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Committee Secretary
Economics and Governance Committee
Parliament House
George Street
Brisbane Qld 4000

9 January 2020

Submission on the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Bill 2019.*

Dear Members,

The Australian Conservation Foundation (ACF) would like to thank you for the opportunity to make a submission to the Economics and Governance Committee on the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Bill 2019* **(Bill)**.

The Australian Conservation Foundation (ACF) is Australia's oldest national environmental organisation, founded in the mid-1960s with the support of eminent Australians, the Australian community and the Australian government. ACF has been, since its creation some 50 years ago, the leading national advocate for the environment. ACF protects, restores and sustains Australia's environment through research, consultation, education, partnerships and advocacy. ACF is strictly non-partisan and we are proud of our political independence. Over the past 50 years our independent advocacy has helped drive extraordinary commitments from governments of all political persuasions as well as from business and communities.

ACF strongly supports reforms to strengthen state and federal political donations and electoral expenditure regimes. This Bill introduces crucial reforms, such as caps on electoral expenditure, caps on donations to politicians and greater public funding of elections, which are critical reforms to bring greater fairness, integrity, and accountability to Queensland's electoral system. We applaud the Government's efforts in bringing forward these reforms.

However, ACF holds a number of significant concerns about the Bill and believes that it should not be passed without serious consultation and amendment. ACF's primary concern is the way in which this Bill unreasonably restricts the public interest advocacy work of charities and not-for-profits in Queensland, the result of which would be to

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silence important community views and voices during election debates. Secondly, the Bill is highly inequitable in who it impacts, as it would greatly restrict charitable advocacy while letting the biggest players at elections off the hook. Section III of this submission contains proposed amendments which address these concerns and also raises a number of technical amendments for the Committee to consider.

Finally, before addressing ACF's substantive concerns regarding this Bill, we wish to note some concerns regarding process. The amendments proposed by the Bill will substantially transform the way elections are run in Queensland and the ability of charities and not-for-profits to raise issues of public importance and advocate for positive outcomes. And yet, the lack of consultation with those who will be most impacted by this Bill, and the act of holding this inquiry over the summer holiday period with very tight deadlines for making a submission, have the effect of restricting participation in the process. This unnecessarily rushed process is limiting proper scrutiny of a Bill that has far-reaching implications for democracy in Queensland.

I. The Bill will prevent charities and not-for-profits from participating in public interest advocacy

The administrative burden that this Bill places on third parties, combined with the fact that the Bill only targets income received through donations, means that the Bill will have a significant negative impact on the ability of charities and small community groups to participate in public interest advocacy. The result of these restrictions will be to make Queensland elections more inequitable, by silencing community voices, while letting the largest third party actors—corporations and industry groups—off the hook.

The importance of public interest advocacy

A thriving democracy needs many voices and robust and vibrant public debate. It works for everyone and represents everyone. Australian not-for-profits and charities have a long, proud history of speaking up for those who may not be able to have their voices heard, asking hard questions, and working with Governments to improve policy outcomes.

Charities and not-for-profits advocate in respect of many matters in the public interest, whether that be protecting endangered species, closing the gap for

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indigenous Australians, or providing legal services to people suffering with a mental illness. For ACF, 'advocacy' means influencing decision making in the interests of conservation and sustainability. These activities inevitably involve generating public awareness and debate in respect of an issue and through that, encouraging legislative and/or policy change to protect the environment and the people, plants and animals that depend upon it. Advocacy is fundamental to our ambitions of driving large scale positive impacts to protect the environment and complements on-the-ground activities such as tree planting and conservation of national parks.

Through charities and other public interest organisations, people are able to come together to unite their voice around issues which are important to them. This is an essential role in modern democracy, providing ways for people to speak up for their views and values where they otherwise have limited ability to be heard or to influence the political process. At ACF we have over 600,000 active supporters.

