



HRO This hearing is now resumed, thank you.

PO Mr RICE.

CA Commissioner, I call Professor Anthony GRAY.

PO Professor, do you have any objection to taking an oath on the Bible?

10 W No.

PO Thank you.

HRO Just repeat after me. The evidence which I shall give in these proceedings.

W The evidence which I shall give in these proceedings.

HRO Shall be the truth, the whole truth, and nothing but the truth.

20 W Shall be the truth, the whole truth, and nothing but the truth.

HRO So help me God.

W So help me God.

CA Sir, is your name Anthony GRAY?

W Yes.

30 CA You're a professor of law; correct?

W That's right.

CA In fact, you're the deputy head of the School of Law and Justice at the University of Southern Queensland?

W I have been, yes.

CA You are appearing today in response to an attendance notice?

40 W That's correct.

CA Can I show you this copy. Is that a copy of your attendance notice, professor?

W Yes, it is.

CA I tender that.

50 PO Exhibit 98.

CA Just to recap on your academic credentials, professor, you have a Bachelor of Business degree from the Queensland University of Technology?

W Yes.

- CA A Bachelor of Laws with Honours from QUT?
- W Yes.
- CA A Graduate Diploma in Legal Practice from the same university, and also a Master of Laws from QUT, and a Doctor of Philosophy from the University of New South Wales; correct?
- 10 W That's correct.
- CA Your special area of interest - correct me if I'm wrong - is constitutional law and human rights?
- W Correct.
- CA You have been good enough to respond to an invitation to make a submission and did send a submission to the Commission; correct?
- 20 W Yes.
- CA Can I just show you this. Is that a copy of the submission that you made, professor?
- W Yes, it is.
- CA I tender that.
- PO Exhibit 99.
- 30 CA You've also been published, have you not, professor, on the subject of donation and spending limits in political finance and their compatibility with the Australian Constitution?
- W That's correct.
- CA There is perhaps an unlikely connection between the constitution and local government, but to explore that, you have suggested, I think, that capping of donations and expenditure for political campaigns might be problematic by virtue of the principle of implied freedom of communication; correct?
- 40 W That's right.
- CA Could you explain what that principle is?
- W In a series of cases commencing in the 1990s, the High Court determined that implicit within our constitution was the right of citizens to participate in political discussion and communication, and, as part of that freedom, they had the right to impart and to receive information to allow them to make an informed decision in relation to our democracy and who leads us.
- 50 CA There have been some decisions within the last three or four years concerning bans on donations?

- W Yes.
- CA In one decision, I think it's the *Unions NSW v New South Wales* case, there was a ban on donations, or at least the court held invalid a ban on donations from anyone other than an individual?
- W That's right.
- 10 CA In another case of *McCloy*, in New South Wales, a ban on donations from property developers was held to be valid?
- W That's correct.
- CA There were different outcomes in those two cases. Is there some unifying principle, nonetheless?
- 20 W That's a good question. The High Court, I might say, has altered its approach to some extent in relation to the implied freedom, and the *McCloy* decision heralded, to some extent, some different principle to be applied in that area. But, yes, I accept that the High Court has found that a ban on donations from developers was constitutionally valid, did not infringe the implied freedom.
- CA That principle, and those decisions, have a flow-over application potentially to local government?
- 30 W It's possible. As you know, local government is not referred to in our constitution. It's kind of the distant aunt in terms of our constitution. But having said that, initially the High Court found that the implied freedom occurred in the context of federal politics and federal government elections, which makes sense, in a way, in that they discern it from the Australian Constitution. But in subsequent cases, including in one of those cases to which you refer, they have clarified that the freedom may also be applicable to state politics.
- So on the assumption that the doctrine is applicable to state political processes, it becomes then possible to argue that it also is applicable with respect to local government, in my view.
- 40 CA You've referred to an additional difficulty, in your submission, with the concept of capping donations and expenditure for political purposes, being the content of our country's liberal democracy, as you term it. What do you mean by the term "liberal democracy"?
- 50 W Well, I certainly am a fan of freedom, and so I guess, at its simplest, I would say that if a citizen wishes to donate money to a political party whom they support, I see that as an exercise of their democratic right. So just as they could express their view in public, in terms of freedom of speech, equally I would suggest that they have the right to decide, rather, to allocate money to someone else who's going to articulate the view that they support. So, to me, it's part of a citizen's ability to contribute to our democracy and our conversation about politics that a donation is one instance of that.
- CA Is that form of freedom of expression a sufficient justification to meet with what some might view as potential for corruption in the donation for

political purposes area?

