REPORT OF PROCEEDINGS

PANEL OF EXPERTS - POLITICAL DONATIONS

ACADEMIC ROUND TABLE DISCUSSION

SESSION THREE: PUBLIC FUNDING OF ELECTION CAMPAIGNS

At Sydney on Thursday 25 September 2014

The Panel met at 10.00 a.m.

PRESENT

Panel - Dr K. Schott (Chair)
         The Hon. J. Watkins
         Mr A. Tink AM

Academics - Prof R. Smith
            Dr S. Mills
            Dr J. Tham

Transcript provided by Karen Russell
CHAIR: Welcome everyone. This third session is focusing on the public funding of election campaigns which was really the number one item in the terms of reference that we had. Welcome to those people in the gallery and particular welcome to Professor Rodney Smith, Dr Stephen Mills and Dr Joo-Cheong Tham, who was with us yesterday.

The particular issue that we are addressing with public funding is whether it decreases the risk or perception indeed of corruption and undue influence by providing all parties and candidates with a base level of financial support. The background of public funding, which was introduced in New South Wales in 1981, was to really take away the arms’ race on election funding and to provide a level of public funding so that the chase after the private sector dollar was not so acute, which leads me onto the second aim of public funding, which is about levelling the playing field so that someone or groups with a great deal of money cannot over-influence the position of a party.

Around that the questions are about whether it is good enough to support the emergence of new parties and independent candidates? Is the funding for them satisfactory in the way that it is handed out or does it just entrench the dominance of the major parties?

I might open with you Dr Tham since you have done a lot of work on this, if you would like to discuss that.

Dr THAM: I will begin with some broad observations. There is clearly a very lively debate going on right now about whether full public funding should be introduced. The broad observations I will make are these: there is nothing inherently beneficial, purifying about public funding itself. Yes, public funding by its nature is free from the risks of corruption and undue influence that attaches to private money. Nevertheless, there are other risks or other possible vices with public funding.

There is the risk of unfairness, depending on how it is designed; the risk of ossifying the party system and the risk of being ineffectual. Indeed, we do not have to look too far in terms of seeing this realised because at the commonwealth level where public funding has been provided with those purposes that you outlined Dr Schott, but provided without any conditions, we see all those risks realised.

That is the first point I make. There is nothing inherently good or beneficial about public funding. The flipside of the point I make of that observation is that there is nothing inherently dirty or negative or adverse about private money. Yes, the controversies and the spotlights have been on large amounts of money often, given with strings attached and those, of course, are corrosive of the democratic system, but that does not, of course, necessarily capture all types of political donations that actually feed into the system.

For one, small, modest amounts of political donations in my strong view should be seen as a beneficial form of political engagement.

CHAIR: By way of background, if we can just talk a little bit about the model in New South Wales, which is different from some of the other jurisdictions. The money that is permitted from public funds for the election campaign basically gets given to the parties in a reimbursable manner, so they spend up to the cap that they can spend to or try to in the election and they get reimbursed 100 per cent for the first slice of it and then a lesser amount. The maximum that they will ever get back is 75 per cent if they spend right up to the cap.

Some other jurisdictions have election campaign funding that is just based on how much of the vote you got in the last election or how many representatives you have got. So it is more of an entitlement system. The obvious disadvantage of that is if you have a row, the next time around you are not going to have much funding.

One of the issues with the reimbursement model which one of the Liberal Party
administrators discussed is the uncertainty. You are never quite sure precisely how much money you are going to get. He was contrasting that system with the federal system, which is more an entitlement type system, depending on your votes.

The other thing in New South Wales that is different is the amount of money that goes to the parties for administration and on the election funding side in the last four years, including an election period, the parties got about $22 million from the taxpayers and with the administrative funds they got $29 million.

A lot of other jurisdictions do not pay an administrative fund and in New South Wales if you are an up and coming party or member of Parliament you can get some money for policy development. They are very small payments, $4,000 or $5,000 or something of that order.

Do any of you have views about the model of the election funding component, whether it should be entitlements or reimbursement model that we have? Stephen?

Dr MILLS: If it was a stark choice between entitlement versus reimbursement—I think you have accurately captured the two aspects of those—there are some strong public interest benefits of the reimbursement process. In other words, I think New South Wales is on the preferred course compared to the commonwealth legislation here. The reason I say that is because reimbursement responds to actual costs rather than potential costs and it seems to be a bit silly if we are funding parties for their election campaigns and over-providing for them in the event that they have not actually spent much money on what was still a successful campaign.

The reimbursement model, importantly, I think has got aspects of disclosure about it. Of course, the commonwealth legislation in its first iteration had a similar set of requirements. From 1984 through to the late eighties or early nineties, the commonwealth legislation was also about a reimbursement method and parties did in fact qualify for payment only after they had submitted invoices showing their actual expenditure on a range of campaign activities.

As I think Joo-Cheong just mentioned, the problem with public funding legislation, particularly at the commonwealth level is that many of the accountability trade-offs have just fallen away over the years. I think that is regrettable and this is a perfect example of it. The requirement to disclose campaign expenditure as a basis for receiving payment was replaced and is now purely on a per vote entitlement basis.

CHAIR: That is based on the last election?

Dr MILLS: Yes.

Mr ANDREW TINK: So it entrenches the result of the current situation necessarily as it might be at the time of the next contest.

Dr MILLS: It rewards for previous performance, yes.

Mr ANDREW TINK: Which does not necessarily reflect the current contest? In other words it deals with past time, not present time?

Dr MILLS: Yes.

CHAIR: Yes. Rodney, do you have any views on that?

Prof SMITH: Yes. There are a number of criteria you can use for disbursing public funding. Different jurisdictions use different criteria. In some European contexts parties have to have a certain proportion of female candidates to qualify for all of their public funding. We do not have that in
Australia but it is an integral part of the public funding regime in some parts of continental Europe, France, Germany and Ireland to name some. So we do not have that. It seems to me what we do in New South Wales is we have a nice balance between three things; one is the number of candidates running, one is the actual level of votes, they have to meet a certain threshold and then Parliamentary representation.

Having all of those three in the mix, to some extent, removes the kinds of disadvantages that particular parties have. If you say we will only give it to parties that have Parliamentary representation, as some countries do, then obviously there is a problem for parties who do not. If you say we only give it to parties which achieve a certain share of the vote, then some parties may get a candidate elected to Parliament but do not achieve that share of the vote. Christian Democrats would be a good example or the Shooters and Fishers Party in New South Wales which do not achieve the overall threshold but have candidates elected and therefore qualify; and running candidates, so you are not giving money to parties who may use a huge amount of money just concentrated on a few electorates.

CHAIR: Single issue parties.

Prof SMITH: Yes. So there is a sense of balance I think in the current New South Wales regime that acknowledges all three of those aspects. In that way it is preferable to some other regimes which leave one of those out. I think the system is not overly complicated but it does not leave out parties. There is a strong argument for reimbursement because parties can more or less judge successfully how much they need to spend and there ought to be an element of risk but you do not go out and blow the bank on the basis that the taxpayer is going to foot the bill if you do not need to. I think there is an element of prudence that after the event reimbursement applies.