Reforms which restrict or discourage the public (through charities and not-for-profit organisations) from participating in advocacy are not in the public interest. This Bill is likely to restrict advocacy in two ways:

A. The cap on donations

This Bill limits philanthropic donations that can be used for public interest advocacy work which meets the definition of electoral expenditure to $4000 per donor over a four-year electoral period. Significantly, the definition of electoral expenditure in the Bill is very broad, capturing communications for the dominant purpose of *directly or indirectly* influencing votes at an election. The effect of these measures is to significantly limit the income that charities and community groups have available for public interest advocacy work during election periods.

Unlike other third parties, charities and not for profits almost exclusively rely on philanthropic donations for their income. In contrast, as highlighted in Section II below, other third parties that do not rely on donations, such as industry associations or corporations, will have no restrictions on the sources of income that they may use towards electoral expenditure. This aspect of the Bill undermines the ability of charities and community groups to undertake their regular advocacy activities during election periods, while placing no similar restrictions on industry associations, corporations or other similar third parties.

Significantly, a cap on philanthropic donations that can be used for advocacy at an election will likely have the most impact on small and/or regional organisations. For

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example, as a large national organisation, ACF has a wide and diverse group of supporters across the country who fund our work through thousands of relatively low-value, individual donations. On the other hand, small and/or regional organisations frequently rely on a much narrower pool of regular donors and often work in more low-income regions than organisations in urban areas. Where organisations rely on a few major donors, the impact of limiting the income that can be used towards advocacy during election periods will have a significant impact and will hurt regional groups the most.

There is no principled reason for restricting donations to charities.

Limiting philanthropic donations to charities serves no public interest purpose. The motivation for capping political donations, as stated in the Explanatory Notes for the Bill, is to reduce the risk of improper, corrupting, or undue influence posed by political donations.[1] In this sense, political parties and candidates represent a much higher corruption risk than third parties. Consequently, the motivations for regulating donations to each are different.

Unlike political parties and politicians, third parties cannot introduce or vote on legislation, make decisions on important planning or development proposals, or exert inappropriate influence over these processes. Third parties can only advocate for government and the public to take particular action on an issue and are removed from the actual decision-making processes of government. Therefore, the primary objective for applying a cap on donations to third parties is to prevent the donation cap on political parties being circumvented by the setting up of third-party organisations that will campaign on behalf of the political party. This is not to negate the fact that third parties can also exert significant influence at elections through large electoral expenditure, however this concern is best and most appropriately regulated through expenditure caps.

This risk does not apply in respect to charities. Charities are the only actors required by law, the *Charities Act 2012(Cth)*, to work in the public interest. They are explicitly forbidden from a primary purpose of supporting a political party or candidate for office. Charities are required to ensure that all of their activities serve their charitable purpose, and are legally prevented from engaging in partisan work or acting as a conduit for political donations.

[1] Explanatory Notes, Electoral and Other Legislation (accountability, Integrity and Other Matters) Amendment Bill 2019, page 10

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The consequences for breaching the obligations under the Charities Act are severe. The Australian Charities and Not-for-profits Commission (ACNC) is empowered and resourced to investigate suspected breaches of the Act and charities found to be in breach can be deregistered with the consequence that DGR status and favourable tax treatment will be lost.

B. The compliance burden is prohibitive

This Bill imposes a number of administrative requirements on registered third parties that receive donations, including the introduction of donor statements and receipts, the requirement to appoint an agent, and to maintain a separate state electoral campaign bank account. Compliance with these requirements will require sophisticated tracking and monitoring of donations and electoral expenditure. For example, like many other charities, a large percentage of ACF's annual donations come from our regular giving program, that is supporters who make a recurring monthly donation. In addition to this, ACF supporters donate in a number of ways, including once off donations, or a few times a year, all in different amounts. We currently have no systems in place that would allow us to track our database of supporters in order to ensure that no single supporter gave over the $4000 cap in political donations over the four year electoral period. Tracking of political donations—including ensuring we receive a statement, issue a donor receipt, move the money to a separate bank account, and keep the necessary documents required by the ECQ—would require a huge amount of resources. This burden will need to be done manually or, alternatively ACF would have to purchase, or pay for the development of, new systems that would be required to comply with these obligations. This would be prohibitive for smaller charities and not-for-profit groups.

