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Committee Secretariat

Senate Standing Committees on Finance and Public Administration

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Dear Committees

***Commonwealth Electoral Amendment (Banning Dirty Donations) Bill 2020***

Thank you for the opportunity to make a submission on Senator Larissa Waters' private senator's Bill, the *Commonwealth Electoral Amendment (Banning Dirty Donations) Bill 2020 (Bill)*.

The Bill proposes that all political donations be capped at \$3,000 in total across the Federal election cycle, and further that some industries be banned from donating altogether. These proposed laws follow the lead of the States: political donations are currently capped in Queensland, NSW and Victoria. In NSW, property developers, tobacco, gambling and liquor industries are prohibited from donating, and in Queensland property developers are classed as prohibited donors.

The Human Rights Law Centre supports the need for legislative measures strengthening the integrity and accountability framework underpinning Australia's electoral system. Commonwealth laws to regulate the flow of money in politics lag far behind the States, and Parliament must act swiftly to change this. It is, however, the Human Rights Law Centre's position that appropriately low and strongly enforced donation caps would be sufficient to curb the disproportionate and distorting influence of harmful industries in our political system. Donation caps that apply across the board would also be constitutionally safer than prohibiting some industries from donating altogether.

**i. The influence of particular industries in our political system**

Large political donations are designed to have political influence. This is true of virtually all big donations, but a growing body of research shows that the influence of some industries is more acute than others.

The Senate Select Committee's 2018 report on the Political Influence of Donations (**Senate Report**) details a number of studies and submissions that illustrate the correlation between political donations made by the mining, tobacco, alcohol and gambling industries and significant approvals or other Government decisions on industry policies.<sup>1</sup> A 2013 policy report by the Australia Institute identified superannuation, banks, mining and gambling as the most influential industries in Australian politics.<sup>2</sup>

Further to this, research by the Grattan Institute details the connection between highly regulated industries and the influence they wield. Highly regulated industries, including mining, property and construction and gambling, contribute the biggest share of political donations and get the lion's share of external meetings with senior politicians.<sup>3</sup> The rationale is, the more highly an industry is regulated, the more their bottom lines may be impacted by Government decisions and the more they are incentivised to wield influence through political donations.<sup>4</sup>

This trend is worrying, not only because it creates inequality within our democracy, but also because industries like mining, gambling, guns and alcohol are highly regulated precisely because of their potential to cause harm. The donations and influence of these industries therefore impact not only our democracy, but also our health and our planet.

## ii. How political donations influence our decision-makers

There is a sliding scale of influence enabled by political donations: at the lower end, a sizeable donation can ensure the donor gets access to a politician that ordinary Australians wouldn't get.<sup>5</sup> In the middle, is what the High Court has described as "clientelism", or a "more subtle kind of corruption... [where] officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder".<sup>6</sup> At the far end, is "quid pro quo" corruption – illegal bribes – where politicians explicitly make promises in exchange for political donations. This last kind may be rare (although in the absence of a Commonwealth integrity commission, we do not know how rare), but the other forms of influence are inevitable in our current political system. The ever-increasing cost of election campaigns adds to the pressure on politicians to keep big donors happy.

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<sup>1</sup> Select Committee into the Political Influence of Donations, *Political Influence of Donations Report*, 2018, 28, citing The Australia Institute, *The tip of the iceberg: Political donations from the mining industry*, September 2017, 4; Foundation for Alcohol Research and Education, *Submission to the Select Committee into the Political Influence of Donations* (Submission 25), October 2017, 7; C Livingstone and Ms Maggie Johnson, *Submission to the Select Committee into the Political Influence of Donations* (Submission 18), October 2017, 7.

<sup>2</sup> D Deniss and D Richardson, "Corporate Power in Australia", *The Australia Institute*, February 2013, 3.

<sup>3</sup> D Wood and K Griffiths, "Who's in the Room: Access and Influence in Australian Politics" *Grattan Institute*, September 2018, 37 and 59.

<sup>4</sup> D Wood and K Griffiths, "Who's in the Room: Access and Influence in Australian Politics" *Grattan Institute*, September 2018, 59.

<sup>5</sup> D Wood and K Griffiths, "Who's in the Room: Access and Influence in Australian Politics" *The Grattan Institute*, 23 September 2018.

