

SUPREME COURT OF QUEENSLAND

CITATION: *The Australian Institute for Progress Ltd v The Electoral Commission of Queensland & Ors* [2020] QSC 54

PARTIES: **THE AUSTRALIAN INSTITUTE FOR PROGRESS LTD**
(applicant)
v
THE ELECTORAL COMMISSION OF QUEENSLAND
(respondent)
and
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
(intervener)
and
QUEENSLAND HUMAN RIGHTS COMMISSION
(intervener)

FILE NO: BS 2246 of 2020

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 30 March 2020

DELIVERED AT: Brisbane

HEARING DATE: 16 March 2020

JUDGE: Applegarth J

ORDER: **The originating application filed 28 February 2020 is dismissed.**

CATCHWORDS: COURTS AND JUDGES – COURTS – JURISDICTION AND POWERS – ADVISORY OPINIONS AND HYPOTHETICAL QUESTIONS – where it is unlawful under the *Electoral Act* 1992 (Qld) for a prohibited donor to make a “political donation” – where applicant has received donations from prohibited donors – where applicant seeks declarations that a gift made to or for the benefit of a third party (which is not a political party, elected member or candidate in an election) to pursue its activities, including in relation to political communications or concerning an election for the Legislative Assembly, is not a “political donation” – where the application for declarations is not supported by evidence of gifts made to third parties, including to the applicant, by prohibited donors “to enable” it to incur “electoral expenditure” – where the application for

declarations is not supported by evidence of the particular activities of the applicant which the gifts from prohibited donors were intended to fund - whether the declarations sought raise hypothetical questions in the absence of findings as to the specific activities of the applicant for which a gift was made – whether the declarations sought lack utility in the absence of findings or agreed facts as to whether a gift to the applicant by a prohibited donor was made or is intended to be made “to enable” it to incur expenditure for the purposes of “a campaign for an election” for the Legislative Assembly – whether appropriate for the Court to determine an issue of statutory interpretation

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PARTICULAR WORDS AND PHRASES – where a gift made to or for the benefit of a political party, an elected member or a candidate in an election is a “political donation” under s 274(1)(a) of the *Electoral Act* 1992 (Qld) – where a gift made to or for the benefit of another entity to enable the entity to incur electoral expenditure, or to reimburse the entity for incurring electoral expenditure, is a “political donation” under s 274(1)(b) – whether s 274(1)(b) is confined to gifts made to enable the entity to incur electoral expenditure on behalf of a political party, elected member or candidate in an election

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – COMPATIBILITY WITH HUMAN RIGHTS LEGISLATION – whether interpretation advanced by the respondent is “compatible with human rights under the *Human Rights Act* 2019 (Qld)

Acts Interpretation Act 1954 (Qld), s 14A
Electoral Act 1992 (Qld), s 222, s 273, s 274(1), s 275, s 276, s 282A.
Human Rights Act 2019 (Qld), s 8, s 13, s 48
Judiciary Act 1903 (Cth), s78B

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564; [1992] HCA 10, cited
Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334; [1999] HCA 9, cited
Camilla Cotton Oil Co v Granadex SA [1976] 2 LI R 10, cited
Croome v Tasmania (1997) 191 CLR 119; [1997] HCA 5, cited
Electrolux Home Products Pty Limited v The Australian Workers’ Union (2004) 221 CLR 309; [2004] HCA 40, cited
Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536, cited
Kelly v The Queen (2004) 218 CLR 216; [2004] HCA 12,

cited

Kuczborski v The State of Queensland (2014) 254 CLR 51; [2014] HCA 46, cited

Lacey v Attorney-General for the State of Queensland (2011) 242 CLR 573; [2011] HCA 10, cited

Lee v New South Wales Crime Commission (2013) 251 CLR 196; [2013] HCA 39, cited

McCloy v New South Wales (2015) 257 CLR 178; [2015] HCA 34, cited

Re The Trade Practices Act and Re an Application by Tooth & Co Ltd (1978) 31 FLR 314; [1978] FCA 10, cited

Spence v The State of Queensland (2019) 93 ALJR 643; [2019] HCA 15, cited

Taylor v O’Beirne [2010] QCA 188, cited

The Queen v A2; The Queen v Magennis; The Queen v Vaziri [2019] HCA 35, cited

COUNSEL: P J Dunning QC, with A Hellewell, for the applicant
S R McLeod QC, with D E F Chesterman, for the respondent
G A Thompson QC SG, with F Nagorcka, for the Attorney-General for the State of Queensland (intervening)
P Morreau for the Queensland Human Rights Commission (intervening)

SOLICITORS: O’Donnell Legal for the applicant
Crown Law for the respondent
Crown Solicitor for the Attorney-General for the State of Queensland
Queensland Human Rights Commission for itself

- [1] The Australian Institute for Progress (“AIP”) is a “think tank” based in Queensland. Most of the AIP Board has a connection with the Liberal National Party. However, many of its members do not. The AIP says that it “stands ready to cooperate with any political parties, or its members or supporters who are prepared to support good policy”. It undertakes research and advocacy on both federal and state issues. According to its Executive Director, as the AIP is “ideologically centre-right”, its criticisms tend to favour parties of the right of politics.
- [2] The AIP’s funding sources include some property developers who are “prohibited donors” for the purposes of the *Electoral Act* 1992 (Qld).
- [3] It is unlawful for a “prohibited donor” to make a “political donation” as defined in the Act.¹ Also, it is unlawful for a person to accept a “political donation” that was made (wholly or in part) by or on behalf of a “prohibited donor”.²
- [4] For the purposes of those provisions, a “political donation” is defined in s 274:

¹ The Act, s 275(1).

² The Act, s 275(3).

“274 Meaning of *political donation*

- (1) For this subdivision, each of the following is a ***political donation*** –
- (a) a gift made to or for the benefit of –
 - (i) a political party; or
 - (ii) an elected member; or
 - (iii) a candidate in an election;
 - (b) **a gift made to** or for the benefit of **another entity** –
 - (i) **to enable the entity** (directly or indirectly) to make a gift mentioned in paragraph (a) or **to incur electoral expenditure**; or
 - (ii) to reimburse the entity (directly or indirectly) for making a gift mentioned in paragraph (a) or incurring electoral expenditure;
 - (c) a loan from an entity other than a financial institution that, if the loan were a gift, would be a gift mentioned in paragraph (a) or (b).” (emphasis added)

The words “electoral expenditure” in this section mean “expenditure incurred for the purposes of a campaign for an election, whether or not the expenditure is incurred during the election period for the election”.³

- [5] The AIP would like to participate in the State election to be held later this year. This includes producing and distributing material that advocates a vote for or against a registered political party. In the coming year it intends to campaign on a number of issues, including power generation and taxation.
- [6] On or about 7 February 2020 the AIP wrote to the Electoral Commission of Queensland and advised that it intended to conduct research and run advocacy campaigns this year, including during the election period. The sorts of activities that the AIP advised it intended to undertake include:
- “• Research
 - Seminars and public meetings
 - Surveys and opinion polling
 - Media
 - Assessment of candidate and political party attitudes to specific issues
 - Advertising

³ The Act, s 197.

- Potentially recommend a vote for or against a particular candidate or party”

[7] The letter noted that the AIP’s funding sources included some prohibited donors, and concluded by asking the Commission to advise “whether it is legal for prohibited donors to donate to us if we conduct these activities?”

[8] On 20 February 2020 the Commission responded and advised that it considered the AIP to be a “third party” in the context of provisions of the Act about incurring electoral expenditure. The letter briefly summarised the statutory provisions which prohibit a prohibited donor from making a gift to another entity to enable the entity to incur electoral expenditure. After referring to the prohibition, the letter observed that:

“As such, an entity would likely be committing an offence by accepting an unlawful donation and incurring electoral expenditure and the other entity would likely be committing an offence by making a gift.”

[9] The Commission noted that the AIP’s letter had advised that it receives funding from “some prohibited donors”. The Commission sought clarification and invited the AIP to advise:

- when these gifts were made;
- the names of the entities who provided the gifts; and
- the amount or value of the gifts.

The Commission sought a response by 2 March 2020 so it could “consider what action is appropriate, if any.” The letter noted that appropriate action “may include the ECQ recovering unlawful donations as a debt to the State”. The letter also directed the AIP to the Commission’s website for further information about third party disclosure obligations and the prohibition on political donations by prohibited donors, and for fact sheets and guides for third parties in State and local government elections.

[10] The AIP did not reply to the Commission’s request for further information. Instead, on 28 February 2020 it filed an originating application seeking declaratory relief.

The declarations sought

[11] The originating application seeks the following declaratory relief:

“1. Declarations pursuant to s 10 of the *Civil Proceedings Act (Qld) (2011)* that:

- a) upon the proper construction of the expression ‘electoral expenditure’ in its definition (b) in s 197 of the *Electoral Act (Qld) (1992) (EA)*, expenditure by a third party (within the meaning of that expression in s 197 of the *EA (Third Party)*) on the activities of that Third Party, including in relation to political communications or concerning an

election for the Legislative Assembly, is not within its meaning;

- b) upon the proper construction of s 274 of the *EA*, and in particular sub-s 274(1)(b), a gift to or for the benefit of a Third Party for that Third Party to pursue its activities, including in relation to political communications or concerning an election for the Legislative Assembly, is not within the meaning of the expression ‘political donation’ in s 274 of the *EA*;
- c) upon the proper construction of Part 11, Division 8, Subdivision 4 of the *EA*, a gift made to or for the benefit of a Third Party by a prohibited donor (within the meaning of that expression in s 273 of the *EA*) for that Third Party to pursue its activities, including in relation to political communication or concerning an election for the Legislative Assembly, does not engage the operation of ss 275 or 276 of the *EA*.”

The Commission’s response to the application

- [12] The Commission contends that the declarations sought take a vague form and are so imprecise that they would not quell any controversy between the parties. It submits that the declarations raise only hypothetical questions which are not the function of the Court to answer. The declarations sought are also submitted to be bad in form because of the absence of any specific details about the activities which the AIP asks the Court to sanction. The absence of any certainty about the conduct which the Court would be providing its imprimatur for a “Third Party” to engage in is said to be an insuperable hurdle to the AIP’s application for declaratory relief.
- [13] The Commission submits that where there are no facts “found or agreed” upon which the Court can proceed, declarations should not be made. It relies upon the principle 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”.⁴ According to the Commission, the AIP is really seeking an advisory opinion from the Court about how the Act is to be interpreted, without factual context, and that is not the function of a suit for a declaration.⁵
- [14] In any event, the proper interpretation of the Act is submitted to be against the propositions for which the AIP contend.