I think the reason that the commonwealth shifted, from memory, was partly to do with the difficulties of minor parties. Obviously the Australian Democrats in particular had getting their accounts right and therefore being reimbursed. I think probably these days with the level of funding that most parties have, they would be able to employ a decent accountant to do their books. I think post hoc payments have advantages over a fixed amount that parties know they will get before the event. If they think they will do better in this election, they can always spend more on the basis that their vote will be higher at this election. There are plenty of opinion polls to guide them with that.

Mr ANDREW TINK: I have just been looking at section 63 of the Act—Entitlements to advance payments, which seems to be on point. Under current law the amount of advance payment you can get is equal to 30 per cent of the total amount. I guess there are a number of questions out of that. The first is, should that be changed to make it no advance payments? Is the percentage right? Is 30 per cent right or should it be increased? What do you say?

Dr THAM: I think the first thing to say is that any criteria you choose for setting the level of public funding is going to have some imperfections. Really it is choosing the one with the least imperfections and perhaps choosing a mix of criteria, to echo Rodney's point, where basically we have overall as little imperfections as possible.

For my part I think it is coming back to the purposes Dr Schott actually mentioned, level the playing field, reducing reliance on private money or at least the corrosive form of private money. When you look at that in terms of the reimbursement model, I think it is at least one effective measure in terms of that first purpose about reducing reliance on private money in conjunction with caps on political donations.

But does it level the playing field? I would strongly argue not because the criterion is not being based on fairness, it depends how much you spent. Yes, it does cover the cost and so on and so forth but I do not think the amount you spend could be reasonably argued to be a criterion of fairness. It is just not a criterion of fairness.
CHAIR: What about the smaller parties like The Greens and Christian Democrats and so on; do they get disadvantaged by the current system?

Dr THAM: Well, not necessarily.

CHAIR: Pick a smaller party that gets more than four per cent of the vote.

Dr THAM: I would not have thought so and I think this is a very important and equitable feature of the New South Wales system, which is basically both for election campaign funds and administration funds; they are basically based on a paper scale. As you mentioned, if you spend more, you get less.

That is good in terms of injecting a level of caution to the parties about spending excessive levels, but I think there is an element of equity involved, where basically the smaller parties, all other things being equal, are going to be spending less in terms of the proportion of the caps. So they will get a higher level of reimbursement.

I think the administration fund in a way operates in the same fashion, on a tapered scale. It is the number of Parliamentarians but the amount actually decreases as the number increases. So I think also there is an element of equity involved and also recognition of economies of scale, I suppose, once you exceed a certain number of Parliamentarians. That is a crucial feature that I think eliminates the risk of disadvantaging minor and smaller parties.

In this imperfect world I am in favour, generally speaking, of a criterion based on number of votes. I think from a democratic perspective in terms of fairness it seems that is the most reliable measure. The big issue, as you all pointed out, is that it has to be inherently retrospective. You cannot say what is going to happen in the next election and you do not want to be relying on polling figures because they are all over the place and are a bit unreliable.

Then the question becomes how do we have offsetting measures to basically compensate for the retrospective nature of this number of votes model? My suggestion, just picking up on an earlier comment, is really having other measures. One is the policy development fund is a very important equitable measure in terms of New South Wales regime. It pretty much functions as a start up fund for new and upcoming parties. I think that is, of course, a very important measure.

There are two measures; I think I mentioned this yesterday, having funds disbursed according to number of members a party has and also perhaps looking at matching with public funding the amount of small donations received by parties. If you have new and upcoming parties, they still need to be credible parties but they have a large membership base, they have yet to secure any votes because it might be the first time they are standing for election and they have managed to demonstrate they are able to actually amass big moneys/small sums, then the State intervenes and actually assists those new and upcoming parties.

CHAIR: The problem with going to membership numbers though is we would have the mother of all branch stacks happen.

Dr THAM: Yes, that is right.

CHAIR: It is very hard to police genuine or not so genuine membership figures.

Dr THAM: That is correct. That is an issue we talked about yesterday. I do not think it is beyond ingenuity I suppose in terms of ensuring the integrity of membership roles. In a way perhaps it is a reflection of what low expectations we have of political parties, there is not confidence that even their membership roles have integrity. That is a matter of concern, I think.
Mr ANDREW TINK: Is there not a principle here about the need for a rough equality to ensure that each contest is relatively even in terms of a ventilation of the issues and all that sort of thing? Is there some aspect to that which has a bearing here?

Dr THAM: It is a very good question.

Mr ANDREW TINK: Do you understand what I am trying to say?

Dr THAM: Yes. You raise a very good question and I think it goes to the complex meaning of fairness in the electoral contest. I would not necessarily say fairness is implying the issue has the same amount of ventilation if you like, but I would definitely argue and I have made this point for a number of years, the key choice is about who is going to be in government. That means there is a choice between the major parties—major parties being defined as those who actually have a serious chance of holding government. I have argued that fairness in that context requires some degree of equality of arms, not necessarily by issues but of actors if you like.

Mr ANDREW TINK: According to the Australian Labor Party submission that is pretty much what happened in the 2011 election is it not? They, usefully I think, provide a table of the State election spending cap, audited spend, public funding and the gap. It strikes me, give or take a little, there is rough equality there.

CHAIR: Yes, there is.

Dr THAM: That is because of the spending caps.

Mr ANDREW TINK: So the system generates a roughly equal contest.

Dr THAM: That is right, exactly.

Mr ANDREW TINK: Rather than a contest based on an historical win in the past by one side or the other, which might have been say—just for argument's sake—a landslide, out of which the electorate might be very happy with what has happened since. The argument would be you want an equality of the contest to make the contest current rather than just an entrenchment of what went before.

Dr THAM: Yes. It just would distinguish between measures that level down and measures that level up. With the spending caps, they are ceilings, right?

CHAIR: Yes.

Dr THAM: So they level down the amount of spending between the parties and you are quite right, between the major parties—and I am a strong advocate of spending caps—they are crucial in terms of equality of arms between the major parties. Now the question in terms of public funding becomes how do we level up? It is not just the major parties of course; it is also the minor parties and new parties and so on and so forth.

Prof SMITH: Elections are about choosing an executive, but before that they are about electing a Parliament.

Dr THAM: Sure, yes.

Prof SMITH: The Parliament has two houses in New South Wales and in the last election, for example, the results in the Legislative Council saw the Labor Party win a little more than twice the votes of The Greens, so about 24 per cent versus 11 point something. In that context, saying the Labor
Party by virtue of the fact that it is the alternative government deserves parity with the Coalition but we will not worry too much about The Greens seems kind of odd to me. It seems particularly odd because of the powers of the Upper House. If you are in this place or you follow events in this place, a lot of the things that are shaping the way in which the people of New South Wales are living at the moment have to do with negotiations between the executive and minor parties, particular the Shooters and the Fishers and the Christian Democrats.

