



ECONOMICS AND GOVERNANCE COMMITTEE

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Mr LP Power MP (Chair)
Ms NA Boyd MP
Mr ST O'Connor MP
Mr DG Purdie MP
Ms KE Richards MP
Mr RA Stevens MP

Staff present:

Ms M Salisbury (Acting Committee Secretary)
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PUBLIC BRIEFING—INQUIRY INTO THE ELECTORAL LEGISLATION (POLITICAL DONATIONS) AMENDMENT BILL 2018

TRANSCRIPT OF PROCEEDINGS

MONDAY, 20 AUGUST 2018

Brisbane

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The committee met at 9.29 am.

CHAIR: Good morning. I declare open this public briefing for the committee's inquiry into the Electoral Legislation (Political Donations) Amendment Bill 2018. I would like to acknowledge the traditional owners of the land on which we meet. My name is Linus Power. I am the member for Logan and chair of the committee. With me here today are: Ray Stevens MP, member for Mermaid Beach and the deputy chair; Nikki Boyd MP, the member for Pine Rivers; Sam O'Connor MP, the member for Bonney; Kim Richards MP, the member for Redlands; and Dan Purdie MP, the member for Ninderry.

On 16 May 2018, Mr Michael Berkman MP, the member for Maiwar, introduced a private member's bill into the Queensland parliament. The parliament referred the bill to the Economics and Governance Committee for examination with a reporting date of 16 November 2018. The purpose of the briefing this morning is to assist the committee with its examination of the bill.

The briefing is a proceeding of the Queensland parliament and is subject to the standing rules and orders of the parliament. It is being recorded and broadcast live on the parliament's website. Media may be present and will be subject to my direction. The media rules are available from committee staff if required. All those present today should note that it is possible you might be filmed or photographed during the proceedings.

I ask everyone present to turn off mobile phones or switch them to silent. Only the committee and the member for Maiwar may participate in these proceedings. Any person may be excluded from the briefing at my discretion or by order of the committee. I also ask that responses to any questions taken on notice today are provided to the committee by 5 pm on 23 August 2018.

We will now hear from Michael Berkman MP, member for Maiwar, who has been invited to brief the committee on the bill.

BERKMAN, Mr Michael, Member for Maiwar, Parliament of Queensland

CHAIR: Good morning and welcome. I invite you to make an opening statement for the committee after which committee members may have some questions for you.

Mr Berkman: Thank you, Chair. I would like to start by echoing your acknowledgement of the traditional owners of the land on which we meet today, the Turrbal and Jagera people, and pay my respects to elders past and present. I note that first nations people have not ceded sovereignty over this land where we are today here in Meanjin. Until such time as colonial powers negotiate a treaty with first nations, we continue to live, work and meet on stolen land.

I do thank the committee for its consideration of this bill and for the opportunity to appear today to speak to it. The purpose of the bill is to eliminate the widely perceived and real risk of corruption within Queensland's democracy as a consequence of corporate donations to politicians, candidates and political parties. It is timely for parliament to consider this bill now and expand on the commendable and necessary ban on developer donations that was passed into law in May this year and in the wake of a flood of corruption investigations being undertaken by the CCC, both during Operation Belcarra and in the months since the release of the CCC's report.

I am sure that none of the more recent developments and the work of the CCC have escaped the attention of the committee or each of you as local members. Most members of the committee represent an electorate in which the council or local government officials have been embroiled in corruption investigations in one way or another. It is noteworthy as well that the mayor of Redland City Council, one of the exceptions that is not currently under a corruption investigation, has written a submission on behalf of council in support of this bill.

I do not think one can overstate the significance of the continuing allegations of corruption in some of our largest local governments and the number of issues that have now come to light. As I said in my introductory speech to this bill, there is no sensible reason to assume that other local governments or the state government are somehow immune from this kind of corruption risk. There is just more bureaucracy to maintain the appearance of legitimacy around decisions that benefit major corporate donors. Whether or not the imputed conduct or decision-making comes to light in formal Brisbane

allegations, investigations, charges or convictions, the perception of benefit and profit as a consequence of huge donations from massive corporations, whether lawful or not, undermines public confidence in the integrity of government in Queensland.

