Before the High Court

McCloy v New South Wales:
Developer Donations and Banning the Buying of Influence

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Abstract

McCloy v New South Wales involves a challenge to the capping of political donations and the imposition of a ban on both indirect donations and donations from property developers in relation to New South Wales elections. If the challenge is successful, it would seriously damage the ability of state governments to take measures to prevent the risk and perception of corruption and undue influence arising from the unfettered making of political donations. While it is likely that the provisions capping donations and banning indirect donations will survive scrutiny by the High Court, the provisions most vulnerable to attack are those that single out property developers, banning them from making any donation at all.

I Introduction

In McCloy v New South Wales,¹ the High Court of Australia will face the question of whether to bring down the whole edifice of election campaign finance law in New South Wales (NSW) on the ground that it unduly burdens the implied freedom of political communication by limiting the funds available to pay for that communication.

II The Facts and the Challenge

The challenge was brought by Mr Jeff McCloy, a property developer² and then Lord Mayor of Newcastle, after hearings by the Independent Commission Against Corruption (‘ICAC’) revealed that he had made donations in excess of $31,500 to, and for the benefit of, candidates in connection with the NSW election of March 2011.³ In addition, one of his companies paid $9,975 in remuneration to a person

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1 High Court of Australia, Case No S211/2014 (‘McCloy v NSW’).

2 Although Mr McCloy did not make property development applications himself, he was deemed a property developer by virtue of his relationship with companies that did. His status as a property developer has been accepted in the pleadings.

3 McCloy (First Plaintiff), McCloy Administration Pty Ltd (Second Plaintiff), North Lakes Pty Ltd (Third Plaintiff), ‘Plaintiff’s Chronology’, Summons in McCloy v NSW, Case No S211/2014, filed 9 February 2015 in the High Court Registry, 1.
who was working on the campaign staff of an election candidate, amounting to an indirect campaign donation. These donations occurred at a time when political donations in relation to the NSW election were capped at $5000, indirect donations were banned and political donations by property developers were also banned.

On 28 July 2014, McCloy commenced proceedings in the High Court of Australia challenging the validity of s 96GA of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) (‘EFED Act’), contending that it breached the implied freedom of political communication. This provision prohibits certain persons and corporations, including property developers, from making political donations. No challenge was initially made to other provisions of the Act.

The scope of the challenge was later expanded, as it appeared from the facts that McCloy may also have breached provisions that imposed a cap on donations and prohibited the making of indirect donations. Accordingly, the proceedings now also challenge:

- the validity of the scheme for imposing caps on donations (EFED Act pt 6 div 2A);
- the banning of indirect donations (EFED Act s 96E); and
- the banning of donations from all categories of prohibited donors (EFED Act pt 6 div 4A).

No challenge has been brought to the cap on electoral communications expenditure or the disclosure regime in the EFED Act. However, if the cap on political donations is held invalid, the cap on expenditure would inevitably fall in the future, as it imposes a more direct limitation upon political communication. Hence, all that would be likely to survive, if McCloy were fully successful in his challenge, would be the disclosure regime.

III The Lange test

All parties in the McCloy case accept that the test developed by the High Court in Lange v Australian Broadcasting Corporation, as modified in Coleman v Power, should be applied to resolve this case. There are two limbs to this test that must be satisfied before there is a breach of the implied freedom of political communication:

- First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

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4 Ibid 2.
5 Writ of Summons in McCloy v NSW, Case No S211/2014, filed 28 July 2014 in the High Court Registry.
6 Note that McCloy seems to be challenging the whole of div 4A regarding prohibited donations, whereas NSW has argued that McCloy only has standing to challenge the validity of that part of div 4A that concerns property developers: State of NSW, ‘Annotated Submissions of the First Defendant’, Submission in McCloy v NSW, Case No S211/2014, 2 March 2015, 11 [51].
7 (1997) 189 CLR 520.
Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?\(^9\)

IV The Concession as to Breach of the First Limb of the Lange Test

It is accepted by both McCloy and the State of NSW, that the impugned provisions burden the implied freedom of political communication because they ‘restrict the funds which are available to political parties and candidates to meet the costs of political communication’.\(^{10}\) This concession is based on the High Court’s reasoning in \textit{Unions NSW v New South Wales} (‘\textit{Unions NSW}’).\(^{11}\) The Court not only accepted that a restriction upon the range of sources available to fund political communications amounted to a burden on the implied freedom of political communication, but it also accepted that ‘the general scheme of the EFED Act also effects burdens on the freedom because it places a ceiling on the amount of political donations which may be made and on the amount which may be expended on electoral communications’.\(^{12}\)

While the logic behind the Court’s reasoning is contestable, at least in relation to caps on political donations,\(^{13}\) it would appear unlikely that the High Court would overturn it so soon after \textit{Unions NSW} was handed down.\(^{14}\) Hence, it appears reasonable for the State of NSW to have made this concession. The effect is merely to shift the battleground to the second limb of the \textit{Lange} test, where the contest is more commonly waged.

