SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER: BS2246/20

Applicant: **THE AUSTRALIAN INSTITUTE FOR PROGRESS LTD (ACN 101 843 396)**

AND

Respondent: **ELECTORAL COMMISSION OF QUEENSLAND**

OUTLINE OF SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR QUEENSLAND (INTERVENING)

A. Basis of intervention

1. The Attorney-General for the State of Queensland intervenes in this proceeding under s 78A of the *Judiciary Act 1903* (Cth) and under s 50 of the *Human Rights Act 2019* (Qld).

2. If either basis for the Attorney-General's intervention is disputed, she relies on the submissions set out in paragraphs [40] to [47] of this outline.

B. Summary of argument

3. The Attorney-General makes the following submissions:

   (a) The application should be refused because it seeks relief in respect of a hypothetical question. Moreover, a declaration in the terms sought should not be made because it would be advisory in nature.

   (b) In any event, the construction adopted by the ECQ, and outlined in its submissions, is correct. Additionally, that construction:

      (i) conforms to the statutory command in s 48 of the *Human Rights Act 2019*; and

      (ii) is entirely consistent with *Spence v Queensland*[1] and provides no basis for doubting the validity of the law as against the implied freedom of political communication.

[1] (2019) 93 ALJR 643.

Document No: 10173610

C. **The dispute is hypothetical and the relief sought is advisory**

4. The Attorney-General adopts the submissions of the ECQ at [12] to [18], that the relief sought should be refused as hypothetical and advisory, and makes the following additional points:

   (a) While the discretionary power to grant declaratory relief is wide,[2] it is 'confined by the considerations which mark out the boundaries of judicial power'.[3] Those considerations include that an exercise of judicial power 'must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined'.[4] The process requires 'a concrete and established or agreed situation' so that the application of the law to the facts may 'quell a controversy'.[5]

   (b) Answering 'abstract or hypothetical questions', by the granting of declaratory relief, lies outside the boundaries of judicial power.[6] 'It is contrary to the judicial process and no part of judicial power to effect a determination of rights by applying the law to facts which are neither agreed nor determined by reference to the evidence in the case'.[7]

   (c) A dispute will be regarded as 'hypothetical' in the relevant sense if it is 'not attached to specific facts, and the question is only whether the plaintiff is *generally* entitled to act in a certain way'.[8]

5. In the present matter, the AIP disputes the ECQ's construction of the *Electoral Act*, but there is no dispute about the application of that Act to a particular set of facts. The dispute is not concerned with whether a particular donation which has been made, or is proposed to be made, infringed or would infringe the prohibition. Moreover, the declaration is not confined to the proposed conduct of applicant: it is framed as a declaration about undefined 'activities ... including in relation to political communication or concerning an election', engaged in by any 'third parties'.

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[2] *Taylor v O'Beirne* [2010] QCA 188, [28] (Chesterman JA, with whom Fraser and White JJA agreed).
[3] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey, and Gaudron JJ).
[4] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J), cited in *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 355 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *Chapman v State of Queensland* [2012] QCA 134, [38]-[41] (Muir JA, Fraser JA and Martin J agreeing).
[5] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 355 [45] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
[6] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey, and Gaudron JJ).
[7] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
[8] Zamir and Woolf, *The Declaratory Judgment* (2nd ed, 1993) 132, adopted in *Bass v Permanent Trustree Co Ltd* (1999) 198 CLR 334, 356 [48] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (emphasis in original). Where the question is whether the plaintiff is entitled to engage in particular conduct, courts will still decline to grant declaratory relief unless the case is 'exceptional': *R v Attorney-General; Ex parte Rushbridger* [2004] 1 AC 357, 366-368.

6. The letter dated 20 February 2020, from the ECQ stated, that 'gifts from a property developer … to a third party to incur electoral expenditure are prohibited. As such, an entity would likely be committing an offence by accepting an unlawful donation and incurring electoral expenditure…'[9] The ECQ sought more information from the AIP about the donations it had received so that the ECQ could consider what action, 'if any', was appropriate.

