; *Tajjour* (2014) 88 ALJR 860 at 874-875 [32] per French CJ, 888 [113] and 890 [126] per Crennan, Kiefel and Bell JJ.
[11] Section 96D, as then in force: see *Unions NSW* (2013) 88 ALJR 227 at 231 [10]; see further paragraph 39 below.
[12] *Unions NSW* (2013) 88 ALJR 227 at 233-234 [19]-[26], 235-236 [31]-[34].

15. Secondly, *Unions NSW* makes it indisputable that the impugned provisions impose at least some burden on political communication, for the purposes of the first *Lange* question. While the imposition of a burden by each of the impugned provisions is admitted on the pleadings in this case,[13] it is necessary nevertheless to define the burden with precision so as to focus and calibrate the inquiry in relation to the second *Lange* question.[14]

16. The burden acknowledged by *Unions NSW* is not imposed directly upon an act of communication; rather, it arises by effecting "a restriction upon the funds available to political parties and candidates to meet the costs of political communication".[15] The availability of public funding under the EFED Act is immaterial, since it "is not equivalent to the amount which may be paid by way of electoral communication expenditure" and the "party or the candidate will therefore need to fund the gap".[16]

17. It is also now well-accepted that in determining whether there is an effective burden on political communication, it is irrelevant to consider "the extent of the burden and whether it is proportionate to the legitimate purpose of a statutory provision", in the sense of how large it is, or what is the impact of coincidental matters such as the availability of public funding. The scale of the burden and coincidental matters could go only to the second *Lange* question.[17]

18. Thirdly, *Unions NSW* provides guidance as to how a relevant "legitimate end", in the *Lange* sense, may be identified. A legitimate end is a legislative end which is itself compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[18] A judgement as to when a legislative end is not legitimate is informed by considering what "impairs or tends to impair the effective operation" of the constitutional system of government.[19] Crucially, though,

> the identification of the statutory purpose in connection with the application of [the second *Lange* question] is arrived at by the ordinary processes of statutory construction. Where, as here, the general purposes of the EFED Act are relied upon to justify the restrictive measures of [the section in question], that section must be understood, by a process of construction, to be connected to those purposes and to further them in some way.[20]

19. In other words, there must be a rational connection, discerned through that process of construction, between the impugned law and its end.[21] That is not a matter of evidence.[22] It is a matter of the terms and operation of the law.

20. In considering what constitutes a "legitimate" end, it must be borne in mind that the system of representative and responsible government which is entrenched by the Constitution is not a utopia of selfless political civility.[23] The constitutional ideal is of an "unfettered interchange of ideas" with a view to "the bringing about of political and social changes desired by the people".[24] That constitutionally mandated interchange is not "a two-way affair between

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[13] Defence paras 51-52, 60-61, 68-69.
[14] *Tajjour* (2014) 88 ALJR 227 at 893-894 [147] and [151] per Gageler J.
[15] *Unions NSW* (2013) 88 ALJR 227 at 236 [38].
[16] Ibid. See also *ACTV* (1992) 177 CLR 106 at 131-132. As to total amounts of funding, and electoral expenditure, see Special Case paras 18-19, 23, 28-29, 30-32, 34, 38, 43, and Annexure 6.
[17] *Unions NSW* (2013) 88 ALJR 227 at 236 [40], citing *Monis v The Queen* (2013) 249 CLR 92 at 212-213 [343]; *Tajjour* (2014) 88 ALJR 860 at 881 [61] per Hayne J.
[18] *Lange* (1997) 189 CLR 520 at 561-562; *Monis v The Queen* (2013) 249 CLR 92 at 141 [105] per Hayne J, 192-193 [274]-[277] per Crennan, Kiefel and Bell JJ.
[19] *Unions NSW* (2013) 88 ALJR 227; *Coleman* (2004) 220 CLR 1 at 49 [91] per McHugh J.
[20] *Unions NSW* (2013) 88 ALJR 227 at 238 [50].
[21] *Unions NSW* (2013) 88 ALJR 227 at 238-239 [50], [60]; *Tajjour* (2014) 88 ALJR 860 at 883 [78] per French CJ, 888 [110] per Crennan, Kiefel and Bell JJ.
[22] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 37-38 [74] per French CJ.
[23] *Coleman* (2004) 220 CLR 1 at 54 [105], 78 [197], 91 [239]; *Roberts v Bass* (2002) 212 CLR 1 at 13 [13], 31 [76] 63 [171]; *Monis* (2013) 249 CLR 92 at 136-137 [85]-[87].
[24] *Unions NSW* (2013) 88 ALJR 227 at 234 [29], citing *Buckley v Valeo* 424 US 1 at 14, 49 (1976), in turn citing *Roth v United States* 354 US 476 at 484 (1957).

electors and government or candidates", but rather exists generally to permit members of the community "to influence others to a political viewpoint".[25] To seek to restrict the content or qualities of that communication, without more, would not be compatible with the constitutional system.[26] And no legitimate end lies in targeting the imposition of a burden in relation to particular members of the community just because they are not electors.[27]

21. Generally the Constitution is neutral as to the content of the political viewpoints which may be advanced, and the political and social changes which may be agitated for. Nor does it matter whether advocacy for change is motivated by altruism or self-interest. And any member of the community seeking to advance a viewpoint "may do so directly or indirectly through the support of a party or a candidate who they consider best represents or expresses their viewpoint."[28] Thus for example a State or federal government within the scope of its powers may prohibit the manufacture of tobacco, or the smoking of tobacco, or may require plain packaging.[29] What it may not do, having passed such legislation, is set out to suppress agitation (whether or not by tobacco companies) for its repeal.

22. In relation to the means by which such a viewpoint is expressed, political parties, and candidates for office, are not just postboxes for conveying public expressions of opinion. They are vehicles for participation. Participation may take many forms. Given that financing is indispensable to enable a political party or candidate to communicate its message within a free market system,[30] a supporter may legitimately participate by means of financial support, as an alternative to oral expression or physically volunteering.[31]

23. The implied freedom exists to allow members of the community to "build and assert political power, including the power to change the [people] who govern them".[32] Thus, at a more basic level even than that of communication, the system of representative and responsible government entails political freedom. A community member's political position must first be "built" before it can be "asserted". Targeting either the building or the assertion of such a position is equally inimical to the constitutional system of government.

24. Fourthly, the reasons in *Unions NSW* and *Tajjour* provide guidance as to how to answer the second *Lange* question. The test of proportionality which is expressed by the terms "reasonably appropriate and adapted to the achievement of" a legitimate end is a "low threshold" test.[33] Application of that test "may involve consideration of whether there are alternative, reasonably practicable and less restrictive means" of achieving the same end. The demonstrable existence of such means may indicate the appropriate conclusion if the alternative means are "obvious and compelling" such that the means which the legislature did choose were not reasonably necessary to achieve that end.[34] In considering these matters, the "central question" is "how does the impugned law affect the freedom,"[35] with reference to all aspects of the burden the law imposes.

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[25] *Unions NSW* (2013) 88 ALJR 227 at 234 [30].
[26] *Coleman* (2004) 220 CLR 1 at 78-79 [199]; *Monis* (2013) 249 CLR 92 at 134 [73]-[74], 139 [97], 159 [166]-[167], 164 [185], 174 [220]-[221], 180 [242]; cf 214-215 [348]-[349].
[27] *Unions NSW* (2013) 88 ALJR 227 at 239 [59]-[60].
[28] *Unions NSW* (2013) 88 ALJR 227 at 235 [30].
[29] See *JT International SA v Commonwealth of Australia* (2012) 250 CLR 1.
[30] Cf *Unions NSW* (2013) 88 ALJR 227 at 236 [38]; see paragraph 16 above.
[31] Cf *McCutcheon v Federal Election Commission*, 572 US ___ (2014), slip op at 16 (Roberts CJ).
[32] *Unions NSW* (2013) 88 ALJR 227 at 234 [29]; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (1992) 177 CLR 106 at 139 per Mason CJ, citing A Cox, *The Court and the Constitution* (1987) at 212.
[33] *Tajjour* (2014) 88 ALJR 860 at 876 [35]-[36] per French CJ, citing *Unions NSW* (2013) 88 ALJR 227 at 237 [44].
[34] *Tajjour* (2014) 88 ALJR 860 at 876 [36] per French CJ, 888-889 [113]-[116] per Crennan, Kiefel and Bell JJ; *Unions NSW* (2013) 88 ALJR 227 at 237 [44]; *Monis v The Queen* (2013) 249 CLR 92 at 214 [347] per Crennan, Kiefel and Bell JJ.
[35] *Unions NSW* (2013) 88 ALJR 227 at 236 [36]; *Tajjour* (2014) 88 ALJR 860 at 890 [127].

The purposes of the EFED Act generally

25. The purposes of the EFED Act in general are revealed by its terms. Its long title states that it makes "provision for the public funding of Parliamentary election campaigns and to require the disclosure of certain political donations and electoral expenditure ... and for other purposes". The scheme of the EFED Act was described in the joint reasons in *Unions NSW*.[36]

26. It was not in dispute in *Unions NSW* that the EFED Act as a whole has a "general purpose" which was put by the State in that case,[37] and repeated in its Defence in this case,[38] in this way:

> [T]o secure and promote the actual and perceived integrity of the Parliament of New South Wales, the government of New South Wales and local government bodies within New South Wales.

27. It might well be said that this description of the statutory purpose has a "large and satisfying ring"[39] to it. But the Court went on in *Unions NSW* to note that:

> More specifically, [the State] identifies the potential risk to integrity as arising from the exercise of undue, corrupt or hidden influences over those institutions, their members or their processes.[40]

28. In this case, the State expands this contention by speaking of the "actual or perceived potential for the exercise of undue or corrupt influence", the "actual or perceived distortion of political communication in favour of those who can afford to make larger political donations", and the "potential" of a prohibited kind of donation "to distort the free flow of communication".[41]

29. The provisions impugned in this case all lie within Pt 6 of the EFED Act, which contains provisions dealing with a number of matters. Division 2A of Pt 6 is aptly described as regulating "the making of political donations to parties, candidates, elected members and others in New South Wales by limiting the amount or value of what may be given to them by any one person, organisation or other entity."[42] But Pt 6 also regulates the making of political donations by means of a disclosure regime (Div 2); imposes a series of prohibitions on particular kinds of donations (Divs 4 and 4A); and imposes caps on "electoral communication expenditure" for State elections (Div 2B).

30. Of central importance is the definition in s 85 of the EFED Act of "political donation". In particular, a "political donation" does not include a gift[43] made to a person in a private capacity and for his or her personal use, i.e. not for use in relation to an election or the person's duties as an elected member (s 85(4)), save if any part of that gift is subsequently used to incur electoral expenditure (s 85(5)). Section 87 defines the expression "electoral communication expenditure", as well as "electoral expenditure" (the former being a subset of the latter).