The interveners

- [15] The Attorney-General for the State of Queensland intervened in this proceeding under s 78A of the *Judiciary Act* 1903 (Cth) and under s 50 of the *Human Rights Act* 2019 (Qld). The Attorney-General submits that:

⁴ *Bass v Permanent Trust Co Ltd* (1999) 198 CLR 334 at 356 [48].

⁵ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-6.

- (a) the application should be refused because it seeks relief in respect of a hypothetical question and a declaration in the terms sought would be advisory in nature; and
- (b) in any event, the construction of the Act adopted by the Commission is correct.

[16] The Queensland Human Rights Commission (“QHRC”) intervened pursuant to s 51(1)(b) of the *Human Rights Act 2019 (Qld) (HRA)*. Its submissions were confined to the interpretation of s 48 of the *HRA* and how the construction of statutory provisions must be undertaken in accordance with that section if the preliminary issues were resolved in the AIP’s favour. Because of the urgency of the application, it did not make any submissions on the justification analysis of limitations on rights under ss 8(b) and 13 of the *HRA* or the application of those principles to the legislation under consideration.

The issue of statutory construction

[17] If the AIP establishes that the matter is an appropriate one for the Court to exercise its discretion to grant declaratory relief then it will be necessary, in due course, to consider the submissions of the AIP, the Commission and the Attorney-General on matters of statutory construction. It is convenient to preview them.

[18] The AIP’s case centres on the proper construction of s 274(1)(b) which I have quoted above. Its essential submission is that s 274(1)(b) is concerned with the incurring of electoral expenditure “on behalf of” any one of the three entities referred to in s 274(1)(a), namely a political party, an elected member or a candidate in an election.

[19] The Commission and the Attorney-General submit that this interpretation is wrong, and requires the words “on behalf of any of the entities mentioned in (a)” to be read into s 274(1)(b) after the words “electoral expenditure”. The Commission and the Attorney-General submit that such a reading is inconsistent with the language of the section, and is also inconsistent with its purpose and context. They contend that if the section had the confined operation for which the AIP contends, then the prohibitions in s 275 could readily be thwarted. A prohibited donor could provide a gift to another entity to enable it to use the gift to recommend a vote for or against a political party or candidate. Parliament’s intention is said to have been to prevent the making of political donations by property developers, either to (or for the benefit of) political parties and candidates or by means of gifts to another entity to enable the entity to incur expenditure for the purposes of a campaign for the election. This is said to be made clear by the terms of s 274 and the prohibitions in s 275.

Two preliminary issues

- [20] There are two related preliminary issues about the availability of the declaratory relief sought in the originating application:
1. Do the declarations raise hypothetical questions, divorced from proven or agreed facts about the activities of the unspecified “Third Party” (or even the AIP) and the intentions and activities of unspecified prohibited donors whose conduct would, in effect, be declared lawful if the declarations were made?

2. Are the declarations bad in form in the absence of findings about the “activities”, and do they lack utility because of the absence of specific details of the particular conduct of the prohibited donor and the unspecified “Third Party” (or even the AIP) which would, in effect, be declared lawful?

The substantial issue

- [21] If it is appropriate for the Court to determine an issue of statutory interpretation over the objection that the Court should not determine such an issue in the abstract, the issue may be formulated as follows:

“Should s 274(1)(b) be read as confined to a gift to enable the entity to incur electoral expenditure on behalf of any one of the entities mentioned in s 274(1)(a)?”

Further factual background

- [22] The AIP is a non-for-profit company, limited by guarantee. In June 2014 it adopted its current name and a new constitution. It undertakes research and advocacy on both federal and state issues. It has published papers and run campaigns on various issues including taxation, housing, free speech and electricity generation.
- [23] Because the institute is not a political party, its view has been that it can receive funding from prohibited donors without breaching the Act, including if it recommends a vote for or against a particular political party or candidate for elected office. However, in early 2020 it became aware that the Commission took the view that it would be illegal for an entity to receive donations from prohibited donors to enable it to campaign for or against a political party or parties in an election for the Legislative Assembly.
- [24] The AIP has had discussions with a number of prohibited donors about funding advocacy and programs on issues such as land tax and stamp duty. Because of the pending State election campaign, during which such issues are likely to be the subject of advocacy by the AIP, it decided that it should ascertain the Commission’s views. Therefore, its Executive Director, Mr Graham Young, wrote to the Commission in a one page letter dated 7 February 2020. As noted, the last dot point in the list of activities which the AIP said it intended to undertake was “Potentially recommend a vote for or against a particular candidate or party”. This was only one of a range of activities which the AIP said it intended to undertake.
- [25] Its request for the Commission’s advice as to whether “it is legal for prohibited donors to donate to us if we conduct these activities?” posed a simple but difficult question. The letter outlined a range of activities. The letter did not disclose whether any prohibited donors made donations to the AIP for a specific activity, such as research or the holding of a seminar, the expenditure for which was unrelated to any campaign for the State election. Similarly, it did not disclose whether any particular prohibited donor had made a gift to the AIP so as to enable it to engage in advocacy during a campaign for the State election and, in particular, to recommend a vote for or against a particular candidate or party.
- [26] The Commission’s letter of 20 February 2020 was also short. It outlined what the Commission understood to be electoral expenditure and that the Commission

considered the AIP to be “a third party”. Some criticism was made in Counsel for the AIP’s submissions of the fact that the Commission used the term “a third party” in the context of a sentence which attempted to summarise the effect of s 275 and the meaning of “political donation” in s 274. Section 274(1)(b) uses the term “another entity” rather than “a third party”. The Commission should not be unfairly criticised in this regard. The substance of its advice was that it did not regard the AIP as being one of the three entities described in s 274(1)(a) (which includes a political party) and therefore was “another entity” for the purpose of s 274(1)(b).

- [27] The Commission’s letter gave general advice that such an entity “would likely be committing an offence” by accepting a donation from a property developer, being a gift which was made to enable the entity to incur electoral expenditure. The Commission did not express any concluded view about whether the AIP had committed an offence, or was intending to commit what the Commission thought would be an offence. The Commission sought further information to enable it to consider “what action is appropriate, if any”.
- [28] The Commission’s letter clearly sounded a warning. Its request for further information was not unreasonable, given the view of the law taken by the Commission (as reflected in its submissions to this Court). The circumstances under which particular gifts from prohibited donors were made, including when the gifts were made, would, on the Commission’s view of the law, be relevant to ascertaining whether a particular gift was made “to enable” the AIP to incur “electoral expenditure” (being expenditure for the purposes of a campaign for an election).
- [29] The AIP apprehended that the Commission in its letter was intimating that the AIP may have committed an offence by accepting an unlawful donation and incurring electoral expenditure, and that the Commission might take action, including seeking to recover the prohibited donation as a debt due to the State under s 276. Mr Young’s affidavit filed 28 February 2020 states that the attitude taken by the Commission in its letter of 20 February 2020 jeopardises the operation of the AIP in its present form, both from the point of view of the risk to the officebearers of the AIP and “the willingness of property developer donors to continue to donate to the Institute”.
- [30] In correspondence between Crown Law on behalf of the Commission and the AIP’s solicitors leading up to the final hearing of this matter, Crown Law advised that the Commission’s position was that there “is a very real question as to whether your client’s application is supported by a concrete factual foundation” and that the AIP’s originating application for declaratory relief did not disclose a justiciable controversy, as the relief “is sought in terms divorced from any factual circumstance”. Seemingly in response to these assertions, the AIP filed a second affidavit of Mr Young on 16 March 2020, the day of the hearing. It relevantly states:
- “4. With the intention of applying pressure on political parties, council members, elected members of the Legislative Assembly or aspirant elected members of the Legislative Assembly to produce good policy, the Institute would like to participate in the municipal and state elections to be held later this year by doing the following:

- a. conducting or commissioning polling;
 - b. producing material that advocates a vote for or against a registered political party;
 - c. distributing material that advocates a vote for or against a registered political party;
 - d. using social media platforms including twitter to advocate for what we see as good policy;
 - e. carrying out research relating to the election with the dominant purpose of the research to influence voting at the election;
 - f. lobbying for good policy outcomes including communicating with [the] public in order to influence voting intentions;
 - g. having the option to recommend a vote for or against a particular candidate or party; and
 - h. carrying out an assessment of the attitudes of candidates and political parties to specific issues with the view to the distribution of material advocating for or against a candidate or party based on that assessment.
5. In the coming year we intend to campaign on a number of issues, including power generation and taxation.
 6. The impact of the letter from the Respondent to the Institute dated 20 February 2020, (which is referred to in paragraph 27 of the First Affidavit and is exhibit GY-3 to the First Affidavit), and the factsheets publicly available on the Respondent's website, (which are exhibit TOD-6 to TOD's affidavit), is that the Institute will be unable to take the actions mentioned in paragraphs 4 and 5 above unless we obtain relief of the kind sought in this application.
 7. In addition, unless we obtain relief of the kind sought in this application, the Institute will be unable to raise money from any prohibited donors and we have been informed by a number of our donors who are classified as prohibited donors that they do not wish to give us money whilst the information referred to in paragraph 6 above is published on the Respondent's website.
 8. In the last state election in November 2017, the Institute did the following:
 - a. production of material that advocated a vote for or against a registered political party;
 - b. distribution of material that advocated a vote for or against a registered political party;

- c. production of a power generation report, based on information provided by the Australian Energy Markets Operator (AEMO) with the view to influence voting at the election; and
 - d. production and distribution of material that advocated for issues which the Institute believed the political parties should address in the election.
9. In the last federal election in May 2019, the Institute did the following:
- a. production of material that advocated a vote for or against a registered political party;
 - b. distribution of material that advocated a vote for or against a registered political party;
 - c. fact checked claims made by the Australian Labor Party on taxation and electricity and the production of reports in those areas;
 - d. campaigned on housing affordability, franking credits, negative gearing, free speech, corporate taxation and affordable energy, with the view to influencing voting at the election; and
 - e. tweeted on what we saw as relevant matters, including, but not limited to, perceived factual errors in statements on taxation by the Shadow Treasurer, Chris Bowen.”

