

Electoral Legislation (Political Donations) Amendment Bill 2018

Explanatory Notes

Short title

The short title of the Bill is the Electoral Legislation (Political Donations) Amendment Bill 2018 (**the Bill**).

Policy objectives and the reasons for them

The objectives of the Electoral Legislation (Political Donations) Amendment Bill 2018 are to eliminate the actual and widely perceived risk of corruption within Queensland's democratic as a consequence of corporate donations to politicians, candidates and political parties.

The Bill builds upon the restrained reforms proposed in the Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 (**the Belcarra Bill**) to help restore Queenslanders' confidence in their political system.

The Crime and Corruption Commission's (**CCC's**) report *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government* (**the Belcarra Report**) included a variety of recommendations following the CCC's investigation into Local Government corruption.

Operation Belcarra gave Queenslanders a troubling glimpse into the corrupting influence of political donations on the workings and decisions of Local Governments, but was fundamentally limited in its scope – it did not consider the influence of donations at the level of State Government, or the variety of corporate donors whose profits are directly affected by State Government decision-making. The issues are broadly summarised in the Belcarra Report as follows:

“Another major concern about political donations is that, rather than being motivated by a desire to purchase direct influence in government decision-making, they are motivated by a desire to purchase access to the decision-makers. That is, there is a belief that donations can lead to donors getting special opportunities to put their cases forward. This too can be seen as a form of corruption in that some stakeholders are illegitimately gaining an advantage over others who should be but are not afforded the same level of access. There is a further risk of corruption when these “rights of access morph... into the adoption of policies designed to materially benefit those to whom access has been

given, rather than to advance the broader public interest” (Accountability Round Table 2014, pp. 2–3).¹

The Belcarra Report made the following observations about the significance of perceived risk of corruption, which apply equally to state government:

“regardless of the actual influence of donations on government processes and decision-making, there will always be a perception that donors expect to and do receive something in return for having supported a councillor’s election campaign. The fact that allegations of this nature have been repeatedly examined in major inquiries in Queensland and other Australian jurisdictions over the last 25 years highlights the inherent potential of donations to lead to perceptions of corruption. These perceptions alone are enough to damage public confidence in the integrity of local government.”²

This Bill will address the actual and perceived corruption risk at both the State and Local Government level, and as a consequence of donations from all for-profit corporate donors, delivering on the Queensland Greens’ commitment at the 2017 State election.

Queenslanders are less engaged with politics than ever, and increasingly sense that Governments don’t represent their interests, but instead represent the interests of the massive corporate donors who fund politicians’ election campaigns.

As the Belcarra Report acknowledged, the Queensland community is calling for local government to be held to higher standards, and the same is true of State Government. This Bill is the first step of many required to restore Queenslanders’ faith in their political system.

Achievement of policy objectives

Banning political donations from for-profit corporate donors

To achieve the policy objectives, the Bill amends the Electoral Act 1992 (EA) and the Local Government Electoral Act 2011 to prohibit the making of political donations by for-profit corporations to candidates in State or Local Government elections, groups of candidates in Local Government elections, third parties, political parties, councilors and Members of State Parliament. The Bill:

- makes unlawful the making and acceptance of political donations made by or on behalf of prohibited corporate donors;
- makes it unlawful for prohibited corporate donors (or others on their behalf) to solicit other persons to make political donations; and
- provides for appropriate transitional arrangements.

¹ *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government*, page 77.

² *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government*, page 78.

Reflecting the relevant provisions of the Belcarra Bill, the Bill introduces provisions based on the New South Wales legislation in this area.

The Belcarra Report identified there is a risk of corruption when donations are made with the expectation that the recipient will, in return, make decisions that deliver a benefit to the donor. The risk is heightened when donors have business interests that are affected by government decisions and, at the Local Government level, this risk is particularly associated with property developers.³ The recommendations of the Belcarra Report were effectively limited to considerations of perceived risk of corruption in Local Government. This Bill relates to donations relevant to all for-profit corporate donors, whose business interests are affected by State or Local Government decisions.