31. These matters demonstrate that Pt 6, far from being concerned with political integrity generally, is concerned with gifts which are used for the purposes of political communication. Apart from anything else, s 85(4)(a) indicates that the true purpose of the legislation is to deny funding to electoral activity by a party, candidate or elected member. The purpose of that paragraph cannot be explained away on the basis that it was necessary for the EFED Act to cover common law bribery, because common law bribery could occur either where the intended or actual use of a gift is personal or where the intended or actual use is for electoral funding.[44]

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[36] (2013) 88 ALJR 227 at 230-231 [1]-[7].
[37] *Unions NSW* (2013) 88 ALJR 227 at 231 [8]. The content and relevance of that statement is disputed in this case.
[38] Defence paras 53(a)(i); 62(a)(i); 70(a).
[39] *Monis v The Queen* (2013) 249 CLR 92 at 164 [186] per Hayne J.
[40] (2013) 88 ALJR 227 at 231 [8].
[41] Defence paras 53(a)(ii); 62(a)(ii); 70(a)(i).
[42] (2013) 88 ALJR 227 at 231 [7].
[43] "Gift" is defined in s 84(1) of the EFED Act; "disposition of property" is defined in s 4.
[44] Cf *R v Allen* (1992) 27 NSWLR 398 at 402; *R v Glynn* (1994) 33 NSWLR 139 at 144.

32. The only provision in the current form of the EFED Act which mentions "corruption and undue influence" is the objects clause, s 4A. That section was only inserted into the Act with effect from 1 December 2014.[45] There was no mention of any such concept in the amending Acts which inserted the various impugned provisions. There is no mention anywhere of any concept described elusively as "hidden influence".

33. The fact that the object stated in s 4A(c), and contended for by the State, extends beyond "corruption" to embrace "undue influence" is of some importance. The Court may be invited in this case to infer, by reference to material other than the statutory text, that the end of some or all of the impugned provisions is, indirectly at least, to prevent or reduce "corruption". However, if such is to be accepted, it must also be accepted that this indirect end also includes preventing any "influence", whether corrupt or not, which is claimed to be "undue".

34. The reference in this context to "undue influence" is not a reference to the equitable principles associated with cases such as *Johnson v Buttress*.[46] Nor does it have the same content as the use of that expression by Griffith CJ in *Smith v Oldham*,[47] in relation to the effect of misleading or anonymous electoral publications.[48] Rather, what is meant by "undue influence" in the context of the impugned provisions is left at large, both by the State and by s 4A(c). The content of that expression must depend upon the operation of the particular legislative provisions which are said to further that end.

35. These matters raise questions which go to the heart of the constitutional system of representative and responsible government. What degree or form of "influence" is, within the constitutional system of representative and responsible government, "undue"? This concept is abstract and ultimately indeterminate, and yet it is relied upon here as justifying the imposition of very real burdens upon political communication.

36. These considerations must be borne in mind when assessing both the legitimacy of the overall "end", and the proportionality of the impugned provisions' impact on political communication to that end (or to some narrower end, if such is to be adopted). As Mason CJ said in *Australian Capital Television Pty Ltd v Commonwealth*,

> the Court should scrutinize very carefully any claim that freedom of communication must be restricted in order to protect the integrity of the political process. ... The Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the political process.[49]

There, as here, the alleged "distortion" was the ability of those with deeper pockets to achieve greater communication.

The provenance of the impugned provisions

37. The various impugned provisions were not all introduced at the same time:[50]

    (a) Section 96E was inserted into the EFED Act with effect from 10 July 2008.[51]

    (b) Division 4A was inserted into the EFED Act with effect from 14 December 2009, in relation to property developers only.[52] With effect from 1 January 2011 it was expanded to include the other classes of "prohibited donors".[53]

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[45] *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act* 2014 (NSW), Sch 2 item 4.
[46] (1939) 63 CLR 649.
[47] (1912) 15 CLR 355 at 358-359.
[48] As to which see also, eg, *Commonwealth Electoral Act* 1918 (Cth) ss 328-329; *Referendum (Machinery Provisions) Act* 1984 (Cth) ss 121-122.
[49] (1992) 177 CLR 106 at 145.
[50] Each set of provisions was inserted before the change of government in March 2011: Special Case para 17.
[51] *Election Funding Amendment (Political Donations and Expenditure) Act* 2008 (NSW), No 43 of 2008, Sch 1 item 34.

(c) Division 2A was inserted into the EFED Act with effect from 1 January 2011.[54]

38. In considering the context of these provisions in Pt 6 of the EFED Act, the matters addressed in *Unions NSW* ought to be acknowledged. At the same time as s 96E was introduced, the original form of s 96D was enacted.[55] In that form, s 96D provided only that it was unlawful for a person to accept a political donation which was required to be disclosed under Part 6, unless the donation was made by an individual or an entity with an Australian Business Number. With effect from 1 January 2011, it was unlawful for a political donation to be accepted unless the donor was an individual enrolled on the State or federal or a local roll of electors, or was an entity with an ABN or other relevant business number.[56]

10 39. The form of s 96D which was declared invalid in *Unions NSW* was then introduced with effect from 9 March 2012.[57] From the time that form of the provision was enacted until the decision in *Unions NSW*, s 96D left Div 4A with little further work to do.[58] The form of s 96D introduced after *Unions NSW*[59] was substantially the same as that which was in effect from 1 January 2011. (It may also be noted that, after these proceedings began, s 96D(4) was further amended to make explicit the purported objects of the section.[60])

40. Some of the provisions impugned in this case share an evolutionary path with the invalid form of s 96D. In particular, a prohibition on political donations by property developers was under consideration at the same time as was the proposal to ban all donations from persons other than electors.[61] But the prohibitions imposed by Div 4A were entirely novel: they were not based on
20 any antecedent legislation existing anywhere in Australia or overseas.[62]

The application of the *Lange* principles in this case

41. The questions of proportionality here must be answered while bearing in mind the centrality to the political system of that which is burdened in this case. It is admitted on the pleadings that each of the impugned provisions imposes a burden on political communication.[63] The admitted burden is analogous to that which the Court held s 96D was imposed in *Unions NSW*. That is, there is a restriction upon the funding available to political parties, candidates and members of Parliament, which restricts the ability of those persons and organizations to communicate with the community.[64]

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[52] *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act* 2009 (NSW), No 113 of 2009, Sch 1.
[53] *Election Funding and Disclosures Amendment Act* 2010 (NSW), No 95 of 2010, Sch 1 items 28-30.
[54] *Election Funding and Disclosures Amendment Act* 2010 (NSW), No 95 of 2010, Sch 1 item 23.
[55] *Election Funding Amendment (Political Donations and Expenditure) Act* 2008 (NSW), No 43 of 2008, Sch 1 item 34.
[56] *Election Funding and Disclosures Amendment Act* 2010 (NSW), No 95 of 2010, Sch 1 item 26.
[57] *Election Funding, Expenditure and Disclosures Amendment Act* 2012 (NSW), No 1 of 2012, Sch 1 item 3.
[58] During that time, the additional operation of Div 4A would have been limited to prohibiting donations from directors of entities that were prohibited donors, and their spouses, and other persons with the requisite level of voting power in such entities or units held in unit trusts, or who were beneficiaries of a relevant trust (cf s 96GB(3), definition of "close associate").
[59] *Election Funding, Expenditure and Disclosures Consequential Amendment Act* 2014 (NSW), No 28 of 2014, Sch 1 item 9 (in effect from 24 June 2014).
[60] With effect from 28 October 2014: *Election Funding, Expenditure and Disclosures Amendment Act* 2014 (NSW), No 63 of 2014, Sch 2 item 6.
[61] Select Committee on Electoral and Political Party Funding, *Report No 1 – June 2008*; Special Case Annexure 25, pp 89-106.
[62] A summary of relevant Australian legislation is found in Annexure A to the NSW Panel of Experts, "Working Paper 1 – Overview of Australian Election Funding and Donations Disclosure Laws" (August 2014) available at http://www.dpc.nsw.gov.au/announcements/panel_of_experts_-_political_donations (accessed 5 Feb 2015). As to overseas political donations legislation, see Special Case Annexure 32, internal page 54.
[63] Defence paras 51-52, 60-61, 68-69.
[64] *Unions NSW* (2013) 88 ALJR 227 at 236 [36].

42. While the effect of *Unions NSW* is that part of the burden is uncontroversial, it is nevertheless proper[65] to acknowledge that there is another aspect to the burden. In the case of each of the impugned provisions – Div 4A, Div 2A, and s 96E – there is a restriction upon 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. The nature of each such restriction is illustrated by the following submissions.

43. That aspect of the burden arises irrespective of whether one describes the conduct associated with making a political donation as involving a personal "right".[66] Political communication is, in fact and in law, being impeded. That is an adverse effect upon the constitutional freedom. If that impact is overlooked then the full scope of the impact of the law upon the freedom cannot be fully appreciated, and thus the inquiry for the purposes of the second *Lange* question would not be properly calibrated.

44. That said, the first question for decision in relation to each of the impugned provisions is whether they serve a legitimate end in the *Lange* sense. That requires at the outset a consideration of what, on their proper construction, those provisions actually do.

Division 4A: the prohibited donors provisions

45. The central operative provision of Div 4A is s 96GA(1), which provides that it "is unlawful for a prohibited donor to make a political donation". The successive subsections of s 96GA impose other prohibitions which complement subsection (1).

46. The definition of "prohibited donor" in s 96GAA essentially targets three classes of persons, each of which is defined in s 96GB by reference to certain business activities. While the plaintiffs challenge Div 4A only in its application to them, insofar as they or some of them are "property developers" as defined, the other classes of "prohibited donors" are material to identifying the purpose and effect of Div 4A as a whole.

47. A "property developer" is defined by s 96GB(1) so as to hinge on a corporation's status, which is defined in a present continuous tense: "*engaged in a business that regularly involves* the making of relevant planning applications...". The corporation must be one "by or on behalf of" which relevant planning applications are made, with the ultimate purpose of sale or lease of the land for profit. There are no express limits on how "regular" the making of relevant planning applications may be, or over what period (past or present) they may have been made.

48. A "relevant planning application" is defined by reference to s 147(2) of the *Environmental Planning and Assessment Act* 1979 (NSW) ("EPA Act"). That section has as its object "to require the disclosure of relevant political donations or gifts when planning applications are made to minimise any perception of undue influence" (s 147(1)). Subsections 147(3) to (5) require disclosure by a person who makes a relevant planning application, or a "relevant public submission", of reportable political donations as defined in the EFED Act made within the relevant period[67] (in relation to councils, disclosure is required of "all gifts" made to councillors or employees of that council: s 147(4)(b) and (5)(b)). The disclosure must be made either at the time of making the application or submission or, if the donation or gift is made afterwards, within 7 days of making it (s 147(6)). Such disclosures are to be published electronically by the Department or council within 14 days after they are made (s 147(12)).

49. The other classes of prohibited donor centre upon corporations "engaged in a business undertaking that is mainly concerned with" either the manufacture or sale of tobacco products (s 96GB(2A)(a)), or either or a combination of "the manufacture or sale of liquor products" or "wagering, betting or other gambling (including the manufacture of machines used primarily

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[65] See, eg, *Coleman v Power* (2004) 220 CLR 1 at 89 [231] per Kirby J, 120 [319] per Heydon J.
[66] Cf *Unions NSW* (2013) 88 ALJR 227 at 236 [36]-[37].
[67] From two years before making the application or submission until determination of the application: s 147(3).

for that purpose)" (s 96GB(2B)(a)). The qualification upon the definition of "liquor or gambling industry business entity", that the relevant business undertaking must be "for the ultimate purpose of making a profit", seems designed to exclude organisations like registered clubs which are non-profit.[68]

50. None of these classes of prohibited donor include (for example) an individual or a partnership who engages in those business activities in his or her own right. The legislature has not stated the assumptions upon which it confined the operation of Div 4A in this way. However, it does have the effect of allowing any kind of entity other than a corporation, in whose name relevant planning applications are lodged, even if in association with corporate entities, to avoid the operation of the prohibition.