7. The letter is relevantly indistinguishable from the letters relied upon by the applicant in *Taylor v O'Beirne*.[10] In that case, Ms O'Beirne, the District Manager of Queensland Corrective Services, and others had sent a number of letters to Mr Taylor alleging that he had contravened his supervision order. Mr Taylor sought a declaration that Ms O'Beirne and the other respondents had no power to make the decisions set out in the letters.

8. Chesterman JA (with whom Fraser and White JJA agreed) said the letters 'did not impose any obligation upon the applicant, nor subject him to any restriction, nor deprive him of any right. They did not create, or evidence, any legal controversy between the applicant and Ms O'Beirne'.[11] The same observations may be made in respect of the ECQ's letter.

9. The dispute is hypothetical and the relief sought advisory. The application should be refused on this basis.

D. Construction of the relevant provisions of the *Electoral Act*

10. The Attorney-General generally adopts the ECQ's construction of ss 274 and 275 of *Electoral Act*, and makes the following additional submissions:

    (a) The AIP's interpretation of s 274(1)(b) involves reading the words 'to incur electoral expenditure' in sub-paragraph (i) as: 'to incur electoral expenditure <u>on behalf of any of the parties mentioned in (a)</u>'. The effect of that interpretation would be to make the words 'or to incur electoral expenditure' in sub-paragraph (i) otiose. That is because 'a gift made to or for the benefit of another entity – to enable the entity (directly or indirectly) to… incur electoral expenditure on behalf of any of the parties mentioned in (a)' would add nothing to the first part of sub-paragraph (i): 'a gift made to or for the benefit of another entity – to enable the entity (directly or indirectly) to make a gift mentioned in paragraph (a)…'

    A 'gift mentioned in paragraph (a)' is:

    > 'a gift made to or for the benefit of—
    >
    > (i) a political party; or

[9] Exhibit GY3, at p 22-23 of the affidavit of Graham Young filed 28 February 2020.
[10] [2010] QCA 188.
[11] *Taylor v O'Beirne* [2010] QCA 188, [29] (Chesterman JA, Fraser and White JJA agreeing). Unlike Ms Beirne, the ECQ did not express an opinion that the AIP had contravened a law. That makes the present proceeding an even clearer example of a hypothetical dispute.

(ii) an elected member; or

(iii) a candidate in an election'.

A gift used for incurring electoral expenditure 'on behalf of any of the parties mentioned in (a)' would be a gift made directly or indirectly for the benefit of the parties in mentioned in (a).

(b) Application of the *Human Rights Act* confirms the construction of the *Electoral Act* adopted by the ECQ.

(c) The ECQ's construction of the *Electoral Act* is consistent with *Spence* and provides no basis for doubting the validity of the law as against the implied freedom of political communication.

Relevance of the Human Rights Act

11. The first two subsections of s 48 of the *Human Rights Act 2019* provide:

> (1) All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.
>
> (2) If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.
>
> (underlining added)

12. Section 48 is relevant to the construction of s 275 (and related provisions) of the *Electoral Act*, because it must be accepted that s 275 'limits'[12] freedom of expression (s 21), and the right to participate in public life (s 23). Freedom of expression is limited because, on any reading, s 275 limits the funds available to people to 'impart information and ideas', including 'political discourse',[13] effectively.[14] The right to participate in public life is limited on any reading of s 275 because it reduces the funds available to individuals to 'participate in the conduct of public affairs' by 'exerting influence through public debate and dialogue' and by 'advertis[ing] political ideas'.[15]

13. Section 48(1) applies to the interpretation of statutory provisions regardless of whether it is raised by a party. Notwithstanding that the AIP has abandoned its reliance on the *Human*

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[12] See *PJB v Melbourne Health* (2011) 39 VR 373, 384 [36] (Bell J).

