INTEGRITY COMMISSION TASMANIA

OUR REF: 2024/003272

9 July 2024
Ben Foxe, Committee Secretary
Standing Committee on Government Administration B
House of Assembly, Parliament House

By email: assemblygab@parliament.tas.gov.au

Dear Mr Foxe,

Submission - Electoral Disclosure and Funding Amendment Bill 2024 (No. 9)

Thank you for the opportunity to make a submission to the inquiry about the Electoral Disclosure and Funding Amendment Bill 2024 (No. 9) ('the Bill'). I am providing this submission on behalf of the Board of the Integrity Commission.

In making this, submission, we refer you to:

- our first submission in 2018 to the review of the *Electoral Act 2004* (Tas) (the Electoral Act) (**Attachment 1**), and
- our 21 September 2021 submission to the Electoral Act Review: Electoral Disclosure and Funding Bill 2021 and Electoral Matters (Miscellaneous Amendments) Bill 2021 (**Attachment 2**).

Noting the *Electoral Disclosure and Funding Act 2023* (the Act) received royal assent on 11 December 2023, we reiterate our views from 2018 and 2021 that were not incorporated into the Act and that are also relevant to this Bill.

Due to the short time of 2 weeks given for submissions to the inquiry, we are not able to comment on aspects of the Bill that have not previously been raised; that includes restriction of donations to natural persons (clause 6); a general cap (clause 6); expenditure limit (clause 14); and misleading advertising (clause 16).

Clauses 4–5, 12, 15

In accordance with our previous submissions, we agree with aspects of the Bill that require reporting of all donations and in-kind contributions of over $1,000 in value rather than $5,000.

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Clauses 7-11, 13

We agree that the new timeframes proposed in the Bill would enhance transparency and accountability.

We maintain that there should not be a differentiation in timeframes in the Act. If the disclosure timeframe is reduced to 24 hours 'within 7 days before a polling day', we do not see why it should be different at other times. It would be simpler to have one set of immediate disclosure rules that applied at all times.

Yours sincerely,

[redacted]

Julia Hickey
Acting Chief Executive Officer

Enc.

1. Integrity Commission submission 2018 - Review of the Electoral Act 2004
2. Electoral Amendments Bill 2021 – Integrity Commission Submission

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INTEGRITY COMMISSION

Our ref: AD001417
Your ref:

18 July 2018

Ms Kathrine Morgan-Wicks
Secretary
Department of Justice
GPO Box 825
HOBART TAS 7001

By email – haveyoursay@justice.tas.gov.au

Dear Ms Morgan-Wicks,

Review of the *Electoral Act 2004*

Thank you for the opportunity to make a submission to this review. I note that its Terms of Reference are:

- modernising the current Tasmanian *Electoral Act 2004* with specific examination of sections including 191(1)(b); 196(1) and 198(1)(b);
- whether state-based disclosure rules should be introduced, and, if so, what they should include; and
- the level of regulation of third parties, including unions, during Election campaigns.

This submission addresses Term of Reference 2, in which the Integrity Commission has a particular interest.

Political donations and public confidence in government

Political donations can give rise to conflicts of interest, which if not properly disclosed and managed can diminish public confidence in government. In the report of the Queensland Crime and Corruption Commission (CCC) investigation into the 2016 local government elections in that State (Operation Belcarra),[1] the following extract appears:

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[1] Crime and Corruption Commission Queensland, *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government* (December 2017) <www.ccc.qld.gov.au/corruption/operation-belcarra> (Operation Belcarra report).

> *Some other councillors the CCC spoke to during Operation Belcarra were of the view that even direct donations do not necessarily give rise to conflicts of interest. This is contrary to the view of the former Queensland Integrity Commissioner that donations "certainly can" lead to real or perceived conflicts of interests for councillors:*
>
> > *It seems self-evident that a reasonable person would expect that electoral donations are made for a purpose, and that donors will expect that their donations achieve that purpose. Those personal or sectional interests can clearly conflict with the public interest which should be the basis for all public decision-making. (Submission from Richard Bingham, pp. 2–3)*
>
> *The CCC concurs with this position. It seems to the CCC that some councillors are particularly failing to recognise perceived conflicts of interest arising from donations, having little or no regard for how the donations they receive may be seen by members of the public to compromise the performance of their duties.*

I maintain the personal views expressed in that extract. Further, in the Commission's view, the passage encapsulates the reasons why state-based political donation disclosure rules should be introduced in Tasmania, at both State and local government level.

Tasmania – and in particular the Tasmanian House of Assembly – has the least regulated election funding and disclosure laws in Australia.[2] In discussing the Victorian situation, which is not dissimilar to Tasmania, the Victorian Ombudsman has aptly summarised why transparency should be increased:

> *There can be little doubt that the lack of transparency in political donations and the lack of limitations on who can make those donations in Victoria creates an environment in which allegations of improper conduct can flourish. Whether they are substantiated or not, whether such allegations are legitimately made or are made for political mischief-making as is often claimed, is not the point. Ultimately, they create a perception that politicians can be bought, which reduces public trust in government.*
>
> *Equally, this lack of transparency can leave political candidates exposed to unfair allegations that they have received donations for improper purposes. Shielding the state election process from a mire of allegations and hearsay is in everyone's interests – voters, candidates and parties.*[3]

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[2] On the basis of comments made by a committee of the Victorian Parliament in 2009, this would appear to make Tasmania 'amongst the least regulated jurisdictions in the western world in terms of political finance law'; see Electoral Matters Committee of the Victorian Parliament, *Inquiry into Political Donations and Disclosure* (2009) vii.
A useful comparison of disclosure laws across Australia can be found in Appendix A of Dr Damon Muller, *Election funding and disclosure in Australian states and territories: a quick guide* (9 November 2017)
<www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Quick_Guides/ElectionFundingStates>.

[3] Victorian Ombudsman, *Investigation of a protected disclosure complaint regarding allegations of improper conduct by councillors associated with political donations* (November 2015) 3.

Better practice electoral disclosure

In December 2014, the New South Wales Independent Commission Against Corruption (ICAC) published a report on electoral funding, expenditure and disclosure issues.[4] It identified the following features of better practice electoral data disclosure regimes. Disclosures should be:

- timely;
- comprehensive;
- accessible and searchable; and
- intelligible.[5]

The NSW ICAC also proposed some recommendations, which in the Commission's view reflect the following additional important features of an effective political donations disclosure system:

- the principal disclosure obligation should rest with the recipient of the donation, not the donor;[6]
- the electoral oversight body (in Tasmania, the Tasmanian Electoral Commission (TEC)) should be adequately empowered and resourced to ensure compliance with any established disclosure regime.[7] The Commission considers that it is important that the TEC should have adequate powers and resources to fulfil all of its functions, and believes that these would benefit from reassessment; and
- the disclosure regime should extend to third party participants in the electoral process[8] i.e. any entity that incurs expenditure for a political activity relating to an election during the disclosure period for that election.[9]

The Queensland model

The Queensland Government has recently introduced real-time donation disclosure for State and local government elections. All entities conducting or supporting political activity in Queensland are required to submit a disclosure return to the Electoral Commission of Queensland (ECQ). These obligations include 'real time' reporting of gifts and loans, as well as periodic reporting of other dealings such as advertising and expenditure.[10]

The Electronic Disclosure System (EDS) allows candidates, third parties and others with disclosure obligations to enter their donations returns electronically. It also makes these returns readily available to the public, providing faster and easier access to political financial disclosure information.

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[4] New South Wales Independent Commission Against Corruption, *Election Funding, Expenditure and Disclosure In NSW: Strengthening Accountability and Transparency* (December 2014) <www.icac.nsw.gov.au/component/finder/search?q=election+funding&Search>.
[5] Ibid 30-1.
[6] Ibid, recommendation 2.
[7] Ibid, recommendations 3, 7-11 and 14-15.
[8] Ibid, recommendations 16 and 20-22.
[9] *Electoral Act 1992* (Qld) ss 123 and 124.
[10] The relevant legislative provisions are contained in the *Electoral Act 1992* (Qld) Part 11, and the *Local Government Electoral Act 2011* (Qld) Part 6.

EDS requires candidates and groups of candidates to disclose all donations and loans they receive above the disclosure threshold (now $1,000 for State election candidates,[11] and $500 for local government election candidates[12]) within seven business days.[13] Third parties are likewise required to disclose all expenditure and donations above the threshold within seven business days.[14]

The Queensland CCC has commented that 'compared with the previous system of paper-based return forms, the EDS provides disclosure data that is more accessible to and searchable by members of the public and the media, enabling them to better understand the sources of candidates' campaign funds and candidates' relationships with donors'. It notes also that this was demonstrated in the Ipswich City Council Mayoral by-election in August 2017, where media outlets made significant use of disclosure data from the EDS in their election coverage.[15]

In the Commission's view, there would be considerable benefit in the introduction in Tasmania of a similar donations disclosure system to that which has been successfully implemented in Queensland. The maximum level of donations beyond which disclosure is required should be no higher than $1,000.

The Commission notes that, in Victoria, the Electoral Legislation Amendment Bill 2018 (Vic) is currently before the Parliament.[16] If passed, this legislation will reduce the disclosure limit from $13,500 to $1,000 per financial year, establishing a system similar to that used in Queensland. It will also introduce a cap on donations at $4,000 over a four-year parliamentary term.

Possible improvements to the Queensland model

In its Operation Belcarra report, the Queensland CCC flagged some possible improvements to the EDS. These fall into three categories:

- ensuring that donations made in the last seven business days before polling are able to be made known to the voting public prior to the election;
- improving the technical capabilities of the EDS, to permit enhanced searching; and
- ensuring that some other relevant donations data is included in the EDS.