W In my mind, that's a separate matter. So my first point is that I believe, in a liberal democracy, that citizens should have the right to engage in the democratic conversation and, as part of that engagement, they should have the right to give money if they wish to a party or to an individual who espouses the kinds of views that they support and would like to be articulated. So I support the principle that someone should be able to freely donate without limit.

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Of course, the question of corruption - that's not something that we can dismiss, and there needs to be safeguards around that threat, but, in my view, that should not mean that people don't have the right to contribute money, donate money, as they see fit.

CA There are a couple of typical justifications for the proposal of donation and spending caps. One is that it serves to limit corruption. Is that something that you adhere to?

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W I don't necessarily believe that that will inhibit or stop corruption. I guess having done some research in this area, one of my takeaways was the extreme difficulty in regulating this effectively. I accept that corruption is a risk, and, of course, I don't want there to be corruption any more than you do, but I don't accept that placing a cap on donations, nor indeed caps on expenditure, is a way or is the best way to inhibit corruption.

CA Have your researches led you to tangible instances of linkage between the two or not?

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W I have been looking for that, because when we refer to the implied freedom, it's not an absolute freedom; it is subject to some kind of reasonable regulation. So if the government could show that there was a good reason for the regulation, then that's permissible.

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So in the course of my research in that area, I have looked, because that is one of the justifications said to support the use of caps on donations, but the evidence, certainly from the research I've done - a lot of American scholars have done research on this, and they find, contrary to what some people might believe without having done research, that there is actually very little evidence of links between money being donated and that particular individual or that particular organisation being given favours. So it's easy to assume that that's happening or that is intended to happen, but not the research I've done in terms of my own survey-type work, but in terms of the scholars I've read from the United States, the overwhelming view that I got from reading a lot of material in that area was that there is actually very little hard evidence of a strong link between any kind of donations and then the political - the quid pro quo, if you like, in terms of the response.

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That doesn't suggest that it never happens, but it just gives me pause to be careful not to overstate, or to assume something that is not perhaps supported by the research evidence.

CA Is there by reference to that research material an inherent difficulty in that proof of a direct link between donations and favours is, by its nature, very difficult to expose?

W That's possible. But I have to rely on the evidence that's - in my view, I have to rely on the evidence that's in front of me, and those people who advocate for limits on donations typically say, well, we need this in terms of stamping out corruption or inhibiting corruption. When I can't see that there is evidence that that is going on on a large scale, then I go back to my starting presumption, which is that we're a liberal democracy and people have the right to express their own view or to pay someone else who expresses the kinds of views they want expressed. That's kind of my default position.

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So if there were strong evidence that donation caps or spending caps were effective in weeding out corruption or inhibiting corruption, I may feel differently, but because I haven't seen that evidence, and the scholars who have looked at it haven't seen that evidence, that takes me back to my starting premise of liberty.

CA One other justification for the use of donation and spending caps is to level the playing field, so to speak, so that candidates come to the electors on a relatively even basis. Does that have merit, in your view?

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W Again, I think the evidence is important to consider. Now, I did have a look at the evidence in that regard and certainly, at the national level, I found that there was relative equality between the two major parties in amongst the registered political parties, relative parity and equality in terms of their ability to raise money. And I guess most importantly, in my view, who are the two parties who are realistically the ones who are able to form government, and between those two I found, according to the Australian Electoral Commission returns, that they have relatively equal access to money. They've both got access to reasonable levels of donations.

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So that, again, causes me to doubt this supposed equality rationale for spending caps or donation caps, whereas I found that there was, in my view, relative equality, at least between the major political parties.

CA In the absence of a greater body of hard evidence, do you revert to your default position that people should freely express their views by having the capacity to donate-

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W Yes.

CA -to whom and in what amounts they choose?

W That's correct.

CA That being so, what importance would you place on a system of disclosure of such donations?

50 W That's very important.

CA What would be best practice, do you think, in terms of a disclosure model, on an open slather type scenario?

W Sure. Well, there must be timely disclosure. So the existing model, I believe, is not effective in terms of that. I mean, I've seen references to

disclosures being required or being able to be made up to 15 weeks after the election date. That's not acceptable.

10 In my view, anyone, when they're going to vote, should be able to see very clearly who the candidates are; where their money is coming from. That should be 100 per cent transparent. It needs to be timely. It needs to be very clear. So practices whereby parties or developers are donating through third party entities, which may have the effect of blurring that picture, that must be dealt with. So it has to be crystal clear. Everyone has got to know who the candidates are and who is financing those candidates. It must be timely, it must be crystal clear.

CA Would a best practice disclosure model provide sufficient balance to unlimited donations; that is your default position, I think?