<sup>6</sup> *McCloy v NSW* [2015] HCA 34 at [36] per French CJ, Kiefel, Bell, Keane JJ.



Our system of campaign financing ensures that the major political parties rely on large donations to fund their election campaigns, and for as long as this is the status quo, many politicians will take donors' calls and prioritise their interests over the interests of those who can't afford it — ordinary Australians.

### **iii. Operation of the Bill**

#### **a. Prohibited donors**

Proposed section 314AK of the Bill would amend the *Commonwealth Electoral Act 1918* (Cth) (**Act**) to make it unlawful for any prohibited donor (or a person on behalf of a prohibited donor) to make a political donation. It would also make it unlawful for a person to knowingly accept a political donation made by or on behalf of a prohibited donor. Both offences would attract a penalty of up to 2 years' imprisonment under proposed section 314AL.

The list of prohibited donors covers property developers, financial institutions, tobacco, liquor, gambling, pharmaceutical, defence and mining industries. These industries have been singled out in the Bill because, according to the Explanatory Memorandum, they have used, or have a strong public perception of using, political donations to influence policy decisions.

#### **b. Donation cap**

Proposed sections 314AR and 314AS of the Bill would introduce a cap of \$3,000 (aggregated across the entire election period) on political donations (gifts) to candidates, political parties, associated entities and political campaigners. Currently under the Act, the definition of "gift" does not include membership subscriptions or ticket sales for fundraising events — amendments to section 287AAA proposed by the Bill would change this.

### **iv. Constitutional concerns with prohibiting the full list of industry donors**

Legislation to restrict the ability of various entities to donate to candidates and political parties has been challenged several times in the High Court for being inconsistent with the implied freedom of political communication, with mixed results.

In *Unions NSW v NSW* [2013] HCA 58, the High Court held that a NSW prohibition on donations from persons not on the electoral roll (i.e. all corporations, trade unions and non-citizens) was unconstitutional. The High Court held that, because the prohibition imposed a restriction upon the source of funds available to political parties and candidates to meet the costs of political communication, the laws burdened the implied freedom of political communication.<sup>7</sup> The laws were further found to be an impermissible burden on the freedom because the anti-corruption purpose put

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<sup>7</sup> *Unions NSW v NSW* [2013] HCA 58 at [38], per French CJ, Hayne, Crennan, Kiefel, Bell JJ.



forward to justify the burden was not, according to the Court, achieved by the prohibition. There was nothing in the relevant Act that identified corporations, unions and persons not enrolled as electors as having “interests of a kind which required them to be the subject of an express prohibition”.<sup>8</sup>

The question appears to be, then, what interest do these seven industries have in influencing government decisions, and are those interests of a kind that would justify a prohibition on their making political donations altogether?

In *McCloy v New South Wales* [2015] HCA 34, the High Court held property developers had such an interest to justify NSW laws prohibiting them from making political donations. In reaching this conclusion, the Court noted that the Independent Commission Against Corruption and other bodies had published a sizeable eight adverse reports concerning land development applications since 1990. This evidence indicated that there was a higher risk of corruption in planning decisions, and the anti-corruption purpose of the ban was legitimate and proportionate.<sup>9</sup>

Measures which prohibited the making of political donations by property developers were again in issue in *Spence v Queensland* [2019] HCA 15. The Queensland laws followed an investigation by the Queensland Crime and Corruption Commission which, as in NSW, supported a conclusion that there was a particular risk of corruption associated with property developers in Queensland. The majority of the High Court did not substantively address the findings of the report, but rather found the Queensland laws constitutionally valid because it was reasonable for States to legislate to mitigate risks of harm that have arisen in other States and Territories.<sup>10</sup>

Based on the case law, it is not possible to say with confidence that a prohibition on at least six of these industries making political donations would survive a challenge. The prohibition on donations from property developers appears the safest from a constitutional perspective. That said, as planning approvals are more commonly the domain of local, State and Territory governments, the nexus between donations and the decisions donors may wish to influence, may be regarded weaker.

The proposed sections of the Bill that prohibit the listed industries from making political donations altogether may therefore be vulnerable to constitutional challenge. A safer route to achieve greater fairness in our political system, is to apply reasonably low donation caps across the board, irrespective of who the donor is. That said, there are also concerns with the way in which the donation cap in this Bill operates.

