The Hon. Mike Baird MP  
Premier  
Level 20  
52 Martin Place  
SYDNEY NSW 2000  

By email: Premier@nsw.gov.au  

9 October 2014  

Dear Premier  

The expert panel was commissioned to inquire into the long term reform of political donations laws in New South Wales and to report to you by 31 December 2014. Asking the Panel to focus on long term reforms avoids the pitfalls of short term ‘knee jerk’ policy responses that have been a feature of past reforms in this area.  

The Panel has consulted broadly on the matters set out in its Terms of Reference. At this stage we have formed a reasonably clear view on several matters and identified a broad direction for action on others. A short Interim Report is enclosed that outlines our preliminary views.  

Laws, compliance and culture  

The context of the Panel’s inquiry is important. We find that the laws in New South Wales concerning political donations are the most strict in Australia. Curiously they are accompanied by a casual approach to some aspects of compliance within the major parties. This is compounded by the fact that the Election Funding Authority’s (EFA) efforts to prosecute serious breaches of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) (the ‘Act’) have been largely unsuccessful.  

The work of Independent Commission Against Corruption (ICAC) following a referral by the EFA has brought allegations of corruption and illegality in both of the major parties to the attention of the community. The ICAC’s investigations have not been concerned with ‘one off’ acts but rather with systemic corruption and co-ordinated breaches of the Act. An important question raised by these allegations is why neither party chose to investigate the matters themselves. Given the nature of the alleged activity in both parties it is highly likely, if not certain, that there would have been some suspicion or knowledge within the party about the wrongdoing. Yet it appears that very little action was taken at senior party levels or by a governance committee before the ICAC intervened. We note that a prospective Liberal party candidate and Senator Heffernan informed the EFA of suspicious activity which was then referred to ICAC. We also note that Senator Faulkner has campaigned in the ALP against corruption for many years. These laudable actions appear to be more exceptional than routine.  

While the Act can be improved, the general framework of disclosure rules, donations caps, expenditure caps and public funding that it establishes is consistent with international standards. The Panel is likely to make recommendations in due course to simplify the Act, to
make its definitions clearer, and to streamline the various processes for disclosure, claims for payment and financial reporting. The Panel is also considering whether the ban on property developer donations, which was later extended to the tobacco, liquor and gambling industries, is still necessary given that political donations in New South Wales are now capped at relatively modest levels. These types of changes would make it easier to comply and to understand the penalties for non-compliance.

The Panel recognises, however, that no amount of regulation will prevent illegal behaviour if people are intent upon dishonesty and corruption. This gets down to the culture in the major parties. Frankly, this must change.

An important driver of corruption is the funding arms race between the parties contesting elections. There is no doubt that elections are competitive and a well-funded campaign has a major advantage. Caps on election spending control the arms race and therefore reduce incentives for corruption. What the caps do not deal with is how the factional relationships within the major parties can be harnessed to inhibit corruption. Recent allegations at ICAC suggest that behaviour driven by some people with factional interests in both the major parties has been corrupt. This is an internal party matter and it is one that must be addressed.

The Panel is exploring whether stricter governance standards could be used to encourage a culture of compliance, particularly within the major parties. In this regard, the Panel notes that while most of the minor parties in New South Wales are incorporated associations or companies, the major parties are voluntary associations – similar to a weekend sporting club. The Panel’s preliminary view is that these governance arrangements are not appropriate for organisations receiving millions of dollars in taxpayer funds and do not allow the EFA to prosecute a party as a separate legal entity for breaches of the Act. This is compounded by the current scheme of ‘agents’ whereby the party agent is liable for various offences under the Act regardless of whether or not he or she is a senior official of the party or is otherwise in a position to ensure compliance with the Act.

**Full public funding**

The Panel has not formed a final view on this issue although it is clear that any system of full public funding raises complex legal and practical challenges. On the practical front the first issue is what categories of expense should the public funding cover? At present there is partial public funding of party administration costs, policy development (in limited cases) and some defined election expenses, in particular the cost of electoral communication. If all party expenditure (including administration costs) was to be covered by taxpayers it would be very costly. If the election expenses to be covered were more broadly defined it would also add to the cost to taxpayers though it may simplify compliance, put less pressure on parties and candidates to fundraise, and be fairer to country based candidates whose travel and accommodation while campaigning is currently not reimbursable from public funds. The Panel will consider a wider definition of reimbursable election expenses, including travel, accommodation, venue hire and market research.

The reimbursement model in New South Wales for election communication expenses can cover around 75% of these election campaign costs. Because of the way the model works there is some uncertainty about the amount of public funding that a party or candidate is eligible for until after the election. The Panel will consider how this matter might be addressed to increase certainty for parties and candidates. There may be merit in increasing the advance payment to parties while maintaining reimbursement requirements.
A total ban on political donations would undoubtedly raise constitutional issues which, on a practical level, would be very difficult to overcome. For example, it would extremely difficult to design a scheme that provided new entrants with adequate resources to compete with incumbents but did not encourage frivolous candidacies. There is also the question of whether political donations to third-party campaigners should be banned to reduce the risk of avoidance. The Panel is advised that any scheme that bans political donations to third parties would need to be accompanied by public funding to third parties in order to survive constitutional challenge.

If public funding was increased to match the total amount permissible for election expenditure (the election spending cap) and political donations were still permitted, any political donations made to a party would be used for administration and policy development. Given the lack of transparency surrounding administrative and policy development spending, the Panel is concerned that such a scheme would not reduce incentives for corruption and undue influence.

The NSW Branch of the Australian Labor Party has suggested an ‘opt in/opt out’ scheme where a party could choose to refuse private donations as a condition of having its election campaign fully publicly funded. While this may avoid the constitutional pitfalls of a total ban on political donations, the Panel is not convinced that optional full public funding is feasible. Such a system would essentially create two sets of rules depending on the financial position of the party or candidate coming into the election. Unless the State can match the resources of the most well-resourced privately-funded party or candidate, an ‘opt in/opt out’ system will be unfair. The Panel received a number of well-argued submissions that suggest that any system of full public funding, optional or otherwise, would make parties dependent on public funds in a manner that may be detrimental to representative democracy in the longer term. Parties that ‘opt in’ to a system of full public funding and stop building their fundraising capacity face the risk of their entitlements being decreased or even abolished by the party that forms government.

On the basis of our work to date the option of full public funding appears to be a legal challenge and practically difficult. It may also be inadvisable on other grounds and our final conclusions are not likely to be supportive.

We trust that you will find the enclosed Interim Report useful and look forward to providing you with our final report by 31 December 2014.

Yours sincerely

Kerry Schott
Chair
Panel of Experts – Political Donations