

PROPERTY COUNCIL OF AUSTRALIA

**SUBMISSION TO THE *LOCAL GOVERNMENT
ELECTORAL (IMPLEMENTING BELCARRA) AND
OTHER LEGISLATION AMENDMENT BILL 2017***

LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

26 October 2017

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EXECUTIVE SUMMARY

- » **Property industry unfairly targeted**
- » **Broader review recommended**
- » **Clearer definition of 'property developer' required**

The Property Council welcomes the opportunity to provide input into the Legal Affairs and Community Safety Committee's investigation into the *Local Government Electoral (Implementing Belcarra) And Other Legislation Amendment Bill 2017*.

As the peak body representing the Queensland property industry, the Property Council has a strong interest in ensuring that the 240,000 Queenslanders employed by the sector are treated equitably under our state's laws and that the reputation of their industry is not unfairly tarnished.

Many industries stand to benefit from the decisions of government, however the limited scope of the Crime and Corruption Commission's *Operation Belcarra* has only highlighted the perceived risks of corruption as they relate to the development industry.

This Bill would have the effect of singling out the property sector for special treatment under electoral laws, and unduly branding Queensland's biggest non-government employer as a corruption risk.

The Property Council, like many of its member companies, has an explicit policy of not making political donations. The property industry's opposition to provisions in the Bill is not motivated by a desire to make political contributions, but by a desire for equal and consistent treatment before the law.

To achieve this consistency, the Property Council encourages the Committee to consider supporting a recommendation that the CCC undertake a further review of political donations. This new review would have a wider remit, that is, one that looks beyond the

four high-growth councils investigated, to include other local governments and the activities of the State Government.

Despite only two weeks being provided to respond to the Committee's investigation- a timeframe not nearly long enough to adequately review all elements of the Bill- the Property Council has received initial legal advice raising concerns with the adequacy of the definition of 'property developer'.

This ambiguous definition will leave many industry participants uncertain as to whether or not they- and their close associates- are captured by the Bill's provisions.

Should the Government pursue the Bill's aim of banning donations from property developers, then a clearer definition is required to ensure there is an unquestionable delineation between who is, and is not, considered a 'property developer'.

A number of concerns with the definition and provisions proposed within the Bill have been highlighted within this submission.

The Property Council thanks the Committee for the opportunity to provide a submission into the inquiry process, and seeks the Committee's support in achieving a better legislative outcome.

THE PROPERTY INDUSTRY'S CONTRIBUTION TO THE QUEENSLAND ECONOMY



CREATING JOBS - PROPERTY IS QLD'S SECOND LARGEST EMPLOYER

240,000 JOBS

PROPERTY INDUSTRY



147,000 JOBS
MANUFACTURING



70,00 JOBS
MINING



The property industry employs more people than mining and manufacturing combined

BUILDING PROSPERITY BY PAYING \$14.7 BILLION IN WAGES & SALARIES

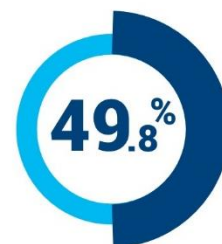


1 IN 6 PEOPLE

IN QUEENSLAND DRAW THEIR WAGE DIRECTLY AND INDIRECTLY FROM PROPERTY

\$9.9 BILLION IN TAXES

PROPERTY IS THE LARGEST SINGLE INDUSTRY CONTRIBUTOR PAYING 49.8% OF QUEENSLAND TAXES, LOCAL GOVERNMENT RATES, FEES AND CHARGES



LEGITIMACY OF PROPOSED DONOR PROHIBITIONS

The Property Council holds that the proposed prohibition on political donations from property developers is a significant departure from the current model of electoral finance regulation in Queensland.

Existing transparency measures provide Queenslanders with a real-time picture of which individuals and entities are financing political campaigns, allowing informed voting decisions.

Quarantining corporations and individuals from one industry sector for unbalanced treatment, will represent a major restriction on the democratic rights of many Queenslanders. The move also opens the door to further expansion of this restriction in future parliaments.

The Property Council contends that this step should not be taken without careful consideration of the evidence, broader issues of electoral probity, and alternate regulatory solutions.