[13] Human Rights Committee, *General comment No 34*, UN Doc CCPR/C/GC/34, 12 September 2011, [11].

[14] See similarly *McCloy v New South Wales* (2015) 257 CLR 178,201 [24] (French CJ, Kiefel, Bell and Keane JJ), 290 [347] (Gordon J).

[15] Human Rights Committee, *General Comment No 25*, UN Doc CCPR/C/21/Rev.1/Add.7, 27 August 1996, 4 [8], 8 [25].

Rights Act, the Court must construe the *Electoral Act* in accordance with the 'statutory directive' in s 48.[16]

Approach to s 48 of the Human Rights Act

14. There are two concepts which are key to understanding the operation of s 48(1): 'consistent with [the statutory provision's] purpose' and 'compatible with human rights'.

15. The first concept, of consistency with the provision's purpose, means that the Court cannot 'remedy' an incompatibility where the legislature has expressed its intention clearly:[17] 'it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment.'[18]

16. The second concept – 'compatible with human rights' – directs attention to ss 8 and 13. Considering whether an interpretation is compatible with human rights involves determining whether the interpretation limits a human right, and if so, whether that limit is justified according to the proportionality test set out in s 13.

17. In light of those concepts, and taking into account Victorian and ACT case law,[19] the Attorney-General submits that in applying s 48, the **first question** is whether the meaning of the provision is ambiguous. Is there more than one interpretation available, under the ordinary principles of construction, and consistent with the provision's purpose? If the answer to that question is 'no', in light of the first concept identified above, s 48 will have no further work to do.[20]

18. However, where a statutory provision is capable of bearing more than one meaning, the **second question** is whether any of those interpretations are 'compatible with human rights'. There are three possible answers to that question:

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[16] *R v Momcilovic* (2010) 25 VR 436, 464 [102], 466 [107] (Maxwell P, Ashley and Neave JJA), overturned on appeal on another point.
[17] Cf *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 571-572 [32] (Lord Nicholls of Birkenhead). See *R v Fearnside* (2009) 165 ACTR 22, 41 [87] (Besanko J, Gray P and Penfold J agreeing); *Momcilovic v The Queen* (2011) 245 CLR 1, 50 [50]-[51] (French CJ), 92 [170] (Gummow J), 123 [280] (Hayne J), 210 [544]-[545], 217 [565]-[566] (Crennan and Kiefel JJ), 250 [684] (Bell J); *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 62 [190] (Tate JA); *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 382 [82] (Redlich, Osborn and Priest JJA).
[18] *Slaveski v Smith* (2012) 34 VR 206, 215 [24] (Warren CJ, Nettle and Redlich JJ), quoted with approval in *Carolan v The Queen* (2015) 48 VR 87, 103-104 [46] (Ashley, Redlich and Priest JJA).
[19] The interstate case law must be approached with an awareness of the differences in the legislative regimes. The equivalent legislation in neither Victoria nor the ACT addresses the link between the 'interpretative clause' (Queensland's s 48) and the limitations clause (Queensland's s 13). Queensland's *HRA* does this in s 8. Additionally, only the ACT has an equivalent of s 14A(1) of the *Acts Interpretation Act 1954* (Qld).
[20] *Slaveski v Smith* (2012) 34 VR 206, 215 [24] (Warren CJ, Nettle and Redlich JJA); *Noone v Operation Smile (Aust) Inc* (2012) 38 VR 569, 573 [16], [20] (Warren CJ and Cavanough AJA), 617 [166] (Nettle JA); *Carolan v The Queen* (2015) 48 VR 87, 103-4 [46] (Ashley, Redlich and Priest JJA); *Andrews v Thompson* (2018) 340 FLR 439, 447-9 [44]-[51] (Elkaim, Loukas-Karlsson JJ, Robinson AJ).

(a) Only one interpretation is compatible with human rights. In this case, s 48(1) dictates that that construction be adopted.