A vitally important shift is apparent in the most recent investigative work by the CCC. The committee would be well aware that the CCC is now investigating corruption in South-East Queensland that is unrelated to donations from developers. You are no doubt aware of the circumstances surrounding the investigation of the Moreton Bay Regional Council. A major donor to the mayor, Moreton Bay Region Industry & Tourism Ltd, appears to have been awarded a multimillion dollar contract to promote the region in circumstances that evidence corruption.

CHAIR: Mr Berkman, it does not seem like you are going there, but I want remind you to peruse your notes as we do have very strict rules on anything that is actually before the courts.

Mr Berkman: Absolutely, Mr Chair. I do not intend to go any further than just the surface of those issues. There is no dispute that most of local government's decision-making power and, consequently, the primary corruption risk is in relation to planning and development. The Belcarra report and the legislation that followed are a sensible and necessary response to this reality. It would be disingenuous—and I would suggest somewhat naive—of us to pretend that this is the extent of the corruption risk. All corporate interests operating in Queensland stand to benefit financially from state government decisions. The material before the committee now demonstrates apparent or perceived influence from political donors in a variety of sectors including development, gambling, mining and resources, tourism, alcohol and tobacco. In the same way that the government took local government corruption risks identified by the CCC in Operation Belcarra and applied them to state government, parliament should now pass this legislation and put an end to the corrupting influence of political donations that can purchase access, influence and favourable outcomes in all areas of state and local government responsibility.

Without revisiting my entire response to the submissions, there are a few points I want to highlight. First, it is noteworthy that not one submission was made in opposition to the bill. The CCC's submission, which warrants separate consideration, neither supported nor opposed the bill. Every other submission either agreed with the reform proposed or indicated a desire to see it go further.

The CCC submission is appropriately measured and framed within its statutory function and the excellent work the CCC has done recently and continues to do. It states neither strong support for nor opposition to the bill. It does note that, on the information available to it at the time, it does not recommend these measures. This is a similar position to the position that the CCC took in respect of developer donations and the ban as it applies to the state government which has since been legislated.

If the committee is concerned about whether there is an adequate information base to justify the proposed reform, as I have said in my response, there are various means by which the committee or the government and opposition together can initiate a parliamentary or an independent CCC inquiry into the influence of political donations. In the circumstances I am positive it is clearly preferable that the CCC be tasked with undertaking a fulsome, independent inquiry, and I have called on the government and the opposition a number of times already to take this course.

My response also incorporates the recent report of the Senate Select Committee into the Political Influence of Donations which, in the absence of a federal anti-corruption body, is perhaps the best that can be achieved at the federal level short of a royal commission. I believe that this report and the other relevant information annexed to my report provide a clear insight into the nature and extent of the issues, the community concern and the need for reform to restore community confidence in the system.

As I indicated when introducing the bill, this is by no means a stand-alone panacea for all of Queensland's electoral ills or for the declining faith in our political system, but it is a necessary step. The bill should be considered in the context of other necessary improvements such as caps on all political donations and on electoral spending. We as elected representatives in the Queensland parliament are here to further the interests of Queensland society as a whole, not a narrow set of corporate interests, and to participate in a contest of ideas as to how we best achieve that. If we accept these fundamentals, there should be no place for big money in politics and parliament should act swiftly to restore faith in our democratic processes. I would be happy to answer any questions that the committee has for me.

Mr STEVENS: Thank you, member for Maiwar, for your presentation in which you obviously thought that corporate donations are given only on the basis of a return in terms of political direction and legislation from those in power at the time. Could you advise me why environmental groups and so-called green groups would not be making donations to seek their own political outcomes and why those donations should not be banned as well?

Mr Berkman: The distinction that is drawn in the bill around the definition of a corporate political donor excludes not-for-profits and charities who are registered and have a charitable purpose. That distinction is based on the fundamental difference between corporate entities, whose sole driver is profit, and any number of other charitable organisations who have a benevolent purpose or a purpose that relates to particular social justice or environmental outcomes, as you have alluded to. By no means are we suggesting that donations will not relate to, in the case of an individual for example, certain value sets that an individual seeks to promote through the political system. Similarly, environmental, social justice or any number of other charitable groups might seek to further those outcomes as well.

