

2018

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

ELECTORAL AMENDMENT BILL 2018

EXPLANATORY STATEMENT

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

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INTRODUCTION

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

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. 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.

BACKGROUND

The ACT Government committed in the 2016 Parliamentary Agreement (at 10.2) to ban gifts from property developers.

In its inquiry, the Select Committee on the 2016 ACT Election and the Electoral Act recommended that political donations from property developers be banned in the ACT (Recommendation 8).

The Committee examined the findings of NSW Independent Commission Against Corruption (ICAC) into the NSW Liberal Party Electoral Funding for the 2011 State Election Campaign and Other Matters, and the NSW Parliament Joint Standing Committee on Electoral Matters recommendations in its report, *Inquiry into the Final Report of the Expert Panel – Political Donations*, and considered submissions from a range of parties, community members and the Electoral Commission.

The Government Response to that inquiry, tabled in the Legislative Assembly on 10 April 2018 agreed with the recommendation to ban for-profit property developer donations, noting that ‘perceived influence by property developers on Government decisions is a serious concern’.

The Response noted that ‘planning and development involve frequent decisions by Government that can have enormous consequences for the value and profits of private land developers. The public has a strong interest in being certain that elections are not influenced by the private wealth that results from those decisions’.

Nationally, there has been a growing understanding that comparative ability of large for-profit corporations to make donations far in excess of those made by members of the public has the potential to distort the representativeness of our political democracy.

The Senate Select Committee into the Political Influence of Donations reported in June 2018 and made a recommendation that the Australian Government amend the Commonwealth *Electoral Act 1918* to introduce a ban on donations from developers and a range of other industries to political parties, candidates and associated entities.

It noted the “compelling evidence that the current political funding and disclosure regime fails to provide the necessary safeguards to prevent corruption of the political process. The fact that the source of the significant majority of funding to those involved in the political process is undisclosed and unknown, is inimical to maintaining trust in the process”¹ and recognised “the importance of limiting the influence of sectors proven to be inimical to public health and the broader public interest”.²

The Electoral Amendment Bill 2018 introduces a prohibition on property developers and their close associates giving gifts to political entities, and a prohibition on political entities accepting such gifts.

The prohibition on property developer donations and the other amendments made by the Bill will complement the ACT’s existing transparent, and robust electoral system, which includes comprehensive funding disclosure rules, clear accountability structures and public funding of candidates.

OVERVIEW OF THE BILL

The Bill amends the Electoral Act to:

1. introduce an objects clause to outline the intended purposes of the Act, including to encourage equality of opportunity for democratic participation
2. prohibit gifts from property developers and their close associates to MLAs, political parties, candidates, and associated entities
3. prohibit political entities from accepting gifts from property developers or their close associates
4. amend the definition of gift to include the first \$250 of a contribution in a single fundraising event
5. 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.

Objects of the Electoral Act

The Bill includes a new objects section in the Electoral Act. This will clearly explain the intended purposes of the electoral framework, including the regulation of funding, disclosure and reporting. The new objects section articulates that the purposes of the

¹ Commonwealth of Australia, Senate, *Select Committee into the Political Influence of Donations Report* (June 2018) at 3.101

² Commonwealth of Australia, Senate, *Select Committee into the Political Influence of Donations Report* (June 2018) at 6.55

Electoral Act include maintaining a fair, transparent and representative electoral system that helps to prevent corruption, undue influence and promotes equal opportunity for participation in the Territory's political process.

Setting out the legislative intentions of the scheme will assist in providing a clear understanding of the legitimate objectives of the Act. In turn this can support justification, in the event of a legal challenge to specific measures in the Act directed at achieving those intentions.

Property developer donation ban

The Bill bans donations from property developers and their close associates. The scope and structure of the ban is based on the ban included in the (now repealed) NSW *Electoral Funding and Disclosure Act 1981* prohibition which was first introduced in 2009. That prohibition has been upheld by the High Court as a legitimate and proportionate response to the evidence in that state of corrupt conduct and undue influence at the intersection of the property development industry and the electoral funding system. The NSW scheme has also been adopted, with some modifications, in Queensland.

The ban implemented by the amendments in this Bill is designed to target those property developers that have the capital and connections to make large donations to seek access and influence.

A property developer or a close associate commits an offence if the property developer or close associate gives a gift to a political entity and, at the time the gift is given, the property developer or close associate has a relevant planning application which is not yet decided or has made three or more applications in the preceding seven years.

A **property developer** is defined as a corporation that carries on a business involving the residential or commercial development of land to sell or lease for profit.

This is intended to cover for-profit companies whose core business is the development of residential or commercial land to on-sell or lease. The ban is not intended to cover not-for-profit companies.