V The Second Limb of the Lange Test

The challenge under the second limb of the \textit{Lange} test is twofold. First, McCloy contends that there is no rational connection between the impugned provisions and any legitimate end. McCloy is not in a position to argue that no legitimate end exists, as the ‘general anti-corruption purposes of the \textit{EFED Act}\(^{15}\) were clearly


\(^{13}\) See further Anne Twomey, ‘\textit{Unions NSW v New South Wales}: Political Donations and the Implied Freedom of Political Communication’ (2014) \textit{16 University of Notre Dame Australia Law Review} 178.

\(^{14}\) See also \textit{Tajjour v New South Wales} (2014) 88 ALJR 860, 887 [105]–[107] (Crennan, Kiefel and Bell JJ), 892–3 [145] (Gageler J).

\(^{15}\) \textit{Unions NSW} (2013) 88 ALJR 227, 237–8 [41], [49] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); 250 [138] (Keane J).
accepted as amounting to a legitimate end by the High Court in *Unions NSW*. In distinguishing s 96D of the *EFED Act* (which banned donations by corporations or other entities) from the rest of the provisions of pt 6 of the Act (which include all the provisions impugned by McCloy), their Honours observed:

In contrast to the general, practical provisions for capping of political donations and electoral communication expenditure, s 96D is selective in its prohibition. Yet the basis for the selection was not identified and is not apparent. By contrast, the connection of the other provisions of Pt 6 to the general purposes of the EFED Act is evident. They seek to remove the need for, and the ability to make, large-scale donations to a party or candidate. It is large-scale donations which are most likely to effect influence, or be used to bring pressure to bear, upon a recipient. These provisions, together with the requirements of public scrutiny, are obviously directed to the mischief of possible corruption.16

Keane J added that it ‘cannot be doubted that the protection of the integrity of the electoral process from secret or undue influence is a legitimate end the pursuit of which is compatible with the freedom of political communication’.17

However, three Justices in *Tajjour v New South Wales*, referring back to *Unions NSW*, observed that there must be a ‘rational connection’ between the legitimate end and the law that purports to serve that end.18 McCloy argues that above and beyond the proportionality test, there must also be a rational connection19 with the legitimate end and that all the impugned provisions fail to meet this requirement.20

Second, McCloy argues that the relevant laws are not reasonably appropriate and adapted to achieve this legitimate end because there are alternative, reasonably practicable and less restrictive means that could have instead been adopted to serve the same legitimate end.21

As the real vulnerability of the NSW provisions lies in the ban on donations by property developers, it is convenient to deal briefly first with the arguments in relation to caps on donations and the ban on indirect donations.

There are very strong arguments that both the caps on political donations and the ban on indirect donations have a rational connection to a legitimate end. Caps on donations of $5000 to parties and $2000 to candidates22 are imposed in

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16 Ibid 238 [53] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (footnote omitted).
17 Ibid 250 [138] (Keane J).
19 Note, however, the Queensland submissions, which argue that a ‘rational connection’ was only required in *Unions NSW* because it was not clear how the impugned submissions served a legitimate end and that if there is no such patent ‘disconnect’, no separate requirement to show a ‘rational connection’ will arise: Attorney-General (Qld), ‘Annotated Submissions for the Attorney-General for the State of Queensland (Intervening)’, Submission in *McCloy v NSW*, Case No S211/2014, 9 March 2015, 3 [12]–[13].
20 McCloy (First Plaintiff), McCloy Administration Pty Ltd (Second Plaintiff), North Lakes Pty Ltd (Third Plaintiff), ‘Plaintiffs’ Submissions’, Submission in *McCloy v NSW*, Case No S211/2014, 9 February 2015, 3 [18], 12 [75], 16 [100]–[102], 19 [124] (‘Plaintiffs’ Submissions’).
21 Ibid 12–13 [76]–[83], 16–18 [103]–[112], 19–20 [125]–[129].
22 Note that these amounts are indexed and therefore change from year to year.
pt 6 div 2A of the *EFED Act* in order to prevent the risk and perception of undue influence or corruption that arises from the making of large donations. The Expert Panel on Political Donations noted that it ‘is generally accepted that the “legitimate end” of a ban [or cap] on political donations is to reduce the risk of actual and perceived corruption and undue influence’. When the caps on donations were first introduced, the Premier stated that the reasons for this reform included providing ‘certainty and confidence in the electorate of the impartiality of government decision-making and of the transparency of process in government’.  