Mr STEVENS: You are saying in your answer that those donations by those not-for-profit and charitable groups and, in relation to my question, environmental groups and the so-called green groups are acceptable in that they support social justice, change or whatever. That was what you have just answered as the differentiating factor between them and corporate entities, who actually work in the system to make a profit, to pay wages et cetera, making donations to political parties. Why are donations for a political outcome by not-for-profits et cetera that you have just mentioned—the green groups—different to corporates donating for a philosophical outcome? I am not talking about specific outcomes as in a profit for a company, which is the area of the CCC in terms of incorrect donations, but in a philosophical manner corporates may see one part of the political world as advantageous to them as opposed to the other parts of the political world.

Mr Berkman: It is interesting the way you have phrased the question in terms of a philosophical preference that might be held by corporate donors because, ultimately, I would argue that corporations do not, as corporate business entities—particularly when we are looking at listed companies—have the capacity to hold a philosophical view. They are legally bound—directors of listed companies in particular—and duty bound to maximise the profits for shareholders. That is their sole reason for existence. It is that pinnacle objective of maximising profits for a very narrow group of society as compared with seeking other philosophical objectives that can be achieved by other not-for-profit groups, charities, benevolent societies and the like. I disagree with the premise of your question that corporate entities are in real terms capable of pursuing philosophical ends. Profit is their goal.

Mr STEVENS: When you say a ‘narrow group of interested parties’—for instance, let’s just take the big banks, which nobody in society has any sympathy for at the moment. Their narrow group of society is about 50 per cent of Australians in terms of their superannuation funds. How is that a narrow group maximising their profits?

Mr Berkman: Certainly in terms of numbers the banks, if you take them as a whole, have a fairly broad base in superannuation—

Mr STEVENS: Ownership.

Mr Berkman:—holders.

Mr STEVENS: Correct.

Mr Berkman: Certainly, but profit cannot be viewed as an outcome in and of itself that should be achieved or should be pursued at all costs.

CHAIR: The Greens political party has taken donations from individuals who run companies—over a million dollars from someone who runs a travel company. Are you suggesting that that donation was not made on a philosophical basis and, instead, was made for some particular gain from the Greens political party?

Mr Berkman: There are a few things that I need to unpack in your question. First of all, the donation in particular that you are referring to was made by an individual, not by a company. The distinction I have just drawn is that individuals might hold philosophical positions whereas companies, I would suggest, cannot.

CHAIR: To be clear, your suggestion is that that donation was made for a philosophical reason, not for a particular gain?

Mr Berkman: Absolutely. People have values. People have—

CHAIR: Another donation that was made to the Greens political party was from someone who made their money out of the gambling industry—over \$500,000. You are not suggesting that they made that donation for the purposes of individual gain or benefit but, instead, for a philosophical purpose?

Mr Berkman: Indeed, and again the individual you are referring to here is very widely recognised for being a key philanthropist who engages with a variety of social justice and environmental causes. This is the distinction I am drawing: people can make donations on the basis of broad-ranging political, social justice values.

CHAIR: When we see companies making donations to things such as the flood relief or helping farmers or the Great Barrier Reef, those things are always done on the basis of a profit motive? Corporate companies can in no way contribute to their society through improving it as a philosophical whole?

Mr Berkman: As I have said, you would be aware of the duties that apply to all directors, particularly of publicly listed companies. They are—

CHAIR: Moving on—

Mr Berkman: Am I able to at least answer the question that you have put to me?

CHAIR: I thought you had.

Mr Berkman: By all means move on, Chair.

CHAIR: I notice that in your explanatory notes you did not mention the case of Unions NSW and Ors v State of New South Wales, where with the act that you say it is modelled on there was a challenge put and the essence was—you are the lawyer; I am not—that the particular case had to present a threat to democracy and that there was an implied right of free speech in giving donations. I have real reservations about donations, but when we make laws we also have to put it within the framework of the law. Given that you have already made a claim in defence of various donations, could similar claims of philosophical advantage not be put in the case of other donations and would it not fail the test that Unions NSW v New South Wales put forward?

Mr Berkman: I think the short answer is no, but we have to preface this by saying, as you have already identified, that none of us here are experts in constitutional law. I certainly do not purport to be an expert in constitutional law and these are very complex questions. With the greatest of respect, I think you have oversimplified and perhaps, to some extent, not necessarily really got the nub of the High Court's decision in Unions NSW v New South Wales.