The Bill defines a 'prohibited corporate donor' as a company registered under the *Corporations Act 2001* (Cth) or an industry representative organisation a majority of whose members are companies registered under the *Corporations Act 2001* (Cth), but does not include charities, not-for-profit organisations, or employee and employer organisations under State or Federal industrial relations legislation.

The Bill provides that it is unlawful for:

- a prohibited corporate donor to make a political donation;
- a person to make a political donation on behalf of a prohibited corporate donor;
- a person to accept a political donation that was made (wholly or in part) by or on behalf of a prohibited corporate donor;
- a prohibited corporate donor to solicit a person to make a political donation; and
- a person to solicit, on behalf of a prohibited corporate donor, another person to make a political donation.

The maximum penalty for doing an act that is unlawful, if the person knows or ought reasonably to know of the facts that result in the act or omission being unlawful, is 400 penalty units or 2 years imprisonment. It is also an offence for a person to knowingly participate, directly or indirectly in a scheme to circumvent a prohibition about political donations. The maximum penalty that may be imposed for this offence is 1500 penalty units or 10 years imprisonment.

Consideration has been given to the effect of the amendments on affected persons' freedom to participate in the political process at a Local and State level, both generally and regarding the treatment of fundraising contributions. However, the provisions are justified given that the risk of corruption has been repeatedly examined in major inquiries in Queensland and other Australian jurisdictions over the last 25 years; highlighting the inherent potential of donations to lead to perceptions of corruption. The High Court has found the New South Wales Election Funding, Expenditure and Disclosure Act 1981 provisions, upon which the Bill's provisions are based, to be valid.⁴

³ *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government*, page 76.

⁴ *McCloy v New South Wales* [2015] 257 CLR 178.

Alternative ways of achieving policy objectives

There is no alternative method of achieving the policy objectives.

Estimated cost for government implementation

There are no significant cost impacts of these amendments.

Consistency with fundamental legislative principles

Freedom of communication on governmental and political matters

As noted by the CCC in the Belcarra Report and at the public hearing, the proposals to ban political donations raises the issue of whether political donations are protected as a form of freedom of communication on governmental and political matters.

While the Australian Constitution does not explicitly protect a right to freedom of speech, the High Court has held that an implied right to freedom of political communication exists as a necessary part of Australia's system of representative and responsible government. This freedom operates as a right to freedom from government restraint about political matters.⁵

However, the freedom of political communication is not absolute, and may be subject to legislative restrictions, providing any such restrictions do not impinge on the system of representative government. Whether legislation imposing restrictions on freedom of political communication is constitutionally valid will be established by examining whether it burdens political communication, has a legitimate purpose compatible with the maintenance of representative and responsible government, and is reasonably appropriate and adapted.⁶

The question as to whether a ban on political donations from property developers 'impermissibly burdens the implied freedom on communication on governmental and political matters contrary to the Commonwealth Constitution' was considered by the High Court in *McCloy v New South Wales*.⁷ In this case, the constitutional validity of New South Wales legislation banning political donations from property developers, among other things, was considered by the High Court.

The decision notes that the lawfulness of any burden on the implied freedom on communication rests on the law: being for "legitimate purposes"; being enacted "by rational means which not

⁵ *Lang v Australian Broadcasting Corporation* (1997) 189 CLR 520, p 560.

⁶ *Coleman v Power* [2004] HCA 39.

⁷ *McCloy v New South Wales* [2015] 257 CLR 178

only do not impede the system of representative government provided for by the Constitution, but enhance it”; and being “justified as a proportionate means of achieving their purpose”.⁸

Consultation

The Member has developed these amendments based on stakeholder and community feedback, and the widespread understanding within the Queensland community that political donations increase both the actual and perceived risk of corruption.