To this end the definition of **property developer** explicitly excludes incorporated associations under the *Associations Incorporation Act 1991* which already have restrictions on their ability to carry on business for pecuniary gain for members, and also excludes other not-for-profit corporations, such as a company limited by guarantee that is not formed or carried on with the object of trading or obtaining pecuniary gain for its members or corporations registered with the Australian Charities and Not-for-profits Commission.

The definition of property developer will also exclude classes of corporation prescribed by regulation or determined by the Electoral Commission to not meet the definition, in accordance with the declaration power in s222I.

A **close associate** is defined as meaning a related body corporate, a director of the corporation or related body corporate, a person who has over 20% voting power in the corporation or a related body corporate, a domestic partner of a director, or person with more than 20 % voting power, a stapled entity of the corporation, a person who is a beneficiary or holds more than 20% of the units in a trust managed by corporation.

A **relevant planning application** includes not only planning applications and associated applications in the merit and impact tracks under the *Planning and Development Act 2007*, but other applications or requests to the Minister or planning and land authority to make a variation, special variation or technical amendment to the territory plan, or call-in or make exemptions from processes required under the Planning and Development Act. It will also cover any other application, request or action under the Planning and Development Act prescribed by regulation.

Fundraising contributions in the definition of gift

The Select Committee into the 2016 ACT Election and ACT Electoral Act recommended including the first \$250 of any single fundraising event contribution in the definition of a gift (Recommendation 3). The Government agreed to this recommendation. Currently any contribution of less than \$250 or the first \$250 of a contribution greater than \$250 is not considered to be a gift. The Bill amends s 198AA which defines 'gift' to remove the distinction in amounts from fundraising contributions, and provide that any contribution to a single fundraising event must be disclosed.

Year round reporting of donations within seven days

The Select Committee also recommended that the ACT maintain its current donation reporting timeframe model where parties and candidates must disclose all gifts and loans totalling \$1000 or more not later than seven days after the day \$1000 threshold is reached, from 1 July through to polling day in an election year (Recommendation 9).

The Government agreed in principle with this recommendation but indicated it would seek to apply the seven day timeframe to all disclosure and reporting throughout the year, not just that applying between 1 July and polling day in an election year consistent with the approach taken in the Queensland *Electoral Act 1992*. The Electoral Commission typically publishes gift reports within 24 hours of receiving them from parties, candidates and other entities. The change made by this Bill will mean that the public will be able to see donations received, within 8 – 9 days of a gift over the threshold being received.

This will support greater transparency throughout the year, reflecting that gifts and the potential for influence and access occur not only in the lead up to elections but all year round.

The Bill will also require each and any additional donations after the threshold is reached to be reported on a rolling basis throughout the financial year (for a party grouping) or other

applicable relevant disclosure period. This means that there will be no lag in reporting of additional donations, as occurs currently where additional donations are only reported when the next \$1000 threshold increment is reached.

HUMAN RIGHTS IMPLICATIONS

The Bill is drafted to be compatible with human rights as set out in the *Human Rights Act 2004* (HRA). Rights under the HRA may be subject to reasonable limits set by laws that are demonstrably justifiable in a free and democratic society (s 28(1) HRA). Limitations will be reasonable if they are balanced, appropriately adapted and proportionate. Section 28(2) of the HRA sets out the criteria for determining if a limitation is reasonable including considering the purpose of the limitation and if the limitation is the least restrictive to achieve that purpose.

The Bill achieves an important purpose overall, as it supports transparency and confidence in public administration in accordance with community expectations. The Bill strengthens the integrity of the electoral system, and in doing so supports the rights to equality of opportunity and rights to public participation in public life, by reducing the risks of undue influence of the property development industry on the ACT electoral process, which is a key part of a free and representative democracy.

This Bill engages a number of rights protected under the HRA, including the following:

- supports and limits section 8 – recognition and equality before the law
- supports and limits section 16 – freedom of expression
- supports and limits section 17 - participation in public life

Section 8 – Right to Equality

The prohibition on gifts from property developers and close associates limits the right to equality, as it imposes a restriction on one class of individuals (noting that corporations have no human rights) based on their profession or their association with particular industry members. Section 8 of the HRA provides that everyone is entitled enjoy his or her human rights without discrimination. No particular people or groups are currently banned from making gifts under the Electoral Act.

However, arguably the current ability of property donors and their close associates to make large donations, sometimes to multiple parties, “undermines the fundamental principle of

political equality—that each citizen has equal political status, irrespective of their economic and social class”.³

Nature of the right

The right to equality is a fundamental right but can be subject to reasonable and justifiable limits. It is recognised that the ban applies to a restricted class of people, who would otherwise be able to make donations apart from the legislation. Other classes of profession with potential reliance on government decision making and spending, such as consultants and advisory services will not be prevented from donating.

