Speech By

Michael Berkman

MEMBER FOR MAIWAR

Record of Proceedings, 18 February 2020

ELECTORAL LEGISLATION (POLITICAL DONATIONS) AMENDMENT BILL

Second Reading

Resumed from 4 February (see p. 98), on motion of Mr Berkman—

That the bill be now read a second time.

Mr BERKMAN (Maiwar—Grn) (5.30 pm), continuing in reply: Before the adjournment of this debate in the last sitting week I was discussing the constitutional context and, in particular, some of the most recent High Court jurisprudence on this issue that was delivered in the decision in Spence v Queensland which came after this bill first returned to the House for debate.

Before I return to constitutional issues, I will quickly turn to how the committee handled fundamental legislative principles. In my earliest contribution I noted that I have genuine concerns about the committee's treatment of FLPs in its report. I put a question to the member for Logan as chair of the committee about the applicability of fundamental legislative principles to corporations as opposed to natural people, and he has chosen not to answer this question in his contribution. To put it bluntly, with all due respect to the committee and to the secretariat, I think the committee has completely missed the mark on FLPs. What is more, the apparent oversight is really telling in terms of the privilege afforded to corporations by both government and opposition members. The committee's report notes the committee's view that the bill raises issues of FLPs only in respect of two issues. Those are the creation of new offences and penalties and the freedom of communication on political matters. The committee only expressed concerns in relation to the impacts on the second of those FLPs but, as I will explain, its concerns are quite misguided.

As everyone in the House is no doubt aware, FLPs are set out in section 4 of the Legislative Standards Act. They include the requirement that legislation has sufficient regard to the rights and liberties of individuals and includes a non-exhaustive list of factors that help inform whether legislation has sufficient regard to the rights and liberties of individuals. I emphasised the word 'individuals' both times there because both parts of section 4 use the term 'individual', which importantly means questions around FLPs do not apply to corporations. The term 'individual' is not defined in the Legislative Standards Act, so we look to the Acts Interpretation Act which states that 'individual' means a natural person. If FLPs were meant to apply to corporations, the Legislative Standards Act would have used an alternative term such as 'person' or 'party', both of which include both natural persons and corporations, but it does not. Members need not rely on my statutory interpretation here. It is not just my opinion. The position is set out explicitly in the explanatory notes for a 2008 Labor bill, the Mineral Resources (Peak Downs Mine) Amendment Bill 2008. The explanatory notes make the following statement regarding the fact that the bill would deprive mining corporations of certain legal rights. It states—

This would appear to be inconsistent with the intention behind section 4(2) of the *Legislative Standards Act 1992*, which provides that legislation should have sufficient regard to the rights of individuals. However, section 4(2) does not technically apply to Cherwell Creek because it is a company.

Section 4(2) of the Legislative Standards Act does not apply to companies—there is no question—yet the committee's position is stated as follows—

An issue of fundamental legislative principle arises as to whether banning political donations by for-profit corporations or an industry representative organisation, as proposed by clauses 6 and 14, impinge on the freedom to participate in the political process and freedom of communication on political matters.

How does the committee arrive at the conclusion that it applies? It is as though this parliament is so used to privileging the rights of individuals and corporations of these fictional legal people over actual everyday people that now Labor and the LNP are accidentally affording them the same rights as real people. It is a bit of a Freudian slip, I would suggest. I have some news for Labor and LNP members of this House that at least some of them need to hear again: we do not govern in the interests of fictional corporate people.

I will return now to the High Court decision in Spence v Queensland. There are a few important points to take from the High Court's reasons in Spence that are relevant to the bill and worth raising in this debate. This is High Court authority, as I mentioned before, that the committee did not have the benefit of in considering and preparing its report. The majority judges of the High Court in Spence explicitly recognised the legitimacy of legislating based on lessons learned from other jurisdictions. The majority judges referred to the following passage quoting Justice Nettle in McCloy. They quoted him as saying—

It is not illogical or unprecedented for the Parliament to enact legislation in response to inferred legislative imperatives. More often than not, that is the only way in which the Parliament can deal prophylactically with matters of public concern.

They went on to make the following observation directly at paragraph 96—

Australian States are not so much 'little laboratories' that each State is required to conduct its own experiments or rely on its own experiences before it can be justified in taking legislative action to address a risk of harm to its system of government highlighted by occurrences in another State.

They are saying in as many words that we can take our lead from other jurisdictions. Just as the New South Wales parliament has done, we could unquestionably now ban donations from tobacco companies, liquor companies or gambling companies like the Star Entertainment Group, for example. There is no doubt that we could ban donations from it, but the government is enjoying its largesse too much and Star is clearly keen to keep the arrangement going as it forges ahead with its enormous new casino right next door to us here on prime CBD land—a 10th of the CBD that has been handed over to this massive corporate donor under a shroud of secrecy.

In the court decision in Spence, Justice Edelman goes further in considering the purpose of legislation and the role of other examples interstate and internationally. To quote a long paragraph, he states—

A reason why parliaments make laws is to shape behaviour. They can act prophylactically, by reference to possibilities and probabilities, as well as reactively. They can shape laws by reference to circumstances overseas. And they can, and often should, shape laws by reference to circumstances and conduct in other States.