INFRINGING THE FREEDOM OF POLITICAL COMMUNICATION IMPLIED IN THE COMMONWEALTH CONSTITUTION

The High Court of Australia determined, in the 2015 *McCloy & Others v State of New South Wales* decision, that restricting political donations burdens the implied freedom of political communication in the Commonwealth constitution, and that the purpose and the means of such restrictions must be legitimately justified.

While the *McCloy* decision upheld the validity of the *NSW Electoral Funding, Expenditure and Disclosures Act 1981*, the decision rested on a body of evidence from eight adverse NSW Independent Commission Against Corruption reports in relation to development decisions. The High Court held that this evidence was

sufficient to legitimise burdening the constitutional freedom.

No such body of evidence exists in Queensland to justify the provisions in this Bill. The Crime and Corruption Commission (CCC) Operation Belcarra Report, which has triggered the creation of this Bill, did not present any findings in relation to property developer donations influencing government decisions. Instead, the report recommended a prohibition of property developer donations at a local government level based purely on perception concerns.

When considering whether there is sufficient evidence to justify the restriction of political donations in Queensland, it is important to note that the Operation Belcarra report has made no recommendations in relation to banning donations at a State Government level.

The Property Council encourages the Committee to consider if the Operation Belcarra report is sufficient evidence to meet the *Lange test* used by the High Court to determine the legitimacy of restrictions on the freedom of political communication.

REQUIREMENT FOR A BROADER INVESTIGATION

The CCC *Operation Belcarra* investigation was limited to four of the fastest-growing local government areas in Australia – Logan, Gold Coast, Ipswich and Moreton Bay. This investigation, conducted in the corner of the state where concerns about growth are most acute, unsurprisingly discovered poor public perceptions of developer influence on Council decisions.

The Property Council contends that a broader investigation, undertaken in accordance with the Palaszczuk Government's election

commitment to ‘...**hold a public inquiry into links, if any, between donations to political parties and the awarding of tenders, contracts and approvals**’, would have uncovered probity concerns more widespread than just the development sector.

The Property Council notes that the Government has indicated that this commitment is ‘In Progress’ in its June 2017 Progress Report on Government election commitments. However, there appears to be no publicly available evidence that such an investigation is being undertaken. The CCC have confirmed in correspondence with the Property Council (Appendix A) that Operation Belcarra was not a wide ranging public inquiry as proposed in this commitment.

There are many other entities or individuals that could be perceived to benefit from political donations, and indeed many have been the subject of media attention:

- » In 2016, the Australia Institute called for a public inquiry to investigate the mining sector’s influence on government, following perceptions of undue influence on decision-making in Queensland.
- » Also in 2016, decisions regarding ethanol in fuel legislation in NSW were brought into question in parliament and the media, when a major ethanol provider in the state was revealed as a political donor.
- » The role the Construction, Forestry, Mining and Energy Union (CFMEU) played in one of the candidate’s campaigns in the 2016 local government election, is the subject of an ongoing CCC investigation.
- » Donations made by the Australian Workers’ Union (AWU) to various political candidates and political campaign groups have this week been made the subject of an Australian Federal Police investigation.

- » The influence of the gambling industry and the perceived importance of poker machine revenue to various levels of governments has also this week been the subject of debate in the media and Federal Parliament.

With the perception of influence of so many other industries also in the public realm, it is highly foreseeable that a wider-ranging review of political donations would have led to a prohibition affecting a broader cross-section of stakeholders.

In NSW, for example, the prohibition on donations not only covers property developers, it has also been deemed appropriate to ban donations from tobacco, liquor and gambling industry business entities.

This Bill seeks to implement the CCC’s Operation Belcarra recommendations, which, as confirmed by the CCC, are based solely on an investigation undertaken of four local government areas, and donations received within the context of a local government election (Appendix A).

The Property Council has previously called on the Government to invite the CCC to conduct a wider-ranging investigation with a scope covering the State Government level, and all local jurisdictions.

The Property Council calls on the Committee to instigate a recommendation that a wider-ranging investigation of political donations is undertaken.

ALTERNATE REGULATORY SOLUTIONS

A more comprehensive investigation of the probity of political donations could provide recommendations on a wider array of regulatory solutions than blanket donation prohibitions.