[31] Objection was taken by the Solicitor-General on behalf of the Attorney-General to paragraphs 6 and 7 of this affidavit. The objection to paragraph 6 was that it constituted “unqualified opinion evidence” and secondary evidence of the contents of documents and was asserting what the meaning and effect of certain documents were. I accept the submission of Senior Counsel for the AIP in response that the paragraph is not concerned with the proper construction of the letter, but is speaking about the impact of the letter and the fact sheets on the AIP’s proposed activities. I will allow paragraph 6. However, as I explained, the real issue is not the effect of the letter as such. The real issue is the apprehended effect of the interpretation adopted by the Commission, more fully developed in its submissions filed on 10 March 2020.

[32] The objection to paragraph 7 is that it contains objectionable hearsay and does not comply with the requirements under r 430 of the *Uniform Civil Procedure Rules* 1999 (Qld) in respect of the reception of hearsay evidence at a final hearing. Senior Counsel for the AIP responded that the paragraph does not contain hearsay but records Mr Young’s account of what people are saying to him. It was evidence of what their reaction had been. In my view, paragraph 7 is not admissible to prove the truth of what the unidentified prohibited donors said. It is simply evidence of their reaction and their intentions so long as the fact sheets remain on the Commission’s website. Again, and as foreshadowed at the hearing, I apprehend that the real issue is not so much the contents of a fact sheet which attempts to capture the substance of a lengthy statutory provision, but the meaning of that

provision, the Commission’s interpretation of it and the uncertain and largely unexplored issue of the particular activities in respect of which prohibited donors have made gifts or would wish to make gifts. The evidence suggests that some prohibited donors may wish to donate to the AIP to specifically fund its expenditure for the purposes of a campaign for the State election, including producing and distributing material that advocates a vote for or against a registered political party. However, the evidence leaves this uncertain, or at least a matter of inference.

- [33] The admissible evidence permits me to proceed on the basis that the AIP apprehends that if the interpretation briefly advanced in the Commission’s letter dated 20 February 2020, and more fully developed in its written submissions in this Court, is adopted, then an unstated number of its donors who are “prohibited donors” within the meaning of the Act will not contribute to some of its activities.

Declaratory relief

- [34] The discretionary power to grant declaratory relief is wide. However, it is “confined by the considerations which mark out the boundaries of judicial power”.⁶ A judicial determination includes a “conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy”.⁷ It involves the application of the relevant law to facts as found in the proceeding.⁸ The High Court in *Bass v Permanent Trustee Co Ltd* stated:

“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.”⁹

- [35] Declaratory relief must not be directed to answering “abstract or hypothetical questions”.¹⁰
- [36] Answers given to a question which leaves the facts unstated or do not identify them with any precision will not finally resolve a dispute or quell a controversy.¹¹ The answers given “may be of no use at all to the parties and may even mislead them as to their rights.”¹²
- [37] It has been said in the context of whether a person has a sufficient interest to establish a justiciable controversy that “[a] person whose freedom of action is challenged can always come to the court to have his rights and position clarified”.¹³ This does not mean, however, that a person whose freedom of action is challenged

⁶ *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582 (“*Ainsworth*”).

⁷ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355 [45] (“*Bass*”).

⁸ *Bass* at 359 [56].

⁹ *Bass* at 359 [56].

¹⁰ *Ainsworth* at 582.

¹¹ *Bass* at 357 [49].

¹² *Ibid.*

¹³ *Kuczborski v The State of Queensland* (2014) 254 CLR 51 at 106 [175] per Crennan, Kiefel, Gageler and Keane JJ quoting Lord Upjohn in *Pharmaceutical Society of Great Britain v Dickson* [1970] AC 403 at 433 and *Croome v Tasmania* (1997) 191 CLR 119 at 127.

in some uncertain way may obtain a declaration that is hypothetical in the sense of being divorced from facts which are proven or agreed.

- [38] The fact that certain facts have not yet occurred does not necessarily bar declaratory relief. Brennan J (as his Honour then was) stated in *Re Tooth & Co Ltd*:¹⁴

“Where the right, obligation or liability which an applicant seeks to establish depends upon facts which have not yet occurred, an 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.

...

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 remedy is nonetheless limited to cases which are not ‘hypothetical’ in a sense relevant to the exercise of this jurisdiction.

...

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.”

- [39] If, in applying these principles, a court makes a declaration about facts which have not yet occurred, the declaration made by the court and the answers given by it to questions “do no more than declare that the law dictates a particular result when certain facts in the material or pleadings are established”.¹⁵ Moreover, it does not remove the requirement for the facts to be identified with precision.
- [40] In some cases the facts will be simple and easily stated, for example that the applicant is threatened with prosecution for the commission of acts which are made illegal under a law which the applicant claims to be invalid. In such a case, in which the applicant seeks a declaration as to the law’s invalidity, it is not necessary to show that a prosecution has been commenced. It may be sufficient if the applicant faces possible criminal prosecution.¹⁶
- [41] Depending on the circumstances, a warning that certain conduct will lead to action being taken by an authority in the future may give rise to a justiciable controversy.

¹⁴ (1978) 31 FLR 314 at 332-334 (footnotes omitted).

¹⁵ *Bass* at 357 [49].

¹⁶ *Croome v Tasmania* (1997) 191 CLR 119 at 138 following *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 257.

In some cases, however, a caution that certain future conduct may lead to action will not.¹⁷

- [42] If there is a justiciable controversy based on facts, found or agreed, identified with precision, then the Court has the power to grant declaratory relief. Whether it exercises its discretion to do so will depend on, among other things, the form of declaration sought and its utility.
- [43] A declaration will not be of utility unless it can be expressed in precise, clear and unambiguous terms.¹⁸
- [44] There is authority that a declaration in a negative form, such as a declaration that a person “is not liable in an existing or possible action is one that will hardly ever be made”.¹⁹ The words “hardly ever” are a warning that declarations in such a form require careful scrutiny and an inquiry whether to grant such a negative declaration would be useful.²⁰ On occasions a Court will make a negative declaration, for example that the defendant has no right to do what he claims to do or does not have the contractual right he claims.²¹
- [45] Whether the declaration is cast in terms of a declaration of right or in a negative form, there remains the need for the relevant facts, including the past or proposed conduct of individuals, to be proven or agreed so that any declaration can be based on those facts.

Application of these principles to the proposed declarations

- [46] The AIP and the Commission are in dispute as to the correct interpretation of certain provisions of the Act. There is, however, no precision as to the facts upon which the proposed declarations would be based.
- [47] The proposed declarations refer to a “Third Party”, not to any particular third party. The words “third party” are defined in s 197 to mean “an entity other than a registered political party, an associated entity or a candidate”. The proposed declarations adopt this statutory term. They therefore extend to an undefined number of entities, not simply the AIP.
- [48] The proposed declarations refer to the “activities” of any such third party, without stating in even a general way what those activities are. Even if the proposed declarations were narrowed to the “activities” of the AIP, those activities are not stated with any precision and are said to include activities “in relation to political communications or concerning an election for the Legislative Assembly”. The activities which are “in relation to” those matters are unstated and ill-defined.
- [49] The AIP has given evidence of a range of activities it undertakes or proposes to undertake, some of which seemingly would involve “expenditure incurred for the purposes of a campaign for” an election for the Legislative Assembly, whilst others would not. Some of its political communications would incur expenditure for such

¹⁷ *Taylor v O’Beirne* [2010] QCA 188 at [13], [29], [33].

¹⁸ Young, Croft and Smith *On Equity*, Law Book Company, 2009 at [16.820].

¹⁹ *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536 at 564.

²⁰ *Camilla Cotton Oil Co v Granadex SA* [1976] 2 Ll R 10 at 14.

²¹ PW Young, *Declaratory Orders*, Butterworths, 2nd edition, 1984 at [605].

a purpose, while others would not. The proposed declarations do not specify the particular conduct of the AIP or of unspecified prohibited donors which would be declared, in effect, lawful because that conduct did not engage the operation of s 275.

- [50] The proposed declarations are not cast in terms which align with the AIP's submissions to the effect that s 274(1)(b) is confined to the incurring of electoral expenditure "on behalf of" any one of the three entities mentioned in s 274(1)(a).
- [51] The absence of details of the precise activities of the AIP to which the declaration would apply is a reason to decline to make a declaration in the form proposed. A declaration in that or a similar form would be uncertain for that reason. Two of the proposed declarations refer to a gift made to or for the benefit of a Third Party by "a prohibited donor". They do not refer to a particular donation by a prohibited donor who is named or referred to in a way that would preserve the prohibited donor's anonymity. Because the declaration refers in general terms to "a prohibited donor" who makes a gift it would apply to a gift which is not made "to enable" the AIP to make a gift mentioned in s 274(1)(a) or to incur "electoral expenditure" as defined in s 197. Yet there is no apparent controversy between the AIP and the Commission in respect of a gift by a prohibited donor which is not made "to enable" such a thing.
- [52] The proposed declarations are not sufficiently linked to an actual gift by one or more specified donors which was made, or which is intended to be made, to enable the AIP to incur expenditure for the purposes of a campaign for an election for the Legislative Assembly. In the circumstances, the proposed declarations are not based on "a concrete and established or agreed situation".²² There is a lack of precision as to the activities of the AIP and the specific conduct of the prohibited donor to which the declarations are to apply.
- [53] The proposed declarations are not expressed in precise and clear terms and, accordingly, lack utility. The lack of precision about the activities of the AIP (and other third parties) and the conduct of the unknown number of political donors would create uncertainty as to the conduct which the court would, in effect, declare to be not unlawful because it fell outside of the definition of "political donation" in s 274 and therefore did not engage the operation of ss 275 or 276 of the Act.
- [54] In summary, the proposed declarations lack precision and therefore are of doubtful utility. Their terms are divorced from specific facts found or agreed in relation to certain gifts, including the particular activities in respect of which the gifts were made or are to be made and the conduct and purposes of the prohibited donor in making them.
- [55] As to the threshold issues, the AIP has failed to establish that declarations in the form sought should be made. Declarations in the form sought would not accord with the principles governing the circumstances in which the court will grant declaratory relief. I decline to exercise the discretion to grant declaratory relief in the form sought, or in a form which limits the proposed declarations to the AIP, rather than one that extends to any "Third Party".

²² *Bass* at 355 [45].

Should the substantial issue about the correct interpretation of s 274(1)(b) be decided?