I think the ventilation of ideas has to include those minor parties and other potential minor parties. In some ways the major parties are just there because of the historical arbitrariness anyway. We are rewarding those parties for being the early winners. They have done that consistently but who is to say that the party system will not evolve.

Mr ANDREW TINK: At the risk of getting my head bitten right off and in the knowledge that this sort of matter has been settled by the High Court I think, I cannot help but refer to your table Dr Tham on page 176 of your paper where you list the top 10 third party campaigners. When you look at the list, the NRMA is out in front with 387,000, Business Chamber 354,000 and then there are a number of unions which collectively add significantly.

Forgive me from coming at it from the point of view that that slants the playing field. That is a real dilemma for my side of politics. I accept it is done and dusted in the High Court, the unions' case and all the rest of it but if we are sitting here talking about level playing fields, it is an issue. Can you see my point from my side?

Dr THAM: I see your point and I agree it is a real issue. Just picking up on Rodney's point, in the first report I did for the Electoral Commission—it goes to the complex meaning of fair elections here—what I pressed was we should have at the forefront four elements of an election. One is that the election needs to be open. There should not be formal restrictions or informal restrictions because of resources from new contenders coming into the electoral contest.

As I mentioned, there should be some equality of arms between the major parties but at the same time, and this goes to Rodney's point, there should not be an imbalance between the major and minor parties. So they are clearly part of the equation of fairness.

The fourth element—and this goes to your point Mr Tink—is that there needs to be an equitable relationship between the contestants; that is the candidates and political parties, and the third party campaigners.

How these components of fairness translate in concrete terms of course is something to be fleshed out. But I think it goes to show when we thing about fairness, it has actually a complex bundle of meanings. They need to tackle all the various issues that are raised.

Mr ANDREW TINK: I am not saying that a union would not necessarily give money to the conservative side of politics in an extreme situation, but it is not usual. I would concede too that third party unions and everybody else has got a perfect right to put a point of view that affects their members. For me the bifurcation starts to occur where, as a result of that, they are actually advocating a vote for a particular side. It just strikes me that that does start to really tilt the playing field.

So a question would arise there—and maybe this has been settled by the High Court too—but why in that circumstance should not that part of it be included in the aggregation of the party. It is conceivable perhaps that a body like the Police Association might be in a certain set of circumstances advocating both for the conservatives, depending on, just for argument's sake, how the law and order debate is running in any particular election. I would say if that happened and they were advocating a vote for the conservative side of politics, then that ought to be included. Do you see what I am trying to say?
Dr THAM: I agree with the concern you express but I do not go as far as you do in the sense that if a third party can benefit by advocating a vote for a party, that spending should automatically be aggregated to that party.

Mr ANDREW TINK: Do you say that?

Dr THAM: I do not agree.

CHAIR: But the spending is capped in that situation, if it is a direct electoral donation.

Dr THAM: Correct. I suppose the question is aggregation, is it not? It will still be capped by the third party campaigner’s cap but I think the question you are raising is about aggregating the spending to the party cap.

Mr ANDREW TINK: I am exploring that further point, yes.

Dr THAM: This was the nature of the provision that was struck down by the High Court.

Mr ANDREW TINK: Yes, I understand.

Dr THAM: I actually do not think that closes off avenues for aggregation. I think there were serious flaws with the provision that was struck down by the High Court simply because the provision treated mere affiliation as tantamount to a co-ordinated campaign.

Mr ANDREW TINK: You have covered this in your paper have you not?

Dr THAM: Correct, yes.

Mr ANDREW TINK: Can you take us to that please?

Dr THAM: Yes. What I suggest is—I must say, I have to refresh my memory about what I wrote—a measure that is in some ways an adaption of what is found in the Canadian system and that there needs to be a provision where there is a co-ordinated campaign between a political party and a third party campaigner.

Merely advocating a vote, as the NRMA says, vote for the Liberal Party because we think they are going to invest more in road infrastructure; that is not a co-ordinated campaign. It is just a view they have formed according to their own processes and they decided that is the best thing that serves the interests of the members.

The same with the Police Association, they might form a view do not vote for the Labor Party because we do not think its workers compensation laws are any good and does not serve the interests of our members. It is about co-ordination.

Mr ANDREW TINK: Can I make a suggestion?

Dr THAM: Yes.

Mr ANDREW TINK: I am really keen to follow this up but rather than hold everybody up right this second, maybe we can do something else and can you please find that provision in your report and perhaps we can come back to it?

Dr THAM: Sure.

Mr ANDREW TINK: I am keen for you to identify it in your report.
Dr THAM: Let us just move on and I will come back to that.

CHAIR: While we are on this public funding topic, the leader of the Labor Party has sent in a submission suggesting an opt in/opt out model for public funding so that a party can decide that it is not going to accept public funding or it can decide that it is going to accept public funding and if it opts for public funding it basically gets all of its election costs funded.

We had a brief discussion about it yesterday along the lines that a very wealthy person or group can come along and say we are opting out, we are going to throw money at the election and so on. What do you think of that sort of system?

Dr MILLS: I have not read the submission but on the summary that you have provided, I would oppose that opt in/opt out practice.

CHAIR: I think it is a device to try and get around the constitutional issues raised.

Dr MILLS: What I would oppose about it, although I recognise that it might be a neat solution to the constitutional problem or road block, but I think it would be undesirable to leave in the hands of the parties the decision whether or not to accept public funding and that decision would be made according to a strategic calculation by the party as to its likelihood of success, availability of funding from other sources, I say relative, in other words, its position, not just in absolute terms but relative to the competition.

I think it is undesirable because public funding—as we have touched on already and as I think the Committee has made clear in its Issues Paper as well—is not just a question of providing money to parties, it is also a question of parties providing some degree of accountability back to the public for those funds.

I think opt out would presumably free the party from compliance with any form of accountability measures that would have been associated with receipt of the public funds. I think accountability by parties for public funding is a highly desirable element, which as I have said, tends to be falling away anyway. This would completely eliminate it, on the basis as I say of strategic calculation by the party head office as to whether or not they can survive on their other sources of funding.

What if you had a situation where the party was making that calculation on the basis of some kind of promise of in kind funding from a media proprietor who was offering television advertising time at uncommercial rates? That might be a very attractive deal for a party. It might allow the party to swamp the airwaves and you would not end up with a good election campaign.

Anyway, parties are still dependent. Whether or not they receive actual public funding, they still benefit from the Australian' Electoral Commission's efforts to get out the vote on their behalf. I just think for a number of reasons you have really got a situation whereby you do not want to put more power in the hands of the party head office to make these kinds of strategic calculations which would take them out of an accountability framework.

CHAIR: There is a view put in a number of submissions and George, who was here yesterday is particularly strong on this, that full public funding really means that there is no onus on the parties to go and engage with the communities or increase their membership or try and activate themselves and actually engage. They basically can drift in to just becoming governing beasts without actually engaging with the world out there.