(b) Two or more interpretations are compatible with human rights. Here, s 48 is silent as to which construction is to be preferred. Accordingly, the Court should select the interpretation that best achieves the purpose of the Act, in accordance with s 14A of the *Acts Interpretation Act 1954*.[21]

(c) Two or more interpretations are available, but all are incompatible with human rights. In this case, s 48(2) commands the Court to select the interpretation that is most compatible (that is, the least incompatible) with human rights.[22]

Application of approach to s 48 to the Electoral Act

19. There is only one reading of s 274 and s 275 which is consistent with their purpose.[23] The purpose of legislation resides in its text and structure,[24] and here the text and structure is clear for the reasons advanced in the ECQ's submissions (at [30] and following) and at [10](a) above. The purpose, and the ordinary meaning of the provisions, is confirmed by the extrinsic materials referred to in the ECQ's submissions at [55].[25] Accordingly, the legislative command in s 48 of the *Human Rights Act* is satisfied without the need to consider whether that interpretation is compatible with human rights.

Alternative submission as to application of s 48 of the Human Rights Act

20. However, in the event that the Court is persuaded that the meaning of the relevant provisions *is* ambiguous, it is submitted that any available interpretative option is nonetheless compatible with human rights. For that reason, the ECQ's interpretation should be adopted in accordance with s 14A of the *Acts Interpretation Act*, as the interpretation which would 'best achieve' the purposes of the Act (see [18](b) above).

21. The Attorney-General accepts that the ECQ's interpretation of each of the provisions would involve a greater burden on those human rights than that advanced by the AIP, because it would restrict the funds available to a greater extent. It follows that, if the ECQ's interpretation is compatible with human rights, *a fortiori*, the AIP's interpretation will also be compatible with human rights. For that reason, these submissions will only address the compatibility of the ECQ's interpretation.

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[21] *Re Application for bail by Islam* (2010) 175 ACTR 30, 73 [216] (Penfold J).

[22] See *WBM v Chief Commissioner of Police* (2012) 43 VR 446, 473 [123] (Warren CJ, Hansen JA agreeing).

[23] See also respondent's outline of submissions, 8 [48], 12-3 [67].

[24] *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[25] See s 14B(1)(c) of the *Acts Interpretation Act 1954* (Qld).

22. Section 8 provides that an interpretation will be 'compatible' if it does not limit a human right, or does so in a way that is nonetheless justified in accordance with s 13.

23. Section 13(1) provides that: 'A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.'

24. Section 13(2) then sets out factors that are relevant to the overall test of justification set out in s 13(1). The factors in s 13(2) reflect the 'structured proportionality' test,[26] which can be summarised as follows (with the relevant paragraphs of s 13(2) added):[27]

> the test for justification is fourfold: (i) does the measure have an legitimate aim sufficient to justify the limitation of a fundamental right [s 13(2)(b)]; (ii) is the measure rationally connected to that aim [s 13(2)(c)]; (iii) could a less intrusive measure have been used [s 13(2)(d)]; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community? [s 13(2)(e)-(g)]

25. As to legitimate aim (s 13(2)(b)), on the ECQ's interpretation of the definitions of 'electoral expenditure' and 'political donation', those definitions have the purpose of reducing 'the risk of actual or perceived corruption related to developer donations' in State elections,[28] and improving transparency and accountability in State elections and State government.[29] These are proper purposes under s 13(2)(b).[30]

26. As to rational connection (s 13(2)(c)), the interpretation 'help[s] to achieve' the anti-corruption purpose, by preventing prohibited donors from influencing the outcome of a State election by indirect means, in circumstances where the State government thereby elected will have 'a significant role in Queensland's planning framework'.[31] The interpretation will also help to achieve the transparency purpose by ensuring that when prohibited donors spend money in

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[26] Explanatory note, Human Rights Bill 2018 (Qld) 16-18.

[27] *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820, 3834 [33] (Baroness Hale, Lord Kerr agreeing), citing *Huang v Secretary of State for the Home Department* [2007] 2 AC 167; *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621; *Bank Mellat v HM Treasury [No 2]* [2014] AC 700.