In *Unions NSW*, Keane J identified an additional legitimate end of donation caps, observing that while they limit the amount that can be spent upon political communication, they are ‘appropriate and adapted to ensure that wealthy donors are not permitted to distort the flow of political communication to and from the people of the Commonwealth’. Earlier, in *Australian Capital Television*, McHugh J had suggested that the imposition of ‘limitations on contributions’ by donors is one legitimate way of overcoming the evil that arises from ‘the conduct of contributors and political officials’.  

Section 96E of the *EFED Act*, which came into force in July 2008, prohibits indirect donations, such as the provision of office accommodation and equipment at no cost or for inadequate consideration, for use solely or substantially for election campaign purposes where the value is more than $1000. It also prohibits donors from paying for party advertising or other electoral expenditure, such as the remuneration of campaign staff. The purpose is to ensure that any benefits are contributed in monetary form so that their value is clear and they can be more easily disclosed and identified. Moreover, indirect donations are susceptible to a greater risk of undue influence and corruption than ordinary money donations. For example, where an organisation provides campaign office accommodation within its own building and provides paid staff to work on the campaign, it has a far stronger influence upon the nature and conduct of the campaign as well as creating ongoing personal connections with the candidate and his or her staff. It therefore opens more doorways for the exertion of undue influence in the future. The provision of money does not create the same level of personal connection.

Once donation caps were introduced in 2011, the ban on indirect donations also formed a critical element of the anti-circumvention measures. It is necessary for donors and recipients to know the full amount that a donor has donated in order to ensure that maximum caps are not breached. Without such a measure, indirect donations would provide an easy way of circumventing donation caps or at least creating uncertainty as to when a cap has been reached due to the lack of clarity concerning the value of indirect donations.

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27 *Election Funding Amendment (Political Donations and Expenditure) Act 2008* (NSW).
It would appear clear that both div 2A and s 96E have a rational connection to a legitimate end. From that point, the case descends, as the Commonwealth submissions put it, to ‘various quibbles as to whether the legislation is overbroad, or under-inclusive, or perhaps both simultaneously’. Arguments can always be made that a particular law might have been made in a different way to achieve the legitimate end, which might have reduced an aspect of the burden on political communication, but it must be recognised that the point of the proportionality test is to expose those cases where a ‘legitimate end’ is a mere ruse to achieve quite a different end and to burden the implied freedom. As these impugned provisions were manifestly made for the purpose of achieving a legitimate end, it is unlikely that any of these quibbles would move the Court to strike down these provisions.

VI The Ban on Donations by Property Developers

As noted above, the most vulnerable provisions in this case are those in pt 6 div 4A that ban donations from ‘prohibited donors’, including property developers. This is largely due to issues of timing. Division 4A, which initially only prohibited the donations of property developers, came into effect from 14 December 2009 and was later extended from 1 January 2011 to donations from liquor, tobacco and gambling industry businesses. Division 2A, which imposed caps upon political donations, also came into effect from 1 January 2011.

If McCloy had only been concerned with challenging the ban upon property developers making political donations, his best argument would have been that even if that ban had been valid at the time it was enacted, because it was reasonably appropriate and adapted to preventing actual or perceived corruption, the provision ceased to be appropriate and adapted once the scheme for donation caps came into effect on 1 January 2011. The argument would have been that property developers, by making very large donations to Members of Parliament prior to 14 December 2009, were perceived as exerting influence over Members of Parliament to support the making of planning decisions that corruptly favoured their businesses. However, once donation caps came into effect on 1 January 2011 and developers could otherwise legally donate no more than $5000 to a party, their donations could be no more influential than the donations of anyone else, largely dissipating the concern about undue influence and corruption. It could therefore have been argued that the ban on donations by property developers was no longer necessary and no longer reasonably appropriate and adapted to serve a legitimate end.