Dr MILLS: I strongly agree with that point and I think Joo-Cheong also, in his opening comments, said there is nothing inherently wrong with private dollars being used for election
campaigns. Nor is there anything inherently desirable about public dollars. We need to put transparency over the provision of private dollars and then what is the problem with that? I really see that full public funding, almost certainly unconstitutional, almost certainly unenforceable but also, I think, undesirable for this point, that it would reduce public participation in party politics. Parties would not have an incentive to persuade their supporters to donate.

That would be particularly unfortunate I think at this very time. Contemporary campaigning is, as we know from the last federal campaign in particular, increasingly moving in the direction, I believe of "micro targeting" or can I say Obama-style campaigning, which is really not solely about, but very importantly about raising funds from party supporters in high volume and low value amounts.

I think from a democratic perspective that is entirely desirable. We do tend to associate private funding with corporate funding and it is of course very significant, but if you were going to remove the incentive in parties, it would be wrong to remove the incentive from parties to motivate those supporters to provide those high volume low value types of donations, and I think that is where campaigning is moving these days anyway.

The Hon. JOHN WATKINS: The opt in/opt out issue, if the whole idea of public funding of election campaigns as it has grown up and seems to be generally accepted is to ensure some level of fairness and to reduce influence peddling, to actually suggest that we should allow a contrary system that allows parties to opt out, where are we going? How do we protect ourselves from a lack of fairness? How then do we protect ourselves from influence peddling?

I just have not discussed in detail with the people involved, but I just cannot see it as anything other than the mechanism to get around that High Court problem that we have got about moving to full public funding because clearly that is what the major parties would enjoy. I cannot imagine an environment where the Labor Party of New South Wales or the Liberal Party of New South Wales would in fact opt out. It may be a minor party that would like to see an opt out clause, but I cannot see the major parties doing it.

CHAIR: Yes.

The Hon. JOHN WATKINS: So why are they proposing it; presumably, as a vehicle to allow even more generous public funding. I think the idea of more generous public funding which the Premier has talked about and the Leader of the Opposition talked about, is a viable option but I think there may be other ways to arrive at that destination rather than having an opt out clause.

The other thing that intrigues me—sorry, this is more of a statement than a question but I will come to a question —is this sense that, and it has come through in Rodney Cavalier's shame that he feels that was just reported today in The Australian that what we have ended up with in New South Wales with public funding actually debauches democracy, he says. It intrigues me and my experience in Labor Party and branches and so forth, I actually cannot see the link between giving the right or the expectation or responsibility that a greater role in fund raising is going to lead to increased membership or increased party democracy. I actually do not see those connected.

With most of my 25 years of experience in the Labor Party branches, they have not been particularly strongly involved in fund raising across that period of time and nor do I think that there is some blissful future where it is going to lead to greater membership and they would be out on the streets raising funds. I think the world has changed.

My question really is that if there is an acceptance of public funding as being valuable in achieving fairness and influence peddling and there is a suggestion that we be able to move to a more fully public funding system, we know that there is a problem with the High Court decision in the unions' case, is there a way that we can get around that? Is there a way that we can achieve what the
leaders of the major parties have talked about—full public funding and not run up against the barrier of the High Court? Is there a mechanism by which we can have an increased level of public funding of the elections of New South Wales?

**Dr THAM:** I think the principle question to be asked is why do we see full public funding as a good thing? We should not be asking the question how do we get around the High Court decision. It is only after we have resolved that issue where they think full public funding is a good thing. Full public funding in a way is a complete mis-description because what it means is nil private funding. It means a ban on political donations.

**The Hon. JOHN WATKINS:** Well, does it?

**Dr THAM:** It does.

**The Hon. JOHN WATKINS:** Well does it?

**Dr THAM:** How can it be full public funding if parties can still receive private money; it is not full anymore?

**Prof SMITH:** Unless it is full for particular purposes and you can donate for other purposes perhaps.

**Dr MILLS:** Or maybe at particular levels. Perhaps if you had a very low ceiling for donations, $100 maximum from any person over—

**Prof SMITH:** That is still not full.

**Dr THAM:** That is still not full.

**Dr MILLS:** I understand that but you are aiming to get around, so you could justify that by saying on grounds of ridding the system of corruption you want to get rid of all large donations, so the High Court might be open to that type of argument on anti-corruption grounds whilst still incentivising parties to do the grassroots campaigning.

**Mr ANDREW TINK:** That is The Greens' argument, I guess sort of acknowledging the full public funding is going to be knocked out by the High Court they were suggesting, if I understand it correctly, that you come as close to full public funding as you can but at the same time recognising a certain level of private funding which will be a lot lower than it is now through changing those caps and so forth, which nevertheless allows you to skate through on the implied freedom of expression or whatever it is that the High Court is focused on. So it is moving at some notional point as close as you can get.

**Dr THAM:** English is my second language, so maybe that is why I am struggling with this. There are no degrees of fullness are there? It is either full or it is not full. If we are talking about full public funding, as I understand it, then we are talking about a complete ban of political donations and I think it is that that we should be looking at. It is not so much the provision of public funding that is an issue in terms of the implied freedom; it is the ban that is an issue.

**The Hon. JOHN WATKINS:** You are not lawyers but would the High Court accept a ban based on our concerns about the corrosive impact that donations have and the corruption issue, which was not tested I do not think?

**Mr ANDREW TINK:** Can I have a go at answering that.

**The Hon. JOHN WATKINS:** Yes, you are a lawyer.
Mr ANDREW TINK: So are you. You keep that very quiet. One of the problems there would be, the ICAC has turned over some very disturbing things, but when you look at it it is in connection with a small number of a particular type of banned donor at the moment. In other words, it is not like there is a huge public interest question over all people who donate privately. Who am I to say that they do but the evidence at ICAC is red hot obviously but it is still in relation to a fairly narrow sub-set of private donors or am I off the track?

Dr MILLS: I think that is on the track but if I may also pick up the view that you quoted from Rodney Cavalier. It is not just a question of who is making the private donations; it is a question of who is receiving the private donations. I think one thing that ICAC is really bringing to light is that there is a lot of, can I say, rogue fund raising going on at the electorate or even branch level, which appears to be, as I understand the evidence, out of the ken of the party head offices.

So there is a compliance issue here which would be beyond the capacity of a well-intentioned normatively strong law abiding head office to cope with. As a general point Cavalier you say is talking about fund raising at the local level—I am not sure that we want a lot of party fund raising at the local level, precisely because it is hard to track and as we are seeing at ICAC, it can get seriously out of hand very fast and only require massive amount of integrity systems to discount.

CHAIR: A lot of this was black money; it was nothing that the party above it would have necessarily blessed.

Dr MILLS: Exactly, but it is still going on and it is still being used for electoral purposes.

Mr ANDREW TINK: That might happen under a full public funding regime.

Dr MILLS: That is right.

CHAIR: I would feel very reticent about stepping into something that says candidates should not be raising money, because that is a strength of democracy, that a good candidate will get a lot of support, some of which will be presented in volunteering and works in kind and some of it will be a cheque.