However arguably the right that is restricted for property developers and close associates (noting that only individuals and not corporations have human rights – see s 6 of the *Human Rights Act 2004*), being the ability to make donations, is not an element of the right to freedom of expression or the right to take part in public life.

There is no settled position internationally on this question, with for example the US Supreme Court finding that that the making of political donations is an element of free expression,⁴ and the Canadian Supreme Court finding that expenditure limits were a justifiable limitation on the right to free expression in service of electoral fairness and meaningful public participation.⁵

In Australia the High Court has rejected arguments that the act of donation is an act of political communication,⁶ noting that the ability to make substantial donations is not part of the freedom of political communication or expression.⁷ Other avenues of political communication and expression that do not involve directly financing campaigns or giving gifts are not limited.

The importance of the limitation

The limitation on property developers and close associates is to address the risk of the potential for a distorting influence of property developer donations on the political system. It supports the rights of all Canberrans to have an equal opportunity to participate in the

³ Commonwealth of Australia, Senate, *Select Committee into the Political Influence of Donations Report* (June 2018) at 3.88

⁴ *McCutcheon v Federal Election Commission* 188 L Ed 2d 468 at 485, 495-498 (2014)

⁵ *Harper v. Canada (Attorney General)* [2004] 1 S.C.R. 827, 2004 SCC 33.

⁶ *McCloy v New South Wales* [2015] HCA 34 [25].

⁷ *McCloy v New South Wales* [2015] HCA 34 [25].

political system. Legislative measures are important to ensure that particular voices, particularly those from an industry that has been found to be at risk of being involved in corrupt conduct (in both NSW and Queensland) do not dominate the electoral process. Legislative regulation of the electoral process directed to the protection of the integrity of the process is, therefore, *prima facie*, legitimate.⁸

The incidence of donations from property developers, the clear role of the government and executive in planning and development decision making that can result in large profits for property developers, and the identified risk of undue influence and the perception of undue influence, means that special restrictions on this industry are warranted. Prohibiting gifts from or on behalf of property developers or their close associates will improve public confidence that finances to parties and candidates from property developers are not able to influence the quality, transparency and rigour of decisions within the planning and development framework, which is an essential Executive and government function.

The High Court agreed that the property development industry is a “sufficiently distinct industry to warrant specific regulation in light of the nature of their business activities and the nature of the public powers which they might seek to influence in their self-interest, as history in New South Wales shows”⁹.

Nature and extent of the limitation

The limitation on the right to equality is targeted and not overly restrictive. Only property developers, their close associates or persons giving on behalf of property developers are prevented from making donations, and only if they are currently, or have recently, engaged in seeking planning decisions.

The ban only applies to property developers who are engaged in a business that involves the development of land to sell or lease for profit. Incorporated associations and other not-for-profit entities, such as Australian Public companies limited by guarantee, are excluded from the definition of a property developer and other corporations can also be exempted by regulation or by seeking a determination from the Electoral Commission that they are not a property developer.

Relevant planning activity is defined broadly so as to cover both planning applications, and requests to the Minister or government to make changes to the planning system that might support favourable outcomes for development applications in the future. It does not include developments where the primary purpose is to provide a place of business, where it is not also sold or leased to another person. This means that a corporation that is developing a

⁸ *McCloy v New South Wales* [2015] HCA 34 [43].

⁹ *McCloy v New South Wales* [2015] HCA 34 [49].

new facility for its business (but not for sale or lease) would not be prevented from making a donation.

Close associates are people in positions of authority, control and influence in relation to a property developer that is a company, as well as related company structures.

Relationship between the purpose and limitation

A prohibition on donations by for-profit property developers in particular will address community concerns about the influence of the property development industry on the direction of planning, land management and urban renewal in the Territory by preventing them from using donations to obtain influence on, and access to, decision makers.

While there is no evidence to date that property developers have achieved such influence in the ACT, that risk is nonetheless present given the interconnected nature of the property development industry with government.

This close link between government decisions and the potential large profit for those investing the substantial amounts of capital required to develop residential or commercial property for sale or lease, gives rise to a risk of perceived or actual undue influence or corruption. In New South Wales and Queensland, investigations have revealed that this industry is one where there is a not insignificant risk of corrupting or corrupt conduct.

The Bill will reduce the risk of specific issues that have occurred within the property development industry in states like NSW and Queensland impacting the political process in the ACT.

The Bill will further the objectives of the Electoral Act of preventing undue influence and corrupting conduct in the political process – there is a rational connection, as the prohibition of property developer donations reduces the risk of influence on planning decisions.

Less restrictive options

The majority of the High Court considered that in NSW the ban on property developer donations was necessary as there was no other reasonable, less restrictive alternative to a ban on property developer donations.