- [56] The foregoing is sufficient to dismiss the application because the AIP has not shown that it is appropriate to grant relief in the form sought.
- [57] At the hearing of its application, the AIP requested the Court to decide the point of statutory construction in dispute, which centres on the correct interpretation of s 274(1)(b). The written submissions of the Commission (which were filed on 10 March 2020 and adopted by the Attorney-General), contended that the AIP was seeking an advisory opinion from the Court about how the Act is to be interpreted, without any factual context. As noted, since those submissions were made the AIP has placed additional facts before the Court. Still, I apprehend that the Commission (and the Attorney-General) urge caution in agreeing to decide the substantive issue, notwithstanding that legal issue having been the subject of comprehensive submissions.
- [58] In this situation, two related issues arise:
- do the facts before the Court raise a justiciable controversy as to the proper interpretation of s 274(1)(b) based on a concrete situation; and
 - if so, should the Court exercise its discretion to decide the issue of a statutory interpretation?
- [59] There is no doubt that the AIP and the Commission have joined issue as to the proper interpretation of s 274(1)(b). That issue is not an academic one. Determining it directly affects whether the prohibitions in s 275 are engaged, and whether the AIP is liable to pay at least the amount of any prohibited donation to the State pursuant to s 276.
- [60] By the time of the final hearing certain facts for the purpose of deciding the issue of statutory interpretation were fairly clear. They may be stated as follows:
1. The AIP proposes to produce and distribute material that advocates a vote for or against a registered political party in the forthcoming State election.
 2. In that regard the AIP intends to campaign in the State election.
 3. In doing so it will incur expenditure for the purposes of its campaign.
 4. It relies on gifts to fund its activities, including campaigns of the kind it proposes to undertake for this year's State election.
 5. Those gifts include gifts from a number of the AIP's donors who are "prohibited donors" for the purposes of the Act.
 6. A number of the AIP's donors who are prohibited donors do not wish to give money to the AIP whilst the Commission adopts the position stated in its letter dated 20 February 2020 and its fact sheets about who is a political donor, the making of a political donation and the making of a gift by a prohibited donor to an entity to incur electoral expenditure.

7. A reasonable inference is that the prohibited donors adopt the same attitude to the Commission's position which is more fully developed in its written submissions.
 8. A reasonable inference is that absent a judicial determination as to the correctness or otherwise of the Commission's interpretation of the relevant provisions, the prohibited donors will not wish to give money to the AIP to enable the AIP to incur expenditure for the purposes of its campaigns for this year's State election.
 9. The prohibited donors do not wish to do so because if the Commission's interpretation of the statutory provisions is correct, they would risk prosecution, as would the AIP, for breaching s 275 of the Act.
- [61] In the circumstances, the dispute between the AIP and the Commission as to the correct interpretation of s 274 is not academic. It is based on a concrete situation. The facts, based on direct evidence and the reasonable inferences outlined above, are sufficiently established.
- [62] There is no clear evidence that prohibited donors have already made gifts to the AIP to enable it to incur expenditure for the purposes of a campaign for the State election. This is an available inference based on the position the AIP took until about January 2020, namely that it could receive funding from prohibited donors to fund its activities, including recommending a vote for or against a particular political party or a candidate for elected office, without breaching the Act. However, because of the lack of clear evidence in this regard I decline to draw that inference. I do, however, infer that prohibited donors intend to make such gifts if the AIP's preferred interpretation of s 274 is adopted, thereby removing or reducing the risk of prosecution for an offence under s 275.
- [63] To the extent one is concerned with an intended future act, namely the making of gifts by prohibited donors, this is a fact which is yet to occur. The reasons of Brennan J in *Re Tooth & Co Ltd* quoted above guide the availability of discretionary relief in such a case. As was said:
- “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.”²³
- [64] While a hypothetical element is necessarily present when facts have yet to occur, this does not render the issue of statutory interpretation “hypothetical” in the sense discussed by the authorities concerning hypothetical situations that are not suitable for judicial resolution. Any determination of the legal issue of interpretation arises in a concrete situation whereby the AIP and prohibited donors who wish to donate to it are exposed to prosecution for an offence under s 275 and the AIP is exposed to a liability to pay an amount to the State under s 276 if the Commission's interpretation is correct.
- [65] In the circumstances, a determination of the correct interpretation of s 274 would not be to give an “advisory opinion” about how the particular Act is to be

²³ (1978) 31 FLR 314 at 333.

interpreted without factual context. The factual context is summarised in the points numbered 1 to 9 above.

- [66] The controversy as to the lawfulness of the proposed future conduct of the AIP (and the prohibited donors who wish to donate to it) is real and immediate. It is a question of law. Resolution of that issue one way or the other may provide an inhibition against the commission of illegal acts or an assurance of a right to donate, and some assurance of freedom from prosecution. In the circumstances, it is appropriate to decide the issue of statutory construction.

The issue of statutory construction

- [67] As previewed, the principal issue of statutory construction is whether the words “to incur electoral expenditure” in s 274(1)(b)(i) should be interpreted as if they read “to incur electoral expenditure on behalf of any of the entities mentioned in s 274(1)(a)”. A related issue is whether the word “campaign” in the definition of “electoral expenditure” in s 197 simply means the activities of candidates and political parties aimed at gaining support for themselves at an election, or means organised activities aimed at achieving some object, such as a campaign which advocates a vote for or against a candidate or political party.

The AIP’s principal submissions

- [68] The AIP submits that the concept of a political donation in s 274 is, in essence, a gift made to or for the benefit of a political party, an elected member or a candidate in an election, or a gift to another for the purpose of making such a gift. According to the AIP, s 274(1)(b) does not extend beyond those three categories. Instead, it is concerned with the incurring of electoral expenditure “on behalf of any one of those three categories”.
- [69] This conclusion is submitted to flow from the statutory context which creates a dichotomy between, on the one hand, political parties and candidates (including elected members) which are seeking their members or themselves to be elected to the Legislative Assembly and, on the other hand, third parties who may participate in the political process in ways that do not urge the election of any particular person or party.
- [70] The AIP also argues that the Commission’s interpretation of the provisions does not support the purpose of the provisions. It submits that if s 274 had the meaning for which the Commission contends, its effect would be to silence a prohibited donor from involvement in matters of political discussion, and that the section’s purpose is not to completely preclude prohibited donors from such participation, nor to practically preclude third parties who are unable to ensure that they do not receive gifts from prohibited donors from such participation. The principle of legality is submitted to be against a construction which would have this effect.

Principles of statutory construction

- [71] The parties do not contest the principles governing statutory construction, and it is unnecessary to discuss them at length.

- [72] A statute is construed in order to ascertain the meaning of its words. The task of construing a statute commences with a consideration of the words of the provision itself, but it does not end there.²⁴ The words are to be construed in their context. The context includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the “mischief which it may be seen that the statute is intended to remedy”.²⁵
- [73] The interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.²⁶
- [74] Courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language.²⁷ This is sometimes described as the “principle of legality” which gives rise to a presumption or a working hypothesis about how statutory language will be interpreted. Gleeson CJ pointed out that the principle is to be applied against a background that “modern legislatures regularly enact laws that take away or modify common law rights”.²⁸ More recently Gageler and Keane JJ stated in *Lee v New South Wales Crime Commission*:²⁹

“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.”

- [75] The submissions of the AIP seek to engage the principle of legality. It contends that one would not expect to see a provision, which it argues would silence a prohibited donor from any involvement in matters of political discussion, contained in the last few words of s 274(1)(b). The significance of such a matter would, on its argument, require a separate, dedicated section.
- [76] The AIP’s submissions do not seek to engage the interpretive principles contained in s 48 of the *HRA*. Although the AIP is not an individual to whom the protections of the *HRA* extend, the task of construing s 274 of the *Electoral Act* requires effect to be given to s 48 of the *HRA*. Section 48 of the *HRA* provides:

“(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

²⁴ *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* [2019] HCA 35 at [32].

²⁵ *Ibid* at [33].

²⁶ *Acts Interpretation Act* 1954 (Qld) s 14A.

²⁷ *Electrolux Home Products Pty Limited v The Australian Workers’ Union* (2004) 221 CLR 309 at 328 [19].

²⁸ *Ibid*.

²⁹ (2013) 251 CLR 196 at 310 [313].

extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.”

- [77] The AIP’s submissions refer to the implied freedom of political communication and submit that before any issue of whether that freedom has been breached arises there is an anterior question of statutory interpretation. Its submissions urge a construction that would avoid an issue of the implied freedom arising. While acknowledging that the law in relation to the implied freedom bears upon the proper approach to statutory construction and the principle of legality, the AIP says that its application is “an exercise of statutory construction only” and does not raise any constitutional issue requiring the giving of notices pursuant to s 78B of the *Judiciary Act* 1903 (Cth). The Attorney-General treated the AIP’s reliance upon the implied freedom as raising such an issue and s 78B notices were issued. The AIP did not develop any argument concerning the implied freedom or the analysis which would be required under it. It does not advance any proportionality analysis either in the context of the implied freedom or in the context of s 13 of the *HRA*. It does not argue that if the construction advanced by the Commission is preferred then the legislation conflicts with the implied freedom of political communication. It seeks to reserve its rights to challenge the legislation on such a ground. Finally, no party contends that the High Court in *Spence v The State of Queensland*³⁰ was required to consider the present issue of statutory construction.

The relevant provisions

- [78] The issue of statutory construction concerns the interpretation of s 274(1)(b) in the context of s 275’s prohibition on political donations by prohibited donors. Section 274(1) has been quoted at the start of these reasons. The AIP relies upon the following provisions of the Act for the purpose of its submissions about the proper construction of s 274(1)(b):

“Part 1 Preliminary

2 Definitions

agent, for part 11, see section 197.

...

candidate, in relation to an election –

- (a) means a person who has become a candidate under section 93(3); and
- (b) for part 11, includes an elected member or other person who has announced or otherwise indicated an intention to be a candidate in the election.

...

disclosure period, for an election, for part 11 –

- (a) for a candidate in the election – see section 198(1); or

³⁰ (2019) 93 ALJR 643; [2019] HCA 15 (“*Spence*”).

- (b) for a third party to which section 263(1) or 264(1) applies for the election – see section 198(3).

...

elected member, for part 11, see section 197.

election means an election of a member or members of the Legislative Assembly.

...

electoral expenditure, for part 11, see section 197.

electoral matter means a matter relating to elections.

...

political donation, for part 11, division 8, subdivision 4, see section 274.

political party means an organisation whose object, or 1 of whose objects, is the promotion of the election to the Legislative Assembly of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part.

...

registered, for part 11, see section 197.

...

registered political party means a political party that is registered in the register of political parties.

register of agents, for part 11, see section 197.

register of candidates means the register kept under section 101.

register of political parties means the register kept under section 70.

...

third party, for part 11, see section 197.

Part 11 Election funding and financial disclosure

Division 1 Interpretation

197 Definitions

In this part –

...

agent means an agent of a registered political party, candidate or third party appointed under division 2.

