



Professor Emerita Anne Twomey

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Senator Louse Pratt,
Chair
Senate Standing Committee on Finance and Public Administration
Parliament House
Canberra, ACT 2600

Dear Senator Pratt,

Please accept this submission on the *Electoral Legislation Amendment (Fairer Contracts and Grants) Bill 2023* (Cth).

While the aim of the Bill is laudatory, it is simultaneously over-inclusive and under-inclusive in its application. It needs to be more focused upon actual corruption, rather than coincidence.

The Bill would insert provisions in the *Commonwealth Electoral Act 1918* (Cth), which have the effect of prohibiting donations to the party in Government by corporations or close associates of a corporation, which have sought to tender to, or enter into a contract with, the Commonwealth, or apply for a grant opportunity, or apply for an approval, licence or permit under a prescribed law (hereafter a 'government approval').

But the Bill does not establish any clear connection between the donation, the application for a government approval and any form of corruption. For example, in those cases where the decision is made by a government official (rather than a Minister), the official is most likely to have no idea whether the corporation, or any of its directors, significant shareholders or their spouses had ever made a donation to the party in Government. It is therefore likely that in such cases no corrupt influence was involved. Equally, the corporation which seeks the government approval may also have no idea that the spouse of one of its directors had made a political donation to the party in government.

There seems to be an automatic (and unjustified) assumption that all political donations are made for the purpose of causing corrupt conduct and that government contracts, grants, etc, are made for the corrupt advantage of political donors. While these things may well occur in some instances, it is over-inclusive to include all contracts, grants, permits, etc, especially where Ministers are not involved as final decision-makers.

Further, it seems to be assumed that corruption only applies where such donations are made to the party in government. It is interesting that the Bill does not touch donations to Independents or minor parties who may hold the balance of power and who may use that power to persuade the Government to do special 'deals' for their constituency, including the approval of grants in their constituency, which may benefit their donors. To this extent, the Bill is under-inclusive and does not pick up a potentially ripe form of corruption.

A further concern I have with the Bill is the underlying sexism upon which it is based. It rests on the assumption that the spouse of a director or other officer of a corporation or of a person with more than 20% of the voting power in the corporation, is a proxy or stooge for their spouse. This is derived from historic assumptions that the husband has the power and the money, and his wife is the ‘little woman’, who just does what he says and is allocated money by him to do his bidding, by making a donation as a proxy for him. Surely in this day and age this assumption can be dropped? Why shouldn’t each spouse be treated as an independently minded person who has their own political views and their own income? Why shouldn’t they have the freedom to make political donations as they wish without having to account to their spouse for it or be treated as a proxy for their spouse? I am aware that this is a long-standing anti-avoidance measure from days when men would indeed use their wife and children to get around laws that impose financial limits, but such assumptions should no longer be made as the world has fundamentally changed since then.

To illustrate the inappropriate breadth and narrowness of this Bill, below are two hypothetical examples (with all names, characters and corporations made-up).

Example A: Rob is a school principal and sits on a number of boards of charities. One of these charities, Civics Australia Ltd, was asked by the Commonwealth Department of Education to tender for a contract to provide neutral civics material during a forthcoming referendum campaign. It was the only organisation that had the skills and capacity to do so in the short timeframe required. It was granted a contract in the sum of \$2 million. It spent the sum and provided the civics material, as per the contract.

Rob’s wife Ellen is a doctor. She makes donations to a number of bodies including an annual donation of \$2000 to Party A, which has recently been elected to Government. She has never mentioned these donations to Rob, as she knows he has a different political inclination, and she doesn’t want to annoy him. Equally, she doesn’t ask Rob about what happens at each of his charity board meetings.

An Opposition Member, scouring political donation records, realises that Ellen is married to Rob, who is a director of Civics Australia Ltd, and demands that action be taken under the new law. Ellen, as the spouse of a director of a corporation, is a ‘close associate’ of that corporation. Under s 302BA, she became a ‘prohibited donor’ when, unknown to her, Civics Australia made a submission in relation to a limited tender in accordance with the Commonwealth Procurement Rules. Section 302J would have been breached by Ellen because she was a close associate of a corporation and a prohibited donor who made a gift to the political party in government over the disclosure threshold (which in this scenario has been reduced by other legislative reforms to \$1000).

The consequences are that:

- a) Ellen is liable to a civil penalty of 200 penalty units or three times her gift (i.e. \$6000), whichever is the higher;
- b) the contract entered into by Civics Australia Ltd was void; and
- c) Civics Australia Ltd would have to re-pay the \$2 million to the Commonwealth, despite having already spent it all and having delivered the value to the Commonwealth – causing Civics Australia Ltd to become insolvent.

All this would occur despite no corruption being involved. The official in the Department of Education who approved the grant of the contract did so on its merits and without any knowledge that a spouse of a Director had made a donation to the party in Government. Yet the consequences were serious.

Example B: Gertrude is an Independent Member of the House of Representatives. She received large political donations from Carbon Cats Ltd, which engages in carbon capture and storage. When the Commonwealth Government seeks Gertrude's support for a housing Bill, she says she will only support that Bill if the Government approves a large carbon capture and storage project in her electorate and gives a grant of \$20 million to Carbon Cats Ltd to undertake the project. The Government agrees, despite warnings from the Department that Carbon Cats Ltd does not have the capacity to perform the grant and it is not value for money. Despite the corruption involved, the Bill would not address it because the donation is made to an Independent, rather than a 'political entity' of which the 'related political party... is in government' at the time of the donation.

The likely effects of such a law

On the assumption that the disclosure threshold for political donations will soon drop to around \$1000, the effect of this Bill, if enacted, would be to discourage people from making donations to the major parties, if they have any relationship to corporations that might at some stage seek a government approval such as a contract or grant. Alternatively, it would cause them to terminate their role as a director, corporate officer or significant shareholder in any corporation that might seek such a benefit, or pressure their spouse to do so. It would stop, for example, former politicians from sitting on boards of charities and community organisations, if they still intended make personal donations to the political party which they previously represented.

It is not clear why any of this is necessary in circumstances where no corruption is involved. Surely it would be better to focus on actual corruption, where the decision-maker in granting the contract or other benefit takes into consideration the irrelevant consideration of political donations?

Yours sincerely,

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* This submission is a personal view. It does not constitute legal advice and does not represent the views of the University or Gilbert + Tobin Lawyers).