

CASE NOTE:

The Australian Institute for Progress Ltd v The Electoral Commission of Queensland [2020] QSC 54

Court/Tribunal	Supreme Court of Queensland
Cause of Action	Declaration under the <i>Civil Proceedings Act 2011</i>
Application of <i>Human Rights Act 2019</i>	Sections 8, 13 and 48
Rights engaged	Participation in public life, Freedom of expression
Outcome	Application dismissed
Commission intervened?	Yes
Year	2020

The Australian Institute for Progress (AIP), a think tank based in Queensland, sought declaration from the Queensland Supreme Court that due to ordinary rules of statutory interpretation, it was able to accept political donations from property developers. Property developers are prohibited from making donations to certain entities under the *Electoral Act 1992*. The relevant provisions aim to reduce corruption and undue influence arising from political donations at both State and local government level.

The action arose after correspondence between AIP and the Electoral Commission of Queensland (ECQ), in which the ECQ advised AIP that 'an entity would likely be committing an offence by accepting an unlawful donation and incurring electoral expenditure'.

The AIP submitted that the relevant provisions, particularly the reference to 'another entity' in s 274(1)(b) of the *Electoral Act*, are concerned only with the incurring of electoral expenditure 'on behalf of' three entities - a political party, an elected member or a candidate in an election. As AIP did not fall into one of these categories, it was free to accept donations from prohibited donors. In response, ECQ argued that the provision prohibited gifts to, or for the benefit of, a fourth category of recipient, 'another entity', to enable it to incur electoral expenditure.

AIP's submissions invoked the common law principle of legality, but did not specifically consider the implied right of political communication in the Constitution or the application of the Queensland *Human Rights Act 2019*. While Queensland's prohibition on property developer donations was found to be a permissible burden on the implied right by the High Court in *Spence v The State of Queensland* (2019) 93 ALJR 643, it did not consider these specific issues of statutory construction.

The Court refused to grant a declaration, as the relief sought did not accord with the principles governing the circumstances in which the Court will grant declaratory relief. This was because the question was essentially hypothetical and the declaration sought was highly dependent on fact-specific circumstances not before the court, such as the purpose of the particular donor and the particular gift. Nonetheless, the Court took the opportunity to clarify the interpretation of the relevant provisions, and in doing so applied sections 8, 13 and 48 of the *Human Rights Act*.

In its first formal intervention under the *Human Rights Act*, the Queensland Human Rights Commission's (QHRC) argued that in cases where multiple interpretations may be possible consistent with the purpose and text of the legislation, the interpretation most compatible with human rights should be preferred. Due to time constraints, the QHRC did not make submissions regarding which interpretation was more compatible with human rights.

The Queensland Attorney-General intervened under the *Human Rights Act* as well as under the *Judiciary Act 1903 (Cth)*. In submissions regarding the *Human Rights Act*, the Attorney-General took a different approach, arguing that compatibility was a binary concept. In citing those provisions unique to Queensland (s 8 and s 48(2)), the Attorney-General argued that compatibility with human rights cannot be equated with the superlative 'best promotes or preserves' human rights.

The Court found that the construction of s 274(1)(b) urged by the AIP was not supported by the text and structure of the section. The Court found that the narrow interpretation sought by AIP would allow prohibited donors to easily avoid the prohibition by 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.

While not directly referring to the difference in arguments between the QHRC and the Attorney-General, the Court stated that s 48 of the *Human Rights Act* had to be considered and that it involved two aspects of statutory construction:

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

The words 'compatible with human rights' then required consideration of ss 8 and 13 of the *Human Rights Act*. Section 8 of the *Human Rights Act* is unique to the Queensland legislation and states that 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.

Section 13 is based on the proportionality provisions of the ACT (s 28) and Victorian (s 7) human rights legislation.

The Court found that combined with other sections, s 274 of the *Electoral Act* may limit the freedom of expression and right to take part in public life protected in the *Human Rights Act*. The Court found the interpretation which best achieved the purpose of the *Electoral Act* was that advanced by the ECQ, and this was to be preferred, including because this interpretation constituted a reasonable limitation on rights.

In discussing the principle of legality and human rights compatibility, the Court noted that a prohibited donor is still free to engage in political discussion by other means than through donations, including by running its own advertisements.

The Court found the purpose of preventing corruption and undue influence in government is consistent with a free and democratic society based on human dignity, equality and freedom. In citing the High Court's consideration of similar issues in *McCloy v New South Wales* (2015) 257 CLR 178 and Spence, the Court concluded that 'reducing corruption enhances our democratic system'. The Court noted that having found the statutory provisions could be interpreted in a way that is compatible with human rights, s 48(2) of the *Human Rights Act* did not arise for consideration. This provision provides that if a statutory provision cannot be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.

The Court noted that the interpretation advanced by AIP would require the 'reading in' of additional words into the provision. *Momcilovic v The Queen* [2011] HCA 34 and earlier cases confirm that Australian courts will not entertain such an approach using human rights interpretation.

The QHRC's submission is published on the [Commission's website](#).

This summary is for information and education purposes only, and should not be relied upon as legal advice. The judgement is available at:

[*The Australian Institute for Progress Ltd v The Electoral Commission of Queensland & Ors* \[2020\] QSC 54](#)