SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS2246/20

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

AND

Respondent: **THE ELECTORAL COMMISSION OF QUEENSLAND**

OUTLINE OF SUBMISSIONS ON BEHALF OF THE RESPONDENT

A. INTRODUCTION AND SYNOPSIS

1. There are two principal issues raised by this originating application, brought by the Australian Institute for Progress Limited (**AIP**), seeking three declarations about the proper construction of s 274 of the *Electoral Act 1992* (Qld.) (**EA**):

   (a.) a preliminary issue (**Issue 1**), about whether the declarations sought raise hypothetical questions, divorced from any facts, so that the questions are not suitable for judicial resolution by way of declaration or otherwise; and

   (b.) assuming that issue is resolved in AIP's favour, the substantial issue (**Issue 2**), about whether on the correct interpretation of s 274(1)(b)(i) and (ii) of the EA, and by the ordinary meaning of the word 'campaign' in the definition of 'electoral expenditure' in s 197 of the EA, a prohibited donor can circumvent the prohibition on making political donations by making them through another entity (i.e. an entity other than a political party, an elected member, or a candidate in an election).

2. The declarations are sought following the exchange of correspondence (but no more) between the AIP and the respondent, the Electoral Commission of Queensland (**ECQ**), in which the ECQ expressed the view that, given the AIP's own description of the activities it performs or may perform, it would be unlawful for it to receive donations from prohibited donors.[1]

3. The AIP has argued for a different interpretation of the EA in its submissions which are undated but were served on ECQ on 5 March 2020 (**applicant's submissions**). These submissions address the applicant's submissions.

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[1] Exhibit GY3, at pp 22 – 23 of the affidavit of Graham Young filed 28 February 2020.

4. It would be inappropriate for the Court to exercise its jurisdiction to grant the declarations sought for two reasons.

5. First, the declarations sought take a vague form and are so imprecise that they would not quell any controversy between the parties. In that form they raise only hypothetical questions which it is not the function of the Court to answer.

6. Second, and in any event, the proper interpretation of the EA is against the propositions which AIP asks the Court to declare. On the proper interpretation of s 274, the AIP is 'another entity' for the purposes of s 274(1)(b). By s 275, it would be unlawful for a 'prohibited donor' to make a gift to or for the benefit of the AIP to enable it to incur 'electoral expenditure' or to reimburse it for such expenditure. That is because such a gift would be a 'political donation' by virtue of s 274.

7. There is no issue raised in the proceeding about whether there has in fact been a contravention of s 275 because there is no evidence about the precise activities of the AIP so that it is impossible to tell whether it has incurred electoral expenditure.

8. The issues which are raised in this proceeding should be determined against the AIP, and the application dismissed, with costs.

B. BACKGROUND AND RELEVANT FACTS

9. The background to the proceeding is sufficiently set out in the applicant's submissions.

10. The relevant facts contained in the AIP's material are limited.[2] It contains some general descriptions about the nature of the activities undertaken by the AIP. There is also a statement about activities which the AIP *intended* it *might* undertake.[3]

11. The absence of any specific details about the activities which the AIP asks the Court to sanction is an insuperable hurdle to its application for declaratory relief.

C. ISSUE 1: DECLARATIONS IN THE FORM SOUGHT SHOULD NOT BE MADE

(1) The declarations are hypothetical

12. The circumstances in which a Court with jurisdiction to do so might grant declaratory relief are not infinite.[4] The High Court affirmed in *Bass v Permanent Trustee Co Limited* (1999) 198 CLR

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2 Paragraphs 7 to 15 of the affidavit of Graham Young filed 28 February 2020.
3 Paragraph 23 of the affidavit of Graham Young filed 28 February 2020.
4 *University of NSW v Moorhouse* (1975) 133 CLR 1, at 10.

334 (at 356) that 'where the dispute is divorced from the facts, it is considered hypothetical and not suitable for judicial resolution by way of declaration or otherwise.'[5]

13. Contrary to the applicant's submissions, the declarations sought in this proceeding are entirely hypothetical in substance.