CHAIR: No doubt.

Mr Berkman: As I said in my opening statement, I want to make clear as well that this is a bill that is proposed as one of a number of amendments that I would suggest are necessary. These are the sorts of steps that are being taken in a number of jurisdictions around Australia at the moment. Going to the question of constitutionality, this case is the most recent and relevant authority where the High Court has found laws were invalid for offending the implied freedom of political communication. However, there are a number of important ways in which this bill should be distinguished from the provisions of the bill that were found to be invalid by the High Court. The fundamental difference is that the court in Unions NSW v New South Wales could not discern a legislative purpose for the provisions under consideration. That appeared to be largely driven by the exclusionary nature of the proposed prohibition—that is, it was put forward as a ban for everyone other than enrolled voters and the court could not discern the basis for that selective prohibition. The situation here is different and the purpose sought to be achieved is clear, I would suggest. It is to eliminate the actual and perceived risk of corruption that derives from donations from for-profit corporate actors. That is a positively identified class—for-profit corporations—that the bill targets.

CHAIR: It is a very broad class, nonetheless.

Mr Berkman: Again, the point I am seeking to make here is that the court did not rule necessarily on the breadth or the narrowness of the class of person. It was a question of how it was able to identify the purpose—whether it was able to identify that legitimate purpose. Then there are the following steps that kind of fill out that second limb of the test in Lang v ABC Insurance Company, which I am sure you are well aware of as well.

CHAIR: As you have said, neither of us are constitutional experts, but you have put forward this bill—

Mr Berkman: Indeed.

CHAIR:—and you are purporting it is constitutional and that we should support it, but you are not sure it is constitutional?

Mr Berkman: As I said, none of us here are constitutional experts. I do think it is safe within the authority that we have seen come out of the High Court most recently. I do not think any of us here can say with absolute certainty that one piece of legislation is or is not constitutional. Indeed, no-one other than the seven sitting members of the High Court can say that. I am careful to not say that I have absolute confidence, but I do believe, on my reading of the current authority and the bill that I have put forward, particularly noting the very clear and direct similarity between the legislation that the Queensland parliament has most recently passed related to this issue and the bill that I have put forward, that it should satisfy the test of constitutional validity.

Mr PURDIE: Earlier we were talking about listed companies and banks. I understand your rationale with that. What about industry groups that might not necessarily work for a profit, for example, the Property Council? Obviously, they have a vested interest in jobs and growth in that industry but not necessarily to make a profit. Where would they sit in your bill?

Mr Berkman: Again, this can probably be most easily answered by reference to the consideration that we have already given to the Belcarra implementation bill. This captures industry representative organisations where the majority of members satisfy that definition of being a corporate political donor. Just as under the Belcarra bill property development industry groups would have been caught, the definition of 'corporate political donors' also captures industry representative groups.

Mr PURDIE: Maybe the Property Council was not the best example. Take an industry group for the tourism sector. They do not profit from a government decision but they want a policy environment where tourism can thrive. Subsequently, they might decide on the back of those policies where they donate. Would they also be caught? Would they be classed as a for-profit corporation, as an industry group?

Mr Berkman: They would not be a for-profit corporation necessarily, but they would fall within the definition. It all depends on whether they are registered with the ACNC, the Australian Charities and Not-for-profits Commission, as a recipient of charitable gifts. On that basis they may not be a for-profit corporation, but they would fall within the definition of 'prohibited corporate donor' on the basis of being a representative group.

Ms BOYD: In banning a single class of donors, how do you intend to prevent political donors from making donations but fashioning them in a workaround of the prohibition? Is there going to be a legitimate-purpose test through a value set? How do you propose that will work?

Mr Berkman: Again, this is very similar to the approach—in fact, it is the same; the provisions are modelled on the approach that the government has put forward in the Belcarra implementation legislation. We could turn to the particular provisions of the bill, if you really want to get down into the weeds, but it does deal with that donation-once-removed type scenario, where someone who facilitates the giving of a donation by a prohibited corporate donor would fall afoul of the provisions of the bill. I am not sure if that answers the member's question.

Ms BOYD: Yes, it does.