In relation to the first issue, the Queensland CCC commented:

> *The move to real-time donation disclosure is a significant step towards ensuring that members of the public have access to timely information about the sources of political funding to help inform their vote. However, the current legislative framework is such that there is the potential for some donations to still remain unknown to voters before polling day. That is, a donation could be made within the last seven business days before polling day, and this would not have to be disclosed until after the election. The CCC sees this as undermining the*

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[11] *Electoral Act 1992* (Qld) s 201A.
[12] *Local Government Electoral Act 2011* (Qld) s 117(1).
[13] *Electoral Regulation 2013* (Qld) reg 8A; *Local Government Electoral Regulation 2012* (Qld) regs 5-7.
[14] *Electoral Regulation 2013* (Qld) regs 8B-8E; *Local Government Electoral Regulation 2012* (Qld) regs 8-9.
[15] Qld CCC Operation Belcarra report, 73.
[16] Premier of Victoria, *Taking money out of politics* <www.premier.vic.gov.au/donationreform/>.

> *fundamental goal of timely donation disclosure — ensuring that voters can make informed decisions at the polling booth. To address this loophole and ensure there is complete transparency of donations before votes are cast, the CCC recommends that candidates and others be prohibited from receiving gifts or loans in respect of an election from within seven business days before polling day (Recommendation 16). In making this recommendation, the CCC notes that the Broadcasting Services Act 1992 (Cth) permits licensed broadcasting of election advertisements until Wednesday midnight before polling day (see s. 3A, Schedule 2). The CCC considers that any law reform proposals to constrain gifts and loans for the purpose of licensed broadcasting of election advertisements may need to take this into account.*[17]

In relation to possible technical improvements in the EDS, the Queensland CCC commented:

> *While the EDS is undoubtedly a useful tool for increasing the transparency of donations, the CCC considers there is room for improvement. This is to be expected given the system is in its infancy. Particular aspects of the EDS that are currently limited include its:*
>
> - *search functions. The EDS's search functions work well for identifying donations received by an individual candidate, for example, but are difficult to use for more "complex" searches such as identifying donations received by all candidates for a particular election or group of elections (e.g. all of the 2016 local government elections).*[18]
> - *available data. Although a wide range of data is entered into the EDS by disclosers, very little of this is made available to the public on the EDS website.*[19] *Likewise, very few pieces of information are included in the data files generated by the EDS,*[20] *which makes it difficult to identify meaningful trends and patterns in donations. As an example, the data files downloaded from the EDS for the 2016 elections do not indicate what council or position (i.e. mayor or councillor) a person was a candidate for, nor do they distinguish between donations received by candidates and donations received by others (e.g. third parties).*
> - *analytical tools. The EDS includes a mapping function, but this only maps donations according to the electorate of the donor (not, for example, for all candidates contesting a particular election). No other tools (e.g. interactive charts, graphs) are provided that may help users in exploring and understanding the data.*

In terms of the donations data which should be entered into the EDS, the Queensland CCC suggested the following enhancements, which it suggested would help to further align

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[17] Qld CCC Operation Belcarra report, 73.

[18] It is possible to search for donations for a particular election (e.g. the 2017 Ipswich mayoral by-election), but this also retrieves irrelevant donations received during the same period (e.g. donations received by state MPs and political parties).

[19] For example, donation recipients are required to give a description of the donation (e.g. whether it was a gift of money or in another form), donors are required to state whether or not they are passing the donation on for someone else, and third parties reporting expenditure are required to state the description and purpose of the expenditure and give the details of the supplier who was paid. However, none of this information is displayed to the public.

[20] Search results from the EDS can be downloaded in both PDF and CSV format. The only information included in these files is the donor's name, the recipient's name, the date the gift was made, the donor's electorate and address and the value of the donation.

Queensland's scheme with international best practice examples, including the New York City Campaign Finance Board and the United States Federal Election Commission:

- *For donations made by an individual, the individual's occupation and employer (if applicable; Recommendation 18, part a). This is consistent with disclosure requirements for federal elections in the United States and New York City elections, and would allow the public to better understand the types of interests, industries and companies associated with individual donations.*
- *For donations made by a company, the names and addresses of the company's directors and a description of the nature of the company's business (Recommendation 18, part b). This too would help the public to more readily identify the industries behind donations, as well as increase transparency in situations where the same individual is behind donations from different companies.*
- *For all donations, a statement as to whether or not the donor or a related entity currently has any business with, or matter or application under consideration by, the relevant council (Recommendation 18, part c). The CCC considers this important for making connections between donors and council decision-making more transparent (see further discussion in Chapter 13).*
- *For expenditure incurred by a third party (including donations), details about which candidate, party or agenda the expenditure was used to support or oppose, and information about who the expenditure was actually paid to (Recommendation 19). The CCC considers that this would lead to the disclosure of more useful data than the current requirement to disclose "the purpose" of an expenditure, which is vague and open to interpretation.*[21]

Whether donations from particular interests should be banned

In New South Wales, property developers and representatives of the tobacco, liquor and gambling industries are not permitted to make political donations.[22] In Victoria, organisations that hold licenses related to casinos and gaming are banned from making donations to a political party exceeding $50,000 in a financial year.[23] There are also foreign donation restrictions in both Queensland and New South Wales.[24]

The Queensland CCC in its Operation Belcarra report recommended that property developer donations to local government candidates should be prohibited. Recommendation 20 of that report proposed the banning of donations from property developers for local government election candidates, third parties, political parties and councillors.[25]

In response to Recommendation 20, in May 2018 the Queensland Parliament passed *the Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018*. This Act implements the recommendation to ban donations from property developers for to local government election candidates, third parties, political parties

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[21] Qld CCC Operation Belcarra report, 75.
[22] *Electoral Funding Act 2018* (NSW) *ss 51–56.*
[23] *Electoral Act 2002* (Vic) s 216.
[24] *Electoral Act 1992* (Qld) ss 267–270; *Electoral Funding Act 2018* (NSW) s 46.
[25] Qld CCC Operation Belcarra report, 78.

and councillors. However, the Act also extends the prohibition to political donations made by property developers to Members of State Parliament.

It is appropriate to consider whether similar restrictions should form a part of any political donations disclosure scheme introduced in Tasmania. While the Commission appreciates the benefits of such prohibitions in some situations, it considers at this stage that the operation of the NSW and Queensland provisions should be monitored. It believes that the introduction of transparency through a scheme modelled on the Queensland EDS is a reasonable first step, and that further measures should be introduced if that does not deliver the necessary public confidence.

Summary

In my opinion, state-based disclosure rules should be introduced in Tasmania. They should:

- require reporting of all donations and in-kind contributions of over $1,000 in value within seven business days;
- apply at both State and local government level;
- allow for electronic reporting;
- place disclosure obligations on the recipient of the donation and the donor, with the principal obligation being on the recipient;
- extend to third party participants in the electoral process;
- require ongoing reporting (i.e. not just require reporting during election periods);
- ensure that donations made in the last seven business days before polling are able to be made known to the voting public prior to the election; and
- ensure that data available to the public is sufficient and adequately searchable.

The electoral oversight body should be adequately empowered and resourced to ensure compliance with these laws.

I would be happy to expand on this submission if that would assist.

Yours sincerely,

Richard Bingham

CHIEF EXECUTIVE OFFICER

Electoral Act Review: Electoral Disclosure and Funding Bill 2021 and Electoral Matters (Miscellaneous Amendments) Bill 2021

Submission

23 September 2021

Background

Thank you for the opportunity to make a submission to this review. I am providing the submission on behalf of the Board of the Commission.

In making this, submission, we refer you to our first submission in 2018 to the review of the *Electoral Act 2004* (Tas) (the Electoral Act), which addressed Term of Reference 2 (*whether state-based disclosure rules should be introduced, and, if so, what they should include*). Our views on these matters have not changed since that submission. Some of the suggestions we made in that submission have been incorporated into the bills. We have summarised our position, and our understanding of the bills, below.

Even if the new system does not fully meet the good practice threshold we suggested, we do note that the bills together establish the potential for vast improvement to the current system. What is not clear from the bills is whether and how the Tasmanian Electoral Commission (TEC) will be resourced. Significantly increasing the resourcing of the TEC will be critical to whether the changes introduced in the bills are effective or otherwise.

Addressing our 2018 submission to the Electoral Act Review

In 2018, the Commission said that state-based disclosure rules should be introduced in Tasmania. We made a number of suggestions for how that system should work. We set out below a summary of those suggestions, and our understanding of whether the bills have addressed them.

In 2018, we said that the systems should:

1. *Require reporting of all donations and in-kind contributions of over $1,000 in value within seven business days*

   While the Electoral Disclosure and Funding Bill 2021 requires reporting of donations and in-kind contributions, it sets a higher threshold for disclosure ($5,000) and does not require such timely disclosures.

   We are curious as to the policy position for setting the disclosure threshold at $5,000, rather than the $1,000 recommended by the majority of submissions to the Electoral Act Review and shown as being comparable to most other Australian jurisdictions.[1] There does not appear to be any evidentiary basis for setting a higher threshold; raising the threshold has a

[1] Final Report, page 63.

corresponding outcome of diminishing transparency. We maintain our 2018 position that the threshold for reporting all donations and in-kind contributions should be $1,000.

The timeframes in the Bill are also not entirely satisfactory. They appear to mean that voters will go to the polls not knowing who has donated in the last fortnight of the election campaign period. Similarly, there seems to be no good reason to allow a 6 month declaration period outside of elections. It would be simpler to have one set of immediate disclosure rules that applied at all times.