Measures used in other jurisdictions such as donation caps, campaign expenditure caps,

and lower disclosure thresholds could all be explored as more effective means of achieving the stated objectives of this amendment bill.

While the CCC *Operation Belcarra* report found no evidence of developer donation impropriety, it did uncover non-compliance with disclosure requirements, deficiencies in the compliance and enforcement framework and the use of third party entities to obscure donations.

The State Government has already taken action to increase transparency, including introducing real-time reporting and lowering disclosure thresholds, but it is clear that there are further opportunities to increase public confidence in the system outside of the blunt option of donation prohibitions.

DEFINITION OF A *PROPERTY DEVELOPER*

The Property Council contends that the definition of a 'property developer' proposed in the Bill manages to simultaneously be too broad and too narrow.

The definition captures many individuals who stand to receive no benefit from a political donation, yet excludes many that the community would consider to be engaged in property development.

While recognising that the definition has been adopted from the NSW *Electoral Funding, Expenditure and Disclosures Act 1981*, the Property Council encourages the Committee to consider refining this imprecise definition to better align with the stated objectives of the Bill.

REGULAR PLANNING APPLICATIONS AS A DETERMINANT

In essence, the Bill proposes to use the regular making of planning applications as the grounds for determining who is a 'property developer'.

It is important to note that the vast majority of planning applications made in Queensland have no political involvement in their assessment. Given that the objective of the amendment is to increase perceptions of probity over political decision-making, the broad application of the prohibition on donations to those engaged in the types of planning applications that receive no political involvement is clearly excessive.

Further clarity is needed to ensure that participants in the Queensland property industry can clearly identify if they are or are not prohibited through this definition.

The Property Council encourages the Committee to seek clarity from the

Government on what constitutes 'regularly', a term not defined in the Bill.

A typical interpretation of 'regularly' would suggest uniform intervals of time between events. However, it is entirely unclear as to how frequently a corporation would need to make planning applications to meet this definition.

While it would be impractical to apply the definition to all who make planning applications, it is worth noting that *regularity* is not in itself a suitable measure for the purposes of this definition. A corporation may stand to receive significant benefit from a government decision made in relation to a solitary planning application.

The Property Council notes that the definition makes reference to the residential or commercial development of land, but does not define these concepts. A reasonable interpretation of this definition could exclude entities that are engaged in development of assets that are not residential or commercial in nature, such as educational or institutional assets.

The proposed definition also requires the ultimate purpose of the planning applications to be the sale or lease of the land for profit. Greater clarity is needed on whether this provision excludes community sector or not-for-profit developers who may have varied levels of revenue from different projects or seek to make minimal income.

Another clear gap in the proposed definition is entities that derive income from the sale or lease of land for profit that do not submit planning applications. These entities may receive significant benefit from government planning decisions, yet are not excluded from

political contributions through this Bill. The Property Council notes several entities which meet this profile are regular political donors in Queensland.

The definition of a property developer, as drafted, will have a significantly broader impact than is intended. How the Bill will apply to a franchisor corporation, such as Subway or Brumbys, is illustrative of this point.

While these types of corporations would not be considered property developers by a reasonable observer, many do regularly lodge planning applications on behalf of franchisees.

Assuming the franchisees are not a related body corporate to the franchisor, and the central corporation is leasing the development to the franchisee for profit, this corporation will be prohibited from making political donations in Queensland. As will the corporation's directors, officers, and their spouses.

The Property Council contends that there are considerable flaws in this definition, and the period of consultation on this Bill has been insufficient to accurately determine all the unintended consequences of the current drafting.

APPLICATION TO PLANNING PROFESSIONALS

The Bill's definition of a property developer will also capture professional planning entities which provide services to property developers.

The Property Council contends that town planners, who regularly lodge planning applications on behalf of clients - but do not have an interest in the corporation that is developing the land, should not be regarded in the same vein as developers.

These entities provide professional advice to developers similar to lawyers, financial

advisors, marketing and advertising specialists and many other consultants used in the development process. Limiting the democratic rights of these professionals appears to bear no correlation with the purpose of the Bill.

APPLICATION TO STATE AND LOCAL GOVERNMENT DEVELOPMENT ENTITIES

The Bill, as drafted, has implications for State and Local Government owned development entities, the elected representatives responsible for their governance, public servants involved in their operation and their spouses.