Dr MILLS: But the compliance systems and accounting systems need to be unified and centralised.

CHAIR: They do, correct.

Dr MILLS: So if there is a candidate raising funds that should go into a linked account.

CHAIR: If we can just go to Rodney's outrage in his submission, which is a very good read if you want to get stirred up, his outrage is really about the funding of the administration of the parties. He is quite supportive of the partial public funding and it is the $29 million that is going to the parties' administration that he thinks is his worst error in his life, that he ever allowed that to happen.

The Hon. JOHN WATKINS: That is a big call.

Dr THAM: I must say, I take some issue with what Stephen has mentioned in terms of allowing fund raising at the local level or having decentralised fund raising activity. I think what is fair to say, and this is part of the diversity of party structures, is that some parties are more centralised than others.

CHAIR: Yes.
Dr THAM: In my strong view, election funding laws should allow the diversity to the extent possible so long as laws can be complied with. The question we need to ask is what centralisation do we need for the laws to be complied with?

CHAIR: Yes.

Dr THAM: I have covered this issue at some length in my 2012 report. It seems to me that the only centralisation required is centralisation of record keeping. You can have fund raising occurring at branch level by candidates and so forth. For example, if the branch at Balmain raises $10,000, as long as somebody centrally knows that that money is raised, therefore knows whether the cap has been breached or not.

Dr MILLS: Would you go a step further, not just record keeping, but banking, so as it is a single banking system so that the donation of Balmain is known at head office?

CHAIR: That has been suggested by a number of people.

Mr ANDREW TINK: It ought to be known to the public and it ought to be known quite clearly. New law is advanced on—

Dr THAM: In terms of continuous disclosure?

Mr ANDREW TINK: Well, you have a system where every branch secretary and candidate and every other person who is getting money presses a button or whatever and makes an entry and up it comes on a public register. This is where we have got to be heading is it not?

Dr THAM: Sure.

Mr ANDREW TINK: Then you have got the transparency, which creates the accountability, et cetera, et cetera, because that is where we have got to be heading as a matter of urgency I would have thought.

The Hon. JOHN WATKINS: Transparency is our greatest friend, is it not, in trying to reduce the risk of corruption.

Mr ANDREW TINK: Absolutely.

CHAIR: This in your patch really Rodney, the education and getting it out there.

Prof SMITH: The International Institute for Democracy and Electoral Assistance just put out a big handbook on political finance. They are looking across the world and they come back to this question of scrutiny and transparency. I think in answer to the first question, would public funding prevent corruption and undue influence, well yes, but I think a more important tool is transparency.

CHAIR: If it is visible.

Prof SMITH: You could have full public funding, let us say the courts allow it, so the parties get all this money; what do they then do with that money? You still need some kind of transparency there. Are they doing dodgy things with it; supporting candidates that are not their candidates. There is a whole range of undue influence. I think the argument about full public funding being a magic bullet for anti-corruption efforts and eliminating undue influence is not correct. It is part of it but I think as the last five or 10 minutes of conversation have suggested, there has got to be this transparency and availability of public scrutiny.

A lot of this stuff is eventually on the records for New South Wales, it is just that people
cannot find it and when you do look at it, as I have over the years, it is out of date and it is difficult to interpret.

Mr ANDREW TINK: It is not only that, but it is very opaque. You go to an entry of a candidate and it is just opaque, it does not actually tell you anything.

Prof SMITH: That is right. That is the kind of side of things I would like to see focused on. Full public funding is a bit of a red herring in many ways; if what we are concerned about is this issue of corruption, undue influence and people being able to use their fund raising skills to exercise undue influence within parties and donors being able to use their donations to exercise undue influence, if that is all you want to focus on, then transparency, auditing, removing the opaqueness, removing the lack of speed of these things being on the public record is really the main game for me.

Dr MILLS: This underlines from the opt in/opt out point, it underlines another really important area caution about opting out because if you were to opt out, presumably you would opt out on any kind of disclosure; traditionally that is what opting out is.

CHAIR: Not necessarily.

Dr MILLS: Is it clear or not clear?

CHAIR: No, it is not clear but it would be much harder to police I think. Can I just go back to the public funding; there is a bit of a flavour in some of the submissions from the smaller parties and independents—and this may be a conspiracy theory—that the major parties get together and decide on something that suits them which either intentionally or otherwise acts against the fairness of the smaller parties and the independents. Do any of you have a view on that?

Dr THAM: I think it is a risk. I suppose in the political science literature they would refer to it as the Cartel Thesis where the major parties collude to basically devise a public funding system that is really about ossifying a system. But it is a risk, not an inevitability.

Mr ANDREW TINK: It would be a little hard to get it through the current Upper House?

Dr THAM: Correct, yes.

CHAIR: It is a little hard getting practically anything through the Upper House.

Prof SMITH: Labor and the Coalition can combine.

Mr ANDREW TINK: There would be plenty of noise about it.

Prof SMITH: Yes, you are right.

Dr THAM: I think it is a risk that needs to be kept in perspective because in some ways we must have some trust and confidence in the major parties. I know of course being alert and vigilant to their self interests playing out in terms of unfair rules, but if we are so utterly pessimistic as to the ability of the major parties to devise fair rules, we will give up on electoral regulation full stop, because by definition, the ones in power are the ones devising the rules of elections. If they cannot do it other than a way that is unfair, let us just give up on it. I am definitely not one for that.

Dr MILLS: But there are examples though, at the federal level certainly. We only have to cast our minds back to 2013 in the dying days of that Parliament when the two major parties did cut a deal in secret to share a $20 million package of administration funding. Neither party bothered to provide any tissue of explanation, like in the good old days, of a robust public interest justification for it. It was all going to be done in secret, it was to be presented as a fait accompli and it was to be
slammed through Parliament, guillotined through with the support of the two major parties. I think from memory there was a proposal to cut in the small parties to allow them to share some of the bounty but obviously in dollar terms the majority of that $20 million would have been shared by the two major parties.

**Dr THAM:** It is a real risk.

**CHAIR:** Did that go through?

**Dr MILLS:** No, it came to light, well reportedly it came to light in a caucus briefing in the Labor Party and Senator John Faulkner as he then was, rang the alarm bell and expressed great dismay and opposition. The then Leader of the Opposition backed away from the deal which he had earlier signed up to in a letter and so the whole thing was scuppered fortunately.

But it is that kind of behaviour that does not just breed cynicism amongst the minor parties but really breeds cynicism in the general public. More public funding, no strings attached, secret deal; that is going to end up eroding the whole system.

**Dr THAM:** As I say, it is a real risk and of course the risk eventuates. You are right, I completely agree with you Stephen in terms of your example. There are examples of features of New South Wales funding laws that I think unfairly advantage the major parties. The administration funding being based on number of Parliamentarians, not so much the major parties but at least incumbent Parliamentarians—

**Mr ANDREW TINK:** It is tapered though, is it not?

**Dr THAM:** It is tapered so it does not disadvantage the parties with fewer numbers of Parliamentarians but both of the parties actually secure more votes and those actually secure Parliamentary representation. They do not get in in terms of administration funding because they have no Parliamentarians and that is the basis of the formula.