The NSW scheme can be distinguished from that proposed to be adopted in the ACT as the NSW scheme also imposes caps on political donations from any person.

As there are no donation caps applying in the ACT, there may be an argument that caps would be a less restrictive alternative, but to cover the bulk of property developer donations which appear to be made in the ACT the cap would need to be set very low to achieve the legitimate purpose of preventing undue influence compared to private citizens, with the result that the cap would effectively be a prohibition.

It might be argued that greater transparency of donations would be sufficient to reduce risk of donations being made by property developers, but this would place an onus on the public to monitor donations and publicly object to those donations being made, in order to moderate their influence. An alternative approach of establishing a property developer register or requiring disclosure of all property development projects the donor has an interest in might be argued to be less restrictive, but the High Court stated that while provisions requiring disclosure of donations were no doubt important they could not be said to be as effective as capping donations (or banning them).¹⁰

Section 16 – freedom of expression

The prohibition on gifts from property developers and close associates arguably limits the right to freedom of expression of property developers and their close associates, by preventing them from donating to political entities which represent their views, opinions and interests.

Nature of the right

The right to freedom of expression in the HRA is a personal freedom which is considered essential for all individuals to achieve full personal development and self-fulfilment through the development and distribution of ideas and opinions. A free flow of ideas is also necessary to encourage the vigorous public debate which is central to the functioning of Australia's liberal democratic system of government.

The right to freedom of expression in the HRA is a right which is broader in scope than the freedom of political communication which is implied into the Constitution

The freedom of political communication implied from the Australian Constitution, is a separate freedom that is not a personal right, but rather a restraint on legislative power. In contrast the right to freedom of expression in the HRA is held by all individuals and extends to cover information and ideas of all kinds. The right to freedom of expression also includes the right of a person to hold their own opinions without interference or sanction and to seek, receive and impart information and ideas of all kinds.

The implied right in the Constitution extends only to protect freedom of communication about government and political matters as ““an indispensable incident of that system of representative government which the Constitution creates”. In ensuring the maintenance of

¹⁰ *McCloy v New South Wales* [2015] HCA 34 [61].

that system, the freedom may operate as a restriction upon the legislative powers of the Commonwealth, the States and Territories”.¹¹

The right of freedom of political communication in the Constitution is not a personal right that can be claimed. Rather this right acts as a restraint on the ability of Parliament to limit political communication, meaning that individuals can challenge laws that purport to restrict political communication.

Political communication cannot be limited unless that limitation is appropriate and adapted to suit a legitimate purpose that is compatible with our representative system of government.¹²

The right to freedom of expression under s 16(2) of the HRA extends a general protection to all forms of expression for any purpose, whether political, commercial, artistic or otherwise. Expression is to be interpreted broadly and includes actions whereby an individual seeks, receives or imparts ideas or information in any form by any method or mode or medium.

However, as noted above, the High Court has rejected the notion that act of making a donation to a political entity is itself an act of political communication. The Court notes however that the making of donations can support the exchange of ideas which is an important element of the right to freedom of expression.

Importance of the purpose of the limitation.

The right to freedom of expression is an essential element “in the fabric of the democracy in all Australian jurisdictions, and is an implied right in the Australian Constitution”.¹³ It is not an absolute right and may be subject to reasonable limitations set by laws that can be demonstrably justified in a free and democratic society. The limitation is designed to specifically support the integrity of the democratic system of government in the ACT by limiting the potential for the property development industry to unduly influence political decision making.

The prohibition responds to an identified risk to the integrity, transparency and fairness of systems of representative government by the property development industry. A number of property developers that have donated to ACT political parties in recent years in the ACT are large national firms, with considerable capital and access to Government.

¹¹ *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520 at 559; *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1 at 49 [90] per McHugh J, 77 [195] per Gummow and Hayne JJ cited by *Wotton v Queensland* [2012] HCA 2 29 February 2012 [76].

¹² *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520 at 567.

¹³ *Daniel Emlyn-Jones v Federal Capital Press [Intervener: Human Rights Commissioner]* [2005] DT 577/2005 (31 July 2009) [155].

The measures in the Bill will mitigate this risk of perceived undue influence from this industry by implementing a clear and targeted prohibition that is closely aligned to the types of for-profit entities that may have the greatest ability and motive to seek to influence political processes, but also includes appropriate safeguards to minimise inadvertent breaches of the law.

The measures are also intended to support the rights of general community members to have an equal opportunity to take part in public life through an electoral system that is not dominated by a particular industry which has a history of making sustained and substantial political donations.

