

Liz Georgiou

From: Ian.Robertson@ [REDACTED]
Sent: Saturday, 17 September 2016 11:50 AM
To: Kaila [REDACTED]
Cc: chris.willis [REDACTED]; Pat [REDACTED]; Sarah.Butler [REDACTED]
Subject: Gift made to a State MP [HR-SYD.FID276823]

PRIVATE AND CONFIDENTIAL LEGAL ADVICE

Dear Kaila

Further to our telephone conversations yesterday afternoon and evening, we have as requested further considered the potential issues arising in relation to the trip taken by a State MP in 2014 and paid for by the Managing Director of ABC Tissues, Henry Ngai or an entity associated with him.

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 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 and other companies of which Mr Ngai is a director to ascertain whether any of them are property developers within the meaning of the EFED Act. 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 the State MP 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 fall within the exemption in section 85(4)(a) of the EFED Act because, as we understand it, the State MP made the trip primarily in his capacity as an MP and that is why Mr Ngai or an entity associated with him paid for it.

The payment for the trip was most likely a political donation

We are of the view that the payment for the trip is most 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 the State MP 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, the State MP must have been aware that the payment for his trip was in excess of the applicable cap or was from a property developer.

We hope that the above advice is sufficient for your present purposes. Please contact us if you wish to discuss any of the above in further detail. I will be out of Australia on leave from tomorrow afternoon but my colleague Sarah Butler is available. Sarah's mobile number is [REDACTED]

Kind regards,

Ian.

Ian Robertson | Partner

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