**CHAIR:** So in the Lower House if you got more than four per cent of the vote but you did not get anybody elected?

**Dr THAM:** You can get election campaign funds for the reimbursement model but do you get administration funding. Even though somebody can get three per cent say, you get the point.

I want my comments to be taken in perspective and I suppose the other thing to point out is there are features of the New South Wales election funding laws that this State should be proud of. This State has been an innovator in terms of election funding laws from 1981 in terms of provision of election funding to disclosure, to the legislation in 2010 which I think is a landmark legislation. It has got its imperfections, it has got its shortcomings of course but this is the most robust regime in this country. Part of why it has been the most robust regime is there are features of fairness, even though the major parties are centrally involved in promulgating this rule. I think vigilance, perhaps not pessimism.

**Mr ANDREW TINK:** Maybe this is a naïve thing to propose but given that there is this sort of elaborate scheme or structure in New South Wales, it might be just that little bit harder to ram through the walls that you have been talking about at the commonwealth level, just because it would stand out pretty starkly, would it not, against the highly structured model we have got here or would they just go and ramp up potentially a particular category of cap or something?

**Dr MILLS:** Well I suppose they could. The real point of that federal story is that it was not in itself an illegitimate proposal; it was for administration funding which already existed in other jurisdictions. It was just that there was no explanation; it was the secrecy of it.
I would attribute a lot of that to the kind of peculiar dynamics of that particular Parliament and that particular government and opposition. Are we going to see too many recurrences of that—perhaps not? But the Cartel Thesis does suggest that parties have got strong interests to collude, to protect their interests, possibly even including the interests of smaller parties but to get themselves closer to the State resources and that was certainly an example of it and it could easily operate in the State as well.

Dr THAM: I think if full public funding is reduced, I think that would give a lot of credence to the Cartel Thesis, because full public funding and perhaps I have not made this emphatically clear, I would like to join the chorus of opposition to a full public funding model—full in the sense of full I suppose; where there is a complete ban on political donations.

I take the point as a legitimate objective and this is one of the key principles about preventing corruption, but it is simply not necessary to ban all donations to achieve that particular objective. It is hard to credibly argue that small and modest amounts, the ones that Stephen pointed out, actually pose any real risk of corruption. I think there are real problems in terms of fairness in terms of the full public funding model.

One of the most difficult if not insuperable problems deals with third party campaigners. With third party campaigners presumably they would be subject to the ban on political donations because if they not, then it becomes this easy way to circumvent the ban. At the same time, presumably they are not going to be eligible for public funding. So there is squeeze on both sides where basically there is no money to actually engage in an election campaign and this comes to the component of fairness that I mentioned early on, that the fairness must include fairness to the third parties, viz a viz the contestants.

Squeezing them on both sides in this way I think is grossly unfair. Not only that, I think this is where we run foul of the Lange test, it does implied freedom of political communication, where the test says, the High Court says that yes you need a legitimate objective, so preventing corruption but the measure has got to be reasonably appropriate and adapted to that objective. If there is no necessity of banning small donations, that is a real problem in terms of being reasonably appropriately adapted and if you have got a problem in terms of gross unfairness to third party campaigners, you also run into a problem according to the second limb of the Lange test. In fact it was that element that was actually quite crucial in the Australian Capital Television case, the High Court decision striking down the ban on political advertising and the free time allocation.

That essentially, crudely speaking, third party campaigners were locked out of the system. I think the full public funding and a ban on political donations has that similar vice.

The Hon. JOHN WATKINS: I have been thinking about how to circumvent this. That may be something we should not do because of the arguments here put forward. The reason my mind comes to this is I think there is strong public support for a fully funded system. That may not be particularly thought through but it is out there in the community and certainly the leaders of at least two political parties have expressed their desire for it.

What if we had a system where you had strong caps, so a party like the Labor Party was allowed to spend $10 million in an election campaign. You then provided public funding to the level of $10 million to the Labor Party. You did not put a ban on private donations but you said that if private donations were accepted by the Labor Party for example, they reduced the amount of public funding to the same amount.

There is no ban on it but there is certainly no great desire or need for the Labor Party or any other party to go out and seek the funds; so they can certainly accept the funds from their branches, from local people in the community who want to desperately donate to their party of choice, but you
take away this desperate arms' race, this desperate desire to get more dollars through the door because the caps deal with that. Then the issue is if you want to accept private dollars; go ahead and accept them but if you do that, you will reduce the amount of public money that you accept. So it takes the pressure off.

Dr THAM: Dollar for dollar?

The Hon. JOHN WATKINS: Yes.

Prof SMITH: No party would accept a donation.

The Hon. JOHN WATKINS: That is right.

CHAIR: Well they would.

Prof SMITH: Because of the transaction costs.

CHAIR: They would, but they would hide it.

The Hon. JOHN WATKINS: That then becomes black money and there is a whole other range of mechanisms that we have already talked about we need to put in place to deal with that. But parties would continue to accept the barbeque money.

Prof SMITH: Why?

The Hon. JOHN WATKINS: Because of what Rodney talks about, that it is actually important for culture and the structure of the party.

Prof SMITH: That is how I read the Labor submission. I found it a very hard document to understand actually; probably my fault. That is how I read their submission; that it was going to operate in that way and I thought that was insane because there are transaction costs.

CHAIR: Say what you really think.

Prof SMITH: There are transaction costs for every donation you get. Someone has got to go and put it in the bank, et cetera. If you are going to get $10 million from the Electoral Funding Authority or whatever it is going to be called, the Electoral Commission, that is one hit; that is one transaction cost. Why would you be worried about someone coming in and saying I have got $5.60 from the sausage sizzle? You would not.

Dr MILLS: Let alone from the point of view of how would you motivate a donor?

Prof SMITH: That is right.

Dr MILLS: Because currently donors are motivated by we look to put one more ad on the television so as to stop the evil whatever, whatever, but if that ad is going up anyway, it is going to be funded—

The Hon. JOHN WATKINS: That is the very point; that we do not need to motivate donors.

Dr MILLS: So why would anybody donate?

The Hon. JOHN WATKINS: Exactly and what that does is release the major parties from all that pressure of dealing with people who want to donate, the developers and those people who are
peddling influence. All of a sudden that becomes redundant. The party does not need the money and if the party takes the money it is going to cost them, as you say, with transaction costs and they are going to have to say no to public money. I am just trying to find a way that is appropriate, that is legal and removes this awful pressure about arms' race, which is what has created this culture in New South Wales.

CHAIR: But do you not think the election funding cap deals with the arms' race?

The Hon. JOHN WATKINS: Well clearly not because of what we have learnt in recent months.