2. *Apply at both State and local government level*

   The bills do not apply to local government.

3. *Allow for electronic reporting*

   This seems to be provided for in various clauses in the Electoral Disclosure and Funding Bill 2021.[2]

4. *Place disclosure obligations on the recipient of the donation and the donor, with the principal obligation being on the recipient*

   The Electoral Disclosure and Funding Bill 2021 places obligations on both donor and recipient, and clause 33 appears to place the principal obligation on the recipient.

5. *Extend to third party participants in the electoral process*

   The Bill extends to third party participants in the electoral process.

6. *Require ongoing reporting i.e. not just require reporting during election periods*

   The Bill achieves this.

7. *Ensure that donations made in the last 7 business days before polling are able to be made known to the voting public prior to the election*

   The Bill does not appear to require this, given that disclosures during an election period do not have to be disclosed for 7 days, and that the TEC will then have another 7 days to upload the disclosures to its website. Real-time reporting, especially in an election period, would be preferable.

8. *Ensure that data available to the public is sufficient and adequately searchable*

   This appears to be provided for in the Bill.

In 2018, we also stated that the 'electoral oversight body should be adequately empowered and resourced to ensure compliance with these laws', and we reiterate that position now. For legislative

[2] Notably clauses 45(2) and 49.

provisions to be effective, they **must** be supported by an adequate compliance and enforcement regime.

Specific comment: Electoral Disclosure and Funding Bill 2021

Clause 8. Meaning of gift

Gifts by way of a will should be included in the definition of gift. We see no sound policy reason for excluding such gifts, which could bring with them just as much risk and potential for damaging public confidence as other gifts.

In regard to clauses 8(2)(a)–(b), we suggest that these should also apply outside a campaign period. We also see no sound reason for confining them to an election campaign period.

Clause 10. Meaning of reportable political donation

As above we maintain our position that the threshold for reporting donations and in-kind contributions should be $1,000, not $5,000.

Additionally, we note that some of the provisions may create a loophole (others do not), allowing multiple donations to candidates of the same party without declaration. Perhaps a simpler requirement for donors would be a declaration when their donation level (regardless of how many they donate to) crosses the monetary threshold.

Part 3 – Prohibited Political Donations

We submit that other donations could also be prohibited, with just as much rationale as those included in the Bill. It is unclear why these other types of donors have not been included. As stated in our 2018 submission:

> *In New South Wales, property developers and representatives of the tobacco, liquor and gambling industries are not permitted to make political donations.[3] In Victoria, organisations that hold licenses related to casinos and gaming are banned from making donations to a political party exceeding $50,000 in a financial year.[4] There are also foreign donation restrictions in both Queensland and New South Wales.[5]*

Clause 160. Commencement of proceedings for offences

It is unclear from this clause who can initiate prosecutions i.e. it is unclear if the TEC will itself be able to initiate prosecutions. We suggest that it is best this be made very clear in the legislation. Extensive legal issues have emerged in other jurisdictions due to a lack of clarity on this issue in the legalisation of integrity bodies.[6]

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[3] *Electoral Funding Act 2018* (NSW) ss 51–56.

[4] *Electoral Act 2002* (Vic) s 216.

[5] *Electoral Act 1992* (Qld) ss 267–270; *Electoral Funding Act 2018* (NSW) s 46.

[6] For example in Western Australia, see *WA corruption watchdog should be denied prosecution powers, parliamentary committee finds* www.abc.net.au/news/2016-11-17/wa-corruption-and-crime-commission-prosecution-finding/8035790

Specific comment: Electoral Matters (Miscellaneous Amendments) Bill 2021

To provide context for these specific comments, please find attached a short draft research paper authored by the Commission (Attachment A). We intend to release a final version of this paper in the future however for now the draft paper remains confidential. We would be happy to discuss the content of this draft paper if you require. We leave it to others, most notably the DPP and the TEC, to assess and comment on whether the investigative provisions in the Bill are sufficient.

Corrupt and illegal practices

We note that this Bill does not appear to remove the distinction in the *Electoral Act 2004* between 'corrupt practices' and 'illegal practices'. The language of 'corrupt' and 'illegal' practices is misleading and can inhibit logical debate. Some of the 'illegal practices' in the *Electoral Act* have fines or terms of imprisonment greater than some of the 'corrupt practices'. We suggest that this distinction should be removed.

Clause 20. Section 187 amended (Electoral bribery)

Based on archaic offences that are very rare and difficult to prosecute in modern Australia, we strongly suggest that the *Electoral Act* should include a definition of the following words and phrases used in this clause:

- public
- public policy, and
- promise of public action.

For example, it should be defined whether 'public' includes a post on a personal Facebook page. Without these definitions, we suggest that it will be nearly impossible to prosecute this offence.

Thank you for providing the opportunity for the Board to make a submission on the draft bills – we hope that our comments are useful and go towards any improvement of the bills.

Please contact me if you require any further information or clarification of our submission.

Yours sincerely,

[redacted]

Michael Easton
Chief Executive Officer

(obo the Board of the Integrity commission)

Encl.

ETHICAL CONDUCT AND POTENTIAL MISCONDUCT RISKS IN TASMANIAN PARLIAMENTARY ELECTIONS RESEARCH PAPER SERIES

PAPER 1: TASMANIA'S ELECTORAL ACT OFFENCES AND CAMPAIGN CONDUCT

INTEGRITY COMMISSION TASMANIA

The objectives of the Integrity Commission are to:

- improve the standard of conduct, propriety and ethics in public authorities in Tasmania
- enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with, and
- enhance the quality of, and commitment to, ethical conduct by adopting a strong, educative, preventative and advisory role.

This report and further information about the Commission can be found on the website www.integrity.tas.gov.au

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CONTENTS

1. Introduction

The Integrity Commission (the Commission) is an independent statutory authority established by the *Integrity Commission Act 2009* (Tas) (IC Act). The Commission's objectives are to:

- improve the standard of conduct, propriety and ethics in public authorities in Tasmania
- enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with, and
- enhance the quality of, and commitment to, ethical conduct by adopting a strong, educative, preventative and advisory role.

Section 31 sets out the Commission's educative, preventative and advisory functions. This includes a function to 'undertake research into matters related to ethical conduct', and to 'take such steps as the Integrity Commission considers necessary to uphold, promote and ensure adherence to standards of conduct, propriety and ethics in public authorities'.

As part of that function, the Commission has decided to release a series of research papers about ethical conduct and potential misconduct risks in Tasmanian parliamentary elections. This is the first paper in the series. We have identified the risks discussed in the papers through various means, including through complaints, assessments and investigations, our own research from open source information including from other jurisdictions, and communications to the Commission. Our aim is to ensure that these risks are communicated to the public and to promote discussion about potential solutions.

This paper is about the risk of 'indirect electoral bribery' – colloquially known as 'pork-barrelling' – in Tasmanian parliamentary elections. Indirect electoral bribery is rarely criminal, and would not usually amount to misconduct.[1] Nonetheless, it poses a significant threat to public confidence in government. It is also questionable conduct from an ethical perspective, if not a legal one.[2]

2. Campaign commitments and potential indirect electoral bribery

The *Electoral Act 2004* (Tas) (Tasmanian Electoral Act) contains offence provisions for 'electoral bribery' (section 187) and 'electoral treating' (section 188). Despite their continued existence, these traditional offences are, for a variety of reasons, now virtually non-existent in Australia.[3]

As traditional vote-buying has become less culturally acceptable or effective, electoral candidates in many parts of the world have moved towards a more indirect form of electoral bribery.[4] Modern commentary around elections frequently refers to commitments made by candidates as 'bribery'.[5]

Known colloquially as 'pork-barrelling', indirect electoral bribery is the promise or giving of a benefit to a small or localised group of electors to 'buy' their vote. Academic commentators have also referred to it as 'metaphorical electoral bribery', and 'wholesale electoral bribery' – as opposed to 'retail' (traditional) electoral bribery, which is aimed at an individual.[6] In this paper, we refer to the practice as indirect electoral bribery.

Closely related to this issue is the process of making individual small-scale grant commitments during an election campaign period. This issue will be dealt with in a subsequent paper.

2.1. Australian examples of campaign commitments

The 1977 federal election involved a 'fistful of dollars' advertising campaign by the Liberal Party that was widely referred to as 'bribery'.[7] It involved an advertisement 'showing a fist thrusting forward and clutching a bunch of dollar notes, with the promise of income tax relief'.[8]

Another example is the federal Labor Party 1993 'sports rorts' affair. The affair revolved around a grant program designed to assist local government and community organisations 'to make up the backlog in the provision of basic sporting and recreational facilities'.[9] While the program had been in existence for some years, the grants became suspicious in the lead-up to the 1993 federal election.

The Australian National Audit Office (ANAO) found that then-Minister for Sport, Ros Kelly, had made decisions on the grants; it found that there was essentially no paperwork around the process. The ANAO:

> *noted some anomalies in the approval of grants (worth $29.5m in 1992–93) by the Minister but was unable to resolve them because the reasons for decisions were not adequately documented.*
>
> *For the same reason claims that decisions on the allocation of grants were politically motivated could not be put to rest.*[10]

The ANAO stated that its 'concern lies not with the actual decisions but with the lack of documentation or apparent needs analysis which would justify … the decisions made'.[11] Ms Kelly resigned from her ministerial role several months after the release of the ANAO report.

