



Ms Regina Walker
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Dear Ms Walker

Confidential and Privileged

**Gloucester Gas Project Concept Plan Approval
Gloucester Gas Project Approval
Reportable Political Donations**

1. Issue

Section 147 of the *Environmental Planning and Assessment Act 1979 (EP&A Act)* requires that reportable political donations be disclosed in relation to certain "relevant planning applications".

You have asked us to advise whether the section 147 of the EP&A Act applied to:

- the application made for concept plan approval under Part 3A of the EP&A Act for the Gloucester Gas Project; and
- the application made for project approval under Part 3A of the EP&A Act for Stage 1 of the Gloucester Gas Project,

(collectively, the **Gloucester Applications**) so as to require AGL Upstream Infrastructure Investments Pty Ltd (**AGL**) to disclose any reportable political donations which it may have made.

2. Summary of Advice

For the reasons set out below:

- section 147 of the EP&A Act did not apply to the Gloucester Applications; and
- accordingly, AGL was not required to disclose any reportable political donations which it may have made in relation to the Gloucester Applications.

3. Reasons

(a) Background

We understand that the Gloucester Applications were made on 6 August 2008, when an application in the form required by the Director General, was submitted by Lucas Energy and Molopo Joint Venture.

On 1 October 2008, after the Gloucester Applications were made, the *Local Government and Planning Legislation Amendment (Political Donations) Act 2008* inserted section 147 into the EP&A Act.

Section 147 of the EP&A Act relevantly provides as follows:

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- (1) *The object of this section is to require the disclosure of relevant political donations or gifts when planning applications are made to minimise any perception of undue influence by:*
- (a) *requiring public disclosure of the political donations or gifts at the time planning applications (or public submissions relating to them) are made, and*
 - (b) *providing the opportunity for appropriate decisions to be made about the persons who will determine or advise on the determination of the planning applications.*
- Political donations or gifts are not relevant to the determination of any such planning application, and the making of political donations or gifts does not provide grounds for challenging the determination of any such planning application.*
- (2) *In this section ... a relevant planning application means ... an application for approval of a concept plan or project under Part 3A ...*
- (3) *A person:*
- (a) *who makes a relevant planning application to the Minister or the Director-General is required to disclose all reportable political donations (if any) made within the relevant period to anyone by any person with a financial interest in the application...*
- ...
- (6) *The disclosure of a reportable political donation or gift under this section is to be made:*
- (a) *in, or in a statement accompanying, the relevant planning application or submission if the donation or gift is made before the application or submission is made, or*
 - (b) *if the donation or gift is made afterwards, in a statement of the person to whom the relevant planning application or submission was made within 7 days after the donation or gift is made.*
- ...
- (11) *A person is guilty of an offence under section 125 in connection with the obligations under this section only if the person fails to make a disclosure of a political donation or gift in accordance with this section that the person knows, or ought reasonably to know, was made and is required to be disclosed under this section. ...*
- (13) *This section applies to relevant planning applications or submissions made after the commencement of this section and, in relation to any such application or submission, extends to political donations or gifts made before that commencement.*

AGL acquired the Gloucester Gas Project in December 2008.

(b) Reasons

Each of the Gloucester Applications is a "relevant planning application" within the meaning of section 147.

There is a rebuttable common law presumption against legislation operating retrospectively so as to deprive people of their accrued rights (this is also reflected in section 30 of the *Interpretation Act 1987 (NSW)*).

In *Baker v Australian Asbestos Insulations Pty Ltd* (1985) 3 NSWLR 280, at [289] – [290], Kirby P usefully summarised the rule relating to the retrospectivity of legislation and noted that:



A statute changing the law will not generally be construed so as to apply to facts that have already occurred or alter rights and liabilities already accrued unless the intention to do so appears 'with reasonable certainty'.

We consider that section 147(13) of the EP&A Act, far from rebutting the presumption against retrospectivity, makes it clear that:

- section 147 only applies to "*relevant planning applications ... made after the commencement of this section*"; and
- does not operate retrospectively to apply to existing applications.

Further, the objects of section 147, as set out in section 147(1), are to require "public disclosure of the political donations or gifts at the time planning applications (or public submissions relating to them) are made". This object would not be advanced by giving section 147 a retrospective application.

Finally, the view that section 147 does not apply to applications made prior to the commencement of section is supported by the decision of Biscoe J in *Kennedy v NSW Minister for Planning* [2010] NSWLEC 129 (26 July 2010) where he held at [49] that:

... s 147 did not apply because the subject application predated the coming into force of s 147: s 147(13).

Yours sincerely

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