CHAIR: In that circumstance, with any not-for-profit that had taken a corporate donation, with donations being fungible, would it therefore make a whole variety of not-for-profits also ineligible to make any donations?

Mr Berkman: That will very much depend on the circumstances.

Ms RICHARDS: If you look at the likes of QShelter and those that are consistently supported by for-profit organisations.

CHAIR: Are there any other questions?

Mr O'CONNOR: To get behind the reasoning and the justification for the bill, could you lay out some examples, if you have them, of why you would be putting this forward?

Mr Berkman: Some specific examples of where a corporate contribution is perceived to have resulted in an outcome?

Mr O'CONNOR: Not just perceived but an actual example of the behaviour that you are trying to stop?

Mr Berkman: Yes, sure. In answering this question, though, I think it is important to identify it. If we go to the material I have included in my response to the submissions and a couple of the clearest examples, I guess, I would probably point to the case of Sibelco, the mining company that has been operating on Stradbroke Island for some years now. While the CCC took a complaint and might have started an investigation, it identified that, because it needs evidence of corrupt conduct to commence an investigation, it was not empowered to take that investigation further. There are some very real

constraints on the power of the CCC in Queensland that limit the capacity to actually take these concerns—the perceived risk—right through to an investigation, not to mention charges and convictions.

One of the Australia Institute reports refers specifically to Sibelco as an example and Washington H Soul Pattinson as the parent company of the New Hope Group, and concerns around very stark shifting positions, particularly within the LNP but also Labor, around support for the New Acland coalmine.

Mr O'CONNOR: Did they donate?

Mr Berkman: Washington H Sole Pattinson, yes. They are substantial donors. Something in the order of \$800,000-odd over a period of maybe five years was donated to the LNP. The concern that was raised was that that led to a favourable decision or a shift in the position. Before the 2012 election, the LNP was vehemently opposed to mining of coal on that good-quality agricultural land. Subsequent to taking government at the 2012 election, its position changed and the New Acland stage 3 expansion was actively supported by the Newman government. That is the kind of scenario where I think people become deeply cynical about the role that donations can play in government decision-making.

CHAIR: You are suggesting that these are cases where an investigative body would not be able to produce any conclusive evidence on those sorts of things and, therefore, would not be useful in taking it forward, for instance, pointing to the High Court to ban an entire class of donors?

Mr Berkman: I am not entirely clear what your question is.

CHAIR: Your answer seemed to say that this is not something that the CCC proceeded with because of an evidentiary basis. Is that the same problem that would be faced when trying to ban an entire class of donors before the High Court?

Mr Berkman: No, I think they are very different things. The definition of 'corrupt conduct' that the CCC has to engage with is the barrier that I am describing here. Maybe a more useful comparison is between what the CCC requires to investigate and what police require to investigate. The CCC needs something evidencing corruption. If they had compelling and complete evidence of corruption, obviously that would not require a CCC investigation; that would be a police investigation. However, the evidentiary threshold for the CCC is higher than in other jurisdictions, which means that not all perceived or potential corruption can be investigated here. When we look at what the High Court has considered in terms of the information base—it is not so much an evidence base, I would suggest, for the High Court's consideration—it is not a question of strict legal evidence.

In answering that question, I might quickly turn to some of the thoughts on this. While we are not constitutional legal experts, George Williams would certainly be recognised as someone who is. He is the Dean of the University of New South Wales Law School. He published this article in the wake of the *Unions NSW v New South Wales* decision. Professor Williams says—

... the High Court decision is strikingly at odds with public debate. It has long been recognised that Australia's system of financing politics and electioneering is broken, and invites corruption. The demand by candidates and parties for large sums of money leaves them vulnerable to corporate and other donors willing to give money in return for access and influence.

That is the kind of broad-brush concern that might stand behind this kind of legislation as justification for its constitutional validity.

CHAIR: With respect, the point Professor Williams is making is that, although we have these concerns, and I certainly share them, we have a High Court that has set a different test about this evidence. Isn't that the point that Professor Williams is making there?

Mr Berkman: No, I do not think so. It is a critique of that particular decision. Let us remember that every time the High Court is asked to consider the constitutional validity of a piece of legislation it does so on the basis of that legislation specifically and the circumstances around it, and these are different bills. As I said before, none of us can be 100 per cent certain, but I am confident that, given the distinction between this bill and the one that the court was considering in *Unions NSW v New South Wales*, they are different—that the test that the court has put forward is different.