29 Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009 (NSW).
30 Election Funding and Disclosures Amendment Act 2010 (NSW).
31 See the observation by the Australian Cyclists Party that it ‘is difficult to conceive how a property developer could seriously attempt to buy undue influence with a $5,700 donation’: Expert Panel Report, above n 23, vol 1, 49.
The State of NSW would then need to argue why complete bans on donations by property developers were still required.\(^{32}\) It may well be able to make out the case that property developers form a particular category of high risk when it comes to potential corruption and the perception of corruption and that it is necessary to maintain public confidence in the integrity of government that their donations be banned completely. It might also be argued that property developers through their webs of associated corporations, partner corporations, directors, officers, major shareholders and their families could still make numerous donations up to the level of the cap, cumulatively exercising influence even with the existence of the current donation caps.

If this argument were raised and pursued in the High Court, despite its absence in the submissions, it would give rise to the interesting legal question of whether a subsequent law can have the effect of rendering unconstitutional an earlier law that was validly enacted, by changing its relationship with the legitimate end it was originally intended to serve.

McCloy, however, is not making this argument to the High Court, because his political donations not only allegedly breached the ban on donations by property developers, but also the caps on donations and the ban on indirect donations. Hence, his case involves a much broader attack on any kind of limitation on the nature, source or amount of donations. As he seeks to attack the validity of the donation caps in div 2A, he cannot logically use the valid existence of div 2A as a means of undermining the constitutional validity of the ban on donations by property developers in div 4A.

Nonetheless, the High Court could still choose to strike down div 4A on the ground that it is no longer necessary, leaving the other provisions concerning caps on donations and a ban on indirect donations in place. It is interesting to note that the Commonwealth, for example, has intervened in support of the State of NSW in relation to the validity of caps on donations and the ban on indirect donations, but is non-committal with respect to the ban on donations by property developers.\(^{33}\)

The problem with taking this approach, however, is that caps on donations only apply to State elections, not to donations with respect to local government elections. Property developer donations potentially have a greater influence at the local government level, where most property development decisions are made. Hence, if the ban on donations from prohibited donors were struck down as invalid, property developers could make uncapped donations at the local government level. The Expert Panel on Political Donations concluded that this

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32 Note the State of NSW’s argument that McCloy has no standing to challenge the ban on donations by other business entities concerning tobacco, alcohol and gambling: State of NSW, ‘Annotated Submissions of the First Defendant’, Submission in McCloy v NSW, Case No S211/2014, 2 March 2015, 1 [5]. Presumably it wishes to narrow the front upon which it needs to make its special case argument.

33 Attorney-General (Cth), ‘Annotated Submissions of the Attorney-General of the Commonwealth of Australia (Intervening)’, Submission in McCloy v NSW, Case No S211/2014, 10 March 2015, 2 [4.5]. Note also that some states chose to deal with the property developer provisions only ‘at the level of principle’. See, eg, Attorney-General (SA), ‘Annotated Submissions of the Attorney-General for South Australia (Intervening)’, Submission in McCloy v NSW, Case No S211/2014, 10 March 2015, 12–13 [43]–[45].
would ‘no doubt enliven corruption risks given the planning and development responsibilities of local government’. 34 It added that ‘political donations from property developers are arguably of greatest concern at the local government level’ and ‘repealing the prohibited donor ban would raise significant corruption risks’. 35 Accordingly, the Panel recommended retaining the ban on prohibited donors. 36

There is, however, the further possibility that if property developer bans were struck down at the state level, they might continue to apply at the local government level. Two reasons might support such an outcome. First, that the property developer ban only ceased to be reasonably appropriate and adapted where caps on donations apply, but remains appropriate and adapted in relation to the local government level, where no caps on donations apply.

Second, David Jackson QC, in advice to the Expert Panel on Political Donations, contended that the implied freedom of political communication might not extend to affect political donations at the local government level. Jackson observed

[T]here is, in my mind, a real question whether the implied freedom of political communication, derived from ss. 7, 24, 64 and 128 of the Commonwealth Constitution, should be extended a further level below State legislatures (which are referred to in the Constitution) to local government (which is not). A State does not have to have any form of local government, or a form of local government which is elected. Nor is it necessary for it to have the same franchise for local government elections as for State elections. The basis for the implication in relation to local government simply does not exist. 37

If this were the case, by a process of reading down or severance, the High Court might find that property developers are able to donate with respect to state elections up to the maximum cap, but remain prohibited donors at the local government level.