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<sup>8</sup> *Unions NSW v NSW* [2013] HCA 58 at [57], per French CJ, Hayne, Crennan, Kiefel, Bell JJ.

<sup>9</sup> *McCloy v New South Wales* [2015] HCA 34 at [53] per French CJ, Kiefel, Bell, Keane JJ.

<sup>10</sup> *McCloy v New South Wales* [2015] HCA 34 at [96] per French CJ, Kiefel, Bell, Keane JJ.

**v. Concerns with the Bill's donation cap**

The first concern regarding the donation cap proposed in this Bill, is that it is too low. \$3,000 between elections works out to be, roughly, \$1,000 per annum, or less than \$20 per week. This is well below an amount that could reasonably have political influence, and could capture a significant number of donors who give small amounts regularly. A cap of between \$5,000 and \$8,000 is unlikely to leave our political system exposed to corruption through donations, and yet it could give a better chance to a greater number of smaller parties and candidates, who are far less likely to have the significant investments of the major parties, to raise enough money to seek election. In addition, if the lost income is intended to, in part, be made up with public funding, a higher donation cap could substantially reduce the burden on the public purse.

Our second concern is that extending donation caps to political campaigners is discriminatory reform. Under the Bill, household charity names that qualify as political campaigners because they advocate strongly on their issues in the lead up to an election will be prevented from receiving small donations for any purpose. This will mean charities and not-for-profits will treat the threshold for becoming a political campaigner as a de facto spending cap. The law will place no equivalent restrictions on the income of corporations and industry associations because they do not rely on donations or membership fees, but rather revenue and levies.

The reason for extending donation caps to political campaigners is not an anti-corruption one: political campaigners do not introduce or vote on proposed legislation, make regulations or planning approvals. The purpose of extending donation caps beyond politicians to political campaigners is to prevent would-be big political donors from diverting their donations to political campaigners that may campaign on the political party's behalf, as PACs do in the US. However there is a better way of achieving this outcome without discriminating against not-for-profits.

The Queensland Government recently passed laws to cap donations of \$4,000 from a single donor per election cycle for political parties, candidates and associated entities.<sup>11</sup> Initially the draft legislation extended the cap on donations to third parties, but following extensive consultation with the charities sector, it became apparent to the Queensland Government that such a cap would disproportionately disadvantage civil society advocacy.

In response, caps on third parties were scrapped in favour of stronger regulation of associated entities. Specifically, Queensland's laws treat donations to associated entities as if they are donations to the political party with which they are associated. At Federal level, associated entities are relevantly those which are controlled by one or more political parties, or operate wholly or to a significant extent for the benefit of one or more registered political parties.<sup>12</sup>

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<sup>11</sup> *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Act 2020* (Qld).

<sup>12</sup> *Commonwealth Electoral Act 1918* (Cth), s. 287H.



Adopting the Queensland approach at Federal level would mean donation caps are applied to any new third parties that form in order to campaign on behalf of a political party, ensuring the caps on political parties cannot be circumvented. At the same time, it would leave charities and issues-based not-for-profits to be able to advocate on their issues in the lead up to an election.

**vi. The solution to reducing the undue influence of large donors in our political system is holistic reform**

The Human Rights Law Centre supports reforms that would achieve greater fairness in our democracy without unduly burdening the small players that best represent our communities. Specifically, we propose reforms that achieve:

- (i) greater transparency for all income that flows to candidates, political parties and associated entities, including lowering the disclosure threshold to \$2,500 and requiring real-time-disclosure;
- (ii) thoughtful, proportionate and non-discriminatory transparency provisions for income to third parties and political campaigners that is used to incur electoral expenditure, including lowering the disclosure threshold to \$2,500;
- (iii) caps on donations, membership fees and contributions from fundraising events at between \$5,000 and \$8,000 pa (indexed and aggregated) to candidates and political parties. Donations to associated entities should be treated as if they are donations to the candidates/political party/s with which they are associated;
- (iv) limit the amount that any candidate, political party, associated entity, political campaigner or third party can spend in an electorate, across each State and Territory, and nationally.

We would be pleased to provide further information should it assist the Committee.

Yours sincerely

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