Dr THAM: I suppose maybe we are talking about two kinds of arms' races here. We are talking about the arms' race in spending and I think that is the point you are making and I suppose maybe Mr Watkins is talking about the arms' race in fund raising.

The Hon. JOHN WATKINS: They are linked.

Dr THAM: They are linked but actually they are a distinct phenomena in a way. I can see where you are coming from and I can see the virtue of that model in terms of the anti-corruption aim but I suppose this comes with my opening comments from yesterday, that when we think about designing a democratic political funding regime, there are other objectives beyond preventing corruption.

One is supporting parties to discharge a democratic function. I will include as one of the functions a participatory function. That means that individual organisations can participate in parties as members but as a consequence can participate or support the parties through small donations. I suppose this comes through my comments that I started with at this particular session. There is a legitimate and desirable role for small money in the system.

The Hon. JOHN WATKINS: I agree.

Dr THAM: That model provides a powerful incentive against the parties to get any money.

The Hon. JOHN WATKINS: But those moneys really if we are talking in reality; are largely unimportant to the major parties. The moneys raised at barbeques where you get members together, raise $3,000, $4,000 or $5,000 maybe, when you look at the vast amounts of moneys that are spent on election campaigns, even in particular electorates, they are not that relevant to them.

Dr THAM : In terms of your policy objectives, why could they not be achieved by proper spending caps, low caps on political donations, public funding scheme that I would advocate based on the number of votes, but even if you go down the reimbursement scheme, but not necessarily a financial penalty for taking up political donations?

So the parties can still have the freedom to take political donations but they are not facing a financial penalty. I suppose that is the difference between what I am outlining and what you are suggesting.

Mr ANDREW TINK: Opt in/opt out is not full public funding, is it? Opt in/opt out is only full public funding for opt in. Opt out means no full public funding rules apply so to me it is a bit of a camel from the beginning; it is misconceived.

Dr THAM: That is right; I agree with you. That is what Stephen has said, the vices of an opt in system, the United States experience has illustrated this, one of ineffectiveness because the more resourced candidates will opt out or they make a calculation and they opt out. When they opt out that is basically the reality of unfairness or inequity. This is the point that Anika made yesterday. One set
of rules applying to one set of actors and another set of rules applying to another set of actors.

CHAIR: That is true, yes.

Dr MILLS: Could I just make another comment or perhaps a question about Mr Watkins' suggestion on the substitution of private donations for public donations and so the dollar for dollar replacement. That would operate where there was full public funding of election campaigners. Would not the parties in the scenario that you outlined still be seeking private donations for non-campaign purposes?

The Hon. JOHN WATKINS: Yes.

CHAIR: Yes.

Dr MILLS: So they would still be open to the moral hazards of accepting private donations for non-campaign purposes. It could be for international travel; it could be for hiring staff; it could be for administration purposes; it could be the new wing on the whatever, so there would still be the potential for unseemly influence being exercised by large donors but not for campaign funding.

The Hon. JOHN WATKINS: Yes but there are other things that we have talked about in the last couple of days about also changing the nature and the culture of the major parties and what can we do to achieve that so that they are corruption resistant themselves internally rather than expecting some external force to do that? Yes, that is true but again the reality is it is that campaign time, it is that six months when there is such urgency to raise funds that the problems really do arise.

One of the problems in the model I have suggested, does it bring spending forward prior to an election campaign, but that is always an issue? As I say, it is only because there are pretty strong statements out there in the community about the value of a publicly funded system and I think we need to think about whether or not that is achievable and then judge whether or not we recommend it by whether or not such a system is of value or not.

I know you are publicly opposed to it, but it is an issue that we need to explore, whether or not there is such a model that we could propose.

Mr ANDREW TINK: It is our first and primary term of reference.

Dr THAM: Of course.

Mr ANDREW TINK: It has to be fully tested and explored. That will happen on Monday too I guess with the lawyers.

Dr THAM: As I said, I am emphatically opposed to a full public funding model for several reasons, one is the lack of necessity and the other one is overkill in terms of anti-corruption objective. You do not need to ban small money to achieve the anti-corruption objective. Unfairness in terms of third party campaigners and another reason I would add is that full public funding, it would seem to me, would have to probably be based on the reimbursement model, I think.

The Hon. JOHN WATKINS: I think so.

Dr THAM: I think so. I am being a bit tentative. I think logically it needs to be based on a reimbursement model.

Mr ANDREW TINK: So everybody would be taking out loans? The campaigners would be taking out loans.
Dr THAM: Or you might have a more generous advanced payment system.

Mr ANDREW TINK: But there would be more.

Dr THAM: Yes. I think this comes to the concerns I have with reimbursement as a criteria for calculating public funding. Maybe as one component it is fine but if you have full public funding based on reimbursement, again I find it hard to see that is it a criterion of fairness. It is just spending.

The Hon. JOHN WATKINS: So you encourage spending up to the cap?

Dr THAM: That is right, exactly. It is not based on engagement with the citizen, engagement with voters, it is just how much you spend; you get the money back. That is what it is.

CHAIR: Just on expenditure, can I just ask a detailed question really about definitions. The money that is permitted and funded publicly on elections, as you know, just covers electoral communications expenditure.

Dr THAM: Yes.

CHAIR: A number of people have said to us that they are very disappointed that it does not cover market research and there were other obvious things it does not cover, in particular, travel and accommodation that we have just mentioned. Do you think the definition should be widened? This is not a really big issue, but if we are making recommendations that are tidying things up, we can have a go at this.

Dr MILLS: I cannot see the purpose of the distinction.

CHAIR: If it is election expenditure, it is election expenditure.

Dr MILLS: Yes. You can think of parties really having as their principal activity winning elections. They do other things as well but they are principally focused on winning elections.

CHAIR: Certainly in the election period they are, yes.

Dr MILLS: And even outside it. I still have some questions about what administration costs are if you are supporting the administration of an organisation which is desiring to win an election, so ultimately my point comes back to thinking of parties as electoral organisations and in that sense everything is—it is a bit of a false distinction between electoral expenses and electoral communication expenses. Market research has already been mentioned and I am glad as I was going to flag it as well. Market research is such a critical driver of communication strategies that it is hard to think why would it not be included as a communication expense?

But more generally why do you only focus on election communications rather than election expenses more generally? Looking at the website of the EFA, at their attempts to explain and define electoral expenditure and electoral communication expenditure, if I was a party official with a lot else on my plate I would be struggling to comply with this.

Mr ANDREW TINK: There is a real point here too in terms of enforceability and penalties. At all times the principle should be that the definitions should be as simple as possible. These definitions are inherently complex, and will probably remain that way but wherever they can be made simpler or clarified, that should be done, because it is as if we might be currently provisionally minded, that far more severe penalties need to apply under this legislation to deter bad behaviour, then you owe it to the people who are going to prosecute, police and enforce; and then people who have got to make a judgment one way or the other as to whether or not a particular definition applies to them or not. You have to make it simple.
Dr THAM: Yes.

Mr ANDREW TINK: That is just a fundamental principle of legal drafting I think.