The ANAO was unable to come to any conclusions about whether Ms Kelly (or her staff)[12] was biased in her decision-making. But subsequent research undertaken by Dr Clive Gaunt suggested that 'priority funding' appeared 'to have been provided to very marginal and marginal government-held seats'.[13]

Similar issues emerged in the 2019 federal election with the 'sports rorts' saga. Unlike the 1993 sports rorts affair, the 2020 version resulted in a clear finding by the ANAO that then-Minister, Senator the Hon Bridget McKenzie, had 'distribution bias' in her decision-making. Specifically, the ANAO found that Senator McKenzie had a bias toward 'marginal' and 'targeted' electorates.[14]

2.2. Tasmanian examples of campaign commitments

Tasmania uses the Hare-Clark electoral system, which is different to that used in the Commonwealth. This means that each Tasmanian House of Assembly:

> *electorate has both government and opposition Members. Accordingly, it is more difficult in the Tasmanian context for a government to disproportionally allocate funds for political advantage. Nonetheless, it is possible to allocate funds in such a manner that it provides support for a marginal candidate or key government member.*[15]

Over at least the last two decades in Tasmanian parliamentary elections, political parties have made a range of small-scale commitments to give money directly to small community groups. These commitments are often referred to as 'grants', and sometimes as 'policies'.

Depending on the processes used in selecting and delivering the funding, these kinds of grants or commitments could be seen as unethical campaign conduct, and potentially indirect electoral bribery. Examples of these grants or policies from the House of Assembly elections in Tasmania held in March 2006, 2010, 2014 and 2018 are set out below.

2006 and 2010 elections

A majority Labor Party government was elected in 2006. In 2010, the Labor Party formed government with the support of the Greens.

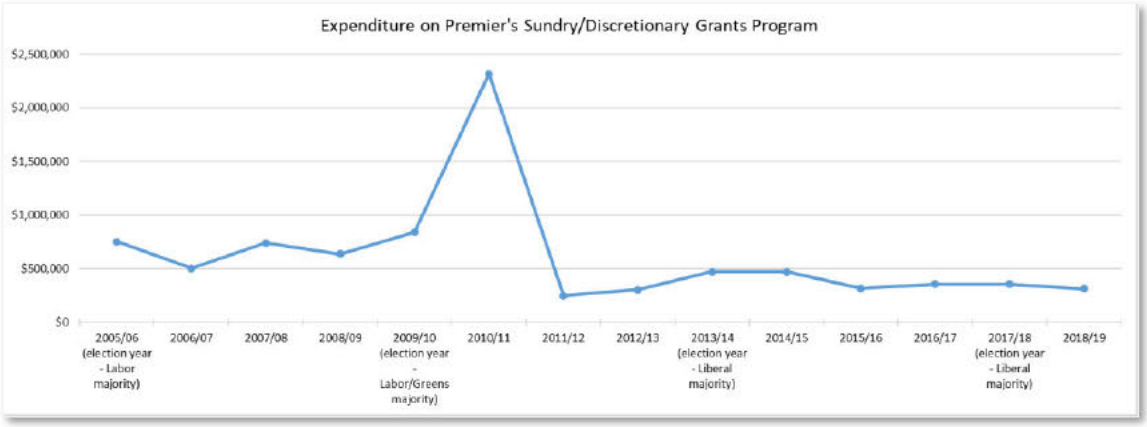
In these elections, the Labor Party made small-scale commitments thorough the Premier's Sundry Grant program, now known as the Premier's Discretionary Fund (PDF). In 2011, the Tasmanian Audit Office released a report critical of the management of the PDF.[16] Recommendations made in that report have not yet been fully adopted.[17]

The graph at Figure 1 below shows the expenditure on the PDF since the 2005–06 financial year to the 2018–19 financial year.[18] The spike in expenditure by the Labor government the year after the 2010 election is noticeable.

The Tasmanian Audit Office stated that 'in 2010–11, the [PDF] budgeted value was increased from $640,000 to $2.32 million. This increase was mainly to fund promises made during the 2010 election'.[19] Examples of grants given out in 2009–10 under the PDF by the Labor government included:

- $2,680 to the North West Remote Control Car Club 'towards the purchase of a 20-foot container'
- $4,000 to the Nubeena Church of Christ 'towards equipment for their new shed'
- $3,000 to the Australian Yard Dog Association 'towards the Australian Yard Dog Championships 2009'
- $10,000 to the Beaconsfield Cricket Club 'towards the purchase of new clubrooms'
- $5,000 to the Bream Creek Show Society 'towards an electricity upgrade', and
- $10,000 to the Circular Head Progress Group Inc 'towards the establishment of the Circular Head Progress Group Inc'.[20]

Figure 1. Expenditure on Premier's Discretionary Grants Program



2014 and 2018 elections

The government changed in 2014, with the Liberal Party elected to form a majority government. The Department of Premier and Cabinet 2014–15 annual report discusses a series of commitments made by the Party in the March 2014 election.[21] It says that the Department administered 87 election commitment grants to community organisations. The value of these commitments was $7.3 million,[22] although elsewhere the figure cited is over $8.6 million.[23]

The commitments ranged in value from $750,000 to Burnie City Council 'towards the Burnie Pool project', down to $1,650 to Devonport Community House Inc 'towards the Devonport Community House Inc Men's Shed'.[24]

In 2018, similar commitments made by Liberal Party candidates together amounted to approximately $21.4 million. Totalling $8,814,759, the appendix to the DPAC 2017–18 annual report lists 262 separate commitments under the heading '2018 Election Commitments – Recipients'.[25] Another 41 commitments totalling $9,833,000 were given out in the 2018–19 financial year.[26]

The 2017–18 commitments ranged in value from $500,000 to the Kingborough District Cricket Club 'towards an extension of the grandstand', down to $2,000 to the Scouts Australia Tasmanian Branch 'towards scout group trailer boxes'.

The commitments were to various organisations, including many sports clubs. There are many football, cricket, netball and bowls clubs on the list, but also other sports such as golf, gymnastics and shooting. There are also commitments to government departments – including the Department of Education and the Department of State Growth, to various local government councils, and to religious and other community groups.

3. Electoral bribery

3.1. Current Electoral Act offences

The offence provisions in the Tasmanian Electoral Act for 'electoral bribery' (section 187, Figure 2) and 'electoral treating' (section 188, Figure 3) are set out below in full. Under the Act, electoral bribery and electoral treating are 'corrupt practices'.[27]

The electoral bribery offence is different to bribery offences like those found in the *Criminal Code Act 1924* (Tas). Most Australian jurisdictions have similar provisions in their electoral acts. The basis of this offence, and the traditional understanding of electoral bribery, is a candidate supplying an elector with money, gifts or some other form of benefit in return for their vote.

Electoral treating is a similar offence, although it is traditionally understood to specifically relate to the supply of food or drinks in return for a vote. In Tasmania, electoral treating includes to 'offer, promise or give a gift, donation or prize to or for any person, club, association or body'.[28]

The electoral treating offence flows from Commonwealth legislation introduced in the early 1900s. Records[29] show that the offence was introduced because parliamentarians were being 'pestered around election time by associations who … had come to expect such customary tributes'.[30] The MP that 'fathered' the provision even referred to it as 'blackmail' by community groups.[31]

A person found guilty of either offence is 'punishable on indictment under the *Criminal Code*',[32] and 'liable to a penalty of a fine not exceeding 100 penalty units or imprisonment for a term not exceeding 2 years, or both'.[33] It appears that this would change if Parliament approved the current version of the Electoral Matters (Miscellaneous Amendments) Bill 2021.[34]

Figure 2. Section 187 of the Tasmanian Electoral Act

187. Electoral bribery

(1) A person must not directly or indirectly –

(a) promise or offer; or

(b) give; or

(c) ask for or receive –

any property or benefit of any kind with the intention of influencing a person's election conduct at an election.

(1A) Subsection (1) does not apply to any property or benefit if the value of that property or benefit does not exceed three fee units.

(2) For the purposes of subsection (1) –

election conduct, in relation to a person, means –

(a) whether or not the person votes; or

(b) who the person votes for; or

(c) whether or not the person nominates as a candidate for election or withdraws his or her nomination; or

(d) whether the person expresses support for or opposition to a candidate or group of candidates; or

(e) whether or not the person lodges an application under section 205 or applies to withdraw an application under section 214 ; or

(f) the performance or exercise by a member of the Commission, a returning officer, an election official or a member of the staff of the Commission of his or her functions or powers under this Act.

(3) A person who contravenes or fails to comply with subsection (1) is guilty of the crime of electoral bribery, punishable on indictment under the *Criminal Code*.