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

[29] Explanatory note, Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 (Qld) 1. The respondent also notes that prohibited donors are free to communicate transparently at 8 [46(c)] of its outline of submissions.

[30] *McCloy v New South Wales* (2015) 257 CLR 178, 209 [53] (French CJ, Kiefel, Bell and Keane JJ), 292 [355] (Gordon J); *Spence v Queensland* (2019) 93 ALJR 643, 670 [93] (Kiefel CJ, Bell, Gageler and Keane JJ). See also Human Rights Committee, *General comment No 34*, UN Doc CCPR/C/GC/34, 12 September 2011, [37] ('maintain[ing] the integrity of the electoral process' is a proper purpose for limiting free expression).

[31] Explanatory note, Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 (Qld) 3.

State elections, they do so directly and transparently (third party expenditure being unregulated in Queensland).

27. As to necessity (s 13(2)(d)), no other alternative interpretation would be 'as effective' in achieving the purposes, while impacting freedom of expression and the right to participate in public affairs to a lesser extent.[32] In particular, the AIP's interpretation does not present as a true alternative because it would not be as effective in achieving the anti-corruption and transparency purposes. In fact, as ECQ points out, the AIP's interpretation 'would substantially undermine' those purposes.[33] Accordingly, the ECQ's interpretation is 'necessary' to achieve its purposes.

28. As to fair balance (s 13(2)(e), (f) and (g)), it should be noted that the impact on the human rights is indirect and goes no further than necessary to achieve its purposes. Individuals remain at liberty to communicate and participate freely in public affairs; they simply cannot do so under certain circumstances using gifts from prohibited donors. They can still say the same thing using the same medium. Prohibited donors also remain free to communicate directly and to participate in public affairs in other ways. Further, the extent of the limitation on human rights does not include the direct impact on corporations (as corporations do not hold human rights) – it includes only the direct or indirect impact on human beings (s 11).

29. On the other side of the scales (s 13(2)(e)), there is little doubt that reducing corruption and increasing transparency are important purposes. As the High Court has said repeatedly, those purposes 'enhance' our democratic system.[34] As the UN Human Rights Committee has pointed out, 'transparency and accountability' are values that underlie freedom of expression,[35] and democracy is the value underlying the right to take part in public life.[36] Thus, the anti-corruption and transparency purposes are consistent with the values underlying the human rights at stake. Weighing the indirect impact on human rights against the importance of the anti-corruption and transparency purposes (which cohere with the underlying values of the rights), it is evident that the ECQ's interpretation strikes a fair balance.

30. It follows that the limits on human rights imposed by the definitions of 'electoral expenditure' and 'political donation' (on the ECQ's interpretation) are justified, and therefore compatible with human rights under ss 8 and 13. That necessarily means that the interpretation for which

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[32] *Tajjour v New South Wales* (2014) 254 CLR 508, 571 [114] (Crennan, Kiefel and Bell JJ).
[33] Respondent's submissions, 11 [57].
[34] *McCloy v New South Wales* (2015) 257 CLR 178, 196 [5], 221 [93] (French CJ, Kiefel, Bell and Keane JJ); *Spence v Queensland* (2019) 93 ALJR 643, 671 [93] (Kiefel CJ, Bell, Gageler and Keane JJ).
[35] Human Rights Committee, *General comment No 34*, UN Doc CCPR/C/GC/34, 12 September 2011, [3].
[36] Human Rights Committee, *General Comment No 25*, UN Doc CCPR/C/21/Rev.1/Add.7, 27 August 1996, 3 [1].

the applicant contends is also compatible (given that it imposes a lesser burden on human rights).