Nature and extent of the limitation

The High Court reasoned that the NSW provisions in the EFD Act, banning donations from property developers, and implementing a cap on donations from other entities –

do not affect the ability of any person to communicate with another about matters of politics and government nor to seek access to or to influence politicians in ways other than those involving the payment of substantial sums of money. The effect on the freedom is indirect. By reducing the funds available to election campaigns there may be some restriction on communication by political parties and candidates to the public. On the other hand, the public interest in removing the risk and perception of corruption is evident. These are provisions which support and enhance equality of access to government, and the system of representative government which the freedom protects. The restriction on the freedom is more than balanced by the benefits sought to be achieved.¹⁴

The same analysis of the nature of the restriction on the right to free expression and political communication, considered alongside the public interest in supporting equality of opportunity for access to, and participation in, public life is supports these measures in the ACT.

The Bill does not establish a total prohibition on campaigning by property developers and their close associates who will still be able to campaign privately for their preferred representatives or issues on their own behalf, or to utilise other forms of political communication. The Bill does not prevent them incurring electoral expenditure in their own right, in accordance with the existing provisions of the Electoral Act.

¹⁴ *McCloy v New South Wales* [2015] HCA 34 [61].

Relationship between the limitation and its purpose

The prohibition is appropriately constrained. Gifts which are returned within 30 days are not treated as gifts meaning that no prosecution could follow if the gift is returned. This means that there is an opportunity for receivers of gifts to do due diligence by establishing the origin of the donation and if necessary returning the gift. Financial representatives of receivers already have general obligations to attempt to record and report the defined details (name and address) of any gift that is not an anonymous gift (s 216A(2)(c)). Based on that information, plus any additional information the receiver might require, the financial representative will be able to make inquiries to determine whether the person giving the gift is a property developer.

It is a defence if a political entity that received a gift from a property developer took reasonable steps to ensure that the person giving the gift was not a property developer or close associate or had not met the threshold for making relevant planning applications.

Reasonable steps might be requiring a statutory declaration from a giver of the gift to the effect that the person is not a donor.

The prohibition is also limited as gifts given or received from close associates who are candidates (at the time of giving a gift) are not considered gifts for the purposes of the prohibition protecting their right to be involved in public office through normal structures of donating to their party grouping to support their campaigns.

In total, the prohibition will send a clear message that the property development industry is not able to unduly influence the political system through donations of money.

Less restrictive options

In considering the proportionality of the proposed prohibition, it is acknowledged that other measures to reduce the influence of well-resourced businesses or individuals have already been implemented. For example the ACT has a system of public electoral funding for parties and candidates to communicate with the public, which reduces their reliance on private donations to communicate their policies.

However, the incidence of donations from property developers, and the identified risk of undue influence and the perception of undue influence means that additional measures are necessary. Public funding of candidates reduces reliance on donations, but does not achieve the purpose of reducing improper influence of property developers as effectively as a ban would.

A cap on donations from property developers, or on all donors is not considered as effective a control on the influence of the property development industry, as property developers could make donations under the capped amount which may still have an influencing impact relative to other members of the general community.

It may be argued that changes in the Bill to require more immediate reporting of donations within seven days of the day after the gift is received, provides the necessary transparency to address any threat of undue influence.

However, increasing transparency of donations is one measure to make the financial interests of particular donors public, but it is not designed to, and could not stop donations entirely. It would leave scope for ongoing political influence by property developers.

Section 17 - right to take part in public life

The prohibition on gifts from property developers arguably limits the right to public participation of property developers and their close associates, by preventing them from donating to political entities which represent their views, opinions and interests.

Nature of the right

The right to take part in public life in s 17 of the HRA is a fundamental right but it is not absolute.

Section 17 provides that every citizen has the right, and is to have the opportunity, to—

- (a) take part in the conduct of public affairs, directly or through freely chosen representatives; and
- (b) vote and be elected at periodic elections, that guarantee the free expression of the will of the electors; and
- (c) have access, on general terms of equality, for appointment to the public service and public office.

The Electoral Act is a key part of the framework that gives effect to these rights to take part in public life by establishing a clear framework for the conduct of elections for representatives that does not unreasonable or arbitrarily limit who may stand for public office.

The UN Human Rights Committee has stated that the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies the freedom to engage in political activity individually or through political parties and other organisations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticise and oppose, to publish political material, to campaign for election and to advertise political ideas. These aspects of

public participation are supported by other rights including the right to free expression and equality discussed above.¹⁵

Importance of the purpose of the limitation

As discussed above the prohibition on the giving or accepting of gifts, by or from property developers or their close associates, may be argued to limit the right to public or political participation.

However this limitation is designed to prevent undue influence or the potential for undue influence from this industry on the political process. Experience in other Australian jurisdictions has shown that there is potential for this particular industry to utilise its capital to gain access to political decision makers and potentially to influence their decisions in a way that limits the rights to political participation of other ordinary citizens who may not have the same ability to make large donations.