When faced with these administrative requirements, larger organisations like ACF will have to divert scarce resources to professional financial and legal staff rather than protecting nature and the environment which is the intention of donors. Smaller less well-resourced organisations will have significant challenges in securing resources and implementing systems to address these compliance burdens and may well have no option but to substantially limit their advocacy during election periods.

Queensland boasts many small environmental groups and conservation councils who do incredible work to protect Queensland's beautiful nature, animals and environment. ACF has spent significant time speaking to groups across the state to understand the potential impacts of the proposed legislation on these organisations. Many of these organisations achieve great impact with very few staff. Many have volunteer boards or councils, including a volunteer treasurer. Many pay an external,

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part-time accountant for their bookkeeping and financial needs. To imagine a volunteer treasurer for an organisation taking on the obligations required by the Bill is difficult. Organisations would be forced, should they want to continue their public interest advocacy work around election times, to direct the limited resources they have to comply with the administrative requirements of this Bill. The reality is that many organisations will choose to self-censor themselves around election times, due to an inability to comply or fear of non-compliance with the legislation.

The effect of this legislation will be to silence many important community voices, particularly those who are already marginalised in mainstream debate, making participation in elections more inequitable overall.

II. The Bill is inequitable and discriminatory in who it captures.

This Bill seeks to make Queensland elections fairer by ensuring all Queenslanders have a more equal opportunity to have a voice in elections, and that those with the biggest wallets cannot drown out the voices of others. Unfortunately, this Bill will likely make elections more inequitable. It limits the ability of charities and community groups to participate in election time policy debate and to speak up for the interests of the communities they serve, or to protect the environment and the people, plants and animals that depend upon it, while leaving the biggest spenders in elections—industry and big business—largely unimpacted.

This Bill only caps and requires disclosure of income received through donations whilst critically missing other relevant types of income which might be directed towards election activities. Likewise, many of the integrity measures introduced in this Bill will only apply to organisations that rely largely upon donations for income. Charities and community groups which rely on philanthropic donations for their work will be the organisations that are singled out to face significant administrative burdens and increased reporting requirements.

In contrast, industry associations and corporations who do not rely on donations will be virtually unimpeded in electoral campaigning. These groups will be free to rely on membership fees, levies and commercial revenues to spend up to $1 million each on election campaigns without any further transparency on the sources of that income. Further, because there are no prohibitions on corporations or industry associations coordinating their election campaigns, corporations and industry associations could foreseeably band together to coordinate multiple million-dollar election spends.

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Some of the biggest spenders during elections are industry groups. By way of example, during the 2016 Federal election[2] the largest total expenditure by a third party was by ACA Low Emission Technologies Ltd on the *'Coal—it's an amazing thing'* campaign. This was followed by the Minerals Council of Australia with the second largest spend, and the Australian Education Union with the third largest.

Table 1: Top three third party electoral expenditures in Fiscal year 2016/17[3]

Organisation	Total Expenditure FY 2016/17
ACA Low Emissions Technologies Ltd	3,584,115.00
Minerals Council of Australia	1,297,025.00
Australian Education Union	894,372.00

The ABC reported the source of the money for the "*Coal—it's an amazing thing'* campaign as voluntary levies paid by coal companies intended for research into "clean coal" but which were later spent on coal promotion during the election. The levies were deducted from mining royalties which otherwise would have gone to state governments for public revenue.[4]

Importantly, no income received by industry associations from levies or membership fees will be captured under this Bill. Associations which rely on levies or membership fees will not be restricted in the amounts that they receive from member organisations for election campaigning and will not be obliged to comply with any of the disclosure requirements instituted by this Bill. Each of these associations will be free to spend up to $1 million on electoral expenditure, without any transparency over the source of these funds.

By only focusing on organisations that receive donations, this reform misses a key opportunity to remove the biggest money and undue influence from the state electoral system. This is a significant shortfall in the current Bill insofar as it aims to create greater transparency over the sources of money used for electoral expenditure. As is, this Bill would create an unequal regulatory regime by only capturing charities and not-for-profits which rely on gifts for income.

