

2020

**THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY**

ELECTORAL AMENDMENT BILL 2018

SUPPLEMENTARY EXPLANATORY STATEMENT

**Presented by
Gordon Ramsay MLA
Attorney-General**

ELECTORAL AMENDMENT BILL 2018

INTRODUCTION

This supplementary explanatory statement relates to Government amendments to the Electoral Amendment Bill 2018 as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Government amendments and help inform debate on them. It does not form part of the Bill and has not been endorsed by the Legislative Assembly.

This statement must be read in conjunction with the Bill and Government amendments. It is not, and is not intended to be, a comprehensive description of the Bill or Government amendments. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

OVERVIEW OF THE BILL

On 29 November 2018, the Electoral Amendment Bill 2018 was introduced in the Legislative Assembly.

The Bill amends the *Electoral Act 1992* (the Act) to:

- introduce an objects clause to outline the intended purposes of the Act, including to encourage equality of opportunity for democratic participation;
- prohibit gifts from property developers and their close associates to Members of the Legislative Assembly, political parties, candidates, and associated entities;
- prohibit political entities from accepting gifts from property developers or their close associates;
- amend the definition of gift to include the first \$250 of a contribution in a single fundraising event;
- amend the timeframe for reporting of gifts received over the \$1000 threshold to introduce a year-round requirement for gifts to be reported to the Electoral Commission within seven days to allow for more real time public oversight.

The explanatory statement accompanying the Bill provides a detailed account of the provisions contained in the Bill and can be accessed at:

https://www.legislation.act.gov.au/b/db_59281/

OUTLINE OF GOVERNMENT AMENDMENTS

The Government amendments will make minor and technical changes to the Bill, including changes to fix incorrect cross-references, and to amend a heading in the Bill. Other changes will:

- amend the commencement provisions in the Bill to provide that the provisions in the Bill commence on 1 July 2021, rather than on a day fixed by the Minister by written notice;
- make a minor amendment to section 216A (4) to insert a separate disclosure obligation for the months of December and January to take into account that the seven-day disclosure obligation inserted by the Bill may be unduly onerous during the end of year holiday period;
- make minor amendments to ensure the offences in the Bill under new sections 222F and 222G, which provide for a ban on giving and accepting gifts from property developers, include consistent reference to ‘close associates of a property developer’, which reflects the Bill’s intention for offences to apply to the conduct of property developers as well as their close associates;
- insert additional subsections and new examples in relation to section 222G to clarify what constitutes a ‘reasonable step’ for a receiver of gifts to take in determining whether the gift is from a property developer or close associate;
- insert a new note under new section 222G to signpost to receivers of gifts that the disclosure obligations under section 216A of the Act apply to all gifts;
- amend the transitional provisions in the Bill so that the ban on a political entity accepting gifts from property developers or close associates would effectively operate between the day after polling day of the 2020 ACT Legislative Assembly election, and commencement of the Bill on 1 July 2021; and
- remove a regulation-making power in the Bill.

Human Rights Considerations

As outlined in the explanatory statement to the Bill, the Bill may engage and limit a number of rights under the *Human Rights Act 2004* (HRA). The Government amendments do not further engage the HRA.

CLAUSE NOTES

Amendment 1

Clause 2

Page 2, line 3

This is an amendment to the commencement provisions of the Bill. It provides that the *Electoral Amendment Act 2018* (the Amendment Act) commences on 1 July 2021, rather than on a day fixed by the Minister by written notice. This change allows a clear timeframe for arrangements to be made in order to effectively implement the offences prohibiting gifts from property developers and close associates.

Amendment 2

Clause 4

Page 2, line 15

This is a technical amendment that fixes incorrect cross-references in relation to the naming of sections in the Bill.

Amendment 3

Clause 10

Page 4, line 19

This is an amendment to section 216A (4) (clause 10) of the Bill. Section 216A of the Act sets out requirements for recording and disclosure of gifts. Section 216A (4) of the Act provides for quarterly reporting for gifts over \$1000, with more frequent reporting for the two quarters leading up to an election. The current provisions in the Bill would substitute section 216A (4) with a new provision to require gifts to be declared no later than seven days after the \$1000 threshold is reached.

The amendment to the Bill would insert a separate disclosure obligation for the months of December and January, to provide additional time for reporting of gifts received during those months. The amendment provides that gifts received in December and January must be reported no later than seven days after the end of January. This reflects the consideration that the seven-day disclosure obligation may be unduly onerous during the typical summer holiday periods.

Amendment 4

Clause 11

Proposed new section 222F (3) (b)

Page 10, line 20

Proposed new section 222F (3) provides that it is an offence for a person to give a gift to a political entity on behalf of a property developer. This amendment ensures that the offence in section 222F also prohibits giving a gift on behalf of a 'close associate of a property developer.'

This amendment reflects the Bill's intention for offences to apply in relation to property developers as well as their close associates. It is also consistent with the wording under section 222F(3)(c) and the offence under new section 222G (1), which provides that it is an offence for a political entity to accept a gift made by, or on behalf of, a property developer or a close associate of a property developer.

Amendment 5

Clause 11

Proposed new section 222F (4) (a)

Page 11, line 8

New section 222F (4) (a) provides that it is an offence for a person to ask another person to give a gift to a political entity on behalf of a property developer. The amendment will ensure this offence also applies where a person asks another to give a gift on behalf of a 'close associate of a property developer.'