...

disclosure period, for an election –

- (a) for a candidate in the election – see section 198(1); or
- (b) for a third party to which section 263(1) or 264(1) applies for the election – see section 198(3).

...

elected member means a member of the Legislative Assembly.

electoral expenditure –

- (a) for division 4 – see section 222; or
- (b) **for division 8, subdivision 4 – means expenditure incurred for the purposes of a campaign for an election, whether or not the expenditure is incurred during the election period for the election;** (emphasis added) or
- (c) for division 10 – see section 282A.

...

political donation, for division 8, subdivision 4, see section 274.

prohibited donor, for division 8, subdivision 4, see section 273.

registered, for an election, means registered under part 6.

register of agents means the register kept under section 211.

...

third party means an entity other than a registered political party, an associated entity or a candidate.

201A Meaning of gift threshold amount

The *gift threshold amount*, for the amount or value of a gift or loan, is \$1,000.

...

Division 4 Election funding

Subdivision 1 Preliminary

222 Interpretation

- (1) In this division, *electoral expenditure*, by a registered political party or a candidate for an election, means expenditure incurred by the political party or candidate for the purposes of a campaign for the election, whether or not the expenditure is incurred during the election period for the election.

- (2) For this division, if a registered political party and a candidate endorsed by the registered political party both claim to have incurred the same item of electoral expenditure, the electoral expenditure is taken to be electoral expenditure incurred by the party.

Division 7 Disclosure of gifts

Subdivision 2 Disclosure of gifts generally

261 Disclosure by candidates of gifts

- (1) If, during the disclosure period for an election, a candidate in the election receives a gift, other than an exempt gift, equal to or more than the gift threshold amount, the candidate's agent must give the commission a return about the gift.

...

263 Disclosure of gifts by third parties that incur expenditure for political purposes

- (1) This section applies to a third party if, during the disclosure period for an election, the third party incurs expenditure for political purposes equal to or more than the gift threshold amount.
- (2) The third party must give the commission a return stating the relevant details of any gift received by the third party during the disclosure period that –
- (a) has an amount or value equal to or more than the gift threshold amount; and
 - (b) the third party has used, in whole or part –
 - (i) to enable the third party to incur expenditure for a political purpose; or
 - (ii) to reimburse the third party for incurring expenditure for a political purpose.

...

- (5) For this section –
- (a) a third party incurs expenditure for a political purpose if the third party incurs expenditure for or by the way of –
 - (i) publication in any way (including radio or television) of electoral matter; or
 - (ii) any other ways publicly expressing views on an issue in an election; or

- (iii) the making of a gift to a political party; or
 - (iv) the making of a gift to a candidate in an election; or
 - (v) the making of a gift to a person on the understanding that the person or someone else will apply, either directly or indirectly, the whole or a part of the gift as mentioned in subparagraph (i), (ii), (iii) or (iv); and
- (b) the relevant details of a gift are the amount or value of the gift, the date on which the gift was made and the relevant particulars of the entity that made the gift.
- (6) For subsection (2), 2 or more gifts made, during the disclosure period for an election, by the same entity to another entity are taken to be 1 gift.

264 Disclosure by third parties of gifts to candidates

- (1) This section applies to a third party that makes, during the disclosure period for an election, a gift to a candidate in the election.
- (2) The third party must, by the day prescribed by a regulation, give the commission a return, in the approved form, stating the required details of the gift.
- (3) However, subsection (2) applies only if the amount or value of the gift is equal to or more than the gift threshold amount.

...

265 Gifts to political parties

- (1) This section applies to an entity that makes a gift, or made a gift before the commencement, to a registered political party (the *recipient party*) in a reporting period.
- (2) If the amount or value of the gift is equal to or more than the gift threshold amount, the entity must, by the day prescribed by a regulation, give the commission a return, in the approved form, stating –
 - (a) the amount or value of the gift; and
 - (b) the date on which the entity made the gift; and
 - (c) the name and address of the recipient party.

...

- (7) If –

- (a) 2 or more political parties are related to each other; and
- (b) at least 1 of the parties is a registered political party;

Subsections (1) to (4) apply as if –

- (c) those parties together constituted a single registered political party (rather than being separate political parties); and
 - (d) a gift made by an entity to any of those parties were a gift made by the entity to the recipient party.
- (8) If an entity makes a gift to a person or body with the intention of benefiting a particular political party, the entity is taken for this section (including subsection (7)(d) to have made that gift directly to the political party.

...

- (11) This section does not apply to gifts made by any of the following –
- (a) a registered political party;
 - (b) an associated entity;
 - (c) a candidate in an election.

Division 8 Rules about particular gifts and loans

Subdivision 4 Political donations from property developers

273 Meaning of *prohibited donor*

- (1) For this subdivision, *prohibited donor* –
- (a) means –
 - (i) a property developer; or
 - (ii) an industry representative organisation, a majority of whose members are property developers; but
 - (b) does not include an entity for whom a determination is in effect under section 277.

...

274 Meaning of *political donation*

- (1) For this subdivision, each of the following is a *political donation* –

- (a) a gift made to or for the benefit of –
 - (i) a political party; or
 - (ii) an elected member; or
 - (iii) a candidate in an election;
 - (b) a gift made to or for the benefit of another entity –
 - (i) to enable the entity (directly or indirectly) to make a gift mentioned in paragraph (a) or to incur electoral expenditure; or
 - (ii) to reimburse the entity (directly or indirectly) for making a gift mentioned in paragraph (a) or incurring electoral expenditure;
 - (c) a loan from an entity other than a financial institution that, if the loan were a gift, would be a gift mentioned in paragraph (a) or (b).
- (2) If a gift is made by a person in a private capacity to an individual (the *recipient*) for the recipient's personal use and the recipient does not intend to use the gift for an electoral purpose –
- (a) the gift is not a political donation when it is made; but
 - (b) if any part of the gift is used for an electoral purpose, then, for the purposes of section 275(3) –
 - (i) that part of the gift is a political donation; and
 - (ii) the recipient is taken to accept that part of the gift at the time it is used for an electoral purpose.
- (3) A reference is subsection (2) to using a gift for an ***electoral purpose*** is a reference to using the gift to incur electoral expenditure or for the recipient's duties as an elected member.
- (4) Despite section 201(4)(a) and (b), a reference in this section to a gift includes a fundraising contribution, to the extent the amount of the contribution forms part of the proceeds of the fundraising venture or function to which the contribution relates.
- (5) Despite section 201(4)(d), a reference in this section to a gift includes any of the following amounts paid by a person to a political party, to the extent the total amount of the person's payments in a calendar year exceeds \$1,000 –

- (a) an amount paid as a subscription for a person's membership of the party;
- (b) an amount paid for a person's affiliation with the party.

275 Political donations by prohibited donors

- (1) It is unlawful for a prohibited donor to make a political donation.
- (2) It is unlawful for a person to make a political donation on behalf of a prohibited donor.
- (3) it is unlawful for a person to accept a political donation that was made (wholly or in part) by or on behalf of a prohibited donor.
- (4) It is unlawful for a prohibited donor to solicit a person to make a political donation.
- (5) It is unlawful for a person to solicit, on behalf of a prohibited donor, another person to make a political donation.

276 Recovery of prohibited donations

- (1) If a person accepts a prohibited donation, the following amount is payable by the person to the State –
 - (a) if the person knew it was unlawful to accept the prohibited donation – an amount equal to twice the amount or value of the prohibited donation;
 - (b) otherwise – an amount equal to the amount or value of the prohibited donation.
- (2) The amount may be recovered by the State as a debt due to the State from –
 - (a) if the recipient is a registered political party that is not a corporation – the party's agent; or
 - (b) if the recipient is a candidate – the candidate or the candidate's agent; or
 - (c) otherwise – the recipient.
- (3) The imposition of liability to pay an amount to the State under this section –
 - (a) is not a punishment or sentence for an offence against section 307A or any other offence; and
 - (b) is not a matter to which a court may have regard in sentencing an offender for an offence against section 307A or any other offence.
- (4) In this section –

prohibited donation means a political donation that was unlawfully made or accepted under section 275.

recipient means the entity to whom, or for the benefit of whom, the prohibited donation was made.

...

Division 10 Disclosure of expenditure

282 Interpretation

A reference in this division to a participant in an election is a reference to –

- (a) a registered political party or a candidate; or
- (b) any other person by whom or with the authority of whom electoral expenditure for an election was incurred.

282A Meaning of *electoral expenditure*

In this division, electoral expenditure means expenditure incurred (whether or not incurred during the election period for an election) on, or a gift in kind given that consists of –

- (a) the broadcasting, during the election period for the election, of an advertisement that advocates a vote for or against a candidate or for or against a registered political party; or
- (b) the publishing in a journal, during the election period for the election, of an advertisement that advocates a vote for or against a candidate or for or against a registered political party; or
- (c) the publishing on the internet, during the election period for the election, of an advertisement that advocates a vote for or against a candidate or for or against a registered political party, even if the internet site on which the publication is made is located outside Queensland; or
- (d) the display, during the election period for the election, at a theatre or other place of entertainment, of an advertisement that advocates a vote for or against a candidate or for or against a registered political party; or
- (e) the production of an advertisement that advocates a vote for or against a candidate or for or against a registered political party, being an advertisement that is broadcast, published or displayed as mentioned in paragraph (a), (b), (c) or (d); or

- (f) the production of any material (other than material mentioned in paragraph (a), (b), (c) or (d) that –
 - (i) advocates a vote for or against a candidate or for or against a registered political party; and
 - (ii) is required under section 181 to include the name and address of the author of the material or of the person authorising the material; and
 - (iii) is used during the election period for the election; or
- (g) the production and distribution of material that –
 - (i) advocates a vote for or against a candidate or for or against a registered political party; and
 - (ii) is addressed to particular entities; and
 - (iii) is distributed during the election period for the election; or
- (h) the carrying out, during the election period for the election, of an opinion poll or other research relating to the election if the dominant purpose of carrying out the opinion poll or research is –
 - (i) to promote or oppose, directly or indirectly, a registered political party or the election of a candidate; or
 - (ii) to influence, directly or indirectly, voting at the election.”

The text and structure of s 274(1)

[79] Section 274(1) defines what a “political donation” is for the purposes of the Act’s provisions about political donations from property developers. Section 274(1) is in two parts:

- (a) the first part, subsection 274(1)(a), concerns a gift made to or for the benefit of three categories of recipients, namely a political party, an elected member or a candidate in an election;
- (b) the second part, subsection 274(1)(b), concerns a fourth category, namely a gift made to or for the benefit of a different category of recipient, described as “another entity”.