Submissions and evidence provided to various inquiries at the Federal and State level, including the Economics and Governance Committee’s inquiry into the Belcarra Bill, have also informed the development of the Bill.

Consistency with legislation of other jurisdictions

Each Australian jurisdiction has unique approaches to addressing the matters contained in these amendments. NSW has adopted sector-based bans on political donations, and the approach adopted in the Bill is modelled on analogous NSW legislation.

⁸ *McCloy v New South Wales* (2015) 325 ALR 15, para 5.

Notes on provisions

Part 1 Preliminary

Clause 1 Short Title

Clause 1 provides that when enacted, the Bill may be cited as the *Electoral Legislation (Political Donations and Election Expenditure) Amendment Act 2018*

Part 2 Amendment of Electoral Act 1992

Clause 2 Act Amended

Clause 2 states that this part amends the Electoral Act 1992.

Clause 3 Amendment of s 2 (Definitions)

Clause 3 amends s 2 to include a signpost for the definitions for 'political donation' (see s 201B) and 'prohibited corporate donor' (see s 280).

Clause 4 Amendment of s 197 (Definitions)

Clause 4 amends s 197 to include a signpost for the definitions for 'political donation' (see s 201B) and 'prohibited corporate donor' division 8, subdivision 5 (see s 280).

Clause 5 Insertion of new s 201B

New section 201B (Meaning of political donation) defines 'political donation'.

Clause 6 Insertion of new pt 11, div 8, sdiv 5

New section 280 (Definition for subdivision) provides that 'prohibited corporate donor' means a company registered under the Corporations Act 2001 (Cth) or an industry representative organisation a majority of whose members are companies registered under the Corporations Act 2001 (Cth), but does not include charities, not-for-profit organisations, or employee and employer organisations under State or Federal industrial relations legislation.

New section 281 (Political donations by prohibited corporate donors) makes unlawful the making and acceptance of political donations made by or on behalf of prohibited corporate donors and prohibited corporate donors (or others on their behalf) from soliciting other persons to make political donations.

New section 281A (Recovery of prohibited donations) provides for the recovery of prohibited donations as a debt due to the State. If the person knew it was unlawful to receive the prohibited

donation, the amount payable to the State is an amount equal to twice the amount or value of the prohibited donation. Otherwise, the amount is the amount or value of the prohibited donation.

Clause 7 Insertion of new ss 307A and 307B

New section 307A (Offence about prohibited donations) provides that it is an offence for a person to do an act or make an omission that is unlawful under new section 281, if the person knows or ought reasonably to know of the facts that result in the act or omission being unlawful pursuant to new section 281. The maximum penalty for the offence is 400 penalty units or 2 years imprisonment. Subsection (2) provides that the offence is a misdemeanor and therefore indictable.

New section 307B (Schemes to circumvent prohibition on political donations) provides that it is an offence for a person to knowingly participate, directly or indirectly, in a scheme to circumvent a prohibition under part 11, division 8, subdivision 5 about political donations. The maximum penalty for the offence is 10 years imprisonment or 1500 penalty units. Subsection (2) provides that it does not matter whether the person also participates in the scheme for other purposes. Subsection (3) designates the offence as a crime and therefore an indictable offence. Subsection (4) provides for the meaning of 'participate in' and 'scheme' in this section.

Clause 8 Amendment of s 308 (Recovery of payments)

Clause 8 amends section 308 (Recovery of payments) by making consequential amendments to section numbers referred to in section 308(1) to take into account new section 281A and reflect a consequential amendment made to section 271 by section 57 of the Electoral Reform Amendment Act 2014.

Clause 9 Amendment of s 385 (Offences under this part are summary)

Clause 9 amends section 385 (Offences under this part are summary) to make amendments consequential to the creation of the new indictable offences and new sections 307A and 307B.

Clause 10 Insertion of new s 385A (Proceedings for indictable offences)

Clause 10 creates a new section 385A (Proceedings for indictable offence) which provides for the way in which proceedings for indictable offences under the Act may be taken.