W That's what I would prefer. My preferred position is light-touch regulation, but very timely and strong disclosure obligations.

20 CA What level of information do you think should be disclosed? For example, under the *Electoral Act*, the kind of information that should be returned, consequent upon a donation, is the name and address of a person. Does that provide sufficient information, or should there be further to indicate what alignment the donor might, in turn, have?

30 W Yes, I think there needs to be more information than that. So, for instance, yes, any political affiliations, any businesses with which they are interested, yes, in an effort to be very clear as to where the money is coming from. And I guess most critically for me, that that information is available to voters. I mean, I understand we have a returns system and that information is provided to the returning officer and to the Commissioner, but, to me, it has to be known to voters, because voters are making the decision. It needs to be an informed decision. I trust voters to be able to weigh up if someone is getting a lot of money from developers, well, that to me is relevant; I like to know that when I decide where to place my vote.

CA By what means, then, should the information be made available to voters? Do you have any thoughts?

40 W I guess the internet, newspapers are perhaps available at polling booths. I understand that may be somewhat difficult to manage, but whatever we can do so that we give voters the clearest opportunity to see who they're voting for and how, if at all, that person is being supported by others.

CA In terms of giving information to voters, there's another subject and it relates to declared independence of candidates. You appreciate, I think, that the context of local government is very typically that candidates are not party endorsed?

50 W Mmm-hmm.

CA But notwithstanding that, a proportion of them have party memberships or other forms of obvious political alignment.

W Mmm-hmm.

CA Is that kind of information pertinent to the voter before voting?

W Most definitely. I think I suggested in my submission that the Act - it needs significant rewriting, in my view, and one of the things that is needed is a definition of an independent, so who exactly do we call an independent, and I would have thought that a candidate who is receiving money or assistance from a registered political party, I don't think most people in the street would characterise that person as being an independent.

10

I've suggested in my submission that that is actually misleading behaviour, and that kind of led me to have a look at the misleading and deceptive provisions in the Act, and they're very, very narrowly cast, as you'd be aware.

CA You have referred in particular, I think, to section 182?

W Yes. Sections 169 and 182 do proscribe misleading conduct, but it relates only to returns and to misleading people about the actual - the voting - the process of voting. I would suggest a much more broadly characterised definition of misleading and deceptive conduct in relation to elections, and that would preclude someone from claiming that they are an independent when they are receiving money directly or indirectly, or assistance, from an existing registered political party.

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CA Do provisions like section 182 have deterrent value, do you think?

W Well, they could potentially. I mean, that's the other thing, that the penalties for some of those wrongs are quite paltry, in my view. I would have thought that misleading and deceptive conduct around elections should be taken very seriously, because that inhibits the voters from making an informed decision from the choices that they have. I think misleading conduct around elections must be taken much more seriously than is to some extent evident in the existing provisions.

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CA Just getting back to the desirability of disclosures being made about party membership, alignments or resourcing, is it sufficient, do you think, to leave that to be exposed as and when voters seek that information from a candidate?

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W Well, I guess my fear is that citizens won't seek out that information. Obviously people are very busy. Some people take great interest in politics. Other people don't take a lot of interest in politics. I don't know that I could recommend that we just rely on people to seek that information out if they're interested, because I think the reality is that a lot of people won't seek out that information yet would be interested, if they knew that the candidate they're voting for is being bankrolled by local developers, I think they'd find that very interesting, but, with respect, they may not think, before the election, "Oh, I'd better ask this candidate where their funding sources are."

50

CA I think you have indicated a preference to a lighter regulatory model, if that's possible. Would you see that kind of disclosure of party memberships, alignments, resourcing, as something that should fall within the regulatory model or left to the political process for it to be drawn out?



- W I think that needs to be regulated. I am generally in favour of lighter regulation, but - you know, I guess one way of looking at it is to say that sometimes there is market failure, where you can't rely on people necessarily to do the right thing, and I think this is an area where we cannot simply rely on individuals doing the right thing. There needs to be regulation in terms of the disclosure obligations, and the time. I mean, that's the other thing that perhaps we should draw out.
- 10 I think in respect of a new candidate, their disclosure obligations relate only to moneys obtained once they announce their candidature, whereas they may have obtained donations from others for years, yet none of that needs to be disclosed. So there's a lack of transparency, in my view.
- CA Given the private funding model, and for a range of other reasons, it is not uncommon for councillors to declare a conflict of interest in relation to matters before council that are being considered, and that gives rise to a choice by that councillor as to whether he or she will or won't continue to discuss and vote.
- 20 W Mmm-hmm.
- CA How should such a choice be exercised, do you think?
- W I don't think we can rely on the goodwill of the relevant person. So the extent to which the current system relies on the person identifying a conflict of interest, I don't think that's a workable system going forward. I think there needs to be independence in relation to that. So whenever there is a question around conflict of interest, there needs to be completely independent third parties look at that and resolve that.
- 30 CA A third party adjudication on the conflict?
- W Yes.
- CA Is that what you're suggesting?
- W Yes.
- 40 CA And if the third party is in favour of the councillor continuing to participate-
- W Sorry, if?
- CA If the third party adjudicator is satisfied that the councillor should then continue to vote and participate, then that should happen?
- W That would be sufficient for me. If I may add in relation to that, just before I came here, I had a look at the legislation around the Integrity Commissioner and their role. Now, my reading of that Act suggests that the Integrity Commissioner does have some power at least to give opinions, not to adjudicate, but to give opinions, but that that jurisdiction is not applicable to the local government level. It's applicable more to the state level. That certainly would be one office.
- 50