[80] Subsection s 274(1)(b) does not use words such as “on behalf of any of the entities mentioned in sub-paragraph (a)”, either after the words “another entity” or after the words “electoral expenditure”. The interpretation for which the AIP contends requires the section to be read as if these words were included, so as to confine s 274(1) (b) to a gift made to enable the entity to incur electoral expenditure on behalf of one of the three categories. It is not necessary to read those words into s 274(1)(b) in order to give it a sensible operation. The structure of s 274(1)

suggests that the Parliament intended that this category of political donation would apply to conduct which was not the subject of s 274(1)(a). Otherwise, subsection 274(1)(b) would be unnecessary.

- [81] If s 274(1)(b) was to be read in the manner contended for by the AIP, namely that it is concerned with the incurring of electoral expenditure “on behalf of” any one of the three entities mentioned in sub-paragraph (a), then it is difficult to see the purpose of s 274(1)(b). A gift made to allow the other entity to incur electoral expenditure on behalf of any of the entities mentioned in sub-paragraph (a) would be a gift made “for the benefit of” one of those entities, and fall within s 274(1)(a).
- [82] The construction of s 274(1)(b) urged by the AIP is not supported by the text and structure of the section.

Context

- [83] The sections relied upon by the AIP by way of context concern a variety of provisions. For example, for the purpose of Division 4, s 222 defines “electoral expenditure” by a registered political party or a candidate for an election. Other parts of the Act concern disclosure of gifts by a “third party”. Division 10 relates to disclosure of expenditure and adopts a definition of “electoral expenditure” in s 282A for the purposes of that division.
- [84] The AIP draws attention to the fact that there are different statutory definitions of “electoral expenditure” for the purposes of different divisions. In my view, little turns on that or their differences. The relevant definition of “electoral expenditure” in this case is the one contained in s 197 for the purposes of Division 8, Subdivision 4.
- [85] The AIP correctly notes that in different contexts, namely election funding, disclosure of expenditure and disclosure of gifts, the Act regulates, on the one hand, those who are seeking to have their members or themselves elected as members of the Legislative Assembly and, on the other hand, third parties. It is true that a third party (both in the ordinary sense and in terms of the statutory definition of “an entity other than a registered political party, an associated entity or a candidate”) may participate in the political process in many ways and in doing so may not urge the election of any person or party to the Legislative Assembly. However, this does not alter the fact that the Parliament passed specific provisions in Division 8, Subdivision 4 for dealing with a category of third party, being a prohibited donor. It singled out prohibited donors and imposed a prohibition upon a prohibited donor making a “political donation”. For that purpose, it defined a “political donation” in a particular way.
- [86] The meaning of “political donation” in s 274 (including the defined words “electoral expenditure”) must be construed in the context of a subdivision concerned with political donations from property developers.
- [87] The fact that the Act, in different divisions, deals in different ways with “electoral expenditure” in different contexts and regulates political parties and candidates in some ways and third parties in other ways does not require a narrow meaning to be attributed to the words “electoral expenditure” as defined for the purposes of s 274

or call for a narrow interpretation of s 274(1)(b) as if it included the words “on behalf of any of the parties mentioned in sub-paragraph (a)”.

- [88] The fact that the Act contains a variety of provisions, some of which deal with political parties and candidates, and others which regulate third parties, for example, third parties which incur expenditure for a political purpose,³¹ is part of the statutory context. The legislature has seen fit to regulate political parties, candidates and third parties in many and different ways. The Act imposes disclosure and other obligations on third parties who receive gifts that are used to incur expenditure for a “political purpose”,³² disclosure obligations on entities that make gifts to candidates and political parties,³³ and imposes obligations on participants in an election to disclose “electoral expenditure” (as defined in s 282A). The context is disclosure by third parties of gifts they receive and expenditure they incur.
- [89] The present context is not about the regulation of entities which are not political parties or candidates in regard to gifts they have received or expenditure they have incurred by requiring them to disclose those matters. It concerns the prior question of whether an entity is permitted to receive a gift. Section 274(1)(b) defines the circumstances in which a gift made to such an entity will constitute a “political donation” for the purpose of the prohibition on political donations by prohibited donors. The present context is concerned with certain donations which are prohibited, not disclosure of donations which are permitted. The definition of “electoral expenditure” and the regulation of third parties in the context of disclosure obligations in other parts of the Act does little to illuminate the meaning of “political donation” and s 274.
- [90] I turn to the definition of “political donation” in s 274(1)(b). If a definition applies, the only proper course is “to read the words of the definition into the substantive enactment and then construe the substantive enactment ... in its context and bearing in mind its purpose and the mischief that it was designed to overcome”.³⁴ To construe the definition “before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment”.³⁵ Section 274(1)(b) should not be construed in isolation from the operative provisions in which the definition is used.
- [91] The definition of a “political donation” in s 274(1)(b) depends on the use of those words in the context of a law that prohibits political donations from property developers, as well as the broader context of the regulation of political parties and electoral expenditure and the mischief to which Subdivision 4 of Division 8 was directed, being the potential for property developer donations to lead to corruption.
- [92] The purpose of the prohibition on political donations by prohibited donors could be easily undermined if a prohibited donor, instead of making a gift to a political party, donated it to another entity which was expected to (or even had promised to) spend the prohibited donor’s gift on a campaign which urged a vote for the political party,

³¹ The Act, s 263.

³² The Act, s 263.

³³ The Act, s 264, s 265.

³⁴ *Kelly v The Queen* (2004) 218 CLR 216 at 253 [103]; *Vickers v Queensland Building and Construction Commission* [2019] QCA 66 at [22].

³⁵ *Kelly* at 253 [103].

or urged electors not to vote for the political party's opponents. Section 274(1)(b) would seem to have been directed at prohibiting such a gift. Without a provision such as s 274(1)(b), the prohibition on political donations by prohibited donors would be narrowed to a gift, as defined in s 274(1)(a), and that provision could be easily circumvented by ensuring that the gift was made to another entity which incurred "electoral expenditure", not *on behalf of* a political party, but for the purposes of a campaign for an election which aimed to secure the election of that political party.

- [93] The purpose of the Act is best advanced by an interpretation which construes s 274(1)(b) according to the ordinary meaning of its words in their context. The definition in s 274 must be read in conjunction with the prohibition on political donations by prohibited donors, and in the broader context of an Act that regulates electoral expenditure, including electoral expenditure by an entity that is not a registered political party, an "associated entity" or a candidate.

The word "campaign"

- [94] The AIP contends that the expression "campaign" in the relevant definition of "electoral expenditure" in s 197 should be confined to the activities of political candidates, organisations and parties aimed at gaining support for themselves or their policies at an election. There is, however, no clear justification in either the terms of the relevant provisions or their context in relation to prohibited donations by prohibited donors, why the word "campaign" should not be given its ordinary meaning of an organised series of activities aimed at achieving some goal or object. It is apt to apply to a campaign for an election by an entity which advocates a vote for or against a political party or candidate.
- [95] Some dictionary definitions of the word "campaign" refer to its use in a specific context, such as military operations. For example the *Macquarie Dictionary*³⁶ has these meanings:

"campaign 1. The military operation of an army in the field during one season or enterprise. **2.** any course of aggressive activities for some special purposes; a *sales campaign* **3.** the activities of political candidates and organisations aimed at gaining support for themselves or their policies at an election or in a referendum, etc. **4.** to serve in, or go on, a campaign."

- [96] The AIP adopts the third of these meanings. However, the second meaning is just as applicable in the present context. The Commission notes that *The Chambers Dictionary* includes the following definition:³⁷

"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."

- [97] To these may be added the *Australian Oxford Dictionary*'s³⁸ definitions:

³⁶ 7th edition, 2017.

³⁷ 10th edition.

³⁸ 2nd edition, 2004.

“**campaign** **1.** an organised course of action for a particular purpose, especially to arouse public interest (e.g. before a political election). **2.a** a series of military operations in a definite area or to achieve a particular objective **b.** military service in the field (*on campaign*). conduct or take part in a campaign.”

- [98] In my view the Act uses the word “campaign” in the first sense or in a similar sense. The word means an organised series of activities aimed at achieving some goal or object.
- [99] It may describe the campaign of a third party or a group of third parties whose organised activities are aimed at achieving the election of a political party or a candidate or the defeat of a political party or candidate at an election.

The AIP’s surplusage argument

- [100] The AIP submits that were the expression “incur electoral expenditure” in s 274(1)(b)(i) to mean literally what it says, then it would mean the incurring of any expenditure for the purposes of a campaign for an election, and that would make the first half of the words in s 274(1)(b)(i) and (ii) surplusage. It argues that this is because the prohibition on the incurring of electoral expenditure would mean that the gifts to the entity for the purpose of making a gift of the kind mentioned in s 274(1)(a) would “simply be a sub-set of the prohibition on incurring electoral expenditure generally”.
- [101] I am not persuaded by this argument. Each part of s 274(1)(a) and each part of s 274(1)(b) has work to do. It is possible to imagine a gift made to an entity to enable the entity to make a gift mentioned in sub-paragraph 274(1)(a) which is not a gift made to enable the incurring of “electoral expenditure”. For example, a gift made to a political party may be for a specific purpose, such as to reduce its indebtedness or to buy a building. A gift made to another entity to enable that entity to make a gift to the political party in order to buy a building would fall within the first half of the words in s 274(1)(b)(i). Such a gift would not be made to enable electoral expenditure to be incurred. The construction advanced by the Commission does not render the first half of the words in s 274(1)(b)(i) surplusage.

The AIP’s consequence arguments and the principle of legality

- [102] The AIP submits that the Commission’s interpretation would silence a prohibited donor from any involvement in matters of political discussion, and that the purpose of the provision is not to completely preclude prohibited donors from any participation in the political process.
- [103] The Commission responds, correctly in my view, that its interpretation would not have the effect of silencing a prohibited donor from any involvement in political discussions. 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 by other means, including by running its own advertisements.

- [104] The AIP's submission which relies upon the principle of legality is founded upon the legislation having the effect of silencing a prohibited donor from any involvement in matters of political discussion. However, this is not its effect.
- [105] To the extent the ban on prohibited donors making a "political donation" limits a certain form of participation by prohibited donors in electoral matters, the limitation does not appear to have been inadvertently enacted. The Parliament clearly intended to prohibit political donors from making certain gifts, not only in the form of a gift to a political party, an elected member or a candidate, but in the form of gift to another entity in the circumstances stated in s 274(1)(b). The category created by s 274(1)(b) was an intentionally created category. This is not a case in which a general expression or loose words are used in a section and it might be thought that part of the inhibition thereby enacted was inadvertent. The Parliament used clear words in creating an additional category of "political donation" in s 274(1)(b), and did so in pursuit of an identified object.
- [106] In the circumstances, the principle of legality does not assist the AIP to advance its preferred interpretation of s 274(1)(b).