VII Narrowing the Scope of an Anti-Corruption Legitimate End

Given the High Court’s acceptance of the legitimacy of an ‘anti-corruption’ end in relation to the EFED Act in Unions NSW, 38 McCloy cannot seriously argue against its legitimacy. Instead, his counsel seek to narrow the meaning of corruption in order to break the rational connection between the measures taken and that legitimate end, or to render those measures disproportionate to the legitimate end.

McCloy’s submissions start this process by accepting that political donations are made so as to advance the interests of the businesses making them or

35 Ibid vol 1, 50.
36 Ibid vol 1, 4, 11, 45, 50 (Recommendation 7).
38 Unions NSW (2013) 88 ALJR 227, 237–8 [41], [49], [53] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [138] (Keane J). See also Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106, 144–5 (Mason CJ), 156 (Brennan J), 189 (Dawson J), 238 (McHugh J).
their close associates. Rather than seeing this as a potential step towards undue influence, it is instead re-characterised and justified as a form of political participation — to ‘build and assert political power’. The submissions assert that having ‘political influence does not mean purchasing specific outcomes; it only entails an increased chance of being heard’. They attack the imposition of caps on donations on the ground that it ‘prevents any person from gaining political influence by way of the making of political donations’. They distinguish this from quid pro quo corruption, where a donation is made in direct exchange for a particular favourable decision.

In doing so, McCloy’s submissions seek to draw into Australia the jurisprudence of the United States (US) Supreme Court, which has recently taken a very narrow view of corruption for the purposes of campaign finance laws, confining it to quid pro quo corruption. The Supreme Court has indicated that buying influence by way of donations does not, in its view, amount to corruption. It is unlikely that the High Court would take such a narrow view of the meaning of corruption. As noted above, the High Court has previously accepted that a legitimate end may include not only the prevention of actual corruption, but also the risk or perception of corruption and the associated undermining of public confidence in the integrity of the political system. Even if there is no quid pro quo corruption, the mere fact that a large donation is made, greater access to Ministers is given to the donor and a governmental decision favourable to the interests of the donor is reached, is enough to sow the seeds of public distrust in the political system and damage public confidence in it.

McCloy’s submissions describe this as a ‘cosmetic objective’, failing to accept that the maintenance of public confidence in the democratic system is a legitimate end. Yet even the US Supreme Court, before its recent narrowing of the notion of corruption, acknowledged that ‘there is little reason to doubt that

39 Plaintiffs’ Submissions, Submission in McCloy v NSW, Case No S211/2014, 9 February 2015, 13 [82].
40 Plaintiffs’ Submissions, 4 [23], 15 [92]. Although described in the plaintiffs’ submissions as a ‘freedom’, the Victorian submission sees this as an assertion of a ‘personal right’, contrary to the High Court’s interpretation of the implied freedom: Attorney-General (Vic), ‘Submissions of the Attorney-General for the State of Victoria (Intervening)’, Submission in McCloy v NSW, Case No S211/2014, 10 March 2015, 8 [20].
41 Plaintiffs’ Submissions, Submission in McCloy v NSW, Case No S211/2014, 9 February 2015, 14 [89].
42 Ibid 14 [90].
43 Ibid 14 [89].
47 Plaintiffs’ Submissions, Submission in McCloy v NSW, Case No S211/2014, 9 February 2015, 16 [105].
sometimes large contributions will work actual corruption of [the] political system, and no reason to question the existence of a corresponding suspicion among voters’ that large donations lead to undue influence.48

Australian judges have also long accepted the need to maintain public confidence in the integrity of the judicial system49 and the need to allay the perception of bias,50 even when it does not exist in fact. It would therefore be surprising if the High Court did not equally accept the importance of maintaining public confidence in the integrity of government and that it is a legitimate end for laws to seek to avert the perception of corruption.

VIII A Rational Connection to a Legitimate End

As the Expert Panel on Political Donations observed, the prohibition on donations from property developers and the tobacco, liquor and gambling industries is intended to lessen the corruption risks seen to be associated with these industries, given the extent to which these particular industries stand to benefit from government decisions, and the risk that political donations could be used as an attempt to buy access and favourable treatment.51

The Panel also described the genesis of this ban as follows:

The ban on property developers was initially introduced by the Labor Government to allay public concern about corruption and undue influence following the ICAC’s 2008 investigation into Wollongong City Council. This investigation involved, among other things, allegations of political donations being offered to councillors in exchange for favourable treatment of development applications. The ban on developer donations was described by the then Premier as the first step toward greater restrictions on political donations and increased public funding.52

The Premier at the time this change was introduced, Nathan Rees, later explained that the reason property developers were singled out was because corruption requires both motive and opportunity, and these are in abundance in relation to property developments, where large profits can be made and hundreds of decisions are being made about property developments every week across Australia.53

The categories of banned donations were later expanded to include the liquor, tobacco and gambling industries, all of which have significant financial interests in decisions made by governments and therefore have a strong profit motive to seek to influence members of the government of the day.