Part 3 Amendment of Local Government Electoral Act 2011

Clause 11 Act amended

Clause 11 states that this part amends the Local Government Electoral Act 2011.

Clause 12 Amendment of s 106 (Definitions for part)

Clause 12 inserts in section 106 a signpost for the definitions for ‘political donation’ (see s 113) and ‘prohibited corporate donor’ (see s 113A).

Clause 13 Insertion of new s 113

New section 113 (Meaning of *political donation*) provides that for division 1, each of the following is a ‘political donation’—

- a gift made to or for the benefit of—
 - a political party; or
 - a councillor of a local government; or
 - a candidate or group of candidates in an election;
- a gift made to or for the benefit of another entity—
 - to enable the entity (directly or indirectly) to make a gift mentioned in section 113(1)(a) or to incur electoral expenditure; or
 - to reimburse the entity (directly or indirectly) for making a gift mentioned in section 113(1)(a) or incurring electoral expenditure;
- a loan from an entity other than a financial institution that, if the loan were a gift, would be a gift mentioned in section 113(1)(a) or (b).

Section 113(2) provides that if a gift is made by a person in a private capacity to an individual (the ‘recipient’) for the recipient’s personal use and the recipient does not intend to use the gift for an electoral purpose—

- the gift is not a political donation when it is made; but
- if any part of the gift is used for an electoral purpose, then, for the purposes of section 113A(3)—
 - that part of the gift is a political donation; and
 - the recipient is taken to accept that part of the gift at the time it is used for an electoral purpose.

Section 113(3) provides that a reference in section 113(2) to using a gift for an ‘electoral purpose’ is a reference to using the gift to incur electoral expenditure or for the recipient’s duties as a councillor of a local government.

In section 113:

‘disposition of property’, see section 107(3).

‘gift’ means—

- the disposition of property or the provision of a service, without consideration or for a consideration that is less than the market value, but does not include—
 - the transmission of property under a will; or
 - provision of a service by volunteer labour; or

- an amount of interest that would have been payable on a loan if—
 - the loan had been made on terms requiring the payment of interest at the generally prevailing interest rate for a loan of that kind; and
 - any interest payable had not been waived; and
 - any interest payments were not capitalised; or
- an amount paid for attendance at or participation in a fundraising activity, to the extent the amount forms part of the proceeds of the fundraising activity to which it relates; or
- any of the following amounts paid by a person to a political party, to the extent the total amount of the person's payments in a calendar year exceeds \$1,000—
 - an amount paid as a subscription for a person's membership of the party;
 - an amount paid for a person's affiliation with the party.

Clause 14 Insertion of new pt 6, div 1A

Clause 14 inserts new part 6, division 1A (Political donations from prohibited corporate donors).

New section 113A (Meaning of *prohibited corporate donor*) provides that for division 1A, 'prohibited corporate donor' means a company registered under the Corporations Act 2001 (Cth) or an industry representative organisation a majority of whose members are companies registered under the Corporations Act 2001 (Cth), but does not include charities, not-for-profit organisations, or employee and employer organisations under State or Federal industrial relations legislation.

New section 113B (Political donations by prohibited corporate donors) makes unlawful the making and acceptance of political donations made by or on behalf of prohibited corporate donors and prohibited corporate donors (or others on their behalf) soliciting other persons to make political donations.

Section 113B(1) provides that it is unlawful for a prohibited corporate donor to make a political donation.

Section 113B(2) provides that it is unlawful for a person to make a political donation on behalf of a prohibited corporate donor.

Section 113B(3) provides that it is unlawful for a person to accept a political donation that was made (wholly or in part) by or on behalf of a prohibited corporate donor.

New section 113C (Recovery of prohibited corporate donations) provides that if a person accepts a prohibited corporate donation, the following amount is payable by the person to the State—

- if the person knew it was unlawful to accept the prohibited corporate donation—an amount equal to twice the amount or value of the prohibited corporate donation;

- otherwise—an amount equal to the amount or value of the prohibited corporate donation.