31. Where, as here, all of the available interpretations are compatible with human rights, s 48 of the *Human Rights Act* 'can provide no further guidance'.[37] That leaves the residual operation of s 14A of the *Acts Interpretation Act*, which directs the court to select the interpretation that 'best achieves' the purpose of the Act. It is submitted that the purpose of the *Electoral Act* includes securing and promoting the actual and perceived integrity of the Queensland Parliament and government.[38] Given that the ECQ's interpretation goes further in pursuit of that objective, the ECQ's interpretation must 'better achieve' that purpose.

32. It follows that s 48 of the *Human Rights Act* does not alter the interpretation of the relevant provisions of the *Electoral Act*. Either their meaning is clear, or the ambiguity is resolved by reference to s 14A of the *Acts Interpretation Act*, by either avenue in favour of the interpretation advanced by the ECQ.

The implied freedom of political communication and the decision in Spence v Queensland

33. In its written submissions dated 5 March 2020, the AIP submits (at [9]) that if the ECQ's construction is correct 'it would invite a reconsideration of the issues that were dealt with by the High Court of Australia in *Spence v The State of Queensland* ... and invite a different basis for the challenge to this aspect of the laws on the ground of breaching the implied freedom.' At [49], the AIP makes the following submission:

> It is the case that when *Spence* was argued in the High Court, including on the implied freedom ground, there was never any suggestion that the prohibited donor laws would prevent a prohibited donor from participating in the electoral process other than that the prohibited donor could not donate to a political party, elected member or candidate ... Plainly, if prohibited donors were prevented from participating in any way in the electoral process, it would have made the argument in relation to implied freedom entirely different.

34. These paragraphs of the AIP's written submissions appear to invoke the principle of statutory construction that '[i]f the choice is between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a court must always choose the latter course

[37] *WBM v Chief Commissioner of Police* (2012) 43 VR 446, 473 [123] (Warren CJ, Hansen JA agreeing).
[38] As with the equivalent New South Wales legislation at the time considered in *Unions NSW v New South Wales* (2013) 252 CLR 530, 545-6 [8] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also *Spence v Queensland* (2019) 93 ALJR 643, 718 [321] (Edelman J).

when it is reasonably open'.[39] Nonetheless, the AIP denies that it has raised a constitutional issue in this proceeding.

35. The AIP's submissions at [9]-[10] and [49]-[50] should be rejected for the following reasons.

36. First, on the ECQ's construction, the legislation does not have the effect of preventing prohibited donors from 'participating in any way in the electoral process'.[40] A prohibited donor remains 'free to engage in political discussion in other orthodox ways (it could run its own advertisements, for example').[41] That understanding of the provisions is consistent with the written submissions filed by the State in *Spence*, which included the following passage (at [24]):[42]

> [T]he provisions regulate funds, not speech, and leave prohibited donors at liberty communicate 'on matters of politics and government, including influencing politicians to a point of view'. In fact, prohibited donors remain at liberty to spend money directly in State elections to promote their political views (third party expenditure being unregulated in Queensland).

37. Secondly, the paragraphs of the judgment in *Spence* relied upon by the AIP do not support its argument. The footnotes to [19] to [21] of the reasons of Kiefel CJ, Bell, Gageler and Keane JJ indicate their Honours' summary of the provisions did not extend to s 274(1)(b). On the other hand, Gordon J did set out s 274(1)(b) (at [244]) and seems to have accepted that the prohibitions were intended to extend to gifts received by third parties (at [260]). Paragraphs [278] and [286] of the reasons of Edelman J summarise the 'essence' of s 275. Those paragraphs say nothing of relevance to the present issue.