…

The plaintiff's submission really reduces to a claim that the result in *McCloy* does not dictate the result in this case because the circumstances underlying the same parliamentary purpose are different in Queensland from those in New South Wales. But the different underlying circumstances do not affect whether the law burdens the freedom of political communication. They do not affect the legitimacy of the law's purpose. They do not affect whether the law is suitable, in the sense of having a rational connection with its purpose. Nor do the different underlying circumstances affect whether there were alternative, reasonably practicable, means of achieving the same object but which have a less restrictive effect on the freedom.

Justice Edelman's judgement here reaffirms the statement of the majority and invites us to consider how we as legislators need to remain live to the need for new preventative legislation to address possibilities and probabilities and to protect the public good. What this decision of the High Court makes absolutely clear is that we here in Queensland could be doing so much more to eliminate the insidious influence of corporate donations in political decision-making. We could go much further than what the government has proposed in the electoral reform bills if only the old parties were not so completely tied to their corporate donors.

The member for Mermaid Beach in his contribution was at great pains to make the case that corporate interests can have a philosophical basis to support a political party, which is absolute rubbish. How can a fictitious legal construct that is a corporation take a philosophical position? Justice Nettle puts this argument in the bin—right where it belongs—on the basis that corporate interests are paramount in any decision to make a political donation. He says at paragraph 115—

Plainly, there are any number of electors who make political donations in the hope or expectation of extracting political favours, exerting political influence or otherwise advancing their own interests. Large corporations which make significant ... donations provide an obvious example: Because the directors of a corporation cannot lawfully authorise the making of a political donation unless persuaded that it is in the best interests of the corporation.

This is the fundamental problem with corporate political donations. Corporations cannot donate unless the donation gets results and aligns with their profit motive. Yes, it is the case that companies can pursue profits by putting up a philanthropic facade. They can adopt so-called corporate social responsibility principles to feign or even genuinely reflect a degree of community concern, but they are duty-bound to put profits first. This duty and their interests in maximising profits, whether or not it is at the expense of everyday people, is the reason they will keep shelling out tens and hundreds of thousands of dollars for access to politicians.

Our recent analysis of the disclosure data shows that Labor and the Liberals sold special access to 114 corporations and lobby groups in the lead-up to the last federal election. After Bupa admitted last year they had paid $27,500 precisely for special access to business forums of Labor and the Liberals and Woodside paid $55,000 and $110,000 for Labor and Liberal business forums, further analysis has shown that this dodgy practice has continued in 2018-19. To explain it as simply as possible, this is an apparently agreed uniform price for a ticket to get in to see your preferred politicians from either of the big parties at their business forums. Business forums is such an innocuous name, but it is better described and understood as cash for access. These payments are so easy to identify in the disclosure data because they are all paying the same ticket price to both sides of politics.

There is a long list of very big, very profitable, very powerful corporations that are buying these tickets to cosy up with Labor and the LNP. Labor made over $2.7 million in the lead-up to the election, selling special access to 69 corporations and lobby groups, including the big banks like Westpac and CBA, private health insurance corporations and big fossil fuel corporations like Santos and Woodside. Also among them is Star Entertainment, the big developer behind the Queen's Wharf mega casino. Meanwhile the Libs made $2 million selling access to 45 corporations and lobby groups in 2018-19 including Westpac, the Commonwealth Bank and private health insurance corporations Bupa and Medibank.

There are plenty of companies that were interested in buying access to both sides, as I have mentioned already: Westpac; CBA, which paid $55,000 to the ALP and the Liberals; the Insurance Council of Australia—clearly it is an organisation that is desperately interested in the wellbeing of Australians as opposed to its profit motives; Woodside—$110,000 to both Labor and the Liberals; Santos paid $55,000 to Labor and $27,500 to the Libs—they clearly have a bit more work to do with Labor, it seems; KPMG went to both—who knows which of their very, very long list of clients they might have been in there spruiking for; and the Australian Banking Association which, interestingly enough, only donated to the Libs—I would imagine Anna Bligh in particular would probably feel pretty ripped off if she had to pay to meet with her old Labor mates.

When they are buying access to both sides where does this leave the member for Mermaid Beach and his musings on the philosophical preferences of big donors? I would suggest it leaves him looking pretty silly. We are well past buying the trickle-down economics myth and we cannot reasonably accept that corporate pursuit of profit is a fundamental good.

When governments take these donations loaded with the expectation of access and outcomes for big corporations, it leaves the people of Queensland worse off. It puts corporate fat cats ahead of mums and dads doing it tough. It means multinationals can buy the outcomes they want and take their profits offshore, paying bugger-all tax in the process. Corporate donations make our lives harder because they help hand control of the political system to people who already have lots of wealth and power. Corporations are not people and they do not deserve the right to buy access and influence in the political process in the way they are currently allowed and that this bill would put a stop to. Labor has taken the Greens' lead on much of our proposed democratic reform policy. The community sees through the corrupting influence of lawful political donations and this proposal's time will come.

I will finish with an invitation. A lot of members of this House have been positively scandalised by the suggestion that donations from big business in exchange for policy outcomes amount to legalised corruption. I invite those members to head down to their local coffee shop or pub or down to the park on Saturday morning to try to convince someone, some regular Queenslander, any one of our constituents, that it is in our interests—in their interests—for big corporations to write big cheques to politicians. I desperately look forward to hearing how any member goes.