CHAIR: With respect, I asked about Professor Williams. That is not the question that I asked. Are there any other questions?

Ms BOYD: In this committee we have been doing a fair bit of work in terms of the recommendations from the Belcarra bill and the legislation that has gone before the House in relation to political donations. In terms of the recommendations that the CCC made, it was around a perceived conflict for property developers to be able to make those donations. We went back and forth a fair bit in the committee, as can be evidenced in our transcripts. During that period the CCC did not recommend that any prohibition extend as far as your bill attempts to do so. The CCC's submission

has also not made a recommendation that we adopt these measures. Why would you say that it is important for us as a committee to go outside the scope of the recommendations of the CCC in this way?

Mr Berkman: I thank the member for the question. Broadly speaking, the reason I think it is necessary I have outlined already: it is integral to restoring broad public confidence in our system and that is representative of people's interests, not corporate interests. In terms of the specific recommendations that the CCC has made, neither this committee nor the parliament are tightly constrained to implement only the recommendations that the CCC has made. We have seen this already in the way the government has extended the recommendation made by the CCC to ban donations to local governments. It has adopted that as something that applies to the state as well. Similarly, there is no reason that the committee cannot look at the issues, look at the concerns, the needs of transparency, faith in our system and adopt this bill and the parliament can do similarly.

CHAIR: Mr Berkman, you have probably read the transcript when questions were put to Mr MacSporran in the consideration of the previous Belcarra bill. He expressed a desire and a personal view that eliminating donations is important. He also expressed the view that you needed to have an evidentiary basis to put before the High Court, which meant a very high test. He also expressed that the state government has a similar role in approving developments. Therefore, although it had not received specific information—he had not recommended it—there perhaps were some analogies. I may be paraphrasing it. I may be overstepping what he said. He probably did not even go that far, but he definitely said that he would not recommend any further donations from a class of donors without putting evidence that could be supported. You read that and ignored the advice of the CCC on this issue?

Mr Berkman: No, not at all. I thank you for the question. That is a really important sentiment that is expressed by Mr MacSporran. We cannot turn a blind eye to the observation of someone in his role that, in an ideal world, all donations would be banned and not take that as a serious basis for us to move as far as we can towards taking the influence of big money out of politics.

Certainly, as you have said, the evidence base, the rationale, the purpose, the legitimacy of that purpose, the proportionality of the legislative response—all of these things—need to be borne very carefully in mind. That is what Mr MacSporran, I believe, was getting at in that committee hearing. I do not think that is an unfair representation of what he said.

If the committee is concerned that we do not have that sufficient justification at the moment—and I have said this already; I do not mean to carry on with the same repetitive answers—the committee is itself empowered to undertake an inquiry, an investigation. The government and the opposition could together initiate an inquiry through the CCC. I suggest that that is far and away the most appropriate course to take in these circumstances given its independence and assuming, of course, that it is adequately resourced to undertake a very thorough investigation of all of the influence of political donations in Queensland politics.

CHAIR: With respect, Mr MacSporran said that the CCC did not want to put forward something that had

... no realistic prospect of a successful challenge to the legislation. That is the last thing that we wanted—to recommend something that was going to be knocked over in the High Court. That is just a waste of everyone's time. You could not ignore those High Court cases. We needed to account for that.

In that case, member for Maiwar, you cannot take the advice that his personal preference was for the banning of all donations and then his absolutely unequivocal advice that legislation that did not already have the evidentiary base would be a waste of time. Is this not a waste of time?

Mr Berkman: No, not at all. I do not think that you are quite taking Mr MacSporran at his word there. He said that if there were something that was absolutely going to fail at the High Court then you would not want to put that forward. I do not think that is the case here. I think this satisfies the test of validity. It does not offend the implied freedom of political communication in the way that would render it invalid before the High Court.

CHAIR: Thank you. There being no further questions, that concludes our briefing. Thank you for the information you have provided today. I thank our Hansard reporters. A transcript of these proceedings will be available on the committee's parliamentary web page in due course. There being no questions taken on notice, I declare this public briefing closed.

The committee adjourned at 10.04 am.