SUMMARY OF FACTS RELEVANT TO THE DECISION OF THE NEW SOUTH WALES ELECTORAL COMMISSION: LIBERAL PARTY OF AUSTRALIA (NSW DIVISION) CLAIM FOR PUBLIC FUNDING

1. Oral and documentary evidence from Liberal Party officials and agents and from The Free Enterprise Foundation (the Foundation) that was provided to the Independent Commission Against Corruption (the ICAC) in the course of its Operation Spicer Inquiry led the 3 member NSW Electoral Commission (the Commission) to conclude there were significant breaches of election funding laws in the latter part of 2011. Those breaches require the Commission to withhold payments for claims by the Liberal Party of Australia, New South Wales Division (the Party) from the Election Campaigns Fund and the Administration Fund, in accordance with sections 70(1) and 97L(1) of the *Election Funding, Expenditure and Disclosures Act* 1981 (the Act).
2. The Act's objects include the establishment of a fair and transparent election funding, expenditure and disclosure scheme; and facilitating public awareness of political donations (s 4A). In its recent *McCloy* decision the High Court accepted that the purpose of the Act was "to secure and promote the actual and perceived integrity of the Parliament and other institutions of government in New South Wales. A risk to that integrity may arise from undue, corrupt or hidden influences over those institutions, their members or their processes."
3. The Act defines "reportable political donations" to include political donations of or exceeding $1000. Parties must disclose, in a declaration complying with section 91 of the Act, details of "reportable political donations" received, including donor names, donor addresses and amounts for donations over that sum where donations were made to or for the benefit of the party.
4. On 26 September 2011 the Party disclosed a list of reportable political donations for the period 1 July 2010 to 30 June 2011, including donations purportedly received from the Foundation on 16 August 2010 ($94,000), 22 December 2010 ($171,000), 23 December 2010 ($358,000 and $64,000) and 24 December 2010 ($100,000). The disclosed list further declared that all political donations required to be disclosed for the disclosure period had been disclosed. The various donations were made in the context of the NSW State General Election held on 26 March 2011.
5. The Commission is of the view that the auditor that provided the audit certificate accompanying the Party's declaration was not aware of, or sought or was provided with the details supporting the donations from the Foundation.
6. In truth, the Foundation had been used by senior officials of the Party and an employed party fund-raiser to channel and disguise donations by major political donors some of whom were prohibited donors. No disclosure of the requisite details for those major donors has been made despite the Party having been requested to remedy the deficiency.