14. The declarations sought:

    (a.) have as their subject a 'third party' but without any identification of that party;

    (b.) concern 'activities' of the unspecified third party, where those activities are also not precisely identified beyond the fact that they include something – the Court is not told what – 'in relation to political communications or concerning an election for the Legislative Assembly';

    (c.) are unconnected with the limited evidence of the conduct of AIP[6] because they do not specify the particular conduct which would be declared lawful (in effect); and

    (d.) therefore, raise a matter of statutory interpretation in the abstract.

15. AIP relies on the letter of 20 February 2020 from the ECQ as giving rise to a justiciable controversy, but on a proper reading that letter does not assert that the AIP has contravened the EA nor assert any facts at all. The letter in facts asks AIP to provide information so that the ECQ 'can consider what action is appropriate, *if any*'. There are no facts 'found or agreed' upon which the Court can proceed.[7]

16. AIP really seeks an advisory opinion from the Court about how the EA is to be interpreted, without factual context. That is not the function of a suit for declarations.[8]

17. The following passage from the judgment of Brennan J in *Re The Trade Practices Act and Re an Application by Tooth & Co Ltd* (1978) 19 ALR 191, at 207-8, is apt to the present case:

> "Where the right, obligation or liability which an applicant seeks to establish depends upon facts which have not yet occurred, and a hypothetical element is necessarily present in the question to be determined, for, the facts upon which the question depends may never occur. But mere futurity does not establish that the question is hypothetical in the relevant sense.
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> The availability of declaratory relief in cases where the relevant facts have not yet occurred provides an inhibition against the commission of illegal acts in some instances, and an assurance of freedom from prosecution in others... But the

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5 See also *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, at 581-582.
6 Paragraph 23 of the affidavit of Graham Young filed 28 February 2020.
7 *Bass v Permanent Trustee Co Limited* (1999) 198 CLR 334 (at [49, [56]).
8 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, at 265-6.

> remedy is none the less limited to cases which are not "hypothetical" in a sense relevant to the exercise of this jurisdiction.
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> ...
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> A controversy as to the lawfulness of future conduct cannot be said to be immediate and real if it is unlikely that the applicant will engage in the conduct. If the prospects of the applicant engaging in the conduct are uncertain, the uncertainty may deprive the controversy of a *sufficient* immediacy and reality to warrant the making of a declaration. The degree of uncertainty as to whether the applicant will engage in the conduct proposed will usually determine whether the circumstances call for the making of a declaration. (References omitted)."

18. The applicant's material contains statements about activities which the AIP *intended* it *might* undertake.[9] There is no certainty that those activities will be engaged in at all, or about the form they will take. Without any evidence of the activities the subject of the declaration this Court ought not grant the declaratory relief because it is purely hypothetical.

(2) Separately, the declarations are bad in form

19. The declarations sought are expressed in the negative form. This form of declaration has been described as one 'that will hardly ever be made'.[10]

20. That salutary warning is particularly apt where the form of declaratory relief sought is vague and imprecise.

21. One question, posed rhetorically, exposes the problem for the applicant: How can the Court decide that the 'activities' are not within the meaning of the expression 'political donation' in s 274 of the EA without knowing – and making appropriate findings about – what the activities are? A qualitative analysis is required of the activities in order to determine, at the least, whether they amount to incurring 'electoral expenditure'[11] within the meaning of the same section.

22. No controversy could be meaningfully resolved by answering the issues of interpretation in the abstract. Beyond lacking any utility, the declarations sought are potentially dangerous because there is no certainty about the conduct which the Court would be providing its imprimatur for a 'third party' to engage in. Significantly, the declarations are not confined to the AIP but would cover any 'third party', even one which was completely partisan to a particular side of politics.

23. For these reasons the application should be dismissed.

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9 Paragraph 23 of the affidavit of Graham Young filed 28 February 2020.

10 *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, at 564-5 (Pickford LJ).

11 Defined in s 197 of the EA, in a way which looks at the purpose for which expenditure was incurred.

D. ISSUE 2: PROPER INTERPRETATION OF THE EA

24. The declarations should also not be made because they do not accord with the proper interpretation of the EA.

(1) The text

25. The appropriate place to start in the construction of s 274 of the EA is the words of the section themselves. In *Australian Finance Direct Ltd v Director of Consumer Affairs Victoria*[12] Kirby J observed:[13]

> "The starting point for statutory interpretation is always the text of the written law. It is in that text that the legislature expresses its purposes or "intention". It is a mistake for courts to begin their search for the meaning of the law with judicial elaborations, ministerial statements or historical considerations. Moreover, in performing its functions, a court should never stray too far from the text, for it constitutes the authentic voice of the … law maker."