51. However, included in the definition of each class of prohibited donor is "a person who is a close associate of" a paragraph (a) corporation. A "director or officer" of the corporation is included (even if the person is an officer because he or she is, for instance, a liquidator of the corporation or receiver of its property[69]). A related body corporate of the corporation is included, which picks up the narrow definition in the *Corporations Act* 2001 (Cth) about when a corporation is "related" to another, but not the broader definition of "associated entities".[70] A person whose "voting power", in either the paragraph (a) corporation or a related body corporate of it, is greater than 20% is also included. A spouse of a director or officer, or of a person with more than 20% voting power, is included.

Division 4A: no rational connection with a legitimate end

52. The end served by the provisions of Div 4A is to be discerned through an exercise in statutory construction. Statutory construction begins with the text.

53. The text of Div 4A does no more than impose a blanket prohibition upon the making of donations by specified classes of person. On its face, the text supports only the conclusion that the end of Div 4A is to prevent those classes of person from providing financial support to political parties and candidates.

54. It may be accepted that, as Hayne J said in *Tajjour*,[71] a rational connection may exist between prohibiting an act and the end of preventing, not just the act itself, but some consequence of the act. Thus there might be an inference that the end of Div 4A is to prevent some evil which arises from the very status of a person as being within one of the classes of prohibited donor. The State, in this case, identifies that consequential evil as the risk of corruption or undue influence. The question thus becomes whether the text and operation of Div 4A provide a rational connection with preventing that consequential evil.

55. The definition of each of the classes of prohibited donor centres on identifying corporations, with reference to their business activities. However, the end served by the provisions must be discerned by reference to the whole of the provisions' operation. Reference must be made not just to those business activities, but also to the nature and scope of the classes of persons subject to the prohibitions.

56. A threshold point is that, like the invalid s 96D in *Unions NSW*,[72] those corporations referred to in paragraph (a) of each of s 96GB(1), (2A) and (2B) (referred to below as "paragraph (a) corporations") are not the sole subjects of Div 4A's prohibitions. Rather, the prohibitions extend to a set of additional persons, being "close associates".

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[68] See, eg, *Registered Clubs Act* 1976 (NSW); *Sydney Water Board Employees Credit Union v Federal Commissioner of Taxation* (1973) 129 CLR 446 at 456 per Mason J; *New York Life Insurance Co v Styles* (1889) 14 App Cas 381 at 394 per Lord Watson.

[69] See *Corporations Act* 2001 (Cth) s 9, definition of "officer" of a corporation.

[70] See *Corporations Act* 2001 (Cth) s 50; cf ss 50AAA.

[71] (2014) 88 ALJR 860 at 883 [78].

[72] See (2013) 88 ALJR 227 at 238 [53]-[54].

57. While that extension has an appearance of being designed to prevent evasion of the prohibitions, that conclusion is precluded by the significant limitations of both the paragraph (a) "corporations", as well as of the classes of "close associates".

58. It is not difficult for an individual or partnership, or other non-corporate entity, to be the person who makes a "relevant planning application". Nothing in the definition of that term precludes it, nor does any compelling commercial consideration. There is no explanation whatsoever why such an obvious means of circumventing the provision is left open. That fact is quite inconsistent with the provisions being designed with a prophylactic purpose.

59. Furthermore, close associates do not include everyone who has the capacity to control the paragraph (a) corporation, or who benefit from its activities.[73] Nor do they include, for example: a director or other officer of a related body corporate; nor the spouse of such a person; nor the spouse of a beneficiary or significant unit-holder in a trust; nor a corporation which is controlled by any such officer or his or her spouse (or by a controller of a paragraph (a) corporation) but which is not "related" to the paragraph (a) corporation in the strict sense.

60. When compared against the scope of the alternative definitions from the *Corporations Act* (ss 50AAA-50AA) which could just as easily have been picked up, the limitation in relation to "related" corporations is inexplicable. The definition of close associate also stands in contrast to the definitions, for the purposes of s 147 of the EPA Act, of a person who "has a financial interest" in a relevant planning application (s 147(7)) and "associated" persons (s 147(8)). Thus, while the "close associate" definition may appear designed to prevent avoidance of Div 4A's prohibitions, it instead exacerbates the arbitrariness of the prohibitions.

61. Ultimately, the apparently deliberately confined scope of both the definitions of the paragraph (a) corporations, and their "close associates", allows for no rational inference to be drawn other than that the end of Div 4A amounts to prohibiting those particular persons from making political donations. Those persons have no uniting feature consistent with any inference that the legislative end was prophylactic against a risk of corruption. On the contrary, if anything, the proscribed classes of person consistently reveal a legislative intention *not* to prevent avoidance of the prohibition.

62. The only remaining component of Div 4A which might lend support to the supposed end of targeting some detrimental influence is the business activities of the paragraph (a) corporations.

63. Obviously enough, the commercial interests of property developers are affected by the exercise of public power. However, the same ultimately applies to any member of the community, all of whom are subject to varying forms of regulation, including taxation; prohibitions upon certain forms of commercial arrangements like cartels; licensing requirements; and restrictions upon the use of premises. The degree to which particular business sectors are so affected inevitably varies. There is further variation in the impact of such regulation on particular persons within each such business sector. But any such person may, and in practice all such persons do, seek to encourage social or regulatory change in his or her own interest by participating in public political affairs. There is nothing different or special in this respect about property developers as a class of persons, or their business.

64. So much can also be said about the other classes of prohibited donors. Restricting the activities of tobacco, alcohol and gambling businesses may be motivated by public health concerns, or by the sheer unpopularity of their businesses, or both. However, the fact that Div 4A has to do with the latter is made plain by the exclusion from the definition of "liquor or gambling industry business entity" of non-profit entities. Whether or not a profit is made has no apparent connection with public health outcomes. Nor, for that matter, does making a political donation. The fact that there is no equivalent exception for tobacco industry business entities makes plain that the prohibition in relation to those entities has nothing to do with the temptation to engage

[73] Cf *Corporations Act* 2001 (Cth) s 50AA.

in corrupt activities in pursuit of profit. And there is no evidence, nor anything inherent in the activities of any of these kinds of businesses, which creates any link between them and corruption or some other diminution of the actual integrity of the political process.

65. It is apparent, then, that not all of Div 4A serves the end of preventing corruption. Rather, at least some part of Div 4A's scope, and potentially all of it, is explicable only as an attempt to prevent socially undesirable persons from being seen to contaminate political parties and candidates with their influence.[74] However, the influence of those persons cannot be seen to be undesirable because it is somehow inimical to fundamental democratic values. Rather, what is apparently judged undesirable is allowing those persons a political means to succeed in their business endeavours. The legislative intention is thus not to preserve public confidence in the political process, but rather an attempt to bolster the popularity of its central actors at the expense of even less popular community members.

66. The State is then compelled to fall back upon an even narrower contention: that, in relation only to entities which are property developers within paragraph (a) of the definition in s 96GB(1), there is such a risk of corruption arising from those entities making political donations that all entities of that class must be prohibited absolutely from doing so.

67. The State will likely rely upon examples of cases in which commissions of inquiry have found corruption to have occurred in connection with property developments.[75] The utility of that evidence is subject to three large caveats.

68. First, the State can point to only eight such instances in New South Wales over two and a half decades. It is perhaps impossible to quantify in any useful manner the vast number of property developments which have occurred in New South Wales over that time. Everyday experience indicates that property development activities are as widespread as the State's entire economy. It may therefore be inferred that the overwhelming majority of such developments, and their developers, have been free from allegations or findings of corruption.

69. Secondly, the instances to which the State can point do not necessarily concern activity on the part of companies which fall within para (a) of s 96GB(1). Indeed, this points up the failure of Div 4A to impose such a prohibition on non-corporate property developers. But nor even are those examples congruent with the scope of the definition of "close associate".

70. Thirdly, all the instances so recorded concern corruption of local government officials or unelected State public servants. There is no support in these examples for a conclusion that the legislative and party political processes at the State level are prone to corruption at the hands of property developers. Nor for that matter is there any support for a conclusion that otherwise reportable political donations may be used as a means for obtaining corrupt influence.

71. Rather, the proper inference is that corruption can flourish in circumstances where there is *no* disclosure of dealings between politicians and those who might benefit from them. That conclusion is equally applicable to all the classes of prohibited donors, in common with all other kinds of commercial venture.

72. A person's status as a property developer, without more, does not allow an inference that the person poses such a risk to the integrity of the political process that they ought not to be permitted to provide material support to any participant in the electoral process. There is nothing intrinsic to that status which puts property developers, or for that matter other prohibited donors, in any different category from any other class of person. The same conclusion might be applied to, for instance, trade unions, banks, lawyers, accountants, financial advisers, real estate agents, media proprietors, supermarket chains, or pharmaceutical companies. In each case, their advancement of their own interests through participation in the

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[74] Cf *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 628-629 per Toohey and Gaudron JJ.

[75] Special Case, paras 48-50.

political process is perceived by some part of the community as pernicious. All that has happened here is that the legislature selected, as the initial subjects of the prohibition, classes of person who were unlikely to attract sympathy, as a prelude to the broader prohibition held invalid in *Unions NSW*.[76]

73. A rational connection with the elimination of pernicious influence associated with a particular industry *could* have been drawn in relation to particular persons who have engaged in such activities. If there is such evidence, those persons could legitimately be singled out and prevented from engaging in such activities again (as they were in the legislation in *Tajjour*).

74. Such, however, is not the scheme of Div 4A. The legislature has not drawn an inference that particular persons pose a risk to the integrity of the political system based on evidence about the actions of those particular persons. Rather, the inference is generalised. The State seeks to support that generalisation by reference to evidence of particular instances of corrupt conduct; but as shown above, that evidence cannot not substantiate the generalisation as an empirical matter (even if it were relevant to an exercise in statutory construction).

75. For those reasons, there is no rational connection between the prohibitions imposed by Div 4A, at least in their application to any of the plaintiffs, and any legitimate end compatible with the maintenance of the constitutional system of government. To that extent at least, the answer to the second *Lange* question in relation to the provisions of Div 4A as they apply to the plaintiffs must be "no", and they are accordingly invalid.

Division 4A: want of proportionality

76. Many of the same considerations serve to highlight the fact that, even if an unstated legislative generalisation about property developers is considered to give Div 4A a legitimate end for the purposes of the second *Lange* question, it is plainly disproportionate to that end.

77. Nowhere else in Australia or overseas has there been any such sweeping condemnation of the whole property development sector as being inherently inclined to corruption by way of political donations. Indeed, the legislative framework of the Commonwealth itself, and of other States and Territories,[77] precludes any such view. Political donations are generally permitted; plainly, they are not assumed to be inherently inimical to the actual or apparent integrity of the political process. And under Commonwealth legislation and elsewhere, that legislative assumption is not subject to any exception in respect of donations from property developers. On the contrary, the fact that such donations are permitted – and indeed are made, in large amounts, with due publicity[78] – reveals a legislative assumption in those jurisdictions that political donations by property developers are not inherently corrupt.