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7. The Commission has relied on the evidence provided to the ICAC by Mr Simon McInnes, the Finance Director and Party Agent of the Party; Mr Paul Nicolaou of Millennium Forum; and Mr Mark Neeham, State Director of the NSW Division of the Party between 2008 and 2013. Through them evidence was also given of the involvement of other senior Party officials constituting the Party's Finance Committee, including Mr Sinodinos the Finance Director/Treasurer, Mr Webster and others (ICAC transcript reference 7279T) in the arrangements touching the Foundation.
8. What follows is a bare summary of the ICAC evidence.
9. The Foundation was purportedly established by deed on 24 August 1981 between Denis Davis ("the Settlor") and Anthony Bandle and Charles Fox ('the Trustees"). Mr Fox was replaced by Peter Marlow in 1986, then Roderick Bustard and lastly Stephen McAnerny. The Trustees were also "the Council" of the Trust. All powers and discretions of the Council and Trustees were undertaken by the two individuals who were in those positions at the relevant time. No other individuals had any input into the decisions made by the Trustees (Reference Trust Deed; ICAC Transcript 3578 – 3580 & 3628 – 3629).
10. The Foundation commenced to be used well before 2010 as a means of offering anonymity to favourably disposed donors wishing to support the Liberal Party. This was not the sole function of the Foundation but it appears to have been a major part of its activities. Prior to 14 December 2009, donations from developers were not prohibited by New South Wales law. But disclosure requirements in relation to recipients of political donations have been in place, albeit subject to amendment, since 1981. Donors have been required to disclose donations since 1993 (once again this provision has been subject to amendment).
11. Mr Nicolaou was paid commission for donations raised, including money channelled through the Foundation. His practice was to solicit donations on behalf of the Party, frequently proposing to donors that they could donate via the Foundation. Cheques in favour of the Foundation were then passed by him to officers of the Foundation accompanied by a standard form letter requesting the Foundation to make an equivalent donation to the Party. This in turn would be done. He described the Foundation as "there to provide anonymity for donors who did not want to be disclosed as Liberal Party donors" (ICAC transcript reference 7279T).
12. Mr Neeham described the Foundation, "This was a body that could raise funds from, from prohibited donors to the division because it was, it was, it was a separate body... [and then it could] ... make a donation to the division" (ICAC transcript reference 7328T).
13. On some occasions amounts intended to be donated to the Liberal Party were entered into the Liberal Party's accounts before a cheque for that amount was paid to the Party from the Foundation.
14. The five large donations of August and December 2010 (stated in paragraph 4. above) purportedly from the Foundation were in reality sums aggregated from individual donors whose money was paid to the Foundation in the manner indicated.
15. Senior officers of the Party's NSW Division knew of the scheme and its use to disguise donations, including from property developers. See for example, ICAC transcript references 7266T-7273T, 7288T-7290T, 7298T, 7300T- 7301T, 7328T-7329T, 7334T-7340T.

16. Mr McInnes told ICAC that in early 2011 he had started to believe that using the Foundation was not within the spirit of the Act. Nevertheless "if [donations] happen to find their way back to the party [they] were completely legal". He conceded that he expected that the money paid by the Party to the Foundation would come back. It always did (See ICAC transcript 7231T - 7237T).

17. The Commission was constituted in December 2014. It replaces the former Election Funding Authority and is armed with regulatory and enforcement functions extending to matters previously regulated by the Authority.

18. Having examined the ICAC evidence in 2015 and 2016, the Commission took its own steps to consider the legal implications. It has concluded that:
    i. The Free Enterprise Foundation was never a validly constituted charitable trust because the purposes to which money it controlled could be paid were not exclusively charitable in the eyes of the law. As the Commission understands it, a valid trust must be for the benefit of entities with legal personality, or for charitable purposes (*Morice v Bishop of Durham (1804) 9 Ves Jun 399 at 404-405; 32 ER 656 at 658*; in *re Astors Settlement Trusts [1952] 1 Ch 534 at 540—547*; *Bacon v Pianta (1966) 114 CLR 635 at 638*). One consequence is that its Council did not have lawful authority to exercise any independent discretion to allocate funds for particular purposes. Accordingly, even if (which is denied by the Commission) "donors" to the Foundation purported to arm the Foundation's Council with unfettered authority to decide as to the disposition of gifted moneys, the true legal position was that the money remained under the control of the "donors" because of a resulting trust consequent upon invalidity. When the Foundation purported to pay the money to the Liberal Party in the abovementioned five large tranches of money (see paragraph 4 above) it was in truth acting as agent for the donors. At all times they were the true donors and their details should have been disclosed by themselves and the Party if the sums involved made them "major political donors".
    ii. In any event, the evidence revealed that s 85(1)(d) of the Act was engaged. It stipulates that a gift made to or for the benefit of an entity [here The Free Enterprise Foundation, according to the Party's position] which was used or intended to be used by the entity to enable the entity to make directly or indirectly a political donation is itself a political donation. Section 85(1)(d) is attracted in two separate ways. The gift was actually used by the Foundation to make a political donation. As well, the gift was intended to be used by the Foundation to make a political donation.

19. The above conclusions stem from the evidence revealed in 2014. And they address different legal issues and provisions of the Act to those considered by the Crown Solicitor in 2013 as well as resting on significantly different information made available through Operation Spicer in 2014.