26. On their natural meaning the words in s 274 do not support AIP's construction.

27. The foundational proposition in the applicant's submissions is that the concept of a 'political donation' in s 274 is confined to a gift made to, or for the benefit of, only three categories of recipients: *one*, a political party; *two*, an elected member; or *three*, a candidate in an election.[14]

28. That proposition then leads to the applicant's next submission – a critical submission in its argument – that the expression 'incur electoral expenditure' when it is used in s 274(1)(b) is 'concerned with the incurring of electoral expenditure on behalf of any one of those three categories' but no other person or entity.[15]

29. This reading of the EA is inconsistent and incompatible with its language. It is difficult to reconcile the applicant's submissions with the clear reference in s 274(1)(b) to 'another entity'. The plain meaning of that expression necessarily connotes an entity that is other than one of the entities referred to in s 274(1)(a).

30. ECQ submits that, on the proper interpretation of s 274(1)(b), there is a 'political donation' where there is a gift made to or for the benefit of another entity, being an entity other than a political party, an elected member, or a candidate in an election, which enables that other entity to incur 'electoral expenditure'.

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12 (2007) 234 CLR 96 [34]; cited in *Wilderness Society of WA (Inc) v Minister for Environment* [2013] WASC 307.

13 See also *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 256 [33]; *Baini v The Queen* (2012) 246 CLR 469 at 476 [14]; *Alphapharm P/L v H Lundbeck* (2014) 254 CLR 247 at 265 [42]; *King v Philcox* (2015) 255 CLR 304 at 323 [31], 326-327 [43], 347 [120]; *AstraZeneca AB v Apotex Pty Ltd* (2015) 257 CLR 356 at 395 [98], 400 [120].

14 Paragraph 28 of the applicant's submissions.

15 Paragraphs 29 and 31 of the applicant's submissions.

31. The language and structure of the section itself supports this interpretation.

32. First, s 274 is a definitional provision. That is, it defines certain circumstances to be a political donation. It does that in the context of a prohibition in s 275 on prohibited donors – defined in s 273 – from making a political donation.

33. The definition in s 274(1) is in two parts:

    (a.) sub-section (1)(a) deals with the three categories of recipients previously referred to (*viz.*, a political party, an elected member, or a candidate in an election); and

    (b.) sub-section (1)(b) then introduces a fourth category of recipient. It does so by the wide expression of 'another entity'.

34. It would be wrong to presume that Parliament did not intend, by the introduction of this fourth category or recipient, that s 274 would operate to regulate the conduct of an entity which was not mentioned in (1)(a). In fact, that must have been the very purpose behind the inclusion of sub-section (1)(b). The concept of a political donation is broadened by sub-section (1)(b). Otherwise that provision would have no effect.

35. Second, it is at sub-section (1)(b) that the concept of 'electoral expenditure' is introduced. It is introduced as an alternative to the making of a gift, as is made clear by the use of the conjunctive 'or'.

36. That is, two different circumstances amount to a political donation under sub-section (1)(b):

    (a.) first, gifts made to or for the benefit of another entity which enable the entity to make a gift mentioned in (1)(a); and

    (b.) second, and separately, gifts made to or for the benefit of another entity to enable the entity to incur electoral expenditure.

37. AIP would have the Court read the words 'for or on behalf of a person or entity mentioned in sub-section (1)(a)' after the words 'electoral expenditure' in sub-section (1)(b)(i) and (ii). But there is no justification for this qualification. The natural meaning of the words used, influenced by understanding the grammar, is against it. That reading passes over the text 'to enable the entity' which precedes the words 'to incur electoral expenditure'.

38. Third, the text of s 274(1)(b)(i) and (ii) includes in parenthesis the words 'directly or indirectly'. This is yet another textual indication of the intended breadth of the concept of political donation in s 274, and therefore the breadth of the prohibition in s 275 of the EA.

