

McCloy v NSW (2015) 257 CLR 178

<https://lawcasesummaries.com/knowledge-base/mccloy-v-nsw/>

Facts

- Jeff McCloy, the former Lord Mayor of Newcastle challenged the validity of several parts of the *Election Funding, Expenditure and Disclosures Act 1981 (NSW)* (**EFED Act**).
- This challenge was made on the basis that the EFED Act infringed on the implied freedom of communication.
- McCloy had been investigated by ICAC in early 2015 about political donations made in excess of the expenditure cap.
- The following parts of the EFED Act were challenged:
 - Division 2A of Part 6 which created a general cap of \$5,000 (increased annually in line with Schedule 1 to the EFED Act) for political donations to a registered party or candidate for State elections;
 - Division 4A of Part 6 which prohibited political donations being made by property developers, the tobacco industry and the liquor and gambling industry; and
 - Section 96E which prohibited certain indirect campaign contributions including provision of office accommodation, vehicles, computers and other equipment for no or inadequate consideration for use substantially for election campaign purposes.

Issues

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Held

- The High Court held that the EFED Act laws did not exceed the implied freedom of political communication.
- The joint judges held that Division 2A and s 96E were not invalid because their capping provisions were aimed at the legitimate end of preventing corruption and undue influence, and reduced the risk of corruption and undue influence by preventing the payments of large sums of money through political donations.
- Division 4A aimed at reducing a risk of corruption that may be higher in property development than in other areas of official decision making.
- The Constitutional implied freedom of political communication is not an absolute freedom, but a qualified freedom that is implied in order to ensure the people of the Commonwealth may “exercise a free and informed choice as electors” (see *Lange v ABC*).
- Building on the two part test to determine if a law infringes on the implied freedom of political communication, the High Court added a third prong to the test:
 - 1. Does the law effectively burden the freedom in its terms, operation or effect?

- 2. Are the purposes of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government?
- 3. Is the law reasonably appropriate and adapted to advance that legitimate objective?

Quotes

"Accepting that Div 2A and Div 4A burden the freedom, in the way explained in *Unions NSW*, the process of justification for which *Lange* provides commences with the identification of the statutory purpose or purposes. The other questions posed by *Lange* are not reached unless the purpose of the provisions in question is legitimate. A legitimate purpose is one which is compatible with the system of representative government provided for by the *Constitution*; which is to say that the purpose does not impede the functioning of that system and all that it entails. So too must the means chosen to achieve the statutory object be compatible with that system."

(French CJ, Kiefel, Bell and Keane JJ at [31])

Full Text

The full text is available here:

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2015/34.html?stem=0&synonyms=0&query=McCloy>

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