38. Thirdly, where a statutory provision burdens the implied freedom of political communication, it will nonetheless be valid where it can be justified as a proportionate burden. In working out the question of justification, a majority of the High Court now applies the test of proportionality set out in *McCloy v New South Wales* and reworded slightly in *Brown v Tasmania*.[43] That test is

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[39] *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 644 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne, Callinan JJ). See also s 9 of the *Acts Interpretation Act 1954* (Qld).
[40] Nor does the legislation (for example) prevent churches from participating in political debate unless they can 'ensure' no property developer has contributed to the collection plate (cf Applicant's submisions at [7]). It is unlikely that such a contribution would be made 'to enable' the church 'to incur electoral expenditure'. Even if the gift did have that purpose, the consequence would be that the amount contributed to the collection plate became a debt due to the State (s 276(1)(a)). The political activities of the church would not be restrained.
[41] ECQ's outline of submissions, 8 [46(c)].
[42] Footnotes omitted and emphasis added. The submissions are published on the Internet and available to download at: https://www.hcourt.gov.au/cases/case_b35-2018.
[43] *McCloy v New South Wales* (2015) 257 CLR 178, 193-5 [2]-[3] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, 363-4 [104], 368-9 [123]-[127] (Kiefel CJ, Bell and Keane JJ), 413 [271], 416-7 [278] (Nettle J); *Comcare v Banerji* (2019) 93 ALJR 900, 913-4 [32]-[38] (Kiefel CJ, Bell, Keane and Nettle JJ), 941 [188] (Edelman J).

essentially the same test of justification adopted by s 13 of the *Human Rights Act*.[44] As paragraphs [25] to [30] above show, the ECQ's interpretation is justified.

39. For those reasons, there is no basis for the submission that, notwithstanding *Spence*, the AIP's construction should be preferred because the ECQ's construction would (or might) lead to the invalidity of the provisions.

E. **Submissions in support of the right to intervene**

Constitutional question

40. This proceeding raises the constitutional question of how the implied freedom of political communication affects the interpretation of the *Electoral Act*. Accordingly, the Attorney-General has a right to intervene pursuant to s 78A of the *Judiciary Act*.

41. The applicant contends that the current application does not give rise to a constitutional question and is 'an exercise in statutory construction only'.[45] Yet, as the applicant itself submits, '[o]bviously, the law in relation to the implied freedom does bear upon the proper approach to statutory construction'.[46]

42. The relevant principle of statutory construction is that '[i]f the choice is between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a court must always choose the latter course when it is reasonably open'.[47]

43. The applicant submits that 'if the ECQ construction is correct, it would ... invite a different basis for the challenge to this aspect of the laws on the ground of breaching the implied freedom of political communication'.[48] This statement appears intended to invoke the principle of construction outlined above; it squarely raises a constitutional question in this proceeding.

Human Rights Act 2019

44. This proceeding gives rise to a question about the interpretation of the *Electoral Act* in accordance with the *Human Rights Act*. Accordingly, the Attorney-General has a right to intervene under s 50 of that Act.

45. Section 48(1) commands that '[a]ll statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights'.

[44] See the linkage drawn to proportionality in human rights in *McCloy v New South Wales* (2015) 257 CLR 178, 217 [79] n 173 (French CJ, Kiefel, Bell and Keane JJ).
[45] Applicant's outline of submissions, 3 [10]. The applicant asserts that it 'reserve its rights ... in the event its construction was not preferred, to challenge on implied freedom grounds' (at 3 [10]).
[46] Applicant's outline of submissions, 3 [10].
[47] *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 644 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne, Callinan JJ). See also s 9 of the *Acts Interpretation Act 1954* (Qld).
[48] Applicant's outline of submissions, 3 [9]. See also 20 [49]-[50].

46. Sections 21 and 23 set out the human rights of freedom of expression and the right to take part in public life. Notwithstanding it has abandoned reliance on the *Human Rights Act*, the substance of the applicant's submissions are to the effect that one or both of these rights are limited by the *Electoral Act*.[49]

47. Irrespective of whether the applicant expressly refers to the *Human Rights Act*, the Court must decide what is the correct interpretation of the *Electoral Act* in accordance with the statutory command in s 48(1). For that reason, the Attorney-General's right to intervene under s 50(1) is enlivened.

GA Thompson QC, Solicitor-General for Queensland
F Nagorcka

Counsel for the Attorney-General

[49] Applicant's outline of submissions, 17 [44].