39. Fourth, the definition of 'electoral expenditure' is neutral on the question. One general definition in the Macquarie Dictionary of one word in the definition of 'electoral expenditure' does not limit, in a substantial way, the scope of s 274(1)(b)(i) and (ii) (as AIP contends).

40. The Macquarie Dictionary also includes this definition of the word *campaign* when used as a noun:[16]

> "Any course of aggressive activities for some special purpose."

41. The Chambers Dictionary (10th Edition) includes the following definition of the word *campaign* when used as a noun:

> "An organised series of activities aimed at achieving some goal or object, as in advertising or in politics, *esp* before an election or in order to influence policy."

42. Contrary to the applicant's submissions,[17] it is not immediately apparent from the definition of the word campaign as it appears in the prescribed definition of 'electoral expenditure' that the latter expression is to be given a limited meaning and operation in the prohibited donor context. Even if this is not clear on the language alone, it is made clear by the context and objectives of the provisions (as explained subsequently in these submissions).

43. If the definition of 'electoral expenditure' had the confining effect which the applicant contends for then the prohibition in s 275 could readily be thwarted. A prohibited donor could lawfully provide a gift to another entity which could then use the gift to recommend a vote for or against a political party or candidate (as AIP might do)[18]. That is an unattractive result.

44. The following example demonstrates the problem with the applicant's contentions. Assume there is an upcoming election for the seat of South Brisbane in the Legislative Assembly. Assume also that one candidate for that seat opposes a proposed development of a park into a residential unit complex. On the applicant's interpretation it would be lawful for the developer of the proposed development (*viz*, a prohibited donor) to give a financial gift to (say) AIP which would enable AIP to recommend a vote for a candidate not opposing the development even if only by recommending a vote against the candidate opposing the development. Either recommendation would be a campaign, on at least one of the usual meanings of that word. Furthermore, it would be a campaign for '…an election of a member or members of the Legislative Assembly'.[19]

45. Contrary to the applicant's submissions, there is no way to read the definition of political donation in s 274(1)(b)(i) and (ii) so that it only prohibits 'expenditure incurred for the purpose of activities of political candidates and organisations aimed at gaining support for having one or more of themselves or their members elected to the Legislative Assembly'[20] but not the same activities – or activities of a similar nature – on the part of 'another entity'.

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16 Macquarie Dictionary, 6th Edition.
17 At paragraph 38.
18 Paragraph 23 of the affidavit of Graham Young filed 28 February 2020.
19 See s 2 EA for the definition of 'election'.
20 Paragraph 37 of the applicant's submissions.

46. It remains to deal with some other aspects of the AIP's contentions. The applicant's submissions list five other matters supporting its interpretation:

(a.) the first, at paragraph 41 of the applicant's submissions, is difficult to understand. The gifts the focus of (1)(a) need not be used for 'electoral expenditure'. They may simply be gifts (such as wine, or art) which could not or would not be used for 'electoral expenditure'. The words are not surplusage because they address a different concern (as explained previously).

(b.) the second, at paragraph 42 of the applicant's submissions, can also be disregarded. The fact that the AIP might be a 'third party' for the purposes of other sections of the EA does not mean that it cannot be 'another entity' for the purposes of s 274(1)(b) of the EA (see paragraphs 59 to 61 below).

(c.) the third, at paragraph 44 of the applicant's submissions, is an exaggeration which does not withstand scrutiny. The legislation would not have the effect of silencing a prohibited donor from *any* involvement in political discussion. The only restraint on a prohibited donor's involvement in political discussion is that it could not make a political donation. It would be free to engage in political discussion in other orthodox ways (it could run its own advertisements, for example). Reliance on the *Human Rights Act* 2019 has since been abandoned.

(d.) the fourth point at paragraph 45 of the applicant's submissions raises a question of fact, but the wrong question at that. A gift does not become a 'political donation' only once it has been used for electoral expenses; it is sufficient if the gift was provided to 'enable' the incurring of such expenditure. Expressed in this way the enquiry is about the intention of the donor, and perhaps also the donee. But in any event, there is no question about the application of facts in this case because AIP asks for the issues to be determined in a vacuum.

(e.) the fifth point at paragraph 46 of the applicant's submissions has previously been dealt with (see paragraph 34 above).

47. The clear language of s 274(1)(b)(i) and (ii) of the EA is unsupportive of the applicant's contentions, for the reasons explained above.