78. The prohibition upon donations from property developers as a class is reminiscent of Deane J's classic example of a disproportionate means of eliminating sheep disease, by eliminating all sheep.[79] To prevent a party or candidate from receiving political donations from any persons of a broadly defined class, irrespective of whether particular members of that class have themselves behaved corruptly, is plainly to impose more of a burden on political communication than is necessary to achieve the objective of the law.

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[76] See *Hansard*, Legislative Assembly, 25 Nov 2009, pp 19917 and 19918 (Nathan Rees MP): "first step".

[77] See paragraph 40 above and the footnotes thereto.

[78] For example, on 2 February 2015 (after the Special Case was agreed and filed) the Australian Electoral Commission published 2013-14 annual returns under the *Commonwealth Electoral Act* 1918 (Cth). One of those returns was filed by Australia Kingold Investment Development Co Pty Ltd and showed donations to branches of the Australian Labor Party totaling $635,000 and to the Liberal Party of Australia totaling $200,000: http://periodicdisclosures.aec.gov.au/Returns/55/TCAV8.pdf (accessed 5 Feb 2015). A second disclosure was filed by Mr Zi Chun Wang, recording two donations made in August 2013 to the Australian Labor Party Federal Secretariat, totaling $850,000: http://periodicdisclosures.aec.gov.au/Returns/55/SVNG9.pdf (accessed 5 Feb 2015). For an example of the attendant publicity, see "Political receipts: Chinese donor gives $1m to Labor", *Sydney Morning Herald*, 3 February 2015, p 7.

[79] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 260-261 per Deane J.

79. The prohibitions in Div 4A could readily have been confined to the making of political donations with some form of intention corruptly to solicit favour. It cannot be contended that such a criterion would be unworkable. The longstanding secret commissions legislation contains exactly that,[80] as does the common law of bribery.[81] This provides an example of an obvious and compelling alternative to the imposition of a prohibition upon property developers as a class. It would also ensure that the impact of the prohibition would be tailored to donations to particular recipients – e.g. local government candidates more than State parliament – whose decisions are actually sought to be influenced, and not aggregated merely by reference to a shared political affiliation.

10 80. The very terms in which a "property developer" is defined exacerbate the disproportionality of the law to any objective of preventing corruption. A particular entity may be capable of sliding in and out of the statutorily defined class, depending upon whether development applications are "regularly" made by it or on its behalf. The present continuous tense leads to definitional difficulties such as that which applies in relation to the second plaintiff. A related corporation of the second plaintiff[82] did make a number of development applications, with a certain measure of regularity over a relatively short period of time, several years ago. There is nothing in the statutory definition to determine at what point that entity, and related corporations such as the second plaintiff, cease or ceased to be a property developer. The result is that the second plaintiff remains subject to a perceived risk of prosecution if it makes a political donation at
20 some point in future. That creates an additional "chilling effect" on political communication,[83] by further reducing availability of funding from such sources. That chilling effect is only partially dissipated by s 96GE, as a determination under that section hinges upon a discretionary decision, which is of limited duration and is able to be revoked, and is based upon whether it is "more likely than not" that the person is not a prohibited donor.

81. The inexplicable extension of the prohibitions in s 96GA to "close associates" exacerbates the burden on political communication, despite the extension having little if anything to do with the supposed likelihood of the company to corrupt. For example, 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. A person who is both a director of a
30 property developer company and an elected member or candidate (as the first plaintiff used to be) could not obtain campaign donations from his or her spouse.

82. Indeed, the prohibitions imposed on such persons restrict their ability to participate in political affairs whatever their motivation. Even if a person who happens to fall within them has strong views on some completely unrelated matter, they are prevented from advancing that cause by means of political donations. For example, a person who is a close associate of several businesses – not just a business of a prohibited donor – would be unable to make political donations so as to advance the interests of those other businesses. As another example, a gay director of a property developer and his or her partner[84] could not donate to a political party or candidate in support of the legalization of gay marriage. On the other side of the coin, political
40 parties and candidates are deprived of sources of election funds for *all* their political purposes, not just for the purpose of developing policies favourable to the commercial interests of prohibited donors.

83. For those reasons, even if it is accepted that the provisions of Div 4A in their application to the plaintiffs, or some of them, serve a legitimate end, they are disproportionate to that end and accordingly are invalid.

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[80] *Crimes Act* 1900 (NSW) s 249B(1)(a)-(b), (2)(a)-(b); see also ss 249D, 249E.
[81] See *R v Allen* (1992) 27 NSWLR 398 at 402.
[82] Nuove Castelli Pty Ltd: see Special Case paras 1(a), 3(b) and 7.
[83] *Coleman* (2004) 220 CLR 1 at 54 [105] per McHugh J; *Roberts v Bass* (2002) 212 CLR 1 at 40 [102] per Gaudron, McHugh and Gummow JJ; *Unions NSW* (2013) 88 ALJR 227 at 253 [161]-[163] per Keane J.
[84] "Spouse" within the definition of "close associate" includes a same-sex de facto partner: EFED Act s 96GB(3); *Interpretation Act* 1987 (NSW) s 21C(1); *Relationships Register Act* 2010 (NSW) s 5(1).

Division 2A: the donation caps provisions

84. The central operative provision of Div 2A is s 95B(1),[85] which renders it "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 on political donations". The other subsections of s 95B create exceptions and defences (s 95B(2)-(5)), an ancillary disclosure requirement (s 95B(6)) and a transitional provision.

85. The "applicable cap on political donations" is set out in s 95A. The amounts set out in s 95A(1) are subject to adjustment for inflation: s 95A(5).[86] The "applicable cap on political donations" appears to apply on a year-by-year basis only, owing to the aggregation provisions. Donations of or less than those amounts by a particular donor "to the same party, elected member, group, candidate or third-party campaigner" are aggregated in each financial year for the purposes of determining whether the amount so aggregated would exceed the applicable cap (s 95A(2)). Aggregation also applies in relation to all donations by a particular donor to "elected members, groups or candidates of the same party" (s 95A(3), see also s 95A(6), and the defence in s 95B(5)). There is also a prohibition on donations to more than three third-party campaigners in the same financial year (s 95C).

86. There are several exceptions. First, a "candidate's contribution to finance his or her own election campaign is not a political donation and is not included in the applicable cap on political donations to the candidate" (s 95A(4)). Secondly, a "party subscription", as defined, is to be disregarded, "except so much of the amount of subscription as exceeds the relevant maximum subscription" (s 95D(1), (3)). So too is a "party levy" paid to a party by an elected member endorsed by that party (s 95D(4)).

87. Under s 95HA(1), a person who accepts a political donation in contravention of Div 2A "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". Correspondingly, a donor "who makes a donation with the intention of causing the donation to be accepted in contravention of Division 2A is guilty of an offence" (s 95HA(2)). Even if those offences are not satisfied due to the absence of the prescribed *mens rea*, acceptance of a political donation which is unlawful gives rise to a liability to pay the same amount to the State (s 96J).

Division 2A: no rational connection with any legitimate end

88. The central effect of the donation caps provisions is that any one "entity or other person" is able only to make the same maximum amount of donations to a particular party, and to candidates, groups and elected members affiliated with that party, and to third party campaigners, as can any other person.

89. Like Div 4A, the terms of Div 2A do not refer to corruption or to any other recognizably pernicious kind of influence. There is no basis to infer that the making of even a very large donation necessarily entails any kind of quid pro quo. Having political influence does not mean purchasing specific outcomes; it only entails an increased chance of being heard. It is obviously another matter if there is indeed an explicit or tacit quid pro quo in a particular case;[87] but such a requirement is not mentioned in Div 2A. Thus, the end served by Div 2A is not about proscribing corrupt donations. It is, instead, an end identifiable only by reference to the prohibition of donations of the proscribed amounts.

90. The practical effect, and the inevitable consequence, of this prohibition is that Div 2A also prevents any person from gaining political influence by way of the making of political donations. That inference may be drawn on the commonsense basis that, while the making of

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[85] Unlike the remainder of Part 6, Div 2A only applies in relation to State elections and elected members of the NSW Parliament (s 95AA; cf s 83(1)). Cf *Local Government Act* 1993 (NSW) ss 328A-328B.
[86] See *Election Funding, Expenditure and Disclosures (Adjustable Amounts) Notice* (NSW), No 2011-597.
[87] Cf *R v Glynn* (1994) 33 NSWLR 139 at 145.

political donations is apt to procure for the donor influence with the donee, realistically a political party or candidate will not be materially influenced by every "rank and file" donor; rather, donors of larger amounts will tend to stand out. Thus, an alternative way of understanding the end Div 2A serves is that it seeks to prohibit the gaining of political influence by way of the making of political donations.

91. The threshold question is whether that end is legitimate.

92. It has been acknowledged in this Court, as early as the decision in *ACTV*[88] and as recently as in *Unions NSW*,[89] that a corollary of the freedom required by the constitutionally prescribed system of government is that people will be free to "build and assert political power".

10 93. Nothing in the Constitution or this Court's decisions admits of the possibility that the degree of political power or influence which might be exercised by any one person, or any number of persons, may legitimately be constrained, for no other reason than that it is undesirable for those people to be more influential than others.[90]

94. Epithets such as "undue", "excessive" and "disproportionate" connote the making of a value judgment in relation to what is "due" and permissible. The question which necessarily arises is: whose values inform the making of that judgment? Inevitably, those values will be different depending on the observer's opinion of the virtues or otherwise of the donor and his or her interests,[91] as much as by the fact that the donor has political influence. That opinion will in turn depend on whether the observer has, or desires to have, such influence – or *more* such
20 influence than the donor.

95. In a party-based political system, a person who is a member of a party (*a fortiori*, a member of Parliament affiliated with that party, or even an unelected official of the party) will have more influence over the workings of the party, and the outcomes of political activity in which the party participates, than will a non-member of that party.

96. In other words, such a person's voice is more readily heard by the party or candidate when it comes to formulating policies. That is a discrete, but no less vital, step in the process. The party or candidate thereafter may be prominent in putting those policies before the public, but the party member's or official's own voice will be no louder than any other in public debate about whether those policies, and the parties and candidates espousing them, are desirable.

30 97. A person may acquire a position of political influence through any number of means, including political skill, social status, family connections, or sheer good luck. Although not everyone has equal access to those means, the legislature could not legitimately single out any of those means so that those who possess them are "taken down a notch".

98. The same must apply to a person who, even if not a member of a party, provides material support to that party, in whatever amount. That such support, and not just membership of a party as such, is a permissible means of advancing one's agenda is necessarily required by the decision in *Unions NSW*. Indeed, the ability to gain influence or access through financial support can compensate for the donor's inability to gain the influence or access they seek through other less tangible means, or through personal volunteering.[92]

40 99. Such an approach is also an alternative to advancing one's agenda through the media. Both individuals and media corporations can, and do, use aggregated wealth to advance an agenda which may entail views which have little public support. Individual judgement, whether that of

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[88] (1992) 177 CLR 106 at 139, citing A Cox, *The Court and the Constitution* (1987) at 212.
[89] (2013) 88 ALJR 227 at 234 [29].
[90] "Ingratiation and access … are not corruption": *McCutcheon v Federal Election Commission*, 572 US ___ (2014), slip op at 2 (Roberts CJ); *Citizens United v Federal Election Commission*, 558 US 310 at 360 (2010).
[91] Cf, in a different statutory context, *Monis v The Queen* (2013) 249 CLR 92 at 137 [87] per Hayne J.
[92] Cf *McCutcheon v Federal Election Commission*, 572 US ___ (2014), slip op at 16 (Roberts CJ).

the elector, representative or candidate, turns upon free public discussion in the media of the views of all interested persons and on public access to that discussion.[93]

100. It might for instance be considered undesirable, from one point of view, that a union, being a body affiliated with a major political party, might be able to exhort its members one and all to make a coordinated campaign of donations to that party (or particular candidates endorsed by it), whereas an opposing party does not have any such formal affiliations with a comparable organization.[94] This Court accepted in *Unions NSW* that targeting a similar means of raising funds had no explicable connection with any legitimate objective of preventing corruption.[95]

101. By analogy, targeting a political party's informal associations with wealthy donors, who have the capacity to provide comparably generous financial support – whether with altruistic motives, or not – does not of itself advance those general objectives.

