File number:

ELECTORAL COMMISSION QUEENSLAND

23 March 2018

Committee Secretary
Economics and Governance Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Secretary

I am writing to provide the Economics and Governance Committee with a public submission from the Electoral Commission of Queensland (the Commission) to the *Inquiry on the Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018*.

Enclosed at **Attachment 1** is the Commission's submission, which offers observations on those aspects of the Bill that relate to the 'Prohibition on donations from property developers' policy objective. I wish to make clear that the Commission's submission is not intended in any way to comment on the merits or otherwise of government policy as represented by the Bill.

As the entity that would be responsible for implementing and administering the proposed prohibition, however, the Commission is keenly interested in the Bill's policy drivers and the resulting amendments to the *Electoral Act 1992* and *Local Government Electoral Act 2011*. In this regard, the implementation phase and the operationalization of the policy objective would not be without it challenges. The Commission has thus offered some observations regarding the clarity of certain provisions in the Bill and the workability of the prohibition overall as proposed.

Should you require further information regarding this matter, please contact me on 1300 881 665 or at ecq@ecq.qld.gov.au.

I trust this information is of assistance.

Yours sincerely

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Queensland Government

ECQ SUBMISSION – LOCAL GOVERNMENT ELECTORAL (IMPLEMENTING STAGE 1 OF BELCARRA) AND OTHER LEGISLATION AMENDMENT BILL 2018

ELECTORAL COMMISSION QUEENSLAND

The Electoral Commission of Queensland (the Commission) welcomes the opportunity to provide the Economics and Governance Committee with a public submission for its consideration.

The Commission's submission focusses on the 'Prohibition on donations from property developers' policy objective advanced through *the Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018* (the Bill). The Commission is not commenting on government policy; rather, it is focusing on the Bill's implementation impact and workability in its current form. This submission should be read in that context.

Recommendations

That the Committee consider:

1. Whether the separate new class of gift – a 'political donation' – will impose an additional and potentially excessive reporting obligation on key stakeholder e.g. political parties.
2. Providing any additional guidance around the making of determinations, and the type of information that should be included in the register of determinations and revocations noting the public interest in this information and appeal options.
3. Providing a suitable period between the Bill's assent and commencement of the prohibited donors elements for associated implementation activity to occur.

Immediate impacts on the Commission of the prohibited donor scheme

Should the Bill become law, the prohibition on donations from property developers (the 'prohibited donor scheme') would have immediate impacts on the Commission.

These impacts relate to the proposed amendments to the legislation which drive the Commission's disclosure-related activities – namely, the *Electoral Act 1992* (EAct) and the *Local Government Electoral Act 2011* (LGEAct).

Firstly, the prohibited donor scheme and its retrospective application represent a fundamental shift in the Commission's disclosure-related responsibilities at local government and state government levels. It would extend the Commission's existing responsibilities into an entirely new field of activity (e.g. property development, planning activity subject to planning applications, corporations law), and involve a potentially vast group of stakeholders given the definition of 'property developer'.

On this latter point, the early stages of implementation are likely to be characterised by regulated parties contesting the scheme and seeking legal clarity about its operation, and by stakeholder engagement that is intensive and time-consuming.

Secondly, to provide regulatory certainty, the Commission anticipates immediately receiving a large number of requests for advice and/or applications from potentially regulated parties for the making

of determinations that they are not prohibited donors[1]. This is because such determinations are one of the key mechanisms underpinning the scheme, and an extensive advice-giving role has already been foreshadowed by the Department of Justice and Attorney-General (DJAG) at the public briefing on 19 March 2018. With the prohibited donor scheme not being confined to election periods, the Commission therefore reasonably suspects that this activity will occur immediately.

Thirdly, based on the Commission's understanding of how the prohibited donor scheme operates in New South Wales (NSW), we anticipate a large volume complaints-driven scheme to eventuate, at least in the early stages of implementation and around electoral events. This would largely involve third parties lodging complaints with the Commission about the operations of potentially regulated parties – e.g. that a person or entity has made or received an unlawful donation, that a person or entity is a close associate of a property developer, or, more seriously, complaints about people knowingly participating in schemes to circumvent the prohibition on political donations. Thorough compliance reviews would be required to provide a response to such complaints, regardless of their veracity. A mechanism would also need to be developed to identify and address vexatious complaints – and this may take some time as the Commission develops a familiarity with this subject matter.

Finally, the Government's and the community's expectation in light of Operation Belcarra will rightly be that compliance and enforcement action is taken by the Commission against any parties that fail to comply with the prohibited donor scheme, including committing related offences. As the scheme has retrospective application back to 12 October 2017, these expectations will be for immediate responses in this regard by the Commission as they relate to the failure to repay any previous political donations received that, due to the commencement of the Bill, are now unlawful.