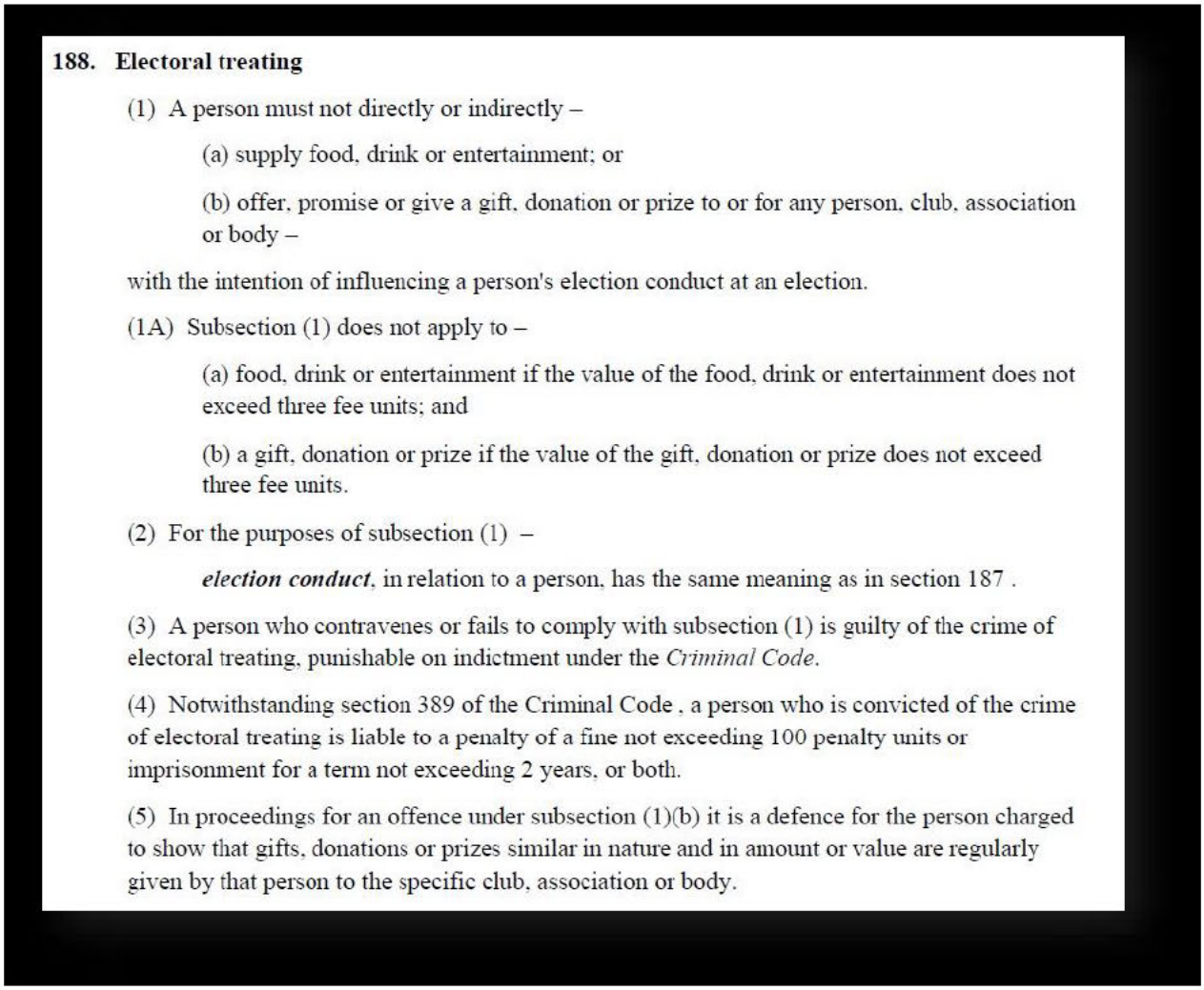
(4) Notwithstanding section 389 of the Criminal Code , a person who is convicted of the crime of electoral bribery is liable to a penalty of a fine not exceeding 100 penalty units or imprisonment for a term not exceeding 2 years, or both.

(5) The crime of electoral bribery does not include –

(a) a declaration of public policy or promise of public action; or

(b) transporting electors to or from polling places for the purpose of voting.

Figure 3. Section 188 of the Tasmanian Electoral Act



188. Electoral treating

(1) A person must not directly or indirectly –

(a) supply food, drink or entertainment; or

(b) offer, promise or give a gift, donation or prize to or for any person, club, association or body –

with the intention of influencing a person's election conduct at an election.

(1A) Subsection (1) does not apply to –

(a) food, drink or entertainment if the value of the food, drink or entertainment does not exceed three fee units; and

(b) a gift, donation or prize if the value of the gift, donation or prize does not exceed three fee units.

(2) For the purposes of subsection (1) –

election conduct, in relation to a person, has the same meaning as in section 187 .

(3) A person who contravenes or fails to comply with subsection (1) is guilty of the crime of electoral treating, punishable on indictment under the *Criminal Code*.

(4) Notwithstanding section 389 of the Criminal Code , a person who is convicted of the crime of electoral treating is liable to a penalty of a fine not exceeding 100 penalty units or imprisonment for a term not exceeding 2 years, or both.

(5) In proceedings for an offence under subsection (1)(b) it is a defence for the person charged to show that gifts, donations or prizes similar in nature and in amount or value are regularly given by that person to the specific club, association or body.

3.2. Electoral commitments and electoral bribery offences

Electoral bribery

This Tasmanian offence of electoral bribery excludes from its ambit 'a declaration of public policy or promise of public action'.[35]

The Electoral Act does not define 'public policy' or 'promise of public action'. There is very little case law on the provision, despite it being present in several Australian jurisdictions.[36] However, there is some Tasmanian case law suggesting that the public policy exemption is broad.[37] This would likely exclude many examples of indirect electoral bribery.

Electoral treating

The offence of electoral treating is traditionally viewed as involving gifts or donations from private candidate finances, not from central government funds. Again, this means that it would very likely exclude most examples of indirect electoral bribery.

As with electoral bribery, the criminal threshold is difficult to meet when:

- electoral commitments are not contingent on the pledging candidate being re-elected (which could happen in Tasmania's Hare-Clark electoral system), and
- candidates do not make direct requests for votes in exchange for electoral commitments.

This means that it would be hard to prove a candidate had an 'intention of influencing' the election conduct in relation to any kind of electoral commitment.

3.3. When can electoral commitments be electoral bribery?

Perhaps the only Australian example of electoral commitments being found to amount to bribery occurred in New South Wales. The case of *Scott v Martin*[38] involved a challenge to the 1988 election of a candidate in the electoral division of Port Stephens.

In *Scott v Martin*, the Court determined that the candidate had breached the NSW electoral bribery offence provision. On that basis, the Court said that the election was void.

As it was a challenge to the election result – not a criminal charge of the candidate – the standard of proof was 'on the balance of probabilities'. This is a lower standard of proof than would be required for the offences of electoral bribery or treating (which is the criminal standard of 'beyond reasonable doubt').

Background

The candidate (Robert Martin) was endorsed by the Australian Labor Party, which formed the incumbent government. Mr Martin was elected by a margin of only 90 votes over the candidate endorsed by the Liberal Party (Walter Scott).

Mr Martin had made a series of financial commitments, ranging from $2,500 to $10,000, to community and sporting groups during the election period.

The judge, Justice Needham, said that Mr Martin spent the last day of the campaign visiting 5 community groups to distribute the money. Justice Needham said that this showed the candidate 'looked upon this activity as of compelling urgency'.[39]

The money was distributed **before** the election by the incumbent government, in the form of cheques.[40] Justice Needham noted that the Opposition was unable to do this.[41]

Also notable is that the NSW offence of electoral bribery did not exclude from its ambit 'a declaration of public policy or promise of public action'.[42]

Policy?

It is unclear whether Tasmania's 'public policy' exception would have resulted in a different outcome in *Scott v Martin*.

One of Australia's foremost experts on electoral law, Professor Graeme Orr, implies that the case may have been successful even in a jurisdiction like Tasmania.[43] Much would hinge on the Court's interpretation of the phrase 'public policy' or 'promise of public action'.[44]

This is because, although the NSW pledges were arguably 'public', they were also arguably not linked to a policy at all. As Professor Orr notes, policy 'at least where welfare or grants are involved, implies a considered prioritisation of needs, rather than a motley collection of beneficiaries chosen for electoral impact'.[45]

However, contrary to Professor Orr, political scientist and Australia's first electoral commissioner Professor Colin Hughes thought that the public policy exception would have resulted in a different outcome.[46]

Or charity?

Justice Needham referred to the NSW grants as 'gifts'. He cited an 1881 case in which it was said that 'Charity at election times ought to be kept by politicians in the background.'[47]

Professor Hughes echoed this opinion, despite finding that they would likely fall within the public policy exception, by referring to such commitments as 'modern, taxpayer-funded versions of … private charity'.[48] He quoted Justice Needham:

> *The respondent's actions were not, in my opinion, corrupt in the ordinarily accepted meaning of that word; unfortunately, in modern times, there seems to be an accepted view that public moneys are … the unrestricted gift of those in power. In some cases, the temptation is to use such resources for purposes of party political advantage.*[49]

Aftermath

When the *Scott v Martin* judgment was released, Professor Orr recounts that the 'general political feeling seemed to be that the decision threatened the "death of politics"'.[50] Commentators feared the impact it would have on election campaigns.