The UN Human Rights Committee has stated that “reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party”.¹⁶ By extension, reasonable limitation on campaign funding may be justified in support of a system of electoral funding that is less susceptible to distortion by donations from particular industry groups.

Nature and extent of the limitation

The ban on property developer donations, only limits a very small element of the right to take part in public life. The core guarantees outlined in s 17 of the Human Rights Act are not impeded. Property developers are still able to take part in public affairs through their chosen representative, are free to vote and to have access to appointment to public office.

The ban does not apply to gifts given by close associates of property developers if they are a candidate in an election at the time the gift is given. This will support the right of individuals to stand for public office, and to contribute to their campaign through political donations, irrespective of their occupation or relationship with a property development company.

¹⁵ UN Human Rights Committee (Fifty-seventh session, 1996) General Comment No. 25 ‘The right to participate in public affairs, voting rights and the right of equal access to the public service’, Un Doc. CCPR/C/21/Rev.1/Add.7 [8, 25]

¹⁶ Ibid [19]

Relationship between the limitation and its purpose

As discussed above, the prohibition will prevent property developers being able to influence or be perceived to influence the political system through the giving of donations to particular political entities.

Less restrictive options

As discussed above other options were not judged to provide the requisite effect in terms of preventing the possibility of undue influence of property developers on the electoral system. Gifts from candidates that would otherwise be banned are not considered gifts for the purpose of the ban.

CLAUSE NOTES

Clause 1 Name of Act

This clause is a formal provision setting out the name of the new Act as the *Electoral Amendment Act 2018* (the Act).

Clause 2 Commencement

This clause provides that the Act will commence on a day fixed by the Minister by written notice.

Clause 3 Legislation Amended

This clause is a formal provision identifying that the Act amends the *Electoral Act 1992*.

Clause 4 Offences against Act—application of Criminal Code etc.

This clause clarifies the operation of the *Criminal Code 2002* which applies to the new offences of property developers and close associates giving gifts, and of political entities accepting gifts from property developers.

Clause 5 New section 3B

This clause inserts a new section 3B which outlines the main objects of the Electoral Act, being to:

- a) recognise, promote and protect the right and opportunity of every elector to take part in the conduct of public affairs, directly or through freely chosen representatives, vote, and be elected, at periodic elections that guarantee the free expression of the will of the electors and have access, on general terms of equality, for appointment to public office
- b) promote public awareness of the electoral system and its role in supporting participation in the political process
- c) enhance equality of opportunity for participation in the political process

- d) establish and promote compliance with, a fair and transparent electoral funding, expenditure and financial disclosure scheme
- e) help prevent corruption and undue influence in institutions of government and public administration in the Territory
- f) provide for the effective administration of public funding of elections, recognising the importance of the appropriate use of public revenue for that purpose
- g) establish an independent Electoral Commission, made up of independent officers of the Legislative Assembly with functions that include promoting the objects of the Act, administering the Act and conducting elections.

These objects are based on the content of the right to take part in public life in section 17 of the HRA as well as the purposes of the main components of the electoral system, including the rules for the running of elections and determination of results, registration of candidates and parties, financial reporting and disclosure, public funding and non-partisan oversight. The objects clause will help articulate the key benefits of maintaining a fair, transparent and representative electoral system. The objects clause reinforces that legislative changes passed by the Assembly are considered by the Assembly to best support and advance the ACT's democracy.

Clause 6 Meaning of gift—pt 14 Section 198AA (2)

Clause 6 substitutes a new section 198AA (2). Currently section 198AA(2)(b) provides that only an amount in excess of the first \$250 of a contribution to a single fundraising event is a gift. The effect of new substituted section 198AA (2) is that any fundraising contribution is considered a gift and must be disclosed and reported in accordance with the funding and disclosure framework.

Clause 7 Section 198AA (3) (d) and (e)

Clause 7 omits references to fundraising contributions of less than \$250 in a single fundraising event as not coming within the definition of a gift. The Bill amends the definition of gift so that any fundraising contribution is considered a gift and must be disclosed and reported in accordance with the funding and disclosure framework.

This amendment will simplify the reporting requirements for fundraising contributions by requiring that all contributions must be reported rather than amounts of more than \$250 being required to be reported and amounts of less than \$250 not being required to be reported.

Clause 8 Section 198AA (4), definitions of fundraising contribution and fundraising event

Clause 8 omits the definitions of *fundraising contribution* and *fundraising event* as they are no longer required because there is no exception for disclosure of amounts previously classed as fundraising contributions.