102. To impose, for their own sake, such constraints on a political actor's capacity to raise funds is to strike deliberately at the ability of such a person to advocate for and bring about such social change as he, she or it desires. Correspondingly, it is a strike against the ability of those providing the funds to obtain an opportunity to communicate. In each respect, that amounts to an end of imposing that burden on political communication. That is an end which is inimical to the implied freedom, and incompatible with the constitutional system of representative and responsible government. Division 2A of Part 6 of the EFED Act serves that end, and no other. It is invalid for that reason.

Division 2A: want of proportionality

103. The question of proportionality arises if the end contended for by the State is accepted as the end served by the impugned provisions. Of course, this is an end framed by the State[96] in terms which sound important and valuable, but which really just restate the question for determination.[97] But even if that supposed end is accepted as a meaningful expression of something Div 2A actually seeks to achieve, Div 2A is in any event disproportionate to that end.

104. In addition to recalling the scope and nature of the impugned provisions' effect on the protected freedom, it is also critical to bear in mind the fact that the putative legitimate end goes beyond *securing* the *actual* integrity of Parliament and the executive, and extends to promoting the *appearance* of that integrity. The distinction between the actuality and the appearance of political integrity is critical to assessing the proportionality of Div 2A to the end the State says it serves.

105. Div 2A fails to target only actual instances of corruption. It goes much further and seeks to prevent any occasion arising in which there could even be a suspicion of something regarded as corruption associated with political donations. Indeed, Div 2A targets only the possibility of such a perceived lack of integrity in connection with the interests of donors who otherwise would donate large amounts of money. This end 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 – irrespective of whether they actually do so. Thus, either Div 2A plainly goes beyond what it is necessary to proscribe in order to protect the actual integrity of the political process, or else it really serves a wider cosmetic objective.

106. To seek to achieve that cosmetic objective by preventing particular kinds of political donations from being made altogether, regardless of the circumstances and irrespective of the publicity that would otherwise attach to those circumstances, goes well beyond what is necessary.

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[93] *ACTV* (1992) 177 CLR 106 at 139 per Mason CJ.
[94] Cf *Unions NSW* (2013) 88 ALJR 227 at 239 [61].
[95] *Unions NSW* (2013) 88 ALJR 227 at 240 [63]-[65].
[96] See paragraphs 26 to 28 above.
[97] Cf *Monis v The Queen* (2013) 249 CLR 92 at 164-165 [186]-[187] per Hayne J.

Indeed, one is compelled to ask why anything more is needed than public disclosure of donations and other dealings. It is by now axiomatic that the light of publicity is the surest scourge of potential corruption.[98] That light is made all the brighter by modern technology facilitating ready access to published information.[99] It is only if the public are comprehensively informed about the relations between political parties and candidates and their donors that it can be said that the actual integrity of the political system matches its appearance.

107. Whatever view may be taken of the importance of the end the State relies upon, Div 2A does not set out to achieve that objective comprehensively. For example, it does not seek to impose additional disclosure requirements in cases where, even though a donation is below the applicable cap, there have also been other kinds of dealings between the donor (or some associated person) and the donee. And it does not seek to prevent otherwise powerful persons (proprietors of major media networks spring to mind) from using their clout to influence political decision-making in other ways. In that context, invocations of public confidence in the political process ring hollow.

108. A further difficulty with Div 2A is that the applicable caps are not confined to direct contributions to individual candidates or decision-makers, but are aggregated by reference to a particular political party or group. This amounts to recasting as "corruption" or "undue influence" a donor's general support for a political party or candidate, and then burdening the party's or candidate's freedom to advocate changes which happen to benefit the donor.

109. Perhaps it was Parliament's view that meeting the perceived threat (whatever that may be) required something more than the existing disclosure regime. However, that disclosure regime could itself be strengthened in several obvious ways. One way would be to increase the prominence and promptness of publication of donations. Alternatively, there could be a requirement for disclosure of particulars of all dealings between the donor and the donee and related candidates and organisations, and all existing or prospective interests of the donor which may be perceived to be linked to the motive of the donation.[100] Indeed, a narrow form of such an expanded disclosure regime already exists in relation to property developers, as noted above.[101] These would be obvious and compelling alternatives which would impose far less restriction, or indeed no restriction at all, on political communication.

110. Furthermore, in its practical effect, Div 2A imposes this burden on political communication in a discriminatory way. There is evidence available of the amounts of donations above the applicable caps which were made before and after Div 2A came into effect.[102] From this evidence two significant facts may be inferred. First, the provisions had the practical effect of singling out those kinds of donors who might otherwise have wished to make donations in amounts above the applicable caps. Given the relative amounts, the potential donors so affected may be inferred to be a minority of overall donors, despite giving varying proportions of the various parties' and candidates' overall donation receipts.

111. Secondly, the provisions also have an unequal practical effect upon the *recipients* of those donations.[103] Those political parties and candidates who might otherwise have commanded

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[98] *Buckley v Valeo*, 424 US 1 (1976) at 67.

[99] Cf EFED Act s 95(1) (prompt website publication of disclosures).

[100] Cf s 95(1) of the EFED Act, which merely requires the Electoral Commission to publish on its website the disclosures themselves "and other information it considers relevant".

[101] See paragraph 48.

[102] Special Case Annexure 6, column headed "Reportable political donations received above the applicable donations cap". Amounts included in that column for periods before 1 Jan 2011 are a total of donations made in amounts above the initial caps later set out in s 95A effective from 1 Jan 2011. Note also fn 8 to that table.

[103] For example, between FY2008-FY2010, the ALP NSW received total donations of $11,724,029.84, of which $8,423,932.18 were donations in amounts above the thresholds which became, from 1 Jan 2011, the applicable caps. Between FY2012-2014, the ALP NSW received total donations of $6,995,111.47, of which $2,553,911.44 were amounts above the applicable cap (but presumably exempted from the caps). By contrast, donations to the Liberal Party NSW in the same periods were: FY2008-2010 total $11,115,905.81, of which $3,061,935.06 was above the

greater financial support from fewer sources (whatever the motivation of the donors) are effectively discriminated against, in favour of those who might command the same total consisting of a larger number of smaller donations.[104]

112. For those reasons, it should be concluded that Div 2A is not appropriate and adapted to achieving the end for which the State contends in a manner compatible with the maintenance of the constitutionally prescribed system of government. Again, on that basis, Div 2A is invalid.

Section 96E: indirect campaign contributions

113. Subsection 96E(1) provides that it is unlawful for a person to make specified categories of "indirect campaign contributions" to a party, elected member, group or candidate. Subsection (2) provides that it is unlawful for a person to accept such an indirect campaign contribution.[105] The term "indirect campaign contributions" is not defined otherwise than by the four categories listed in subsection (1), subject to the exclusions in subsection (3). Thus, the content of those categories is key to understanding the purpose and effect of the prohibition.

114. One feature which unites the first three categories of indirect campaign contribution in s 96E(1) is their apparent magnitude: "provision of office accommodation, vehicles, computers or other equipment"; "full or part payment ... of electoral expenditure for advertising or other purposes"; and "waiving of all or any part of payment ... for advertising". Each such form of indirect contribution is only proscribed if it is made for electoral purposes, which are defined so as primarily to cover electoral communications. However, as exemplified by s 96E(1)(d), the proscribed categories of "goods or services" are not closed.

115. Meanwhile, under s 96E(3), the "provision of volunteer labour or the incidental use of vehicles or equipment of volunteers or other [authorised things]" is treated as permissible (as physical participation in politics is evidently considered desirable). The exclusion in s 96E(3)(b) further acknowledges the desirability of parties providing support to their endorsed candidates. The exclusion in s 96E(3)(c) of things the value of which "as a gift does not exceed $1,000" also suggests a concern with the magnitude of the contribution. There are obvious exclusions for public funding provided under Pts 5 and 6A (s 96E(3)(d)). But again, the categories of what is "permitted" are not closed (s 96E(3)(e)).

Section 96E: no rational connection with any legitimate end

116. The end really served by s 96E may be revealed by comparing the operation of the law to the absence of the law.[106] If there were no prohibition on in-kind donations, then such donations could lawfully be made, but would then be caught by the disclosure requirements of Div 2 of Pt 6. (A "political donation" includes a gift by way of a disposition of property, including chattels and incorporeal property other than money, as well as provision of a service for no or inadequate consideration: ss 84, 85.) The "amount" of the in-kind donation would be quantified as its monetary value (s 84(4)).

117. There is no reason to think that making an in-kind donation which is disclosed would undermine the effectiveness of the disclosure regime in respect of *monetary* donations. And, by definition, being required to disclose a *non-monetary* donation could not undermine the effectiveness of the disclosure regime in relation to those donations. The making of in-kind donations could only undermine the regime for transparency of donations generally if there were no requirement to disclose that category of donations at all.

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notional caps; and FY2012-FY2014 total $8,952,646.97, of which only $91,037.16 was above the applicable caps. These are totals of the relevant entries in Special Case Annexure 6.

[104] Cf *ACTV* (1992) 177 CLR 106 at 146 per Mason CJ.

[105] Breach of s 96E may engage the offence provision in s 96I(1), and the forfeiture provision in s 96J.

[106] Cf *Tajjour* (2014) 88 ALJR 860 at 884 [81] per Hayne J.

118. Indeed, notwithstanding their simultaneous introduction in 2008, there is no textual link between s 96E and Div 2. The imposition of the prohibition, in circumstances where Div 2 would cover any donations also prohibited by s 96E, tends against such a link being inferred. Moreover, under the regime in effect before commencement of the 2008 amendments, the disclosure requirements applied equally to both cash and in-kind political contributions, the latter to be valued in money's worth.[107]

119. The object of the prohibition must therefore be something other than enhancing transparency generally or the disclosure regime in particular. The end must be the achievement of the prohibition, as such – in other words, the imposition of the burden.

10 120. The State will likely contend that imposing that prohibition bolsters the effectiveness of the donation caps provisions, in that it may be difficult to quantify the value of an in-kind donation and, thus, if in-kind donations are prohibited then it will be easier to ascertain whether donations which are made, and disclosed, are within the applicable caps.

121. However, nothing in the text of the provision creates any link to Div 2A of Pt 6. Indeed, as outlined above,[108] s 96E was introduced in 2008, together with an updated disclosure regime; Div 2A was introduced in 2011. Any congruence of operation between s 96E and Div 2A is sheer happenstance.

122. Moreover, when account is taken of the fact that the EFED Act provides for a valuation mechanism for in-kind donations, it is again impossible to see that the prohibition of in-kind
20 donations assists the operation of the caps. The prohibition is just an attempt to avoid the effort of applying the valuation mechanism. The argument thus rests, not upon the characterisation of the provisions of the EFED Act, but upon an assumption of executive indolence.