[2] NB, Expenditure data is not yet available for the 2019 Federal election.
[3] Australian Electoral Commission, Summary of Political Expenditure Returns – 2016-17, <https://periodicdisclosures.aec.gov.au/SummaryPoliticalExpenditure.aspx>
[4] Stephen Long, 2017, 'Pre-election coal advertising funded by meant for clean coal research', Australian Broadcasting Corporation, <https://www.abc.net.au/news/2017-02-20/coal-advertising-funded-by-money-meant-for-clean-coal-research/8287326?pfmredir=sm>

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III. Recommendations

Based on the above, ACF supports the following amendments to the Bill:

A. Amendment to the definition of electoral expenditure

ACF believes that the most critical and significant amendment needed to the Bill is to narrow the definition of electoral expenditure so as to ensure that legitimate public interest advocacy work is not unreasonably restricted. This can be achieved by inserting the following new subsection into proposed section 199 of the Bill, which defines electoral expenditure:

(6) Expenditure incurred by a third party registered under the Australian Charities and Not-for-profits Commission Act 2012 or with an annual income of less than $50,000, is only electoral expenditure if material that is published, aired or otherwise disseminated refers to—

(a) a candidate or a political party; and

(b) how a person should vote at an election.

The amended definition of electoral expenditure for registered charities and small organisations is proposed on the basis that both categories of organisation pose a very low risk of being used to circumvent the donation cap to candidates and political parties. As outlined in Section I(A)of this submission, charities are already required under the Charities Act 2013 to act within their charitable purpose. Small organisations with an annual income of $50,000 or less are also included in the proposed amendment because they are likely to be volunteer run and would not have the resources to obtain and maintain charitable status. The amendment will exclude these organisations from the onerous obligations and penalties under the Bill unless they do very specific and clear "vote-shifting" work.

We believe this amendment, by narrowing the definition of electoral expenditure for these two categories of third party alone, is preferable to merely raising the threshold for registering as a third party or raising the donation cap for third parties.

This amendment follows the approach of the narrower definition of "political expenditure" for third parties in the Victorian Electoral Act, which the Victorian government explicitly stated was designed to protect the right of third parties to

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pursue social issues advocacy, and the right of donors to fund it.[5] The definition we propose here is narrower than the Victorian definition in order to best preserve the intended purposes of the Bill, while protecting the ability of charities and small community groups to pursue social issues advocacy, which we see as crucial.

RECOMMENDATION: The definition of electoral expenditure in Section 199 of the Bill be amended to protect the ability of charities and small community groups to participate in public interest advocacy during election periods.

B. The threshold for registering as a third party campaigner should be raised

The current threshold at which organisations must register as a third party campaigner ($1000) is too low. The administrative burdens imposed under this Bill for registered third parties are significant, such that some organisations may need to spend more money in trying to comply with the administrative requirements than in public interest advocacy on their issues. These burdens will also have the effect of stopping some smaller organisations from engaging in advocacy on important public interest issues at election time all together.

The threshold should be set at an amount that relieves the potential chilling effect of the administrative burden, without being so large as to render the transparency measures ineffective.

RECOMENDATION: The threshold for registering as a third party campaigner be raised to $6000.

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[5] The Victorian *Electoral Legislation Amendment Bill 2018* Explanatory Memorandum states (Clause 40): *It is intended that gifts to associated entities and third party campaigners for the purpose of general issues advertising and awareness raising will not be considered political donations, if the gift is not for the dominant purpose of directing how a person should vote at an election by promoting or opposing a candidate or party. This will ensure the right of donors to be active in social issues, including by giving gifts to organisations that support these issues, without being subject to the limitations provided under the scheme. It will also ensure that third party campaigners are not subject to onerous reporting obligations due to activities that are not for the dominant purpose of directing how a person should vote at an election by promoting or opposing a candidate or registered political party.*
In his second reading speech, the Minister stated:
"Advertising and raising awareness about issues, without promoting or opposing a candidate or political party, will not be considered political expenditure. Political expenditure has been defined narrowly in this way, to ensure that all Victorians will maintain their right to engage in public discussion on policy matters that are important to them."