The amount may be recovered by the State as a debt due to the State from—

- if the recipient is a registered political party that is not a corporation—the party’s agent; or
- if the recipient is a group of candidates—the members of the group or the group’s agent; or
- if the recipient is a candidate—the candidate or the candidate’s agent; or
- otherwise—the recipient.

The imposition of liability to pay an amount to the State under section 113C—

- is not a punishment or sentence for an offence against section 194A or any other offence; and
- is not a matter to which a court may have regard in sentencing an offender for an offence against section 194A or any other offence.

Section 113C(4) provides that an action in a court to recover an amount due to the State under section 113C may be brought in the name of the electoral commission.

Section 113C(5) provides that any process in the action required to be served on the State may be served on the electoral commission.

In section 113C:

‘prohibited corporate donation’ means a political donation that was unlawfully made or accepted under section 113B.

‘recipient’ means the entity to whom, or for the benefit of whom, the prohibited corporate donation was made.

Clause 15 Insertion of new ss 194D and 194E

Clause 15 inserts into part 9, division 5 new sections 194D and 194E.

New section 194D (Offence about prohibited donations) provides that a person must not do an act or make an omission that is unlawful under section 113B if the person knows or ought reasonably to know of the facts that result in the act or omission being unlawful under that section. The maximum penalty is 400 penalty units or 2 years imprisonment. An offence against section 194A(1) is a misdemeanour.

New section 194E (Schemes to circumvent prohibition on particular political donations) provides that a person must not knowingly participate, directly or indirectly, in a scheme to circumvent a prohibition under part 6, division 1A, about political donations. The maximum penalty is 1500

penalty units or 10 years imprisonment. For section 194E(1), it does not matter whether the person also participates in the scheme for other purposes. An offence against section 194E(1) is a crime.

In section 194E:

'participate in', a scheme, includes—

- enable, aid or facilitate entry into, or the carrying out of, a scheme; and
- organise or control a scheme.

'scheme' includes arrangement, agreement, understanding, course of conduct, promise or undertaking, whether express or implied.

Clause 16 Insertion of new s 201A

Clause 16 creates a new section 201A (Proceedings for indictable offence) which provides for the way in proceeding for indictable offences under the Act may be taken.

Section 201A(1) provides that proceedings for an indictable offence against the Local Government Electoral Act 2011 other than a designated electoral offence under section 201, may be taken, at the election of the prosecution—

- by way of summary proceeding under the Justices Act 1886; or
- on indictment.

Section 201A(2) provides that a magistrate must not hear an indictable offence against section 194B (Schemes to circumvent prohibition on particular political donations) summarily if—

- the magistrate is satisfied, at any stage of the hearing and after hearing any submissions by the prosecution and defence, that because of the nature or seriousness of the offence or any other relevant consideration the defendant, if convicted, may not be adequately punished on summary conviction; or
- the magistrate is satisfied, on an application made by the defence, that because of exceptional circumstances the offence should not be heard and decided summarily.

Section 201A(3) provides that, if section 201A(2) applies—

- the magistrate must proceed by way of an examination of witnesses for an indictable offence; and
- a plea of the person charged at the start of the proceeding must be discharged; and
- evidence brought in the proceeding before the magistrate decided to act under section 201A(2) is taken to be evidence in the proceeding for the committal of the person for trial or sentence; and
- before committing the person for trial or sentence, the magistrate must make a statement to the person as required by the Justices Act 1886, section 104(2)(b).

The maximum penalty that may be summarily imposed for an indictable offence is 100 penalty units or 3 years imprisonment.

Clause 17 Amendment of schedule (Dictionary)

Clause 17 inserts in the schedule signposts for the definitions for 'political donation' (see s 113) and 'prohibited corporate donor' (see s 113A).