

McCLOY & ORS v STATE OF NEW SOUTH WALES & ANOR **(S211/2014)**

Date writ of summons filed: 28 July 2014

Date special case referred to Full Court: 28 January 2015

Part 6 of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (“the Act”) regulates political donations and electoral expenditure in relation to the Parliament and the local councils of New South Wales. Division 2A of Part 6 of the Act imposes caps on political donations in relation to State elections and makes it unlawful for anyone to accept a donation that exceeds a prescribed cap. Division 4A of Part 6 of the Act prohibits the making of political donations by certain classes of person. Those classes include property developers. Section 96E (in Part 4 of the Act) prohibits the making of certain indirect campaign contributions, such as payments for advertising and the provision of equipment in return for inadequate payment.

The first plaintiff, Mr Jeffery McCloy is or was a director of both the second plaintiff, McCloy Administration Pty Ltd and the third plaintiff, North Lakes Pty Ltd. Both the third plaintiff and Mr McCloy are “property developers” for the purposes of Division 4A of Part 6 of the Act.

Mr McCloy made donations in excess of \$31,500 for the benefit of candidates in the New South Wales state election (“NSW election”) held in March 2011. The second plaintiff made an indirect contribution of \$9,975.00 to the election campaign of Mr Tim Owen, a candidate for the seat of Newcastle in the Legislative Assembly in the NSW election. At the time the plaintiffs commenced proceedings in this Court (in July 2014) they each intended to make donations to the Liberal Party of Australia or to other political parties.

The proceedings brought by the plaintiffs in this Court challenge the validity of s 96E and Divisions 2A and 4A of Part 6 of the Act. This is on the basis that at least some of the relevant provisions impermissibly infringe the freedom of communication on political or governmental matters implied in the Commonwealth Constitution.

The plaintiffs have filed a Notice of a Constitutional Matter (and an Amended Notice). The Attorneys-General of the Commonwealth and the States of Victoria, Queensland, Western Australia and South Australia are intervening in the proceedings.

The parties filed a Special Case, which Justice Gageler referred for consideration by the Full Court. The Special Case states the following questions for the opinion of the Full Court:

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

2. Is Division 2A of Part 6 of the Act invalid (in whole or in part and, if in part, to what extent) in its application to the plaintiffs because it impermissibly burdens the implied freedom of communication on governmental and political matters contrary to the Commonwealth Constitution?
3. Is s 96E of the Act invalid in its application to the plaintiffs because it impermissibly burdens the implied freedom of communication on governmental and political matters contrary to the Commonwealth Constitution?
4. Who should pay the costs of the special case?