

**Submission
No 8**

**THE FINAL REPORT OF THE EXPERT PANEL –
POLITICAL DONATIONS AND THE GOVERNMENT’S
RESPONSE**

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Mr Jai Rowell MP
Chair
Joint Standing Committee on Electoral Matters
Parliament House
Macquarie St
Sydney NSW 2000

20 October 2015

Dear Mr Rowell,

Inquiry into the Political Donations Final Report and Government Response

Please accept this late submission to your inquiry.

The report of the Panel of Experts into Political Donations was written in the shadow of a constitutional challenge to the validity of caps on political donations, the ban on indirect political donations and the ban on donations by property developers. There was a degree of uncertainty as to the constitutional scope for reforms in the area of political donations.

That uncertainty has now been resolved by the High Court in *McCloy v New South Wales* [2015] HCA 34. This submission will focus on that case, as it is relevant to any New South Wales and national reforms that may now proceed.

The High Court unanimously rejected Mr McCloy's challenge to the imposition of caps on political donations and the ban on indirect donations. By a majority of 6:1 (with Nettle J dissenting) it also rejected his challenge to the ban on donations by property developers.

As it had previously done in *Unions NSW v New South Wales*, the High Court accepted in *McCloy* that the purpose of Part 6 of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) is to prevent the reality and perception of undue influence and corruption, and that this is a 'legitimate end' for the purposes of the implied freedom of political communication.

McCloy had argued that political donations are made to secure access to politicians in order to seek to influence them and that this did not amount to corruption. Rather, he argued, this was an exercise in participating in political power that was protected by the implied freedom. The High Court rejected this argument. The joint judgment of French CJ, Kiefel, Bell and Keane JJ responded that 'guaranteeing the ability of a few to make large political donations in order to secure access to those in power would seem to be antithetical to the great underlying principle' of representative government that involves equal sharing in political power. Gageler J added that McCloy's argument about the use of political donations as tools of influence was as 'perceptive as it is brazen' and saw it as going 'to the heart of the mischief to which the provisions are directed'.

McCloy, relying on the approach of the US Supreme Court in cases including *Citizens United* and *McCutcheon*, contended that gaining access and influence through the making of political donations does not amount to corruption. In the United States, only *quid pro quo* corruption, in which there is a direct exchange of donations for corrupt favours, is regarded as 'corruption' for the purposes of justifying the imposition of limits on political donations. In *McCloy*, the joint judgment noted that limiting 'restrictions on political donations to acts of bribery would undoubtedly reduce the efficacy of the statutory scheme' and that large donations can have the tendency to corrupt even if that is not the subjective intention of the donor.

The High Court identified two additional forms of corruption, beyond *quid pro quo* corruption. The first was 'clientelism', in which an office-holder becomes financially dependent upon donors so that he or she ceases to act in the public interest, instead acting in the interests of the donor. The joint judgment saw this as sapping the 'vitality, as well as the integrity, of the political branches of government'. Gageler J, while accepting that preferential access through the making of donations does not necessarily equate to corruption, considered that the 'line between a payment which increases access to an elected official and a payment which influences the official conduct of an elected official is not always easy to discern.' He acknowledged that the 'basic human tendency toward reciprocity means that payments all too readily tend to result in favours'. Gageler J concluded that the elimination of preferential access to government based upon the making of donations is not only a legitimate end for legislation but also a 'compelling objective'.

The other kind of corruption was described in the joint judgment as 'war-chest' corruption in which the best funded candidates and parties squeeze out other voices from political discourse by dominating advertising and other sources of conveying mass communications. While the High Court has given mixed messages about whether a 'level playing field' is a legitimate end for electoral legislation, the joint judgment in *McCloy* recognised that '[e]quality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our Constitution'.

Gageler J appeared to accept the Canadian view that 'preventing wealthy voices from dominating political discourse so that other voices may be heard' is a legitimate end as it enhances the right to vote. He also concluded that 'unequal access to government based on money' was something that the Parliament could legitimately seek to eliminate.

Nettle J focused on political sovereignty, arguing that it requires those who govern to take account of the interests of all, 'not just the few ... who have the means of buying political influence'. He distinguished US jurisprudence as based upon express individual rights, noting that it cannot be transposed to Australia's constitutional context. He considered that 'reducing opportunities for the purchase of political influence tends to reduce undue influence, encourage candidates and parties to seek support from more individuals and broader segments of society, and motivate individuals with common interests to build political power groups', all of which enhances the system of government that the implied freedom seeks to protect.

Gordon J accepted that it was legitimate for the Parliament to seek to secure to each individual an equal share, 'or at least a more equal share than they would otherwise have, in political power.'

Six Justices accepted that there was sufficient evidence of corruption involving property developer donations in New South Wales to justify special measures to prohibit their donations. The joint judgment accepted the submission by NSW that ‘the degree of dependence of property developers on decisions of government about matters such as the zoning of land and development approvals distinguishes them from actors in other sectors of the economy’. Their Honours also noted that the ban on property developer donations applies at the local government level as well as the State level, whereas the cap on donations only applies at the State level. They observed that it was ‘not suggested that the legislature should allocate resources to extend the capping and public funding provisions in order to give them the same scope as the prohibition, nor was it suggested that a partial removal of the prohibition, for local government elections, would be practicable’.

The High Court also rejected the argument that an equivalent end could be achieved simply by increasing transparency through the disclosure of donations. All the Justices concluded that disclosure was not an adequate alternative to restrictions on donations.

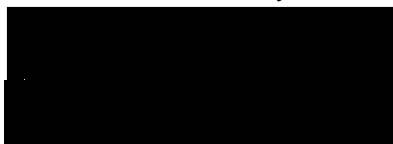
Overall, the High Court gave very strong support to the imposition of limitations on political donations as a means of reducing or removing undue influence and facilitating the equal share of individuals in political power. It also recognised as a legitimate end the imposition of limits to prevent those with wealth from dominating political communication to the exclusion of others.

The *McCloy* decision is relevant to Recommendation 2 of the Panel, as it clears away constitutional doubts about the enactment of similar reforms at the national level. The excuse of constitutional uncertainty can no longer be used as a crutch for the recalcitrant.

The High Court’s judgment is also directly relevant to Recommendation 7 concerning the ban on donations by property developers (although to the extent that it extends to the liquor, gambling and tobacco industries, care would have to be taken that similar justifications can be made and evidence supplied). Recommendation 8, being the continuation of caps on political donations, is also directly supported by the judgment in *McCloy*.

The principles, as set out in the judgments in *McCloy* will also be relevant to other recommendations and the matters to be considered by the Committee.

Yours sincerely,

A large black rectangular redaction box covering the signature of Anne Twomey.

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