48. When the meaning of the words used by the legislature are clear and unambiguous the proper approach is to apply that meaning to the circumstances before the Court. The result of this approach in this case is the dismissal of AIP's application.

(2) Contextual support for the plain meaning

49. The legislative context of s 274 of the EA supports the natural meaning of the words used. The context of a provision to be construed has been identified as an important element in its construction.[21] The construction contended for by the ECQ has the advantage that it is consistent with the language of s 274 and the other provisions of the statute.[22]

50. That context includes a prohibition in s 275 which is very widely cast. It is unlawful for:

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

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

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

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

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

51. Parliament's intention to prevent the making of political donations by property developers – by any means or conduits – is made clear by the prohibitions in s 275.

52. Further, by s 307B of the EA it is a crime for a person to knowingly participate in a scheme to circumvent the prohibitions in s 275. Again, the appearance of this provision confirms that the ban on political donations by prohibited donors is not to be easily evaded or thwarted.

53. AIP's submissions ignore this context and seek to create an avenue for property developers to engage in political campaigns. The broader context of the EA indicates this is not permissible (and is in fact unlawful).

(3) A purposive construction

54. The ECQ's construction supports the purposes and objectives[23] of the EA and has the effect that prohibited donors would not be able to circumvent the prohibition in s 275 by channelling funds or other resources into the electoral process by an intermediary.

55. When introduced into Parliament the purpose or objective of these provisions was explained in the following ways (emphasis added):[24]

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21 *Project Blue Sky Inc v. Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 (per McHugh, Gummow, Kirby and Hayne JJ).

22 *Project Blue Sky Inc v. Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 (per McHugh, Gummow, Kirby and Hayne JJ).

23 See s.14A of the *Acts Interpretation Act 1954* (Qld.).

24 Explanatory Notes to the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018*, pages 1 to 4.

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

1. reinforce integrity and minimise corruption risk that political donations from property developers has potential to cause at both a State and local government level;
2. improve transparency and accountability in State and local government; and
3. strengthen the legislative requirements that regulate how a councillor must deal with a real or perceived conflict of interest or a material personal interest.

...

The Bill is the first stage of integrity reforms to implement the Government's response to the following recommendations of the Belcarra Report considered significant to require urgent legislative change:

- recommendation 20 **to ban donations** from property developers for candidates, **third parties**, political parties and councillors. This is extended to Members of State Parliament; and

...

To achieve the policy objectives, the Bill amends the *Electoral Act 1992* (EA) and the LGEA **to prohibit the making of political donations by property developers to** candidates in State or local government elections, groups of candidates in local government elections, **third parties**, political parties, councillors and Members of State Parliament. ...

The Belcarra Report identified there is a risk of corruption when donations are made with the expectation that the recipient will, in return, make decisions that deliver a benefit to the donor. The risk is heightened when donors have business interests that are affected by government decisions. At the local government level, this risk is particularly associated with property developers.

...

There is also a real risk of corruption when donations are made by property developers at a State government level where the State has a significant role in Queensland's planning framework – administering the entire planning framework; mandating the powers that can be exercised by the Planning Minister, including approving planning schemes and other local planning instruments and sometimes deciding on a development application when council is the assessment manager; mandating the role and responsibilities of local governments; and assessing and advising on applications that trigger a State planning matter. Corruption in relation to donations from property developers at both local government and State government levels has been investigated and reported on in New South Wales by the Independent Commission Against Corruption (ICAC)."

56. The fundamental objective of the legislation was to eliminate the the 'very real potential for property developer donations to lead to corruption **or perceptions of** corruption which can

damage public confidence in the integrity of both local and State government' (emphasis added).[25]

57. The AIP's interpretation of s 274(1)(b) would substantially undermine that purpose or objective. It would allow a prohibited donor to, at least, indirectly engage in a campaign and influence an election by providing resources to another entity which could then funnel those resources into electoral expenditure. It is worth noting that the AIP has indicated that it might recommend a vote for or against a political party or candidate.[26]

58. That capacity to gain influence – or even the perception of gaining influence – by the making of a donation is the very thing which the law prohibits in the case of prohibited donors. It would at least give rise to the perception of corruption in the decision-making processes of the State government. This is what the reforms were introduced to avoid. The effectiveness of the reforms would be undermined if a property developer could fund an intermediary (i.e. another entity) to enable it to influence an election by spending those funds.