This amendment reflects the Bill's intention for offences to apply to the conduct of close associates of property developers. It is also consistent with the wording of section 222F (4) (b) and the offence under new section 222G (1), which provides that it is an offence for a political entity to accept a gift made by, or on behalf of, a property developer or a close associate of a property developer.

Amendment 6

Clause 11

Proposed new section 222G (2), new examples 3 and 4

Page 12, line 27

This is a minor amendment which inserts additional examples in relation to new section 222G (2).

New section 222G (2) provides that the offence prohibiting a political entity from accepting gifts from property developers and close associates under new section 222G (1) will not apply if the political entity takes reasonable steps to determine whether the gift is from a property developer or close associate. Current examples of reasonable steps in the Bill refer to the use of a statutory declaration to confirm certain information about the gift giver.

New example 3 is that a reasonable step for a small gift may be asking the person who gives the gift whether the person is a property developer or a close associate.

New example 4 is that a reasonable step for a fundraising event may be providing clear written notice to potential donors that property developers and close associates are prohibited from giving gifts to a political entity.

The inclusion of these examples allows receivers of gifts to better understand what may constitute ‘reasonable steps’ in a range of circumstances. New example 3 also aims to clarify that a ‘reasonable step’ should be reflective of conduct that is proportionate to the sum of the gift received.

Amendment 7

Clause 11

Proposed new section 222G (2), new note

Page 12, line 29

This amendment inserts a new note under new section 222G (2) to signpost to receivers of gifts that the disclosure obligations under section 216A of the Act apply to all gifts (as defined under sections 222B and 198AA of the Act). Section 216A provides that the financial representative of the receiver of gifts must record information for every gift, including: the date the gift is received and the amount given, certain details about the giver and source of the gift, or if given anonymously, that the gift is anonymous.

Amendment 8

Clause 11

Proposed new sections 222G (2A) and (2B)

Page 12, line 29

This is an amendment to clarify what must be considered by a court in determining whether reasonable steps have been taken under new section 222G (2). New section 222G (2) provides that the offence prohibiting a political entity from accepting gifts from property developers and close associates under new section 222G (1) will not apply if the political entity takes reasonable steps to determine whether the gift is from a property developer or close associate.

New section 222G (2A) provides that in deciding whether a political entity has taken reasonable steps, a court must have regard to the amount of the gift accepted by the political entity. This reflects the intention that, for a larger gift, a political entity should have a higher degree of certainty that the giver is not a property developer or a close associate. This is based on the notion that the larger the gift received, the higher the risk of undue influence. The exception to the offence under new section 222G (2) and the requirement to take reasonable steps is intended to prevent a defence of mere ignorance.

New section 222G (2B) provides that subsection (2A) does not limit the matters to which the court may have regard. This clarifies that the court will also be able to consider a range of circumstances in determining whether the receiver took ‘reasonable steps.’

Amendment 9

Clause 11

Proposed new section 222H heading

Page 13, line 8

This is a technical amendment to the heading of new section 222H. The Bill currently includes the heading 'Repayment of other gifts from property developers etc.' The amendment will rename this heading to 'Gifts from people that become property developers etc.' The amended heading more accurately reflects the effect of the provision, which requires a giver of a prohibited gift to make a payment to the Territory equivalent to the gift. This is, strictly speaking, not a repayment.

Amendment 10

Clause 12

Proposed new section 517 (1)

Page 15, line 7

This is an amendment to new section 517, which relates to transitional aspects of the Bill.

New section 517 applies a ban on gifts from property developers prior to the commencement of the provisions in the Bill. Currently, section 517 provides that the ban will be effective from the time the Bill was presented in the Assembly (29 November 2018) to the time the Bill commences. The explanatory statement to the Bill describes this as a 'transitional ban.' Section 517 does not criminalise the giving of a gift but provides that a political entity would need to repay to the Territory the amount of a gift received from, or on behalf of, a property developer.

This amendment changes the timing for commencement of the 'transitional ban' under section 517 so that it will apply on the day after polling day of the 2020 ACT Legislative Assembly election, due to be held in October, to the time the Bill commences on 1 July 2021.

This will mean that from 18 October 2020 to 31 June 2021, should a property developer or close associate make a gift, an amount equal to the amount of the gift is payable to the Territory as a penalty. Notably, the offence provision under new section 222F will only apply when the Amendment Act commences on 1 July 2021.

The amendment recognises that a substantial period of time has passed since the Bill was introduced in November 2018 and provides a reasonable opportunity for property developers to become aware of the application of the ban.

Amendment 11

Clause 12

Proposed new section 518 (2) and (3)

Page 16, line 14

This amendment removes subsections 518 (2) and (3) from the Bill. Those provisions provide a power for the Executive to make regulations to modify Part 33 of the

Amendment Act in order to deal with transitional issues. The provision was originally included in the Bill in order to ensure any unforeseen transitional issues could be addressed following passage of the Bill.

This broad regulation-making power is no longer required. The time that has passed since presentation of the Bill in the Assembly in November 2018, and recent consideration of Government amendments, has provided the opportunity to carefully review the provisions in the Bill in detail. Through this process, transitional issues in relation to commencement and operation of provisions have been addressed through the Government amendments, and no further transitional uncertainties have been identified.

Notably, new section 518 (1) will remain in the Bill, which enables the making of a regulation to support the coming into effect of the Bill. This will ensure that any transitional matters that arise as a result of the enactment of the Bill can be effectively addressed. Importantly, regulations made under section 518 (1) must be confined to matters which are within the same sphere of operation as the Bill.