

Liz Georgiou

From: Sarah Butler
Sent: Friday, 16 September 2016 7:04 PM
To: Ian Robertson
Subject: Nick Lalich MP
Attachments: Email to NSW ALP re Nick Lalich MP vw .doc

Hi Ian

I am having a few issues with my remote access to File Site, so I have drafted the email in the attached Word document.

Please let me know if you have any comments or questions.

I am happy to spend some more time on this later tonight, but I have to head to dinner now so I thought I should send this to you in the interests of time.

Kind regards,

Sarah

>

>

PRIVATE AND CONFIDENTIAL LEGAL ADVICE

Dear Kaila

Further to our telephone conversation this afternoon, as requested we have further considered the potential issues arising in relation to the trip taken by Nick Lalich MP in 2014 and paid for by the Managing Director of ABC Tissues, Henry Ngai.

Mr Ngai's status as a property developer

As you know, a property developer is a prohibited donor under section 96GAA of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (EFED Act). A property developer under is defined under section 96GB of the EFED Act as:

- (a) a corporation engaged in a business that regularly involves the making of relevant planning applications by or on behalf of the corporation in connection with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit,*
- (b) a person who is a close associate of a corporation referred to in paragraph (a).*

Accordingly, if Mr Ngai is considered a "close associate" of a property developer, it is unlawful for an elected member to receive a political donation from him. For completeness, we note that section 96GB(3) of the EFED Act provides that a "close associate" of a property developer is each of the following:

- (a) a director or officer of the corporation or the spouse of such a director or officer,*
- (b) a related body corporate of the corporation,*
- (c) a person whose voting power in the corporation or a related body corporate of the corporation is greater than 20% or the spouse of such a person,*
- (d) if the corporation or a related body corporate of the corporation is a stapled entity in relation to a stapled security—the other stapled entity in relation to that stapled security,*
- (e) if the corporation is a trustee, manager or responsible entity in relation to a trust—a person who holds more than 20% of the units in the trust (in the case of a unit trust) or is a beneficiary of the trust (in the case of a discretionary trust).*

We understand that the ALP (NSW) is conducting due diligence in relation to the status of ABC Tissues as a property developer and Mr Ngai as a close associate of any property developer, including ABC Tissues if relevant. We would be happy to advise on this issue further once the ALP (NSW) has received more information.

A gift to an individual in a private capacity is not a gift

We note that if the payment for the trip was made in a private capacity by Mr Ngai and Mr Lalich did not use the trip for a purpose relating to an election or his duties as an elected member, the payment for the trip will not constitute a gift. Accordingly, the payment for the trip would not be a political donation. Specifically, section 85(4)(a) provides that:

a gift to an individual that was made in a private capacity to the individual for his or her personal use and that the individual has not used, and does not intend to use, solely or substantially for a purpose related to an election or to his or her duties as an elected member...

We do not have sufficient information to provide definitive advice regarding whether section 85(4)(a) of the EFED Act will apply in these circumstances. However, we are of the preliminary view that it is unlikely that the payment for the trip will be caught by section 85(4)(a) of the EFED Act because, as we understand it, Mr Lalich made the trip primarily in his capacity as MP.

The payment for the trip was likely a political donations

We are of the view that the payment for the trip is likely a political donation, as it constitutes a gift made for the benefit of an elected member under section 85(1)(b) of the EFED Act.

As you know, the cap for political donations to or for the benefit of an elected member is \$2,000 under section 95A of the EFED Act (to be indexed according to when in 2014 the payment was made: http://www.elections.nsw.gov.au/fd/political_donations/caps_on_political_donations).

It is unlawful under section 95B of the EFED Act for a person to receive a political donation if the donation exceeds the applicable cap. Accordingly, if the payment for the trip was in excess of the relevant cap, it was unlawful for Mr Lalich to receive that gift.

Offences relating to caps and penalty for breach

The maximum penalty for breach of section 95B of the EFED Act is 400 penalty units (being \$44,000) or imprisonment for 2 years, or both (section 96HA of the EFED Act).

However, in order to be guilty of an offence under section 95B of the EFED Act, the person must have been, at the time of the act, aware of the facts that result in the act being unlawful. Accordingly, in order to have committed an offence, Mr Lalich must have been aware that the payment for his trip was in excess of the applicable cap.

We hope that above advice is sufficient for your present purposes. Please contact us if you wish to discuss any of the above in further detail.

Kind regards,

Ian.