Clause 9 Section 216A (3) (b), Records and regular disclosure of gifts

This clause omits the requirement that additional gifts made by a giver over the initial \$1000 threshold must be reported only when the next \$1000 increment of gift value is reached. This change will mean that all gifts over the \$1000 threshold are required to be reported on an ongoing basis.

Clause 10 Section 216A(4) and notes

This clause substitutes a new section 216A (4) to provide that all gifts received over the initial threshold amount of \$1,000 must be declared in a return by the financial representative of the receiver no later than seven days after the day the threshold is reached.

Clause 11 New division 14.4A

This clause inserts a range of new sections in a new Division 14.4A about gifts from property developers and close associates which that give effect to the ban on property developer donations. This division includes new offences for property developers and their close associates to give or cause another to give a gifts to a political entity. It is also an offence for a political entity to accept a gift from a prohibited donor.

New Section 222A Application – div 14.4A

New section 222A makes clear that new Division 14.4A does not apply to a gift that is returned to the giver within 30 days after its receipt. This provides a safeguard in that receivers of gifts are able to inquire into the origin of a gift and to return it if they suspect or establish that it has been made by a property developer. This may prevent receivers inadvertently committing the offence of accepting a gift which was from a property developer, by giving them time to make reasonable enquiries to establish the identity and nature of the giver.

Additionally, a gift given or received from a close associate who is a candidate at the time the gift was given is not a gift for the purposes of the ban. This is to safeguard the right of individuals who are close associates of property developers to run for public office despite their occupation or relationships to property developer corporations. Such candidates will be able to support their campaign for election in accordance with the other applicable rules.

New section 222B Definitions – div 14.4A

New section 222B outlines definitions of key terms for this division.

It defines when a relevant planning application is considered **decided**, for the purposes of assessing how many planning applications have been made over a specific period, which is part of the test of whether an offence has been committed. The application is decided when it is finalised or decided in accordance with the relevant processes.

The section defines **make**, for the purposes of the concept of a property developer or close associate making a relevant planning application, as including making or causing another person to make a relevant planning application.

The section defines **political entity** as including an MLA, a non-party candidate, an associated entity, or a party grouping. These terms have the meanings they have throughout the Electoral Act.

New section 222 C Meaning of *property developer*—div 14.4A

This section defines property developer as a person who carries on a business involving the residential or commercial development of land to sell or lease for profit.

The definition excludes an incorporated association under the *Associations Incorporation Act 1991*. Associations are ineligible for incorporation if they trade or obtain pecuniary gain for members). The definition also excludes other not-for-profit corporations. This section includes an example of a not-for-profit company as being a *Corporations Act 2001* company limited by guarantee that does not operate to obtain pecuniary gain for their members. The definition also excludes a corporation prescribed by regulation or a corporation to which a s222I declaration by the Electoral Commission applies.

New section 222D Meaning of *close associate*—div 14.4A

This section defines a close associate of a corporation to include a related body corporate, an officer of the corporation or related body corporate, a person who has over 20% voting power in the corporation, a domestic partner of a director, or person with more than 20 % voting power, a stapled entity of the corporation, a person who is a beneficiary or holds more than 20% of the units in a trust managed by corporation, or any other person or body prescribed by legislation.

New section 222E Meaning of *relevant planning application*—div 14.4A

This section defines relevant planning application. This definition is relevant to when a property developer commits an offence of giving a gift. It has been cast broadly to cover not only planning applications and associated applications in the merit and impact tracks under the Planning and Development Act, but other applications to the Minister or planning and land authority to make a variation, special variation or technical amendment to the territory plan. It will also cover any other application, request or action under the Planning and Development Act prescribed by regulation.

It is important that these types of requests be covered as they have the potential to impact the strategy, focus and values of the planning framework within which subsequent applications will be determined. The broad definition covers applications that could influence or be perceived to have potential to influence high level policy decisions of this nature to create a climate favourable to particular types of development, even though no actual application for a particular development proposal has been submitted at the time the decision is made.

The section also provides that a relevant planning application does not include an application if the dominant purpose of the application is to provide residential premises to be occupied by the applicant or commercial premises to carry on business (where no substantial part of the commercial premises are to be sold or leased to another person). This qualification will limit the application of the ban on corporations or close associates who would otherwise be prevented from making political donations where they were developing property for their own residential or commercial premises.

New Section 222F Ban on gifts from property developers etc

Section 222F(1) provides a new offence where a property developer gives a gift to a political entity.

Sections 222F(2) to (4) provide similar offences for:

- a close associate of a property developer who gives a gift to a political entity ; or
- a person who gives a gift to a political entity on behalf of a property developer; or
- a person who asks another person to give a gift to a political entity on behalf of a property developer. Ask includes causing, inducing or soliciting another person to give a gift.