20. On 11 February 2016 the Acting Electoral Commissioner wrote on behalf of the Commission to the Party Agent of the Party, Mr McInnes . The letter outlined the Commission's tentative concerns and invited submissions directed to the two legal

issues mentioned above as well as the issue as to whether a final payment should be made under the Election Campaigns Fund in light of these matters.

21. The letter in reply from Mr McInnes dated 18 February 2016 did not advance any response to the suggestion about the invalidity of The Free Enterprise Foundation "trust". The letter further asserted that the Party had and has no responsibility to disclose information relating to individual donors to the Foundation, a position that the Commission completely disputes. The invitation to remedy the deficient 2011 declaration was firmly declined.
22. On 24 February 2016 the Commission considered whether the Party was eligible for public funding taking into account sections 70(1) and 97L(1) of the Act. The Commission was not at that stage satisfied that the Party was eligible, because the Party had failed to disclose reportable political donations for the period ending 30 June 2011.
23. Since public monies totalling $4,389.822.80 is at issue the Commission decided to give the Party a further opportunity to change its stance or satisfy the Commission that the Commission's tentative views were erroneous. A letter was sent to Mr McInnes on 26 February 2016 enclosing a draft Summary of Facts document and inviting the Party's response.
24. On 18 March 2016, Swaab Attorneys forwarded the Party's response. None of the Summary of Facts were disputed.
25. The Party's response contended that a declaration in requisite form had been lodged and that its adequacy in terms of detail was irrelevant to the decision confronting the Commission under sections 70(1) and 97L(1).
26. The Commission rejects this submission for the reasons already set out. Neither does the Commission accept the submission that the amount that must be withheld cannot exceed the total of unlawful donations involved. For one thing, this ignores the matters set out in paragraphs 2 and 3 above. On 23 March 2016 SWAAB Attorneys sent a further letter on behalf of the Party urging the Commission to release all but $693,000 of the funding claimed. After careful consideration the Commission believes it does not have discretion in this matter having regard to the terms of sections 70(1) and 97(1) of the Act.
27. The Party further disputes the proposition that the Foundation was not a validly constituted charitable trust. Particular reference is made to *Attorney-General (NSW) v Henry George Foundation Ltd [2002] NSWSC 1128* and *Aid/Watch Incorporated v Commissioner of Taxation (2010) 241 CLR 539; 272 ALR 417*.
28. The Commission has considered this submission but remains of the view stated. Each of the cases cited in the Party's response involved a trust where the predominant purpose was charitable in the legal sense (educational in the former case, the relief of poverty in the latter). Even if one ignores entirely the activities of the Foundation, its Prescribed Purposes are not of this nature. Even if the purposes of the Foundation were beneficial to the community (which is not conceded) that would not be sufficient to make them charitable under the fourth head in Pemsel's case as it is only those purposes beneficial to the community which are "within the equity of the preamble to the Statute of Elizabeth" (*Aid/Watch* at [18]), or as it is sometimes put "within the spirit and intendment of the preamble to the statute of Elizabeth" (*Aid/Watch* at [28]) that are charitable. The purposes of *Aid/Watch* qualified as charitable within the fourth head

only because the debate that *Aid/Watch* fostered was debate concerning the relief of poverty, a matter clearly within the preamble to the Statute. In *Henry George Foundation* Young CJ also considered that the trust in question could have been saved by s 23 *Charitable Trusts Act (NSW).* There is no question of applying s 23 to the Foundation as the law that applies to the Foundation trust deed is that of the Australian Capital Territory (ACT), and there is no equivalent of s 23 under the ACT law.

29. The Commission invited the principals of the Foundation to comment on the draft Summary of Facts. A letter received by the Commission today from the Foundation's solicitor did not respond to the substance of the Commission's stated concerns about the validity of the Trust. Its terms were noted.

23 March 2016