Government-owned or corporatised development entities are commonplace in Queensland. The Department of Infrastructure, Local Government and Planning website describes Economic Development Queensland (EDQ) as a "specialist land use planning and property development unit." SunCentral Maroochydore Pty Ltd is a development entity wholly owned by Sunshine Coast Council, with a remit to develop property within the Maroochydore City Centre Priority Development Area. South Bank Corporation is another example of a government-owned entity with a property development function.

Given that these entities have or will regularly submit planning applications and seek to make a return from their activities for the benefit of taxpayers, the Boards, Directors and Officers of these entities - and their spouses - would all be defined as 'property developers' under the definition proposed in the Bill.

The shareholder or responsible Ministers and Councillors for these entities would also be captured by the definition of a 'close associate'. While the Bill would enable these individuals to donate to their own campaigns, perversely, their spouses would be prohibited.

EXTENT OF THE 'CLOSE ASSOCIATE' STATUS

Section 273(5) provides a broad definition of what constitutes a 'close associate' of a property developer corporation. The Bill will preclude these individuals from making political donations in Queensland.

The definition of a close associate used would have the effect of the restricting the democratic rights of thousands of Queenslanders, many of which derive little or no benefit from government decision-making in relation to development.

The Property Council contends that the prohibition on spouses of directors or officers of a property development corporation is out of step with modern cultural expectations of how individuals should not be defined by their spouse's occupation or interests.

The Property Council encourages the committee to seek a more robust and targeted definition of a property developer in the Bill.

A credible alternative policy solution to legislating a complex and imperfect exclusion of one industry sector, would be creating more stringent and transparent electoral donation regulations that can be applied to across the board.

As the Property Council has made clear, there are many political donors outside of the property industry over which there are poor community perceptions of the probity of their contributions. A broader, consistent, evidence-based approach to campaign finance reform would be encouraged.

PROCEDURAL AND TECHNICAL CONCERNS

RETROSPECTIVITY

The Property Council is concerned that the Bill's provisions are to be imposed retrospectively from the date of introduction.

While noting that the retrospective application of this Bill's provisions will not regard donations made or received between introduction and commencement as an offence, the imposition of retrospective obligations on Queenslanders is contrary to best-practice legislative principles.

As the Bill is not yet passed, any entity or individual who wishes to seek a Section 113 determination from the Electoral Commissioner that they are not excluded from making donations, would be unable to. Therefore, these individuals and entities will remain in a legal limbo until these amendments come into effect.

LIMITED CONSULTATION PERIOD

The two-week period provided for submissions to this inquiry is insufficient for a genuine analysis and response from affected stakeholders.

Provisions within the Bill have serious long-term implications for Queensland's electoral system, and should have been afforded a greater period of consideration and consultation.

The Property Council is concerned that this limited consultation period will result in hidden flaws within the Bill not becoming apparent until the amendments come into effect.

APPENDIX A

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**Crime and Corruption
Commission**
QUEENSLAND

Our Reference: CO-17-1486 / 17/187820
Contact Officer: PXB

17 October 2017

Mr Chris Mountford
Queensland Executive Director
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By Email: cmountford@propertycouncil.com.au

Dear Mr Mountford

RE: OPERATION BELCARRA - PUBLIC REPORT

I refer to your letter of 16 October 2017 and I advise as follows.

Operation Belcarra was an investigation into allegations of corruption regarding four local councils – Gold Coast City Council, Ipswich City Council, Moreton Bay Regional Council and Logan City Council. The Crime and Corruption Commission (CCC) did receive similar complaints in relation to other councils however these complaints were not part of Operation Belcarra.

In drafting its public report, the CCC examined information from the Electoral Commission Queensland regarding donations and their disclosure across all Queensland councils. Some relevant findings from the CCC's analysis are discussed on page 44 (relating to the value of donations received by candidates in different council elections) and pages 65 and 66 (relating to candidates who failed to submit a donation disclosure return). The information examined by the CCC related only to the 2016 local government elections.

Operation Belcarra did not investigate any allegations in relation to State Government issues. The recommendations in the public report were directed towards local government reform, although a number of the recommendations could be equally applicable at other levels of government.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Paxton Booth'.

Paxton Booth
Director
Office of the Executive Director, Corruption

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