But the lack of subsequent cases has led Professor Orr to conclude that *Scott v Martin* may well be confined to its facts, or at least to cases where the fund distribution (not just the commitment) also smacked of impropriety.[51]

4. Why is indirect electoral bribery a problem?

According to Professor Graeme Orr, modern 'ethical problems facing Australian politics are … not usually the ones about individual acts of corruption and or malfeasance. They are more likely to involve systemic corrosion'.[52]

Indirect bribery is one example of this systemic corrosion. It could also be called a 'perversion of electoral politics'.[53] Professor Orr comments:

> *Metaphorical electoral bribery reminds us that elections have the potential to pervert some of the democratic and good governance goals they are ostensibly designed to achieve, such as balanced policy making, social progressivism and equality of treatment and opportunity, by creating an auction in which electoral rivals bid for the votes of a narrow class of swinging voters in marginal seats.[54] …*
>
> *The emerging pattern is of governments exercising fiscal rectitude in the first couple of years of the electoral cycle, with a view to amassing an electoral 'war-chest'. Then, in the budget and related measures prior to the election, the government targets spending on electorally sensitive groups.*
>
> *The problem is not so much that some pork-barrelling is going on, or even that it is carefully co-ordinated (though this in itself buys advantage for the incumbent), but that good governance is rendered hostage to the electoral cycle, in an anti-competitive manipulation that is designed to give the opposition little or no room to make counter-balancing promises. …*
>
> *Resentment, manifesting itself in the pejorative 'electoral bribery', is not just jealousy from those who miss out on the bribes because they are not in the target class or seats (i.e. objection to partiality in the name of government), but resentment at the* ***misuse of resources owned by or intended for the collective good being used, for electoral advantage*** *(i.e. objection to partisanship in the name of government).[55]* (emphasis added)

As Professor Orr commented on this kind of political behaviour:

> *The politician can be motivated to reap the partisan or incumbency benefit, provided their action also has a passable 'public' element, benefiting some public group or cause.*
>
> *To 'realists', that is the stuff of politics.*
>
> *To others, it risks over time a corruption of the body politic, as politicians scramble for the spoils of office, leading to a decline in public trust (let alone inefficiencies or distortion in an economic welfare sense in the use of public money).[56]*

It is perhaps unsurprising then that some academics suggest that indirect electoral bribery is 'not necessarily less objectionable' than its traditional form.[57] To put it simply, pork-barrelling of groups of people could be just as unethical as bribing an individual for their vote. It could potentially fall within Transparency International's definition of 'corruption', which includes 'the abuse of entrusted power for … political gain'.[58]

4.1. Why isn't indirect electoral bribery regulated or criminalised?

If it undermines our democratic system, and is 'not necessarily less objectionable' than traditional bribery, why is indirect bribery not (usually) illegal? The two most commonly cited reasons are:

- the difficulty, and dangers, in defining what is and what is not an acceptable campaign commitment, and

- the public nature of campaign commitments.

In the United States, the *United States Constitution* amend I (the First Amendment) has been found to protect such commitments; the key case is *Brown v Hartlage*.[59]

Brown v Hartlage

In this early 1980s case, the candidate (Carl Brown) promised to lower his salary if elected. This is electoral bribery under the common law. When Mr Brown was advised his promise was illegal, he withdrew it. When he was elected, the opposition candidate (Earl Hartlage) petitioned the court to find the election invalid. Initially the petition was upheld, but on appeal this was overturned due to the First Amendment.

The Court came to the view that the public nature of the promise in *Brown v Hartlage* offered 'a strong indication that the statement contained nothing fundamentally at odds with our shared political ethic'.[60]

The purpose of campaign commitments: winning the election

In the majority judgment, Justice Brennen wrote that:

> [c]*andidate commitments enhance the accountability of government officials to the people whom they represent, and assist the voters in predicting the effect … of their vote. The fact that some voters may find their self-interest reflected in a candidate's commitment does not place that commitment beyond the reach of the First Amendment.*
>
> *We have never insisted that the franchise be exercised without taint of individual benefit; indeed, our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare.*
>
> *So long as the hoped-for personal benefit is to be achieved through the normal processes of government, and not through some private arrangement, it has always been, and remains, a reputable basis upon which to cast one's ballot.*[61]

The Court also pointed out that it 'is not the government's function to select which issues are worth discussing in the course of a political campaign'.[62]

As Professor Orr says, on its face the issue is clear: elections are about winning government based on the party's policy. In his thesis, he posits that:

> *The direct regulation of public policy action or promises … is not for the law, but for the political realm. … The public nature of offerings such as tax bribes also means that opponents can critique their economic and social ramifications. Above all, if the candidate or party concerned wins and does not deliver, it faces a backlash.*[63]

Benefits to all

Professor Orr also points out the 'diffuse nature' of many electoral commitments by way of the tax promise analogy: everybody 'who qualifies for the tax break will be entitled to it, without any necessary connection to their voting behaviour'.[64]

In the case of *Brown v Hartlage*, the promise the candidate made was to work at a reduced salary. The benefit – however diffuse – would in theory have flowed to all electors, by reducing their taxes or allowing their taxes to be put to other uses.[65]

The unacceptable or improper commitment

Although the Court found Mr Brown's commitment acceptable, it did say in *Brown v Hartlage* that some electoral promises may be unacceptable. The Court did not decide how to distinguish between acceptable and unacceptable commitments.[66]

In the Australian case of *Bowering v Wells*,[67] Justice Ward stated that, for the offence of electoral bribery to be established:

> *the profit, advancement, benefit, or enrichment promised by the candidate with a view to securing the vote of the elector must be something which it is improper for the candidate to promise.*[68]

However, it is very difficult to define the line between something which is 'improper' to promise and something which is not improper to promise.

Professor Richard Hasen has undertaken some work in trying to establish the difference between proper and improper commitments. In 2000, he published an article that distilled the central rationales for prohibiting traditional electoral bribery.[69] He then applied these rationales to determining whether other forms of vote-buying should also be prohibited. One form of vote-buying he examined was indirect electoral bribery.

Of the different forms of vote-buying examined, Professor Hasen found indirect bribery the hardest to analyse. He used the example of a promise of tax relief to illustrate the difficulties. He found that:

- a promise of tax relief 'targeted at only homeowners with homes valued below $100,000' would be legal, and
- a promise of tax relief for one particular homeowner would be illegal, as it would essentially amount to traditional electoral bribery.

But what, he asks, if it was tax relief somewhere between the two – targeted at homeowners on a particular block or in a particular suburb?[70]

To this we can add the question: what about promises to homeowners in a particular (marginal) seat? Would – or should – these promises be prohibited? Where is the line to be drawn?

As Professor Hasen points out, the public nature of a promise cannot be 'the sole, or even the most important, factor'.[71] This is because even a **public** promise of tax relief to an individual would be prohibited. The academic commentary and American case law that indicates (like the Tasmanian legislation) it is the public nature of the promise that makes the difference[72] is therefore of limited use.

If we draw the line in the wrong place, we risk the fair and free nature of elections. This means that no one has been able to 'construct a viable regulatory deterrent' to indirect electoral bribery 'that does not empty politics of its ability to achieve legitimate trade-offs'.[73]

5. Electoral commission powers and practices

Each jurisdiction in Australia has an electoral commission. The Tasmanian Electoral Commission (TEC) was established by the Tasmanian Electoral Act in 2005. The TEC is headed by the Tasmanian Electoral Commissioner, Andrew Hawkey.

In Australia, the primary function of electoral commissions is the running of elections. However, electoral commissions also have an oversight or regulatory role, and may be 'the single most important factor in ensuring free and fair elections'.[74] Mr Hawkey and the TEC are usually the first stop when electoral bribery or electoral treating are suspected.

5.1. Current Electoral Commission practices

Queries

The TEC reports that during most elections it receives 'queries from candidates and their election agents checking whether a planned event or activity may fall foul of the bribery and treating provisions'.[75] The TEC does not provide legal advice in response. However, it does:

- point people towards the relevant provisions
- always urge caution, and
- advises that 'if in doubt, they should not risk it'.[76]

Complaints

The TEC also receives complaints. A complaint may be made verbally or in writing. Most complaints are not about electoral bribery or electoral treating, but minor technical breaches of the Tasmanian Electoral Act:

> *In these cases the Commissioner needs to weigh up the short and long term needs for the election. Often a significant response during the election period could be seen as impacting on the campaign of the candidates – which may benefit the complainant or provide a perception that the Commission is focussing on one side of the campaign and showing bias.*
>
> *For minor technical breaches, the aim of the Commissioner is usually to remove the breach and allow the election to continue unhindered.*[77]

Nonetheless, since its establishment, the TEC has received regular complaints about electoral bribery and electoral treating during parliamentary elections.[78] Complaints about local government elections are less common, with none received since 2005.[79]

The TEC's practice in relation to such complaints is to:

- make some preliminary inquiries to ensure there is some substance to the complaint, and then
- request legal advice from the Office of the Solicitor-General.

In the case of more serious allegations, the TEC 'will investigate and refer where appropriate'.[80]

TEC records indicate that there has been a rise in bribery and treating complaints during House of Assembly elections since 2005. The TEC's opinion is that:

> *election campaigning has changed rapidly in recent times due to social media and other online communications such as digital news sites and this phenomenon may well be impacting on the number of matters reported to us.*[81]

5.2. Electoral Commission powers in relation to 'corrupt practices'

'Corrupt practices' and 'illegal practices'

The Tasmanian Electoral Act differentiates between 'corrupt practices' and 'illegal practices'.[82] Under the Act, electoral bribery and electoral treating are corrupt practices.

Section 9 of the Tasmanian Electoral Act sets out the TEC's powers and functions. Section 9(1)(f) states (emphasis added):

> *In addition to the functions conferred on it by any other provisions of this Act or any other Act, the Commission has the following functions: …*
>
> *(f) to investigate and prosecute **illegal practices** under this Act.*

There is no similar power in relation to corrupt practices. This doesn't mean that the TEC has no power to investigate corrupt practices such as electoral bribery and treating.

However, the TEC does not have any explicit power, for example, to apply for a search warrant, or demand the production of documents. The only explicit investigatory power given to the TEC in its legislation is the power to require information in relation to election expenditure.[83] The passing of the Electoral Matters (Miscellaneous Amendments) Bill 2021 would appear to remedy this situation.