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C. Section 251(2) is potentially incompatible with the tax deductible gift requirements under the Income Tax Assessment Act 1997 (Cth)

ACF holds concerns over the compatibility of the draft requirement for a donor statement and the requirements for a donation to be eligible for tax deductibility under the Income Tax Assessment Act 1997 (Cth) as specified in the *Taxation Ruling 2005/13*.

It is our understanding that, for a donation to qualify as a tax-deductible gift, it is not permissible for the donor to direct an organisation in how they expect a donation to be used. While donors may state their preference for how a donation is used, they may not oblige the organisation to do so.

Section 251 of the Bill sets out the requirements for a donor statement. Of relevancy is subsection 2(d) which states as follows:

> "(d) state that the gift or loan is made—
> (i) for a gift or loan mentioned in section 250(1)(b)—for a purpose mentioned in section 250(1)(b); or
> (ii) otherwise—with the intention that the gift or loan is used for an electoral purpose; and"

These statements may be interpreted as more than a simple preference of the donor, but rather a directive as to how funds must be spent. On the other hand, if the statement was changed so that the donor must issue a statement that the gift may be used for an electoral purpose, then a conflict would likely be avoided.

We raise this as an issue that we hope the Committee will explore further in order to ensure that requirements of a donor statement are compatible with the tax deductible gift requirements under the Income Tax Assessment Act 1997 (Cth).

RECOMMENDATION: The Committee seek expert advice and consider whether the requirements under s. 251(2) are compatible with the tax deductible gift requirements under the Income Tax Assessment Act 1997 (Cth).

D. Donations not used towards electoral expenditure should not have to be disclosed to the Electoral Commission Queensland (ECQ)

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Section 263(2)(b) of the Bill requires the disclosure of all gifts even if only a portion of a gift was given as a political donation and used for electoral expenditure.

To help illustrate the issues which arise from this requirement, we give the following example:

A supporter decides to give a one-off philanthropic gift to ACF of $10,000. The donor does not provide a donor statement and no part of this gift is classified as a political donation.

Later in the year, that supporter clicks through to the ACF website from an email fundraising drive to raise money for a Queensland specific issue and donates $25. The donor provides a donor statement nominating that this gift may be used toward electoral expenditure. ACF deposits this money into it's state campaign bank account and later uses this money to produce an advertisement on an election issue. ACF reports this spend as electoral expenditure.

The donor has given, in total, $10,025 to ACF. Even though, this donor only gave $25 as a political donation, ACF would be required to declare the total gift amount of $10,025 to the ECQ. This would make it appear as if ACF accepted a donation in breach of the donation cap, and as if the donor made a $10,025 donation to ACF for the purpose of electoral expenditure in Queensland.

To avoid this scenario, it should be made clear in the Bill that gifts (or portions of gifts) not used towards electoral expenditure do not need to be declared to the ECQ. This would also be consistent with Section 314AC of the *Electoral Act 1918 (Cth)* which provides this exception for certain organisations.

RECOMMENDATION: An amendment to the Bill (section 263) is required to state clearly that gifts or portions of gifts that are not used for electoral expenditure are not required to be disclosed to the Electoral Commission Queensland.

E. Electoral expenditure should be published

Currently, the Bill does not make it a requirement that the ECQ make public on its website returns related to electoral expenditure. Instead, in order to access returns related to electoral expenditure a person must search records at the ECQ office or request and pay for a copy of a specific record. These records are available six weeks after the polling day for the election.

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Electoral expenditure should be made available, published to the ECQ website, as is donations data. In addition to real time disclosure of political donations, it would be preferable for total donations *and* expenditure data to be submitted in a single annual return, made publicly available on the ECQ website.

RECOMMENDATION: To promote greater transparency, electoral expenditure should be made publicly available on the ECQ website.

F. Appropriate powers for ECQ to conduct investigations

RECOMMENDATION: The ECQ should be given appropriate resourcing and powers to conduct investigations to ensure that organisations and individuals are not breaching obligations under the Bill.

Yours sincerely,

Anthony Moore
Acting Chief Executive Officer