123. Even then, the scope of the prohibition in s 96E(1) does not avert the need to apply the valuation mechanism, because of the exclusion from the prohibition of indirect contributions valued at less than $1,000. Thus, it cannot be seen to be directed towards eliminating the perceived vice of difficulty in measuring value of donations for the purposes of enhancing the effectiveness of the donation caps, or of promoting transparency generally.

124. The ordinary processes of statutory construction therefore reveal that the end served by s 96E is simply to prohibit the political donations to which it applies. The provision thus seeks directly
30 to restrict the resources available to political parties and candidates for electoral purposes. Even though the resources so denied are of a particular kind, the very objective of doing so is incompatible with maintenance of the constitutional system of government, for the reasons already given.

Section 96E: want of proportionality

125. Even if the State's argument about bolstering the donation caps is accepted, the provision is plainly disproportionate to that end.

126. Assuming that the argument is put on the footing that the donation caps provisions would be too difficult to apply in the absence of absolutely reliable, objective evidence of the value of an in-kind donation, then there is readily apparent a compelling alternative. Provision of a reliable
40 valuation is an obvious condition to be imposed on the liberty to make a non-pecuniary donation. A donor, or the recipient, could be required in all cases to disclose satisfactory evidence of value, rather than merely asserting a value.

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[107] See EFED Act, Part 6 as in effect until 9 July 2008; s 4 (definition of "gift"). A procedure for assessing the value of in-kind contributions was then prescribed under the *Election Funding and Disclosures Regulation* 2004 (NSW), reg 30.
[108] See paragraph 37 above.

127. That approach would go only very slightly beyond the existing provision for means of valuing the donation. Indeed, the pre-existing regime, if vigorously administered, was capable of having the same effect. The effect would be to impose no real or tangible burden on political communication, in contrast to the substantial burden imposed by s 96E.

128. In contrast to such an alternative approach, to prohibit absolutely the making of a gift which is capable of being valued by conventional means, apparently for no other reason than that it is thought preferable not to have to value it, is to use a sledgehammer to crack a nut.

129. For those reasons, either because the end is illegitimate or because it is disproportionate to that end, s 96E is invalid.

PART VII: RELEVANT CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

130. The relevant provisions are set out in the Annexure.

PART VIII: ORDERS SOUGHT

131. The plaintiffs submit that the following answers should be given to the questions set out in the special case:

1. Is Division 4A of Part 6 of the EFED 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 communication on governmental and political matters contrary to the Commonwealth Constitution?

   A. Yes, in whole.

2. Is Division 2A of Part 6 of the EFED 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 of communication of governmental and political matters contrary to the Commonwealth Constitution?

   A. Yes, in whole.

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

   A. Yes.

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

   A. The first defendant.

PART IX: ORAL ARGUMENT

132. It is estimated that 4 hours will be required for the plaintiffs' oral argument.

Dated: 9 February 2015

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ANNEXURE: RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Each of the applicable constitutional provisions and statutes is set out below as in force on 28 July 2014, and remains in force and in that form as at the date of these submissions. Section 4A of the EFED Act, which was introduced after 28 July 2014 and took effect on 1 December 2014, remains in force in the same terms as at the date of these submissions, and is set out below.

The Constitution: ss 7, 24, 62, 64, and 128

7 The Senate

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State,[5] but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

24 Constitution of House of Representatives

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:

(i) a quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators;

(ii) the number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

62 Federal Executive Council

There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

64 Ministers of State

The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

Ministers to sit in Parliament

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

128 Mode of altering the Constitution[23]

This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

In this section, ***Territory*** means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.

Election Funding, Expenditure and Disclosures Act 1981 (NSW), Pt 6 Div 2A, s 95E, Pt 6 Div 4A, and relevant definitions (as at 28 July 2014)

Part 1 Preliminary

...

4 Definitions

...

candidate, in relation to an election, means a person nominated as a candidate at the election in accordance with the Parliamentary Electorates and Elections Act 1912 or in accordance with the Local Government Act 1993 (as the case requires) and includes a person applying for registration as, or registered as, a candidate in the Register of Candidates for the election.

...

disposition of property means any conveyance, transfer, assignment, settlement, delivery, payment or other alienation of property, and includes:

(a) the allotment of shares in a company,

(b) the creation of a trust in property,

(c) the grant or creation of any lease, mortgage, charge, servitude, licence, power, partnership or interest in property,

(d) the release, discharge, surrender, forfeiture or abandonment, at law or in equity, of any debt, contract or chose in action, or of any interest in property,

(e) the exercise by a person of a general power of appointment of property in favour of any other person, and

(f) any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of the person's own property and to increase the value of the property of any other person.

donor—see section 84.

elected member means:

(a) a member of Parliament, or

(b) a councillor (including the mayor) of the council of a local government area,

and includes a person who, during any period after ceasing to be a member of Parliament or a councillor, is entitled to remuneration as such a member or councillor.

election means a State election or a local government election.

electoral communication expenditure—see section 87.

electoral expenditure—see section 87.

endorsed, in relation to a party, means endorsed, selected or otherwise accredited to stand as a representative of the party.

entity—see section 84.

...

expenditure—see section 84.

...

general election means:

(a) in relation to State elections—an Assembly general election and a periodic Council election held or to be held concurrently, or

(b) in relation to local government elections—a local government election other than a by-election.

gift—see section 84.

group means:

(a) in relation to State elections—a group of candidates, or part of a group of candidates, for a periodic Council election, or

(b) in relation to local government elections—a group of candidates, or part of a group of candidates, for a local government election.

interest in property means any estate, interest, right or power whatever, whether at law or in equity, in, under or over any property.

local government election means an election under the *Local Government Act 1993* for the office of councillor or mayor under that Act (other than an election of mayor by councillors).

...

Parliament means the Parliament of New South Wales.

party means a body or organisation, incorporated or unincorporated, having as one of its objects or activities the promotion of the election to Parliament or a local council of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part.

...

payment includes a loan, advance or deposit.

...

political donation—see section 85.

...

property includes money.

...

registered party means a party registered under Part 4A of the Parliamentary Electorates and Elections Act 1912, being a party which stated in its application for registration that it wished to be registered for the purposes of this Act.

...

State election means an Assembly general election, a periodic Council election or a by-election for the Assembly.

third-party campaigner means an entity or other person (not being a registered party, elected member, group or candidate) who incurs electoral communication expenditure during a capped expenditure period (as defined in Part 6) that exceeds $2,000 in total.

Part 6 Political donations and electoral expenditure

Division 1 Preliminary

83 Application

This Part applies in relation to:

(a) State elections and elected members of Parliament, and

(b) local government elections and elected members of councils (other than Divisions 2A and 2B).

Note. Political donations and electoral expenditure are required to be disclosed in connection with both State and local government elections and members but the cap on political donations, the cap on electoral communication expenditure and public funding of election campaigns only apply to State elections and members.

84 Definitions—general

(1) In this Act: ...

applicable cap on political donations—see Division 2A.

...

disposition of property—see section 4.

Note. A disposition of property includes any transaction that diminishes the value of a person's own property and increases the value of the property of another person. Property includes money.

donor means a person who makes a gift.

entity means:

(a) an incorporated or unincorporated body, or

(b) the trustee of a trust.

expenditure includes any disposition of property.

financial year means a financial year ending 30 June.

gift means any disposition of property made by a person to another person, otherwise than by will, being a disposition made without consideration in money or money's worth or with inadequate consideration, and includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration.

...

(2) An individual who, or a group of individuals which, accepts a gift for use solely or substantially for a purpose related to the proposed candidacy of the individual or individuals at a future election is, for the purposes of this Part, taken to be a candidate or group when accepting the gift.

Note. Section 96A (2) makes it unlawful for any such political donations to be accepted unless the individual or group is registered as a candidate or group under this Act.

(2A) An individual who, or a group of individuals which, makes a payment for electoral expenditure for the election of the individual or individuals at a future election is, for the purposes of this Part, taken to be a candidate or group when making the payment. The guidelines of the Authority may exclude minor payments from the operation of this subsection.

Note. Section 96A (5A) makes it unlawful for any such electoral expenditure to be incurred unless the individual or group is registered as a candidate or group under this Act.

(3) For the purposes of this Part:

(a) a person who is a candidate in an election, or

(b) a group of candidates in an election,

is taken to remain a candidate or group for 30 days after the polling day for the election.

Note. A disclosure is still required to be made by candidates and groups after they cease to be candidates or groups following the election if they were a candidate or group during any part of the relevant disclosure period for the disclosure—see section 88 (4).

(3A) Subsection (3) does not apply to a candidate at a time when the candidate is an elected member.

(4) For the purposes of this Act:

(a) 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

(b) the value of property disposed of or the value of a gift may, if the Authority so requires, be determined by valuers appointed or approved by the Authority in accordance with the regulations.

Note. The regulations may make provision for requiring agents to obtain valuations from a valuer approved by the Authority of political donations that are not gifts of money (or enabling the Authority to obtain any such valuations—see section 117 (1) (a1)).

(5) A reference in this Part to the name and address of a person making a donation or loan is:

(a) in the case of a donation or loan made by an unincorporated association—a reference to the name of the association and the names and addresses of the members of the executive committee (however described) of the association, and

(b) in the case of a donation or loan purportedly made out of a trust fund or out of the funds of a foundation—a reference to the names and addresses of the trustees of the fund or of the funds of the foundation and the title or other description of the trust fund or the name of the foundation.

(6) For the purposes of this Part, corporations that are related to each other (as determined in accordance with the *Corporations Act 2001* of the Commonwealth) are taken to be a single corporation.

(7) For the purposes of this Part, an amount of electoral expenditure by a candidate for election to the Assembly includes, if the candidate is the endorsed candidate of a registered party, any amount of electoral expenditure that is:

(a) incurred by that party for the benefit of the candidate or for the benefit of the candidate and other candidates endorsed by the party at the election (whether or not as an agent for the candidate), and

(b) invoiced by that party to the candidate for payment (whether or not the candidate has a legal liability to pay to the party the amount invoiced).

85 Meaning of "political donation"

(1) For the purposes of this Act, a ***political donation*** is:

(a) a gift made to or for the benefit of a party, or

(b) a gift made to or for the benefit of an elected member, or

(c) a gift made to or for the benefit of a candidate or a group of candidates, or

(d) a gift made to or for the benefit of an entity or other person (not being a party, elected member, group or candidate), the whole or part of which was used or is intended to be used by the entity or person:

(i) to enable the entity or person to make, directly or indirectly, a political donation or to incur electoral expenditure, or

(ii) to reimburse the entity or person for making, directly or indirectly, a political donation or incurring electoral expenditure.

(2) An amount paid by a person as a contribution, entry fee or other payment to entitle that or any other person to participate in or otherwise obtain any benefit from a fund-raising venture or function (being an amount that forms part of the proceeds of the venture or function) is taken to be a gift for the purposes of this section.

(3) An annual or other subscription paid to a party by:

(a) a member of the party, or

(b) a person or entity (including an industrial organisation) for affiliation with the party,

is taken to be a gift to the party for the purposes of this section.

Note. Unless details of any such subscription are required to be disclosed because it is a reportable political donation of or above $1,000, the total amount of subscriptions and other details are required to be disclosed under section 92 (4).