49 Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1, 16 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51, 98 (Toohey J), 107–8 (Gaudron J), 116–7 (McHugh J), 134 (Gummow J).
50 Ebner v Official Trustee (2000) 205 CLR 337, 345 (Gleeson CJ, McHugh, Gummow and Hayne JJ); 363 (Gaudron J).
McCloy’s counsel, however, have attempted to depict these provisions as targeting businesses based upon their ‘sheer unpopularity’ with the alleged intention of bolstering the popularity of central government actors ‘at the expense of even less popular community members’. In support of this view, McCloy’s submissions point to the exclusion of non-profit entities from the category of prohibited donors, arguing that this means that the prohibition cannot be directed at achieving public health outcomes. No recognition is given to the fact that non-profit entities do not have the same incentive to seek to use donations to influence governments to make decisions that enhance their profits.

Indeed, the debate upon the 2010 amendments shows that Members of Parliament drew a distinction between ‘sheer unpopularity’ and the potential to exercise undue influence over governmental decisions. The extension of the category of prohibited donors to the alcohol, tobacco and gambling industries was justified, despite the simultaneous introduction of caps on donations, on the ground that the next government would face a number of important decisions with respect to a smoke-free environment, tobacco vending machines, liquor licensing, alcohol consumption and gaming machine licences. It was argued that these decisions should not be ‘perverted by the rivers of cash that come from those industries’. The provisions were deliberately designed to catch only for-profit businesses and industry representative organisations, as they were the ones with the financial incentive to seek to exert undue influence by way of donations.

The Christian Democrats sought to move an amendment adding the ‘sex industry’ to the category of prohibited donors. This amendment was rejected by the NSW Legislative Council because the sex industry did not have a history of making significant donations or seeking to exercise influence over government policy in the same way as the other prohibited donors. As David Shoebridge, a Member of the Legislative Council, noted, the sex industry was not involved in corrupting public processes and was therefore not ‘a rational stand-alone sector to target’.

The High Court in Unions NSW recognised that there might well be good reason to ban donations from specific groups. It compared the general ban on donations from corporations and other entities to the specific ban on donations by property developers and tobacco, liquor and gambling industry business entities. Their Honours noted that the general ban did not identify the affected entities or persons ‘as having interests of a kind which requires them to be the subject of an express prohibition’. They observed that the State of NSW had not sought to ‘liken the interests of industrial organisations, such as the plaintiffs, to those of the prohibited donors’ and that the ‘history which may explain or support the targeting of the “prohibited donors” in Div 4A was not addressed in any detail in argument’, as it was not necessary to do so. The distinctions drawn by the Court indicate that

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54 Plaintiffs’ Submissions, Submission in McCloy v NSW, Case No S211/2014, 9 February 2015, 11 [65].
55 Ibid 10–11 [64].
56 NSW, Parliamentary Debates, Legislative Council, 10 November 2010, 27502 (John Kaye).
57 Ibid 27501–2 (John Kaye).
58 Ibid 27503–4 (David Shoebridge).
59 Unions NSW (2013) 88 ALJR 227, 239 [57] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
60 Ibid 239 [58] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
it is open to argument that certain groups have interests of a kind that require them to be the subject of an express prohibition and that history may explain and support such targeting. The question will then be whether the State of NSW satisfies the Court that property developers form such a group.  

IX Conclusion

On the basis of the High Court’s recent judgments in this area, it appears unlikely that McCloy will be successful in his tilt at election funding laws, unless one of his ‘quibbles’ regarding proportionality succeeds. The main risk is to the ban on donations by property developers, due to the ameliorating effect of caps upon donations. McCloy’s choice to broaden his case has had the consequence that he is not making his best argument. Whether the Court itself takes up this issue, and the consequences for local government elections if it does, remain to be seen.

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61 See the argument put by the State of NSW, referring to reports of the ICAC and parliamentary committees: State of NSW, ‘Annotated Submissions of the First Defendant’, Submission in McCloy v NSW, Case No S211/2014, 2 March 2015, 9–10 [38]–[46].