Prosecuting corrupt practices and illegal practices

Section 237 of the Tasmanian Electoral Act is titled 'Prosecutions for offences involving corrupt or illegal practices':

> *(1) Whenever the Director of Public Prosecutions has reason to believe that a person may have engaged in a **corrupt practice** at an election, whether as a result of a determination under section 215*[84] *by the Supreme Court or otherwise, the Director of Public Prosecutions is to consider the matter with a view to determining whether or not there is sufficient evidence to support a prosecution against that person in respect of the corrupt practice and, if there is such evidence, whether such a prosecution should be instituted.*
>
> *(2) Whenever the Commission has reason to believe that a person may have committed an **illegal practice**, whether as a result of a finding under section 215 by the Supreme Court or otherwise, the Commission is to consider the matter with a view to determining whether or not there is sufficient evidence to support a prosecution against that person in respect of the offence and, if there is such evidence, whether such a prosecution should be instituted.* (emphasis added)

The section is somewhat curious, as the DPP's office is not an investigative body; it is a prosecutorial body. It has no investigative powers or resources. Therefore, in practice, when allegations of this nature are brought to the DPP's attention:

> *they are referred to Tasmania Police for further investigation, if* [*the DPP has*] *formed the view that a person may have engaged in a corrupt practice and such investigation is warranted.*[85]

Local government elections

The *Local Government Act 1993* (Tas) ('LG Act') contains, in section 314, the offence of 'bribery and undue influence'. The offence merges the Tasmanian Electoral Act offences of electoral bribery and electoral treating. It includes a prohibition on candidates promising or giving 'a gift, donation or prize to or for any specific club, association or body or to or for clubs, associations or bodies'.

In contrast to the Tasmanian Electoral Act, the *LG Act* grants the Electoral Commissioner powers of search and demand in relation to the conduct of a local government election. The Electoral Commissioner therefore currently has greater investigative power in relation to local government elections than parliamentary elections.

5.3. A brief survey of other jurisdictions

Nature of electoral commissions

Electoral commissions have a central role in 'maintaining and enhancing electoral democracy',[86] therefore it is vital that they are – and are seen to be – independent and lacking in bias. Some commentators say that their fear of being seen as biased may, at times, lead electoral commissions to be 'timid' in pursuing breaches of their legislation.

In Queensland, the Crime and Corruption Commission (CCC) has conducted an extensive investigation into the conduct of candidates at local government elections. In its 2017 'Operation Belcarra' report, the CCC criticised the Electoral Commission of Queensland's (ECQ) narrow focus on its administrative role, saying that:

> *any role* [*the ECQ*] *might be expected to have in promoting transparency and integrity in the conduct of candidates and other election participants is outweighed by its focus on the administrative side of elections.*[87]

The CCC recommended that the ECQ be given investigative powers in relation to local government elections, along with the resources to support those powers.[88]

Professor Orr argues that an electoral commission's ability to police its legislation 'lies less in organisational form and more in the … mindset required'.[89] In his thesis, he argued that:

> [*e*]*lectoral authorities could also be less timid in respect of investigating and petitioning or prosecuting examples of the buying of electoral support.*
>
> *Without case law, the judicial apparatus cannot cast light on the line between acceptable and improper influence, for example, in instances of cash-for-preferences, or secret deals with lobby-groups or undue media pressure.*[90]

The United States and the United Kingdom have separated the functions of regulating and managing elections into separate bodies. The United Kingdom's commission has search powers, and the power to compel the production of material.[91]

Most Australian jurisdictions do not separate electoral management and regulatory functions. Despite this, few Australian electoral commissions have investigative powers. Apart from the TEC, as at mid-2020, only two had an express and general power to investigate breaches of their legislation.

ACT and NSW electoral commissions

The first is the Australian Capital Territory; section 325 of the *Electoral Act 1992* (ACT) as follows:

> *The commissioner shall—*
>
> *(a) investigate; or*
>
> *(b) refer to the appropriate authority for investigation;*
>
> *any complaint alleging a contravention of this Act, unless the commissioner believes on reasonable grounds that the complaint is frivolous or vexatious.*

Electoral bribery is an offence under section 285 of that Act. As with the TEC, it appears that no specific supportive powers have been granted to the ACT Electoral Commission.

New South Wales is the second jurisdiction that has an express power in relation to breaches. Professor Orr says that the NSW Electoral Commission (NSWEC) successfully combines the two functions of regulating and managing elections.[92]

Under section 10(2)(b) of the *Electoral Act 2017* (NSW), the NSWEC may 'institute proceedings for offences' under a range of Acts, including that Act. Section 209 of that Act contains the offence of 'Electoral bribery, treating and selling of votes'.

Investigative powers – including the power of entry and the ability to compel the production of documents – are granted to the NSWEC by way of section 258 of the *Electoral Act 2017*, through the *Electoral Funding Act 2018* (NSW). The NSWEC has a team of investigators (called 'inspectors') appointed under section 139 of the *Electoral Funding Act 2018*.[93]

The NSWEC may also refer matters to the Independent Commission Against Corruption (ICAC) or NSW Police Force; it has a memorandum of understanding with the ICAC.[94] The recent public ICAC inquiry into donations to the Labor Party by a property developer ('Operation Aero') derived from a complaint made to, and initial investigation by, the NSWEC.[95]

Other electoral commissions

The Victorian Electoral Commission (VEC) has the general 'power to do all things necessary or convenient to be done for or in connection with the performance of its responsibilities and functions'.[96] It also has the power to institute proceedings for offences.[97] However, it does not have the power to conduct investigations.

None of the other Australian electoral commissions appear to have the power to investigate electoral bribery during a parliamentary election. Where known, their processes on receiving these kinds of allegations seem to be comparable to the processes of the TEC.

6. Regulating indirect electoral bribery

6.1. Benefits of regulation

Despite the difficulties, academics have at times called for at least some kind of regulation of indirect electoral bribery. In 1998 – and there have been no substantive changes in Australia since that time – Professor Hughes stated that:

> *The time has come to try to get back to first principles and devise a new legislative framework which would discourage what ought not to happen and make as certain as possible what ought to be allowed.*[98]

Professor Orr also suggests that there should be some kind of legislation in this area, even if it is 'fuzzy law':

> *The ideal sanction in politics is accountability through public debate and censure. Yet there must be a serious, legal context to debates about political ethics.*
>
> *Fuzzy law, which captures moral concerns without being neatly applicable to all particular circumstances, can serve an ethical purpose even if it does not generate routine convictions. It can form a rhetorical and institutional device to leaven debate and circumscribe ethical practices.*[99]

That is, even if it is a difficult to prosecute, the existence of an offence would be advisable because:

- it expresses an important democratic value about fair elections, and
- it provides a legal framework to bolster debates about problematic election campaign tactics.[100]

In considering whether to develop an offence that 'would be difficult to successfully prosecute, but would provide an ethical framework and would promote democratic principles',[101] the Tasmanian DPP has cautioned that:

> *Whilst the rationale behind the creation of such an offence is understandable, I note that creating such an offence would carry with it an expectation that such conduct could and would be subject to prosecution, and convictions. In my view, care must be taken to ensure that the creation of any such offence does not unreasonably raise expectations as to the capabilities of the criminal justice system, and that any offence created must be reasonably capable of being successfully prosecuted.*[102]

6.2. Options for reform

We have set out some ways in which Tasmania could regulate questionable campaign commitments.

Undertaking a cost/benefit analysis

Some academics have said that:

> *promises such as a promise to increase funding for the high school band or to place a moratorium on new liquor licenses "all produce private, divisible benefits for identifiable groups in the community, but **at a collective cost that probably exceeds those benefits**".*[103] (emphasis added)

From this, we could design a test that campaign promises to distribute money should have a benefit that outweighs the collective cost. One of the problems with this test would be calculating when the cost exceeds the benefit; it is likely that such a test would be subjective.

However, the test need not be so rigorous – essentially, it could amount to requiring monetary promises to meet good practice grant management measures. Some of these measures are already in place in the Commonwealth and will the subject of a future Integrity Commission research paper.

Applying the test for the offence of misconduct in public office

Another option, from a criminalisation perspective, would be to consider forming an offence based on the recently reformulated New South Wales test for the offence of 'misconduct in public office'. The test for electoral commitments would be: but for the intention to corruptly influence election conduct, would the candidate have made the commitment?[104] However, there are obvious difficulties in defining what it means to intend to 'corruptly influence' an election.

Regulating targeted and enforceable commitments

Another option would be to amend or create legislation or regulations based around the work of Professor Hasen. In his paper about prohibiting different types of vote-buying, he found that there were three main rationales for the illegality of electoral bribery: efficiency, equality, and inalienability.[105] To paraphrase his explanations, traditional electoral bribery is illegal because:

- it would allow buyers to engage in rent-seeking that would diminish overall social wealth (efficiency)
- the poor are more likely to sell their votes than the wealthy, which would lead to political outcomes favouring the wealthy (equality), and
- votes belong to the community as a whole and should not be alienable by individual voters (inalienability).

