

# Decision by Electoral Commissioner regarding Spence matter



## STATEMENT OF REASONS

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### Decision

In relation to the prohibited donors scheme (PDS) and the High Court of Australia's (HCA) decision in the *Spence v State of Queensland* matter, the Electoral Commissioner will exercise the statutory discretion that exists under sections 276 and 308 of the *Electoral Act 1992* to not recover amounts payable as a debt due to the State from political parties, subject to the Commissioner being satisfied that specified conditions have been met.

This decision is based on careful consideration of the legal implications of the HCA's decision, the statutory powers and responsibilities of the Electoral Commission of Queensland (ECQ) under its enabling legislation, and public interest considerations related to the potential courses of action available on this matter. Further details of these considerations are outlined below.

### Background

On 21 May 2018, the Queensland Parliament passed laws prohibiting property developers making donations to political parties registered in Queensland, candidates and third parties. The laws commenced on 2 October 2018 with retrospective application from 12 October 2017.

Prior to the commencement of Queensland's prohibited donor laws, Mr Gary Spence, the then President of Liberal National Party (LNP) commenced proceedings in the HCA challenging the validity of the prohibition (*Spence v State of Queensland*).

On 1 January 2019, the Commonwealth Government enacted laws regarding the regulation of gifts and donations to political parties and third parties operating in Federal and State elections. Essentially, the Commonwealth provisions, namely section 302CA of the *Commonwealth Electoral Act 1918*, enabled Queensland political parties to receive otherwise unlawful donations from property developers, if those donations were either designated to be used for Commonwealth electoral purposes, or might be used for such a purpose. The ECQ communicated to stakeholders stating that gifts from property developers designated for Commonwealth electoral purposes would be treated as protected by the Commonwealth law and therefore not caught by the PDS.

On 17 April 2019, the HCA made orders in relation to *Spence v State of Queensland*. The HCA found that section 302CA of the amended *Commonwealth Electoral Act 1918* was wholly invalid. Therefore, section 302CA of the *Commonwealth Electoral Act 1918* is treated as though it was never enacted.

The HCA ruling means that any donations received by Queensland registered political parties between 1 January 2019 and 17 April 2019, from prohibited donors and regardless of whether it was intended for use for a State or Commonwealth purpose, are unlawful and may be recovered by ECQ as a debt to the State in accordance with sections 276 and 308 of the *Electoral Act 1992*.

## Prohibited donors scheme (PDS)

The PDS was enacted as part of the Queensland Government's response to the recommendations of the Crime and Corruption Commission's (the CCC) report into corruption in local government – *Operation Belcarra: A blueprint for integrity and addressing corruption risks in local government*.

The laws seek to reduce the 'risks of corruption' and the 'perception of corruption' in local government and the State in dealing with applications for relevant planning approvals made by property developers who have made political donations.

## Role of the ECQ

The ECQ is an impartial and independent statutory authority that serves the public interest. The ECQ's compliance and enforcement related work is performed under the authority and powers conferred upon it by law.

The ECQ has the role of the regulator for the PDS and uses a range of compliance and enforcement responses to encourage compliance with electoral laws. In deciding which compliance or enforcement tool (or the combination of such tools) to use, the ECQ's first priority is always to achieve the best possible outcome for the community and to manage risk proportionately.

In accordance with its statutory functions, the compliance and enforcement tools available to the ECQ to prevent funding and disclosure related non-compliance include:

- promoting public awareness of electoral matters via education and information programs;
- providing information and advice on electoral matters to stakeholders including the Legislative Assembly, the government, political parties, elected officials, candidates and the community;
- publishing material on matters that relate to its funding and disclosure related functions;
- taking enforcement action with due regard to public interest considerations that is commensurate with the nature and circumstances of offences; and
- working proactively with stakeholders and other regulators about relevant matters.

## Public interest considerations

The Electoral Commissioner has a discretion in relation to the recovery of unlawful donations pursuant to ss 276 and 308 of the *Electoral Act 1992*. In deciding to exercise this discretion, the Electoral Commissioner has considered:

- the roles and functions conferred upon the ECQ under the statutory framework;
- the reasonable ethical expectations that members of the community have of public bodies in discharging their functions; and
- model litigant standards and principles of natural justice and procedural fairness.

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The public interest considerations that have been taken into account by the Electoral Commissioner in exercising the discretion not to commence proceedings to recover the debts payable, include:

- the risk or perception of corruption, which the PDS seeks to negate, is averted with the return of the gift to the donor;
- the ECQ, as regulator, issued advice prior to the commencement of the Commonwealth laws based on an understanding of the laws as they operated at that time;
- parties acted in good faith and in accordance with ECQ advice, and the receipt of unlawful donations arose from a genuine understanding that the receipt of the donations was lawful at that time; and
- recovery action in the circumstances may jeopardise voluntary compliance and cooperation by stakeholders in the future.

## Conditions

All registered political parties will be required to comply with the following conditions set by the Electoral Commissioner for the discretion to be exercised in the way described above:

- All gifts received by registered political parties from prohibited donors between 1 January and 17 April 2019 are to be returned to the donors. The party is required to provide the ECQ with relevant details of the gift/s and evidence that the gift has been returned to the donor/s.
- All registered political parties will be required to demonstrate general compliance with Queensland electoral laws by providing details required by ECQ to assess compliance.

The Electoral Commissioner will communicate with each of the political parties regarding these conditions. Where instances of non-compliance are identified, the Electoral Commissioner reserves the right to recover unlawful donations and/or take other enforcement action considered appropriate in the circumstances.