Statutory purpose and a purposive interpretation

- [107] The terms and structure of s 274(1) create a fourth category of entity to whom a gift is made. This indicates that Parliament's purpose was not simply to stop prohibited donors making gifts to or on behalf of a political party, an elected member or a candidate in an election. If this was so then s 274(1)(a) would be sufficient to regulate the making of a gift to an entity to be used on behalf of, and therefore for the benefit of, an entity mentioned in s 274(1)(a). The terms and structure of s 274(1)(b) indicate that the Parliament intended to define a "political donation" to include a gift made to another entity to enable it to incur electoral expenditure.
- [108] The purpose of the legislation which enacted the provisions which I am asked to interpret was to eliminate 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."³⁹
- [109] An interpretation of s 274(1)(b) which construed it as if it read "to incur electoral expenditure on behalf of any of the parties mentioned in sub-paragraph (a)" would narrow the effect of s 275 and permit it to be easily avoided by the simple step of making a gift to "another entity" to enable the entity to incur electoral expenditure which is used to recommend a vote for or against a political party or candidate. Such an interpretation is not one which best advances the purpose of the Act and its provisions in relation to political donations from property developers.
- [110] I accept the Commission's submission that the AIP's interpretation of s 274(1)(b) would substantially undermine the Act's purpose or objective. It would allow a prohibited donor to influence an election outcome by providing money to another entity to enable it to campaign for or against a political party or candidate. The Commission's submissions give the example of an election for a seat in the Legislative Assembly in which one candidate opposes a proposed development of a

³⁹ Explanatory Notes for the Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 ("Explanatory Notes"), page 11.

park into a residential unit complex. According to the AIP’s interpretation, it would be lawful for the developer who is a prohibited donor to make a gift to an entity to enable it to recommend a vote for the candidate not opposing the development or to recommend a vote against the candidate opposing the development. Such organised advocacy would be a campaign, according to the ordinary meaning of the word “campaign”, and the campaign expenditure would be expenditure for the purposes of a campaign for an election.

- [111] I conclude that the interpretation advanced by the Commission best advances the purpose of the legislation.

Human Rights Act, s 48

- [112] The AIP’s original written submissions supported its approach to statutory construction and its reliance upon the “principle of legality” by contending that it was consonant with the *HRA*. By letter dated 6 March 2020 the solicitors for the AIP advised that, in the interests of having the matter promptly determined, it would “not press any issue arising under the Human Rights Act”. The submissions of the Attorney-General however, referred to s 48 of the *HRA* in connection with the issue of interpretation and advanced arguments as to why the relevant provisions, when interpreted in the way contended for by the Commission, were “compatible with human rights” under the *HRA*. In addressing the issue of statutory construction and the proper approach to statutory construction, Senior Counsel for the AIP submitted at the hearing that the *HRA* did not ultimately progress the argument about the point of statutory construction.

- [113] Nevertheless, s 48 of the *HRA* is relevant to the interpretation of s 274(1)(b) in its application to ss 275 and 276. Therefore, it is appropriate to consider s 48 and the arguments made by the Attorney-General as to why the interpretation advanced by the Commission (and adopted by the Attorney-General) is consistent with the purposes of the relevant provisions of the *Electoral Act* 1992 (Qld) and is “compatible with human rights”.

- [114] As noted, s 48(1) of the *HRA* provides:

“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.”

That provision’s command as to statutory interpretation has two aspects:

- (a) the consistency of an interpretation with the statutory provision’s purpose; and
- (b) an interpretation which is “compatible with human rights”.

The second of these directs attention to human rights under the *HRA*. The words “compatible with human rights” require consideration of ss 8 and 13 of the *HRA*.

- [115] Under s 8 of the *HRA*, an act, decision or statutory provision is “compatible with human rights” if it:

- “(a) does not limit a human right; or

- (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.”

[116] Section 13 states:

“13 Human rights may be limited

- (1) 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.
- (2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant –
 - (a) the nature of the human right;
 - (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
 - (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
 - (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
 - (e) the importance of the purpose of the limitation;
 - (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
 - (g) the balance between the matters mentioned in paragraphs (e) and (f).”

[117] Section 48(1) of the *HRA* does not authorise an interpretation of statutory provisions which is inconsistent with their purpose. Instead, the provisions must be interpreted, to the extent possible that is consistent with their purpose, in a way that is “compatible with human rights”.

[118] Is the interpretation advanced by the Commission “compatible with human rights” as that phrase is defined in s 8 of the *HRA*?

[119] For the purposes of the *HRA*, all individuals in Queensland have human rights, and only individuals have human rights.⁴⁰ The *HRA* does not grant rights or freedoms to the AIP and other corporations. However, it may be accepted that s 275 limits the freedom of expression (*HRA*, s 21) and the right to take part in public life (*HRA*, s 23) of individuals insofar as it affects the funds available to property developers to:

⁴⁰ *HRA*, s 11.

- (a) make gifts to a political party, an elected member or a candidate in an election, either directly or via another entity (s 274(1)(a) and the first parts of s 274(1)(b)(i) and (ii)); or
- (b) make gifts to an entity to enable the entity to incur “electoral expenditure” or to reimburse the entity for incurring “electoral expenditure” (the second parts of s 274(1)(b)(i) and (ii)).

[120] The section thereby limits the funds available to corporate entities and also to individuals to impart information and ideas. In respect of the part of the definition of “political donation” in s 274(1)(b), s 275 may be said to limit the freedom of expression of individuals and their right to take part in public life in respect of activities involving expenditure that is incurred for the purposes of a campaign for a State election. Therefore, s 275 may be said to limit a human right for the purposes of the *HRA*.

[121] This leads to an analysis of whether the limit can be justified in accordance with s 13 of the *HRA*. In deciding whether the limit is reasonable and justifiable as mentioned in s 13(1), it is convenient to have regard to the factors stated in s 13(2) which “may be relevant” in deciding that issue.

[122] I have addressed the nature of the human right (s 13(2)(a)). Section 13(2)(b) concerns the purpose of the limitation. The purpose of legislation resides in its text and structure.⁴¹ The purpose of the relevant provisions, as appears in their text and structure, is to prevent a property developer or any other “prohibited donor” from making a “political donation” to a political party, an elected member or a candidate in an election and to prevent such a prohibited donor from making a gift to another entity to enable the entity to make such a gift or to enable the entity to incur expenditure for the purposes of a campaign for a State election. Like similar provisions upon which the provisions of Division 8, Subdivision 4 were based, the provisions have “the general purpose of preventing corruption and undue influence in the government of the State”.⁴² As Kiefel CJ, Bell, Gageler and Keane JJ observed, the choice to insert Subdivision 4 of Division 8 of Part 11 into the Queensland *Electoral Act* was based on lessons learned from the experience in New South Wales of corruption associated with land development applications occurring at the level of State government.⁴³

[123] The AIP did not contest the Attorney-General’s submission that the purpose of the relevant provisions was in reducing the risk of actual or perceived corruption related to developer donations in State elections and improving transparency and accountability in State elections and State government. If, however, there was any doubt about the provisions’ purpose, such a purpose is confirmed by the Explanatory Note to the legislation.⁴⁴ It records that the legislation aims to minimise the corruption and undue influence that political donations from property developers have the potential to cause at both a State and local government level.⁴⁵

⁴¹ *Lacey v Attorney-General for the State of Queensland* (2011) 242 CLR 573 at 592 [44].

⁴² *Spence* at [93] – [96].

⁴³ *Ibid* at [94], [96].

⁴⁴ Explanatory Notes at p 1, 3, 4, 11.

⁴⁵ Explanatory Notes at p 1, 3.

The risk of corruption at a State level arises where the State holds a “significant role in Queensland’s planning framework”.⁴⁶

- [124] The legislation still permits prohibited donors to spend money in seeking to influence the outcome of a State election when they do so directly, for example, by paying for advertisements that urge a vote in favour or against a political party or candidate. The apparent purpose of the relevant provisions is to prevent prohibited donors from influencing the outcome of a State election by less direct and less transparent means, including by making gifts to an entity to enable the entity to incur expenditure for the purposes of a campaign for an election. The purpose of preventing corruption and undue influence in the government of the State is consistent with “a free and democratic society based on human dignity, equality and freedom”.⁴⁷
- [125] The relationship between the limitation and its purpose has been discussed and the limitation helps to achieve the purpose.⁴⁸ The part of the definition of “political donation” in s 274(1)(b), as applied to the prohibitions in s 275, seeks to ensure that the purpose of the provisions is not thwarted by gifts being made to entities so as to achieve the same electoral outcome as a gift to a political party or candidate. It helps achieve the purpose by ensuring that the prohibition on the making of gifts to or for the benefit of political parties or candidates is not undermined by making the gift to another entity which can use the gift to urge a vote for or against a political party or candidate.
- [126] As to whether there are any less restrictive and reasonably available ways to achieve the purposes of the provisions,⁴⁹ none are nominated by the AIP in response to the Attorney-General’s submissions. Substantial arguments were advanced by the Commission in the context of the issue of interpretation as to why a provision which did not include the part of the definition in s 274(1)(b) would not be as effective in achieving the purpose of preventing corruption and undue influence in the government of the State. Without that part of s 274(1)(b), the purpose of the provisions could be easily defeated by making the gift to another entity to achieve the same electoral or political outcome as a gift to one of the entities mentioned in s 274(1)(a).
- [127] The purpose of the limitation on human rights is important. Reducing corruption enhances our democratic system.⁵⁰
- [128] Preserving the freedom of expression of individuals and the rights of individuals to take part in public life also is important. This is especially so in the context of the imparting of information and ideas and the participation of individuals in campaigns for an election.
- [129] The limitations on the rights and freedoms of corporations, such as the AIP, is not directly relevant since s 13 is concerned with limitations on the human rights referred to in the *HRA*. Nevertheless, the effects of the relevant prohibitions on the

⁴⁶ Explanatory Notes at p 3.

⁴⁷ *HRA*, s 13(1), s 13(2)(b).

⁴⁸ *HRA*, s 13(2)(c).

⁴⁹ *HRA*, s 13(2)(d).