In terms of efficiency, Professor Hasen says there are pros and cons to indirect electoral bribery. The pro is that 'campaign promises are a means of providing information to voters so that they may make an informed choice'.[106] The con is that 'promises to identifiable groups of voters … lead to interest group rent seeking'.[107]

In terms of equality, Professor Hasen said that

> *political equality does not seem threatened by such campaign promises* [*because*] *the promises are unenforceable and therefore unlikely to motivate any voting behavior.*
>
> *It is well known that campaign promises are not worth very much; these are not exchanges, but rather signals by politicians as to the steps they plan to take in office. …*
>
> [*But*] *the more targeted the promise, and the more likely it is that the candidate can deliver on the promise, the greater the threat to political equality.*[108]

Similarly, for inalienability, he found that the more narrow or targeted the promise, and the more likely to be fulfilled, the more likely it is to encourage voters to focus on 'self-interest rather than on the public good'.[109]

Professor Hasen concluded by finding that:

> [*t*]*he proper focus here must be on delineating how targeted and enforceable the campaign promise must be before it crosses the line into illegal vote buying. My own view is that the promise must be targeted to a small group or an individual and likely enforceable before it crosses the line into impropriety or illegality.*[110]

Amending the electoral treating offence

The current Tasmanian offence of 'electoral treating', states that a person:

> *must not directly or indirectly … offer, promise or give a gift, donation or prize to or for any person, club, association or body with the intention of influencing a person's election conduct at an election.*[111]

In Western Australia, the equivalent offence does not require the commitment to be made with the intention of influencing election conduct:

> *Any person who, having announced himself as a candidate, shall, after the date for an election is ascertained, and within 3 months of the polling day, offer, promise, or give, directly or indirectly, to or for any club or other association, any gift, donation, or prize, shall be guilty of an offence against this Act, unless such gift, donation or prize is similar to one that the person has given to that club or association before the date on which he announced himself as a candidate:*
>
> *Provided that no proceeding shall be taken for a contravention of this section except within 3 months after the act complained of.*[112]

The Tasmanian electoral treating offence could be amended in a similar way.

Policing Electoral Act offences

In July 2018 in the TEC's first submission to the ongoing review of the Electoral Act, it suggested a revision to its powers:

> *Under the Act, the* [*TEC*] *has a number of responsibilities including those related to … responsibility for responding to queries and complaints about possible breaches of the Act regarding illegal or corrupt practices.*
>
> *The Commission has powers of demand under the Act in relation to electoral roll information and Legislative Council candidate expenditure information. However, the Commission has no powers of demand for the investigation of illegal or corrupt practices.*
>
> *The TEC suggests:*
>
> - amending section 9(f) to include the words "corrupt practices"; and
> - to provide the Commission with the power to conduct investigation into all the offences under this Act in order to comprehensively administer the functions of the Commission under the Act.[113]

The latter suggestion at least has been incorporated into recently proposed amendments to the Electoral Act.[114]

We would caution that, for legislative provisions to be effective, they must be supported by an adequate compliance and enforcement regime.[115] In addition to not currently having specific investigative powers, the TEC also lacks the resources – including staff skills – required to investigate and prosecute corrupt conduct.

Moreover, the language of 'corrupt' and 'illegal' practices is misleading and can inhibit logical debate. Some of the illegal practices in the Tasmanian Electoral Act have fines or terms of imprisonment greater than some of the corrupt practices.

7. Conclusion

It is not currently possible for the Tasmanian Electoral Commission to adequately investigate or enforce compliance with the corrupt practices provisions in the Tasmanian Electoral Act. Furthermore, the division in that Act between illegal practices and corrupt practices is illogical and confusing.

The Tasmanian Electoral Act contains the systemic requirements to ensure free and fair elections in Tasmania. Its importance cannot, and should not, be denied. Under its legislation, the TEC theoretically has the power to investigate corrupt practices. However, in practice the TEC has been hamstrung by a lack of specific powers and resources. This may now have been remedied with the drafting of the Electoral Matters (Miscellaneous Amendments) Bill 2021 (Tas).

Indirect electoral bribery, like traditional electoral bribery, is a serious issue that may threaten our democratic system. But it is not currently regulated, and it is rarely illegal. Whether and how this kind of conduct should be regulated, or even made contrary to law, is for the Tasmanian people and Parliament to decide.

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[4] Graeme Orr, 'The Australian Experience of Electoral Bribery: Dealing in Electoral Support' (2010) 56(2) *Australian Journal of Politics and History* 225, 225.

[5] Graeme David Orr, 'Dealing in Votes: Electoral Bribery and its Regulation in Australia' (PhD Thesis, Griffith University, 2004) 216; Graeme Orr, 'Dealing in Votes – Regulating Electoral Bribery' in Graeme Orr, Bryan Mercurio and George Williams (eds), *Realising democracy – Electoral law in Australia* (The Federation Press, 2003) 130, 130–1.

[6] Pamela S Karlan, 'Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System' (1994) 80(7) *Virginia Law Review* 1455.

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[8] Andrew Clark, 'Malcolm Turnbull and Bill Shorten fighting with a fistful of dollars', *The Australian Financial Review* (online, 22 June 2018) <www.afr.com/news/politics/national/turnbull-and-shorten-fighting-with-a-fistful-of-dollars-20180621-h11ol6 >.

[9] Australian National Audit Office, *The Auditor-General Audit Report No.9 1993-94 – Efficiency Audit – Community Cultural, Recreational and Sporting Facilities Program* (November 1993) ix.

[10] Australian National Audit Office, *The Auditor-General Audit Report No.9 1993-94 – Efficiency Audit – Community Cultural, Recreational and Sporting Facilities Program* (November 1993) vii.

[11] Australian National Audit Office, *The Auditor-General Audit Report No.9 1993-94 – Efficiency Audit – Community Cultural, Recreational and Sporting Facilities Program* (November 1993) x.

[12] Given the scale of the grant program, it was not feasible that the Minister herself undertook the whole analysis and selection process. The ANAO found that the 'role of the Minister's staff in the selection of grants appears significant', see Australian National Audit Office, *The Auditor-General Audit Report No.9 1993-94 – Efficiency Audit – Community Cultural, Recreational and Sporting Facilities Program* (November 1993) x.

[13] Clive Gaunt, 'Sports Grants and the Political Pork Barrel: An Investigation of Political Bias in the Administration of Australian Sports Grants' (1999) 34(1) *Australian Journal of Political Science* 63, 73.

[14] Australian National Audit Office, *Auditor-General Report No.23 2019–20 Performance Audit – Award of Funding under the Community Sport Infrastructure Program* (January 2020) 52.

[15] Tasmanian Audit Office, *Auditor-General Special Report No. 98 – Premier's Sundry Grants Program and Urban Renewal and Heritage Fund* (June 2011) 26.

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[27] *Electoral Act 2004* (Tas) s 3 (definition of 'corrupt practice').

[28] *Electoral Act 2004* (Tas) s 188(1)(b).

[29] Graeme David Orr, 'Dealing in Votes: Electoral Bribery and its Regulation in Australia' (PhD Thesis, Griffith University, 2004) 113–115. The debates are in Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1905, 7119–7123.

[30] Graeme David Orr, 'Dealing in Votes: Electoral Bribery and its Regulation in Australia' (PhD Thesis, Griffith University, 2004) 114.

[31] Graeme David Orr, 'Dealing in Votes: Electoral Bribery and its Regulation in Australia' (PhD Thesis, Griffith University, 2004) 113–115. The debates are in Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1905, 7119–7123.

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[33] *Electoral Act 2004* (Tas) ss 187(4), 188(4).

[34] This bill, along with the Electoral Disclosure and Funding Bill 2021, arises from a review of the Tasmanian Electoral Act. The review commenced in May 2018 and was finalised in *The Final Report of the Electoral Act Review* (released in February 2021). The government is currently undertaking public consultation on the bills.

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[36] For example, see *Electoral Act 2017* (NSW) s 209(4), *Electoral Act 1992* (ACT) s 285(2), *Electoral Act 1907* (WA) s 185, *Electoral Act 1985* (SA) s 109(2), and *Commonwealth Electoral Act 1918* (Cth) s 326(3).

[37] *Taylor v Dean* (Unreported, The Court of Petty Sessions at Launceston, Magistrate Szramka, 2005, Complaint number 94578/05).

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[40] *Scott v Martin* (1988) 14 NSWLR 663, 666–8.

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[57] Graeme David Orr, 'Dealing in Votes: Electoral Bribery and its Regulation in Australia' (PhD Thesis, Griffith University, 2004) 268, citing Richard A Epstein, 'Why restrain alienation?' (1985) 85 *Columbia Law Review* 970.

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[59] 456 US 45 (1982).

[60] *Brown v Hartlage* 456 US 45, 57 (1982).

[61] *Brown v Hartlage* 456 US 45, 55–6 (1982) (citations omitted).

[62] *Brown v Hartlage* 456 US 45, 46 (1982).

[63] Graeme David Orr, 'Dealing in Votes: Electoral Bribery and its Regulation in Australia' (PhD Thesis, Griffith University, 2004) 233–4; see also Graeme Orr, 'Dealing in Votes – Regulating Electoral Bribery' in Graeme Orr, Bryan Mercurio and George Williams (eds), *Realising democracy – Electoral law in Australia* (The Federation Press, 2003) 130, 134–5; Dr Lehoucq also points out that 'democratic accountability' is an aspect of election promises, see Fabrice Lehoucq, 'When do parties buy votes? Theoretical and empirical perspectives on electoral corruption' (Conference Paper, Massachusetts Institute of Technology Conference on Trading Votes: The Comparative Politics of Vote Buying, 26–7 August 2002) 4.

[64] Graeme David Orr, 'Dealing in Votes: Electoral Bribery and its Regulation in Australia' (PhD Thesis, Griffith University, 2004) 232.

[65] *Brown v Hartlage* 456 US 45, 58 (1982).

[66] See *Brown v Hartlage* 456 US 45, 56 (1982), where the Court said, 'It remains to determine the standards by which we might distinguish between those "private arrangements" that are inconsistent with democratic government, and those candidate assurances that promote the representative foundation of our political system. We hesitate before attempting to formulate some test of constitutional legitimacy: the precise nature of the promise, the conditions upon which it is given, the circumstances under which it is made, the size of the audience, the nature and size of the group to be benefited, all might, in some instance and to varying extents, bear upon the constitutional assessment.'

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[69] Richard L Hasen, 'Vote Buying' (2000) 88(5) *California Law Review* 1323.

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