



HIGH COURT OF AUSTRALIA

7 October 2015

McCLOY & ORS v STATE OF NEW SOUTH WALES & ANOR

[2015] HCA 34

Today the High Court upheld the validity of certain provisions of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ("the EFED Act"), which impose caps on political donations, prohibit property developers from making such donations, and restrict indirect campaign contributions.

Division 2A of Pt 6 of the EFED Act ("Div 2A") provides for general caps on the amount of political donations which a person can make to or for the benefit of a particular political party, elected member, group, candidate or third-party campaigner. Division 4A of Pt 6 ("Div 4A") prohibits the making or acceptance, directly or indirectly, of a political donation by a "prohibited donor" or the soliciting of a person by or on behalf of a "prohibited donor" to make a political donation. "Prohibited donor" is defined to include "a property developer". Section 96E prohibits the making or acceptance of "indirect campaign contributions". Div 4A and s 96E apply in New South Wales to State and local government elections and to elected members of Parliament and councils. Div 2A applies only to State elections and elected members of Parliament.

The first and third plaintiffs are "property developers" and the second plaintiff made an "indirect campaign contribution" within the meaning of each expression in the EFED Act. Each of the plaintiffs intended, if permitted by law, to make donations in excess of the caps imposed by Div 2A. The plaintiffs brought proceedings in the original jurisdiction of the High Court, challenging the validity of Div 2A, Div 4A (as it applied to "property developers") and s 96E on the basis that these provisions impermissibly burden the implied constitutional freedom of communication on governmental and political matters. They submitted that the impugned provisions burden the freedom of political communication by restricting the funds available to political parties and candidates to meet the costs of political communication, and further that the restrictions imposed upon the plaintiffs' ability to gain access and make representations to politicians and political parties were also such a burden.

The High Court accepted that the impugned provisions indirectly burden political communication by restricting the funds available to political parties and candidates. However, the Court unanimously held that the burden imposed by the donation caps in Div 2A is not impermissible and the provisions are a legitimate means of pursuing the legitimate objective of removing the risk and perception of corruption and undue influence in New South Wales politics. The Court held that the provisions in fact enhance the system of representative government which the implied freedom of political communication protects. Section 96E was also held to be valid, on the basis that as an anti-avoidance provision its validity depends on that of Div 2A. By majority the Court held, taking note of a history of corruption in New South Wales, that the prohibition on donations by property developers in Div 4A is also valid.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*