I mean, the CCC would be an option. The Integrity Commissioner would

be another option in terms of a third party looking at these types of arrangements.

CA You'd like to see an adjudication on a conflict?

W That's my preference.

CA Other than by the person who's the subject of it?

10 W I don't think we can leave it in the hands of the person who is potentially subject to the conflict.

CA In the course of looking at the *Local Government Act*, you had occasion to look at the definition of groups of candidates, I think, and had a view about the scope of it?

20 W Yes. So I would redraft that provision. It defines this group of candidates concept in terms of the purpose for which the individuals form, or their collective approach. Generally, perhaps some analogy with - because I am a constitutional lawyer, I do some analogising to some constitutional law principles. It happened to be the very week that we were talking about the concept of trading corporations in the constitution, and I teach my students that initially we defined a trading corporation by reference to the purpose for which it was formed, but we explain that now that approach has kind of fallen into disfavour and we generally look at what they're actually doing rather than the purpose for which it was formed, because that may give you a misleading or an incomplete picture.

30 So I guess with a similar thought in mind, I don't really like the idea of defining an organisation in terms of the purposes for which it was formed, because different people may have different views of the purpose or purposes for which it was formed. If someone wants to avoid being seen to be a group of candidates, they can always say that they had a purpose different from what the two purposes referred to are in the current definition.

40 As I say, this is a very difficult area to regulate, as I indicated earlier, but I don't think the definition should hang on that the association was formed for a particular purpose.

CA Where the definition focuses on the purpose for which a group was formed, it rather requires that, by some means, there be evidence of that purpose. Is that the difficulty that you're alluding to?

W That's part of the difficulty - proving what the purpose was. Different people will have different views. They may - it may be in their interest to fall outside that definition.

50 CA And as part of that, the concept of a group falls somewhere loosely in between the formality of a party structure and a single independent candidate?

W That's right.

CA Making the formalities of the formation of a group perhaps a bit more problematic?

- W That's true, yes. That's - yes, I agree with that. I guess the other thing is I'd like to know, as a voter, if someone for whom I'm considering casting a vote is a member of one of these groups. As you know, in politics sometimes people, if they get to vote for Mayor and they get to vote for a local councillor, some people like to hedge their bets and choose people who are non-aligned. Other people like to vote for, you know candidates who are aligned in the Lower House and the Upper House in the case of the federal government; at local government level in the case of the Mayor and the councillor. Some people like to hedge their bets in that way and cast votes for individuals who are non-aligned. So I would think it very important that individual voters are aware of what kinds of alliances and groupings there are.
- 10
- As you know, there is no provision in the current legislation for that information to be made known to the public. It's known to the relevant administrators, but it's not something that the public needs to be made aware of.
- 20 CA We have spoken about your views on the capping of donations. What about capping of expenditure?
- W For similar reasons, I'm against that. Because, again, I see that the fact that a party or an individual is able to raise substantial funds - to me, that's indicative of the fact that - it's indicative of the democratic will. You know, so I guess the example I alluded to was Barack OBAMA, his presidency. He attracted a lot of funding from people who might not ordinarily donate to campaigns, and so he had a large amount of cash to spend. Now, to me, that's democracy at work. That's people who have decided to give a candidate money because they support that candidate. So what's logical, to me, is that that person should then be free to spend that money, because that money is an expression of the democratic will.
- 30
- CA Should there, then, be disclosure requirements pertaining to expenditure?
- W Sure, yes.
- CA As you suggested for donations?
- 40 W Yes. Yes, I'm entirely comfortable with complete transparency around money, including expenditure, yes.
- CA Thanks, professor.
- W Thank you.
- PO Thanks, professor. Thanks for coming. You're excused.
- W Thank you.
- 50