The main tool used by the Commission for compliance is the Electronic Disclosure System (EDS) which will require modifications to allow the Commission to capture returned gifts, instances of non-compliance, and users who will be captured under the definition of prohibited donor. The Commission considers that in conjunction with developing operational policy, care will need to be taken to construct and develop the scheme in the EDS to ensure the scheme is realised. Coupled with the other points raised above, there is a flow-on effect for other systems, knowledge set, staffing capabilities, and expertise that the Commission would require to administer and regulate this scheme and engage with the stakeholders regulated by it.

Differences between Queensland and NSW re 'political donations'

The Commission notes that there are some factors which make the scheme's operation in Queensland different to NSW, leading to questions about the workability of applying it in its current form in the Queensland context.

In particular, NSW has a monetary cap on 'political donations'[2] which necessitates this concept being separately defined from other types of gifts. That construct then operates in concert with the prohibited donor scheme, which also links back to the definition of 'political donations'. However, the Bill does not propose Queensland put in place similar monetary caps on political donations.

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[1] Refer sections 13 and 30 of the Bill which, respectively, propose the insertion of section 277 in the EAct and section 113D in the LGEAct

[2] Refer http://www.elections.nsw.gov.au/fd/political_donations/caps_on_political_donations

Instead, the Bill seeks to apply the NSW definition of 'political donation' but only in a 'prohibited donors' context. This has the effect of creating a new class of gift that seems overly complicated in the Queensland context. A simpler construction that would be easier to monitor and enforce – including for the purposes of the offences – would be to link prohibited donors to gifts in general.

Definition of 'political donation'

As described above, the definition of 'political donation' is problematic for several reasons. One relates to whether it is required at all as new class of gift in the Queensland context.

The other relates to identifying and reporting gifts (especially in a real-time context using the EDS) which transition from being standard gifts to being political donations upon their use for 'electoral purposes' (refer, for example, section 13 of the Bill and inserted section 274). From a practical perspective, such gifts would be lodged using the EDS, but upon their use in whole or part for an electoral purpose there appears to be no separate reporting requirement, so how will the Commission or the public know when this transition has occurred[3]? This goes to the practicality of instigating investigations and taking compliance and/or enforcement action against parties who may commit related offences, and providing advice to the general public.

Making and registering determinations

In making determinations that a person or entity is not a prohibited donor, two questions arise for the Commission that the Bill does not provide clarity on:

1. If a person or entity is determined to be a prohibited donor, or otherwise, how long is it before they or a third party can make a new application for a determination?
2. If there is not enough information in the application, what inquiries, if any, should the Commission make – e.g. contact the entity and seek information, even if a third party is the applicant? Or should the Commission, based on our interpretation of the Bill, make no further inquiries at all but determine the application based just on the information received?

With regard to the register of determinations and revocations of determinations[4], how much information should be captured in the register? The Bill does not specify what information in this regard, but the Commission's working assumption is that this would need to include all of the written information provided by an applicant as well as the instrument of determination issued by the Commission.

Further clarity on these elements of the Bill would be useful.

Operational policy required

As the NSW experience demonstrates, and as DJAG representatives alluded to on 19 March 2018 at the Committee's public briefing, there are areas where operational policy will be required to guide the Commission's business processes, advice-giving, and decision-making. The extent of this

[3] By contrast, the NSW scheme has 'Reportable Political Donations' which are "a donation that is valued at $1,000 or more" http://www.elections.nsw.gov.au/fd/political_donations

[4] Refer sections 13 and 30 of the Bill which, respectively, propose the insertion of section 279 in the EAct and section 113F in the LGEAct

requirement depends entirely on how well constructed the legislation is in terms of any ambiguity that may exist (e.g. about who may be captured, and under what circumstances).

For example, the NSW Electoral Commission (NSWEC) has the following: *Determination Person or Entity is not a Prohibited Donor Policy and Procedures*[5]. This document (refer page 8) also highlights the NSWEC's related *Compliance and Enforcement Policy* and *Compliance and Enforcement Procedures*. Development of policies and procedures such as these will take time, and the Commission is cautious about developing a framework with the current available resources until there is certainty about the passage of the Bill and the final form of the prohibited donor scheme.

Period between the Bill's assent and commencement

As the information above indicates, a suitable period of time would be appreciated between the Bill's assent and the commencement of the prohibited donor scheme provisions for the Commission to design and deploy the administrative and compliance/enforcement policies, procedures, and processes required to support the scheme's implementation.

The Commission estimates that 3-6 months would be suitable in this regard, with a preference for 6 months. This timeframe would also depend on new resourcing available to the Commission related to the scheme, which is currently subject to Government consideration through the usual budget process.

[5] Refer http://www.elections.nsw.gov.au/fd/documents/legislation_and_policies/policies/audit_and_compliance_policies/Detrmination_Person_or_Entity_is_Not_a_Prohibited_Donor_Policy_and_Procedures.pdf