These offences are established if at the time the gift is given the property developer or a close associate of the property developer has made at least one relevant planning application which has not yet been decided or has made three or more planning applications in the seven year period before the gift was given.

The Criminal Code applies to these offences which means that intention to give the gift is required to be proved.

The offence carries a maximum penalty of 50 penalty units (\$8,000 for an individual or \$40,500 for a corporation) or imprisonment for six months, or both.

New Section 222G Ban on acceptance of gifts from property developers etc.

New Section 222G makes it 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.

These offences are established if at the time the gift is given, the property developer or a close associate of the property developer has made at least one relevant planning application which has not yet been decided or has made three or more planning applications in the seven year period before the gift was given.

It is a defence to this offence if the political entity can prove that it took reasonable steps to ensure that the person giving the gift is not a property developer or close associate, or has not made a relevant planning application which has not yet been decided or has made three or more planning applications in the 7 year period before the gift was given.

This section includes examples of what might constitute reasonable steps. For example, the political entity may obtain a statutory declaration from a person who gives a gift to certify that a person is not a property developer, or has not made relevant planning applications at the time the gift is given. These are not requirements, but examples that would support a defence to this charge.

This offence carries a maximum penalty of 50 penalty units (\$8,000 for an individual or \$40,500 for a corporation) or imprisonment for six months, or both.

Subsection 222G(3) provides that where a political entity accepts a gift from or on behalf of a property developer who has made relevant planning applications, the financial representative of the entity must pay to the Territory the amount of the gift. This amount is enforceable as a debt, and can be recovered in court.

New Section 222H Repayment of other gifts from property developers

New section 222G deals with gifts made by, or received from, people who within 12 months of making the donation, become a property developer and make a relevant planning application. The section does not make the giving of the gift a criminal offence but requires an amount equal to any gift to be repaid to the Territory. This amount is enforceable as a debt, and can be recovered in court.

This section is aimed at preventing corporations or close associates from giving gifts immediately prior to becoming a property developer, in order to avoid the prohibition. This provision strikes a balance by limiting the period covered to twelve months after the giving of the gift, rather than a more extended period. The corporation or close associate giving the gift would be expected to have foresight of the likelihood that they would engage in a business that involves property development within next the 12 months from the time they give a gift.

New Section 222I Declaration that corporation is not a property developer

This section includes a power for the Electoral Commission to receive and decide applications from corporations or close associates for a declaration that the corporation is not a property developer for the purposes of the ban. This will allow entities that are uncertain about the status of the corporation that may make donations to obtain a ruling that they are or are not a property developer, which they can rely on when deciding whether or not to make a donation. This safeguard mechanism supports the intent of the prohibition, while allowing opportunity for companies to pre-emptively check their status.

The declaration of the Commission will be conclusive for the validity of any donation made while the declaration is in force, unless it was made on the basis of false or misleading information. This will mean that potential donors will be able to obtain certainty about the lawfulness of any gift given to a political entity.

The declaration will have force for 12 months unless revoked by the Commission with at least seven days' notice to the property developer.

Clause 12 New Part 33

Part 33 Transitional – Electoral Amendment Bill 2018

New section 517 Transitional—gifts from property developers in pre-commencement period

Clause 12 includes transitional provisions to apply the ban on gifts from property developers from the time this Bill is presented in the Legislative Assembly. This measure will prevent the ability for property developers or close associates to make donations to political parties between the time the bill is presented and when it commences.

The Select Committee report on the 2016 ACT Election and Electoral Act recommending that a ban on property developer donations was published in November 2017, and the Government's agreement to that recommendation in its response, tabled on 10 April 2018. Property developers have been aware that a ban on property developer donations is imminent. The transitional ban in new 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.

New Section 518 Transitional Regulations

This new section provides for the Executive to prescribe by regulation any transitional matters necessary or convenient to be prescribed to support the commencement or operation of the amendments in this bill.

The regulation may modify this part to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part.

This transitional provision will allow for any additional details relevant to the retrospective commencement of the prohibition to be settled without the need for further amending legislation to be passed by the Assembly.

New Section 519 Expiry—pt 33

This section provides that the transitional provisions expire after 3 months. This means that they will no longer be visible in the Electoral Act after that time, however, the provisions will continue to have legal force and effect after expiry consistent with the general rule in s 88 of the *Legislation Act 2001*.

Clause 13 Dictionary, note 2

This clause inserts into note 2 terms defined within the *Legislation Act 2001* that are relevant when interpreting the provisions of new Division 14.4A in the Electoral Act.

Clause 4 Dictionary, new definitions

This clause inserts new definitions of terms used in Division 14.4 the Bill in the Dictionary for the Electoral Act. The terms have the specific meanings they are given throughout the sections in Division 14.4A.