(4) Third party vs another party

59. The applicant's submissions attempt to make something of the fact that AIP was said by ECQ to be a 'third party', so that it cannot be 'another entity' for the purposes of s 274(1)(b) of the EA.

60. The point is without any significance. As has already been submitted, the fact that the AIP might be a 'third party' for the purposes of other sections of the EA does not mean that it cannot be 'another party' for the purposes of s 274(1)(b). The definition of 'third party'[27] in the EA does not include all of the categories of donee in s 274(1)(a) and in fact refers to category of entity not in s 274(1)(a), signifying that it is inapplicable to s 274(1)(b).

61. The phrase 'third party' is used in the Explanatory Notes but not in a way that signifies Parliament intended that another entity which received donations from a property developer could still participate in a campaign for election by incurring electoral expenditure.

(5) Reliance on Spence

62. Reference is made in the applicant's submissions to the High Court of Australia's recent decision in *Spence v State of Queensland* (2019) 93 ALJR 643; [2019] HCA 15. In that case the majority concluded that these provisions of the EA did not infringe the implied freedom of political communication.

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25 Explanatory Notes to the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018*, page 11.

26 Paragraph 23 of the affidavit of Graham Young filed 28 February 2020.

27 See s 197 of the EA.

63. AIP would appear to disavow any attack on s 274 based upon the implied freedom of political communication, yet curiously seeks to reserve its rights in the event its construction of the EA is 'not preferred, to challenge on implied freedom grounds'.[28] Accordingly, ECQ, on 10 March 2020, issued s 78B notices under the *Judiciary Act 1903* (Cth.)

64. Notwithstanding that precautionary step, the AIP should not be permitted to introduce an attack on the effect of the prohibition by sidewind, as it seeks to do at paragraphs 9, 49 and 50 of its submissions. Given the issue now before the Court was not raised or argued before the High Court in *Spence* (as the applicant submits), that decision is not determinative of the issues.

(6) The principle of legality

65. The applicant's submissions raise the principle of legality.[29] However, given that the applicant does not seek to impugn the provisions of the EA based upon the implied freedom of political communication, it is difficult to identify the fundamental right to which it is contended the principle ought attach. It is noteworthy that in neither *Spence* nor in *McCloy v New South Wales* (2015) 257 CLR 178 (which considered the analogue provisions in New South Wales), did the High Court consider the principle of legality in determining the effect of the provisions.

66. In any event, the principle of legality gives rise to a presumption or a working hypothesis upon which statutory language will be interpreted.[30] Like any presumption or hypothesis, the principle can be overridden or displaced by the clear will of the Parliament. In *Lee v New South Wales Crime Commission* (2013) 302 ALR 363; [2013] HCA 39, Gageler and Keane JJ said (at [317]):

> "The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.
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> ...
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> The interpretative strictures of the legality principle should not be applied so rigidly as to have a sclerotic effect on legitimate innovation by the legislature to meet new challenges to the integrity of the system of justice."

67. Here, even if the right to make a political donation is found to be a fundamental right, the clear language of s 274 of the EA indicates Parliament's will that such a right be overridden in pursuit

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28 Paragraph 10 of the applicant's submissions.

29 Paragraphs 10 and 44 of the applicant's submissions.

30 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, at [19]-[21] (per Gleeson CJ).

of the purposes and objects of the amending legislation which introduced that section (explained above).

E. CONCLUSIONS

68. The AIP is 'another entity' for the purposes of s 274(1)(b). By s 275, it would be unlawful for a 'prohibited donor' to make a gift to or for the benefit of the AIP to enable it to incur 'electoral expenditure' or to reimburse it for such expenditure. That is because such a gift would be a 'political donation' by s 274.

69. Whether a particular activity would fall within the meaning of 'electoral expenditure' in s 197 can only be determined on a case by case basis and on the specific facts of each case. There is insufficient evidence about AIP's proposed activities to allow such a finding in this case.

70. For the reasons detailed above, the Court should dismiss the application, with costs.

S.A. McLeod QC
D.E.F. Chesterman
Counsel for the respondent
10 March 2020