⁵⁰ *McCloy v New South Wales* (2015) 257 CLR 178, 196 [5], 221 [93]; *Spence* at [93].

activities of corporations in indirectly limiting the participation of individuals in public affairs and the information they receive, particularly in the course of campaigns for elections, must be taken into account.

- [130] I take account of the evidence before me in relation to the inhibition on the preparedness of prohibited donors to donate to the AIP if the Commission's interpretation of the Act is correct. The evidence does not disclose whether the prohibited donors are corporations or individuals. In any case, a disinclination to make a donation to the AIP to enable the AIP to incur expenditure for the purposes of a campaign for the State election may be expected to have consequences for the extent of participation by individuals in campaigning activities and for individuals who would receive information as a result of such expenditure.
- [131] There is no evidence of the extent to which the prohibition on prohibited donors making a political donation to "another entity" might prompt them to participate in other ways in the political process, including by seeking to directly influence the outcome of an election by themselves incurring expenditure, for example, by paying for political advertising or other activities involving public participation. Also, as previously noted, the provisions do not prevent prohibited donors from donating to entities such as the AIP to fund activities that fall outside of s 274(1)(b).
- [132] Although not made in the context of submissions about the *HRA*, I take note of the submissions made by the AIP about the principle of legality. I reiterate my conclusion that, contrary to those submissions, the legislation does not completely preclude prohibited donors from participating in the electoral process or in the political process.
- [133] I take account of the importance of preserving the human rights recognised in ss 21 and 23 of the *HRA* and take account of the nature and extent of the limitation on them. I also take account of the importance of the purpose of the limitation, namely to enhance our democratic system by preventing corruption and undue influence in the government of the State. The balance between those matters favours the purpose of the limitation.⁵¹
- [134] I have addressed matters which s 13(2) states may be relevant to the issue of whether a limit on a human right is reasonable and justifiable in terms of s 13(1). I turn to the issue posed by s 13(1).
- [135] In my view, the limitations on the human rights contained in the *HRA* are reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. The purpose of the limitations is consistent with a free and democratic society based on those values. The provisions seek to prevent corruption and undue influence in the government of the State. They enhance our democratic system. The nature and extent of the limitations on freedom of expression and the right of individuals to participate in public life does not preclude prohibited donors from participating in public affairs, including election campaigns, by direct and open means, including by incurring expenditure on activities which they undertake in order to influence the outcome of an election, including advertising which urges electors to vote for or against political parties and candidates.

⁵¹ *HRA*, s 13(2)(e), s 13(2)(g).

- [136] Because, in my view, the limitations on human rights are justifiable in accordance with s 13, the relevant provisions are therefore “compatible with human rights” within the meaning of s 8 of the *HRA*.
- [137] To return to s 48(1) of the *HRA*, I find that:
- (a) the interpretation of the statutory provisions advanced by the Commission is consistent with their purpose; and
 - (b) that interpretation is compatible with human rights.
- [138] Because the statutory provisions can be interpreted in a way that is compatible with human rights, s 48(2) does not arise for consideration.

Conclusion on the issue of proper construction of s 274(1)(b)

- [139] The interpretation of s 274(1)(b) which best achieves the purpose of the Act is the one advanced by the Commission, so it is to be preferred to any other interpretation.⁵²
- [140] The interpretation contended for by the AIP requires words to be read into s 274(1)(b), namely “on behalf of one of the entities mentioned in paragraph (a)” after the words “electoral expenditure”. If Parliament had intended to confine the operation of s 275, it might easily have added those words to s 274(1)(b).
- [141] The text of the definition in s 274(1)(b), as applied to ss 275 and 276, does not confine those provisions to expenditure on a political party’s or candidate’s own campaign in which they seek to have themselves elected. Obviously, it would include such a campaign. The words of the provision also may apply to a campaign by the entity or another entity for the election, such as a campaign which has as its objective the election of a party because the party supports policies that the entity advocates.
- [142] Section 274(1)(b) must be construed in the context of s 274(1)(a). If s 274(1)(b) related to only the incurring of electoral expenditure *on behalf of* any of the entities mentioned in subparagraph (a), it would add nothing to s 274(1)(a) or the first half of s 274(1)(b)(i) because such a gift would be made “for the benefit of” the political party, elected member or candidate referred to in subparagraph (a).
- [143] Contrary to the AIP’s submissions, the Commission’s interpretation does not make the first half of the words in s 274(1)(b)(i) surplusage. They have work to do in the case of a gift to an entity to enable the entity to make a gift to a political party for something other than electoral expenditure. An example would be a gift to enable the purchase of a building in which to house the political party’s offices.
- [144] The interpretation advanced by the Commission is not inconsistent with the principle of legality. Contrary to the AIP’s submissions, that interpretation does not “completely preclude prohibited donors from any participation in the political process” or “silence a prohibited donor from any involvement in matters of political discussion”. A prohibited donor may not make a “political donation” as defined in

⁵² *Acts Interpretation Act 1954 (Qld)*, s 14A.

s 274. It is, however, free to engage in political discussion in other ways, including by running political advertisements and engaging in political debates.

- [145] Section 275 prohibits a prohibited donor making a gift to an entity to enable the entity to incur expenditure “for the purposes of a campaign for an election” of members of the Legislative Assembly. The definition of “electoral expenditure” that applies for the purposes of s 275 and s 276 does not refer to expenditure incurred “on behalf of” a political party or candidate. The sections should not be interpreted as if those words were inserted into s 274(1)(b).

Expenditure incurred for the purpose of a campaign for an election

- [146] The provisions do not create a general ban on the making of gifts by prohibited donors to an entity such as the AIP to enable the AIP to conduct its various activities or to participate in the political process. The prohibition created by the application of the definition in s 274(1)(b) to the prohibition in s 275 is on gifts that are made “to enable” the entity to incur expenditure for the purposes of a “campaign for an election”.
- [147] The AIP correctly points to the fact that the Act uses the composite expression “campaign for an election”, not simply a campaign. I would add that the definition would not apply to a political or other campaign simply because the campaign occurred *during* an election. The campaign must be “for an election”. For example, a third party’s campaign that aimed to achieve the election or the defeat of a political party at the State election would be a “campaign for an election”.
- [148] The words “to enable” in the definition focus attention on the purpose of the donor in making the gift, and probably the purpose the donee understood the gift was intended to achieve. The words “for an election” direct attention to the goal of the campaign in which the expenditure is intended to be incurred. As is apparent, these terms involve a fact-specific inquiry concerning the circumstances in which a gift is made.
- [149] I have concluded that the definition of “electoral expenditure” which applies for the purposes of s 275 is not limited to a campaign by a political party or candidate to have themselves elected. Section 274(1)(b) does not use the words “campaign by a political party or candidate” and there is no compelling reason to interpret the provision as if it did.
- [150] The definition of “political donation” in s 274(1)(b) is not concerned with expenditure for political purposes in general, such as research and advocacy for certain policies. It is concerned with expenditure for the purposes of a campaign for an election. The application of the section requires:
- (a) identification of activities that would constitute a “campaign for an election”; and
 - (b) an inquiry into whether a gift was made to enable the entity to incur expenditure for the purposes of that campaign.
- [151] I do not accept the AIP’s argument that the interpretation advanced by the Commission practically precludes third parties like it from participating in the political process because they are unable to ensure that they do not receive gifts

from prohibited donors. The law prohibits such entities from receiving gifts from prohibited donors only in some circumstances. The entities are free to receive gifts from others and to receive gifts from prohibited donors in other circumstances, and thereby participate in the political process. As the AIP's submissions note, for s 274(1)(b) to be engaged, the gift needs to be for the entity to actually incur expenditure on electoral matters. The words "to enable the entity ... to incur electoral expenditure" require such a connection. Therefore, s 275 does not impose a general ban on the making of gifts by prohibited donors to an entity such as the AIP. It is not concerned with a gift made by a prohibited entity to enable the entity to conduct activities which fall outside the statutory definition. The prohibition, when applying the second part of the definition in s 227(1)(b)(i), is on the making of gifts to or for the benefit of the entity to enable the entity to incur "expenditure for the purposes of a campaign for an election". The AIP does not explain why it cannot ensure that the gifts it receives from prohibited donors are not to enable it to incur such expenditure.

Conclusion on the application for declaratory relief

- [152] The questions raised by the declaratory relief sought by the AIP about the activities of a "Third Party" do not permit a yes or no answer. Any answer would be "it depends". This is because whether or not the activities of a third party, including the AIP, fall within part of a statutory definition, such as s 274(1)(b), and therefore an operative provision such as ss 275 or 276, depends upon the particular activities. The provisions, properly construed, do not lead to an all or nothing answer in respect of the AIP's various activities.
- [153] Whether or not a gift falls within the part of the definition of "political donation" in s 274(1)(b) which I have been asked to construe depends on the circumstances in which the gift was made. It depends on the purpose of the particular donor and the particular gift: was it "to enable" the AIP to incur expenditure "for the purposes of a campaign for an election" for the Legislative Assembly?
- [154] The issue of whether the making of a gift engages the operation of ss 275 or 276 is fact-specific. Not all of the AIP's activities, including its political communications, will be "for the purposes of a campaign for the [State] election". Therefore, not every gift to it by a prohibited donor will fall within that part of the definition of "political donation" and be prohibited.
- [155] Because the matter is fact-specific, the declarations sought by the AIP lack utility, and it would be inappropriate to grant any of them, or even declarations which refer to the AIP rather than any "Third Party". It would be inappropriate to grant a declaration which referred in an unhelpful way to the AIP's activities.
- [156] While certain facts proven in the case have allowed me to determine an issue in dispute between the AIP and the Commission concerning the correct interpretation of s 274(1)(b), the AIP has not established that it is appropriate to grant declaratory relief in the form sought by it or in a similar form which is not fact-specific as to the precise activities to which the declaration refers.
- [157] The form of declaratory relief sought by the AIP is imprecise and does not engage with the issue of whether a gift to it by a prohibited donor was made "to enable" it to incur expenditure for the purposes of "a campaign for an election" for the

Legislative Assembly. The evidence does not establish that such a gift has been made. The Court should not grant a declaration on the basis of an assumption that such a gift has been made. To do so would be to make a declaration that is hypothetical in the sense of being divorced from facts which are found or agreed.

[158] It being inappropriate to grant declaratory relief in the form sought, I dismiss the application.

[159] I will hear the parties, including the interveners, if required, on any question as to costs. At this stage, the only order will be that the originating application filed 28 February 2020 is dismissed.