(3A) The following dispositions of property are taken to be a gift for the purposes of this section:

(a) a disposition of property to a NSW branch of a party from the federal branch of the party,

(b) a disposition of property to a NSW branch of a party from another State or Territory branch of the party,

(c) a disposition of property from a party to another associated party (whether associated because of common membership, coalition arrangements or otherwise).

Note. Any such disposition will be a political donation that is required to be disclosed and subject to the cap on political donations under this Part, but will not be subject to the cap to the extent that it is paid into (or held as the assets of) an account of a party that is used only for the purposes of expenditure incurred for federal election campaigns or local government election campaigns—see section 95B (2).

(3B) Uncharged interest on a loan to an entity or other person is taken to be a gift to the person for the purposes of this section. Uncharged interest is the additional amount that would have been payable by the person if:

(a) the loan had been made on terms requiring the payment of interest at the generally prevailing interest rate for a loan of that kind, and

(b) any interest payable had not been waived, and

(c) any interest payments were not capitalised.

(4) The following are not political donations:

(a) a gift to an individual that was made in a private capacity to the individual for his or her personal use and that the individual 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,

(b) a payment under Part 5 (Public funding of election campaigns) or Part 6A (Political Education Fund).

Note. Even though an election funding payment to a group or candidate is not a donation required to be disclosed, the amount is required to be paid into the separate campaign account that is established for donations to and electoral expenditure by the group or candidate—see section 77 (2A).

(5) However, if any part of a gift referred to in subsection (4) (a) is subsequently used to incur electoral expenditure, that part of the gift becomes a political donation.

...

87 Meaning of "electoral expenditure" and "electoral communication expenditure"

(1) For the purposes of this Act, ***electoral expenditure*** is expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election.

(2) For the purposes of this Act, ***electoral communication expenditure*** is electoral expenditure of any of the following kinds:

(a) expenditure on advertisements in radio, television, the Internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material,

(b) expenditure on the production and distribution of election material,

(c) expenditure on the Internet, telecommunications, stationery and postage,

(d) expenditure incurred in employing staff engaged in election campaigns,

(e) expenditure incurred for office accommodation for any such staff and candidates (other than for the campaign headquarters of a party or for the electorate office of an elected member),

(f) such other expenditure as may be prescribed by the regulations as electoral communication expenditure,

but is not electoral expenditure of the following kinds:

(g) expenditure on travel and travel accommodation,

(h) expenditure on research associated with election campaigns,

(i) expenditure incurred in raising funds for an election or in auditing campaign accounts,

(j) such other expenditure as may be prescribed by the regulations as not being electoral communication expenditure.

(3) Electoral expenditure (and electoral communication expenditure) does not include:

(a) expenditure incurred substantially in respect of an election of members to a Parliament other than the NSW Parliament, or

(b) expenditure on factual advertising of:

(i) meetings to be held for the purpose of selecting persons for nomination as candidates for election, or

(ii) meetings for organisational purposes of parties, branches of parties or conferences, committees or other bodies of parties or branches of parties, or

(iii) any other matter involving predominantly the administration of parties or conferences, committees or other bodies of parties or branches of parties.

(4) Electoral expenditure (and electoral communication expenditure) does not include expenditure incurred by an entity or other person (not being a registered party, elected member, group or candidate) if the expenditure is not incurred for the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election.

Note. Division 2B caps electoral communication expenditure during a State election campaign (and Part 5 limits public funding for such expenditure at State election campaigns to part of that capped amount). Division 2 (section 93) requires disclosure of the above electoral expenditure incurred at any time for State and local government elections. Section 96N also requires the annual disclosure under this Part by a party of donations and electoral expenditure to be accompanied by an audited annual financial statement of the party.

...

Division 2A Caps on political donations for State elections

95AA Application to State elections only

(1) This Division does not apply to donations in relation to local government elections and elected members of councils.

(2) Accordingly, a reference in this Division:

(a) to an election is a reference that relates to a State election, and

(b) to an elected member or to a candidate or other person is a reference that relates to a member of Parliament or to a candidate or other person in connection with a State election.

95A Applicable cap on political donations

(1) **General cap**

The applicable cap on political donations is as follows:

(a) $5,000 for political donations to or for the benefit of a registered party,

(b) $2,000 for political donations to or for the benefit of a party that is not a registered party,

(c) $2,000 for political donations to or for the benefit of an elected member,

(d) $5,000 for political donations to or for the benefit of a group,

(e) $2,000 for political donations to or for the benefit of a candidate,

(f) $2,000 for political donations to or for the benefit of a third-party campaigner.

(2) **Aggregation of donations during financial year**

A political donation of or less than an amount specified in subsection (1) made by an entity or other person is to be treated as a donation that exceeds the applicable cap on political donations if that and other separate political donations made by that entity or other person to the same party, elected member, group, candidate or third-party campaigner within the same financial year would, if aggregated, exceed the applicable cap on political donations referred to in subsection (1).

(3) **Aggregation of donations to elected members, groups or candidates of same party**

A political donation of or less than an amount specified in subsection (1) made by an entity or other person to an elected member, group or candidate is to be treated as a donation that exceeds the applicable cap on political donations if that and other separate political donations made by that entity or other person to elected members, groups or candidates of the same party within the same financial year would, if aggregated, exceed the applicable cap on political donations referred to in subsection (1).

(4) **Non-aggregation of contributions to candidate's own campaign**

For the avoidance of doubt, a candidate's contribution to finance his or her own election campaign is not a political donation and is not included in the applicable cap on political donations to the candidate.

Note. Political donations in relation to separately registered parties that are in coalition or otherwise associated are not aggregated and, accordingly, the applicable cap applies separately in relation to each such registered party.

(5) **Indexation of capped amounts**

Each of the amounts referred to in subsection (1) is an adjustable amount that is to be adjusted for inflation as provided by Schedule 1.

(6) **Meaning of candidates etc of same party**

For the purposes of this section, elected members, groups and candidates are of the same party if the same party endorsed the elected members, members of the group or candidates at the last election (including any subsequent by-election) or are to be endorsed by the same party at the next election. If any such person ceases to be a member of that party after being elected or endorsed as a candidate, the person ceases to be of the same party for the purposes of this section.

95B Prohibition on political donations that exceed applicable cap

(1) **General prohibition**

It is unlawful (subject to this section) 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 on political donations.

(2) **Exception—federal or local government campaign donations**

It is not unlawful for a person to accept a political donation that exceeds the applicable cap if the donation (or that part of the donation that exceeds the applicable 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.

(3) A political donation of property (not being money) that is held as an asset of an account kept for federal or local government election campaigns ceases to be excluded by subsection (2) from the prohibition under this section if the proceeds of the disposal of the property are paid into any other account.

(4) **Exception for third-party campaigner**

It is not unlawful for a person to accept a political donation to a third-party campaigner that exceeds the applicable cap if the donation (or that part of the donation that exceeds the applicable cap) is not to be paid into (or held as an asset of) the campaign account of the third-party campaigner under section 96AA.

(5) **Defence—aggregation**

If a political donation to a person exceeds the applicable cap because of the aggregation of political donations made to other persons, the acceptance of the donation is not unlawful if the person did not know and could not reasonably have known of the political donations made to the other persons.

(6) **Donors required to disclose related corporation donors**

It is unlawful for an individual to make a political donation on behalf of a corporation that is related to another corporation (referred to in section 84 (6)) that has made a political donation to the same party, elected member, group, candidate or third-party campaigner in the same financial year unless the individual complies with the requirements of the regulations relating to the disclosure to the person accepting the donation of particulars of the other corporation and its political donations.

(7) **Transitional—donations before 1 January 2011**

In calculating whether a political donation made after 1 January 2011 exceeds the applicable donation cap, a political donation made at any time after 30 June 2010 is to be taken into account as a donation made during the 2010–2011 financial year.

95C Prohibition on donations to more than 3 third-party campaigners

(1) It is unlawful for a person to make or accept political donations to more than 3 third-party campaigners in the same financial year.

(2) This section applies only to a political donation to a third-party campaigner that is to be paid into (or held as an asset of) the campaign account of the third-party campaigner under section 96AA.

(3) A political donation to a third-party campaigner in contravention of this section is not unlawful if the person making or accepting the donation did not know and could not reasonably have known of the political donations to which this section applies made to the other third-party campaigners.

95D Exemption from donation cap for party subscriptions and party levies

(1) A party subscription paid to a party is to be disregarded for the purposes of this Division, except so much of the amount of the subscription as exceeds the relevant maximum subscription under subsection (3).

(2) A ***party subscription*** is:

(a) an annual or other subscription paid to the party by a member of the party, or

(b) an annual or other subscription paid to the party by an entity or other person (including an industrial organisation) for affiliation with the party.

(3) For the purposes of this section:

(a) the maximum subscription in respect of membership of a party is $2,000, and

(b) the maximum subscription in respect of affiliation with a party is:

(i) if the amount of the subscription is not calculated by reference to the number of members of the affiliate—$2,000, or

(ii) if the amount of the subscription is calculated by reference to the number of members of the affiliate—$2,000 multiplied by the number of those members of the affiliate.

(4) A party levy paid to a party by an elected member endorsed by the party is to be disregarded for the purposes of this Division.

Note. Bequests are not donations for the purposes of this Part (see definition of ***gift*** in section 84) and accordingly are not subject to the political donation cap.

Division 4 Prohibition of certain political donations etc

[...]

96E Prohibition on certain indirect campaign contributions

(1) It is unlawful for a person to make any of the following indirect campaign contributions to a party, elected member, group or candidate:

(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,

(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),

(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,

(d) any other goods or services of a kind prohibited by the regulations.

Electoral expenditure for advertising is taken to be incurred by a party, elected member, group or candidate if the advertising is authorised by the party, elected member, group or candidate.

(2) It is unlawful for a person to accept any such indirect campaign contribution.

(3) However, an ***indirect campaign contribution*** prohibited by this section does not include:

(a) the provision of volunteer labour or the incidental or ancillary use of vehicles or equipment of volunteers or other things authorised by the guidelines of the Authority, or

(b) anything provided or done by a party for the candidates endorsed by the party in accordance with arrangements made by the party agent of the party, or

(c) anything provided or done whose value as a gift does not exceed $1,000 unless the total value of all such things provided or done by the same person over the same financial year (ending 30 June) exceeds $1,000, or

(d) a payment under Part 5 or 6A, or

(e) any other thing of a kind permitted by the regulations.

[...]

Division 4A Prohibition of donations from property developers or tobacco, liquor or gambling industries

96GAA Meaning of "prohibited donor"

For the purposes of this Division, a ***prohibited donor*** is:

(a) a property developer, or

(b) a tobacco industry business entity, or

(c) a liquor or gambling industry business entity,

and includes any industry representative organisation if the majority of its members are such prohibited donors.

96GAB (Repealed)

96GA Political donations by prohibited donors unlawful

(1) It is unlawful for a prohibited donor to make a political donation.

(2) It is unlawful for a person to make a political donation on behalf of a prohibited donor.

(3) It is 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.

(4) It is unlawful for a prohibited donor to solicit another person to make a political donation.

(5) It is unlawful for a person to solicit another person on behalf of a prohibited donor to make a political donation.

Note. Section 96I makes it an offence for a person to do any act that is unlawful under this Division if the person is, at the time of the act, aware of the facts that result in the act being unlawful. Section 96J also provides for the recovery by the Authority of unlawful political donations.

96GB Meaning of "property developer", "tobacco industry business entity" and "liquor or gambling industry business entity"

(1) Each of the following persons is a ***property developer*** for the purposes of this Division:

(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,

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

(2) Any activity engaged in by a corporation for the dominant purpose of providing commercial premises at which the corporation or a related body corporate of the corporation will carry on business is to be disregarded for the purpose of determining whether the corporation is a property developer unless that business involves the sale or leasing of a substantial part of the premises.

(2A) Each of the following persons is a ***tobacco industry business entity***:

(a) a corporation engaged in a business undertaking that is mainly concerned with the manufacture or sale of tobacco products,

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

(2B) Each of the following persons is a ***liquor or gambling industry business entity***:

(a) a corporation engaged in a business undertaking that is mainly concerned with either or a combination of the following, but only if it is for the ultimate purpose of making a profit:

(i) the manufacture or sale of liquor products,

(ii) wagering, betting or other gambling (including the manufacture of machines used primarily for that purpose), or

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

(3) In this section:

close associate of a corporation means each of the following:

(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,

(c) a person whose voting power in the corporation or a related body corporate of the corporation is greater than 20% or the spouse of such a person,

(d) if the corporation or a related body corporate of the corporation 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).

officer has the same meaning as in the *Corporations Act 2001* of the Commonwealth.

related body corporate has the same meaning as in the *Corporations Act 2001* of the Commonwealth.

relevant planning application has the same meaning as in section 147 (Disclosure of political donations and gifts) of the *Environmental Planning and Assessment Act 1979*.

spouse of a person includes a de facto partner of that person.

Note. "De facto partner" is defined in section 21C of the *Interpretation Act 1987*.

stapled entity means an entity the interests in which are traded along with the interests in another entity as stapled securities and (in the case of a stapled entity that is a trust) includes any trustee, manager or responsible entity in relation to the trust.

voting power has the same meaning as in the *Corporations Act 2001* of the Commonwealth.

96GC Loans included as political donations

(1) A loan that, if it had been a gift, would be a political donation is to be regarded as a political donation for the purposes of this Division unless the loan is from a financial institution.

(2) In this section:

financial institution means an entity whose principal business is the provision of financial services or financial products, and includes a bank, credit union, building society or other entity prescribed by the regulations.

loan means an advance of money, the provision of credit or any other transaction that in substance effects a loan of money.

96GD Exception for membership contributions

An annual or other subscription paid to a party by an individual as a member of the party or for the individual's affiliation with the party is not a political donation for the purposes of this Division unless it is a reportable political donation.

Note. A political donation of $1,000 or more is a reportable political donation—see section 86.

96GE Determination by Authority that person not a prohibited donor

(1) A person (***the applicant***) may apply to the Authority for a determination by the Authority that the applicant or another person is not a prohibited donor for the purposes of this Division.

(2) The Authority is authorised to make such a determination if the Authority is satisfied that it is more likely than not that the person is not a prohibited donor. The Authority is to make its determination solely on the basis of information provided by the applicant.

(3) The Authority's determination remains in force for 12 months after it is made but can be revoked by the Authority at any time by notice in writing to the applicant.

(4) The Authority's 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 while the determination is in force (even if the determination is subsequently found to be incorrect).

(5) The Authority's determination is not presumed to be correct in favour of any person who makes or accepts a political donation knowing that information provided to the Authority in connection with the making of the determination was false or misleading in a material particular.

(6) The Authority is to maintain a public register of the determinations made under this section and is to publish the register on a website maintained by the Authority.

(7) A person who provides information to the Authority in connection with an application for a determination by the Authority under this section knowing that the information is false or misleading in a material particular is guilty of an offence.

Maximum penalty: 200 penalty units or imprisonment for 12 months, or both.

(8) The Authority may establish and publicise policies as to how the Authority will deal with applications for determinations under this section.

***Election Funding, Expenditure and Disclosures Act* 1981 (NSW), s 4A (as at 9 February 2015)**

4A Objects of Act

The objects of this Act are as follows:

(a) to establish a fair and transparent election funding, expenditure and disclosure scheme,

(b) to facilitate public awareness of political donations,

(c) to help prevent corruption and undue influence in the government of the State,

(d) to provide for the effective administration of public funding of elections, recognising the importance of the appropriate use of public revenue for that purpose,

(e) to promote compliance by parties, elected members, candidates, groups, agents, third-party campaigners and donors with the requirements of the election funding, expenditure and disclosure scheme.

***Environmental Planning and Assessment Act* 1979 (NSW), s 147 (as at 28 July 2014)**

147 Disclosure of political donations and gifts

(1) The object of this section is to require the disclosure of relevant political donations or gifts when planning applications are made to minimise any perception of undue influence by:

(a) requiring public disclosure of the political donations or gifts at the time planning applications (or public submissions relating to them) are made, and

(b) providing the opportunity for appropriate decisions to be made about the persons who will determine or advise on the determination of the planning applications.

Political donations or gifts are not relevant to the determination of any such planning application, and the making of political donations or gifts does not provide grounds for challenging the determination of any such planning application.

Note. This Act makes provision for planning applications to be referred to various bodies for advice or determination. Section 124A makes special provision where development consent is tainted by corruption. The *Local Government Act 1993* makes provision with respect to voting by local councillors with a conflict of interest in any matter before the council.

(2) In this section:

gift means a gift within the meaning of Part 6 of the *Election Funding and Disclosures Act 1981*.

Note. A gift includes a gift of money or the provision of any other valuable thing or service for no consideration or inadequate consideration.

local councillor means a councillor (including the mayor) of the council of a local government area.

relevant planning application means:

(a) a formal request to the Minister, a council or the Director-General to initiate the making of an environmental planning instrument or development control plan in relation to development on a particular site, or

(b) a formal request to the Minister or the Director-General for development on a particular site to be made State significant development or State significant infrastructure or declared a project to which Part 3A applies, or

(b1) an application for approval of State significant infrastructure (or for the modification of the approval for any such infrastructure), or

(c) an application for approval of a concept plan or project under Part 3A (or for the modification of a concept plan or of the approval for a project), or

(d) an application for development consent under Part 4 (or for the modification of a development consent), or

(e) any other application or request under or for the purposes of this Act that is prescribed by the regulations as a relevant planning application,

but does not include:

(f) an application for (or for the modification of) a complying development certificate, or

(g) an application or request made by a public authority on its own behalf or made on behalf of a public authority, or

(h) any other application or request that is excluded from this definition by the regulations.

relevant public submission means a written submission made by a person objecting to or supporting a relevant planning application or any development that would be authorised by the granting of the application.

reportable political donation means a reportable political donation within the meaning of Part 6 of the *Election Funding and Disclosures Act 1981* that is required to be disclosed under that Part.

Note. Reportable political donations include those of or above $1,000.

(3) A person:

(a) who makes a relevant planning application to the Minister or the Director-General is required to disclose all reportable political donations (if any) made within the relevant period to anyone by any person with a financial interest in the application, or

(b) who makes a relevant public submission to the Minister or the Director-General in relation to the application is required to disclose all reportable political donations (if any) made within the relevant period to anyone by the person making the submission or any associate of that person.

The relevant period is the period commencing 2 years before the application or submission is made and ending when the application is determined.

(4) A person who makes a relevant planning application to a council is required to disclose the following reportable political donations and gifts (if any) made by any person with a financial interest in the application within the period commencing 2 years before the application is made and ending when the application is determined:

(a) all reportable political donations made to any local councillor of that council,

(b) all gifts made to any local councillor or employee of that council.

A reference in this subsection to a reportable political donation made to a local councillor includes a reference to a donation made at the time the person was a candidate for election to the council.

(5) A person who makes a relevant public submission to a council in relation to a relevant planning application made to the council is required to disclose the following reportable political donations and gifts (if any) made by the person making the submission or any associate of that person within the period commencing 2 years before the submission is made and ending when the application is determined:

(a) all reportable political donations made to any local councillor of that council,

(b) all gifts made to any local councillor or employee of that council.

A reference in this subsection to a reportable political donation made to a local councillor includes a reference to a donation made at the time the person was a candidate for election to the council.

(6) The disclosure of a reportable political donation or gift under this section is to be made:

(a) in, or in a statement accompanying, the relevant planning application or submission if the donation or gift is made before the application or submission is made, or

(b) if the donation or gift is made afterwards, in a statement to the person to whom the relevant planning application or submission was made within 7 days after the donation or gift is made.

(7) For the purposes of this section, a person has a financial interest in a relevant planning application if:

(a) the person is the applicant or the person on whose behalf the application is made, or

(b) the person is an owner of the site to which the application relates or has entered into an agreement to acquire the site or any part of it, or

(c) the person is associated with a person referred to in paragraph (a) or (b) and is likely to obtain a financial gain if development that would be authorised by the application is authorised or carried out (other than a gain merely as a shareholder in a company listed on a stock exchange), or

(d) the person has any other interest relating to the application, the site or the owner of the site that is prescribed by the regulations.

(8) For the purposes of this section, persons are associated with each other if:

(a) they carry on a business together in connection with the relevant planning application (in the case of the making of any such application) or they carry on a business together that may be affected by the granting of the application (in the case of a relevant planning submission), or

(b) they are related bodies corporate under the *Corporations Act 2001* of the Commonwealth, or

(c) one is a director of a corporation and the other is any such related corporation or a director of any such related corporation, or

(d) they have any other relationship prescribed by the regulations.

(9) The disclosure of reportable political donations under this section is to include disclosure of the following details of each such donation made during the relevant disclosure period:

(a) the name of the party or person for whose benefit the donation was made,

(b) the date on which the donation was made,

(c) the name of the donor,

(d) the residential address of the donor (in the case of an individual) or the address of the registered or other official office of the donor (in the case of an entity),

(e) the amount (or value) of the donation,

(f) in the case of a donor that is an entity and not an individual—the Australian Business Number of the entity.

Note. The above details are the details required to be disclosed of political donations under Part 6 of the Election Funding and Disclosures Act 1981.

(10) The disclosure of gifts under this section is to include disclosure of the following details of each such gift made during the relevant disclosure period:

(a) the name of the person to whom the gift was made,

(b) the date on which the gift was made,

(c) the name of the person who made the gift,

(d) the residential address of the person who made the gift (in the case of an individual) or the address of the registered or other official office of the person who made the gift (in the case of an entity),

(e) the amount (or value) of the gift.

(11) A person is guilty of an offence under section 125 in connection with the obligations under this section only if the person fails to make a disclosure of a political donation or gift in accordance with this section that the person knows, or ought reasonably to know, was made and is required to be disclosed under this section. The maximum penalty for any such offence

is the maximum penalty under Part 6 of the *Election Funding and Disclosures Act 1981* for making a false statement in a declaration of disclosures lodged under that Part.

(12) Disclosures of reportable political donations and gifts under this section are to be made available to the public on, or in accordance with arrangements notified on:

(a) a website maintained by the Department (in the case of planning applications or submissions made to the Minister or the Director-General), or

(b) a website maintained by the council (in the case of planning applications or submissions made to that council).

The disclosures are to be made so available within 14 days after the disclosures are made under this section.

(13) This section applies to relevant planning applications or submissions made after the commencement of this section and, in relation to any such application or submission, extends to political donations or gifts made before that commencement.