Dr THAM: Yes.

Dr MILLS: Exactly and a couple of detail questions, where does data base management, where does software expenses come into it? It only refers to staff, what about consultants? There are so many really important distinctions which are not addressed.

Dr THAM: I think the genesis of this particular project, members of the Secretariat can correct me if I am wrong, is adopting the approach taken in the United Kingdom legislation, which is basically itemising particular items of expenditure that come within the caps.

CHAIR: It is based on a world of letters and stamps too and moving onto television advertising, it is not based on the use of social media and a targeted sort of campaigns.

Dr THAM: Exactly.

Mr ANDREW TINK: Rodney's is couriered by horse. That is Rodney Cavalier by the way.

Dr THAM: In the 2012 report I did for the Electoral Commission I advocated that we should move away from this complex definition. One reason is for simplicity; for all the reasons that have been mentioned but also bear in mind that this particular definition feeds into the public funding reimbursement scheme because how much you spend on electoral communication expenditure determines how much money you get back in terms of election campaigns' fund.

What that means, and this came through the interviews I had with the party officials for that report, is that party officials were more inclined, of course, to classify items of expenditure as electoral communication expenditure rather than something else, because they actually get public money for that.

Why should the law actually give an incentive or as I put it, distort the composition of the campaign spending of political parties? Spending caps should only be concerned about the level of spending, not the composition of the spending. It is up to the parties to decide how or what they think is competitively advantageous but we do not want them spending above a certain amount.

CHAIR: I think there might be some agreement with that.

Dr MILLS: Can I just raise one caveat about that or at least float an idea. I think the principle that Joo-Cheong just outlined is absolutely sound. There is no public interest in telling parties how to run their campaign but in a practical sense most campaign expenditure has gone on television advertising. Earlier on the Committee was discussing the policy debate that takes place in an election campaign and the desirability to have a policy debate. There is not much policy debate that actually happens and there is certainly not much policy debate that is actually funded by campaign funding. The largest single item is television, we understand, not the production of it but buying time.

So in other words, most of the public dollars are going into the public licensees of the television broadcasters. It is a bit of a money go round in that regard. It seems to a bit odd that we are providing so much funding and so much effort around the funding and so much risk in terms of private donations to buy television advertising, which is provided at a commercial level, somewhat murky pricing and obviously highly sensitive to urban market or regional market.

If we were to drill down and it is a big threshold to cross, into campaign planning and budget
allocations by campaigners, I think you would get a lot of benefit of a cap on television advertising.

Mr ANDREW TINK: How does that fit in with this Capital Television case? Is that irrelevant; I do not know?

Dr THAM: The ACTV case is relevant but in that case all that was struck down was a ban on political advertising.

Mr ANDREW TINK: Not a cap?

Dr THAM: Not a cap, that is right. That was not a measure that was considered at all. So Stephen, are you suggesting there is a broad cap on electoral expenditure but some kind of sub-cap in terms of advertising?

Dr MILLS: Yes and again, it would work in a reimbursement system. It would not work in an entitlement system, but a reimbursement system where invoices are provided up to a certain amount. Beyond that, no, do something else with your campaign funds; we have had enough television advertising.

Mr ANDREW TINK: In the current climate, like night follows day, that would end up in the High Court. Media proprietors would have it in the High Court in a flash would they not?

CHAIR: Yes. It depends on the case probably.

Mr ANDREW TINK: I am not saying that is a reason not to do it; it is absolutely not a reason not to do it, but that was why my question was to you about the ACTV case and you are saying the difference is between potentially a ban and a cap.

Dr THAM: Yes.

CHAIR: You could do what the Kiwis do, which is tell the media proprietors they have to provide free time during an election campaign and split it up.

Dr MILLS: That would be another step further. I think that is a tremendous system. We have free time with ABC advertising. Presumably there would be a licence condition with the broadcaster licence that a certain amount of electoral television is provided for free.

Mr ANDREW TINK: This then gets you way beyond our jurisdiction; that is Malcolm Turnbull's country surely, as the communications minister; so that is way out of New South Wales.

The Hon. JOHN WATKINS: Except we do restrict currently parties on how they spend the money that the New South Wales taxpayer gives them.

Mr ANDREW TINK: That is true but if you were talking about a policy which required television stations to give free air time, that is Malcolm Turnbull's area surely?

The Hon. JOHN WATKINS: That is.

Dr THAM: Yes.

CHAIR: The Nationals say in their submission that they feel disadvantaged with the cost of advertising in regional New South Wales where a particular constituency has more than one regional television station covering them, so they have got to go to a couple of places and they have got such a wide coverage. I am not sure to what extent we need to speak to them about that being a major issue in country areas.
Dr THAM: It goes back to the question is it unfair?

CHAIR: They were saying that it was.

Dr THAM: All candidates contesting those regional areas would be subject to those similar price difficulties.

CHAIR: That is right.

Dr THAM: So it is not the National Party problem, it is candidates in regional areas.

The Hon. JOHN WATKINS: I always thought that regional candidates had a great advantage actually because they had local television.

CHAIR: The point I think is that a constituency could have more than one television station.

The Hon. JOHN WATKINS: That is right and so if they are going to use television they are going to have to use a couple of them but as a city based member of Parliament, you never got on the television advertising; whereas you could actually use that tool in a regional centre, and they do, very effectively.

Mr ANDREW TINK: We are hearing from them this afternoon, the National Party want two or more tiers of electorate specific spending caps to take into account higher local costs.

The Hon. JOHN WATKINS: It is unlike the National Party to want a different system from the rest of New South Wales.

Dr THAM: I think that is something that raises an important issue that we have not covered which is the sub-caps that apply in particular electorates.

CHAIR: Yes, that is right.

Dr THAM: I think we have more been talking about aggregate caps. The first thing I will say about those caps, and this emerged in the report I wrote for the Electoral Commission, while we have information about what the parties on the aggregate, we do not have information about what they spend in particular electorates.

So I was actually unable to form a view; are we talking about caps are too low or too high? This goes to the issue that the National Party is raising, they are saying it is too low. Maybe it is; I do not know. We simply do not have the information to decide that. In fact, if we are talking about disclosure, I think disclosure for the purpose of transparency, preventing corruption and undue influence, that is important but disclosure is also for understanding the effectiveness of the measures that are put in place.

Mr ANDREW TINK: This is actually a very interesting submission because they go on to say:

“This could possibly be offset by reducing a party's non-electorate specific spending cap by an equivalent amount, so the total spending cap for each party is the same.”

They have not actually necessarily got a bid in for more money because they have got regional electorates; what they are on about, as I read it, is more flexibility within caps; party versus electorate. Do you see what I am saying?
Dr THAM: I understand what you are saying.

Dr MILLS: It does go immediately to the television question, both for the rural electorates but as you say in urban electorates, local candidates do benefit from television advertising even though they do not personally feature in it. It is just effective and efficient to move it across all of Sydney or all of Newcastle.

I am not sure that the best unit of measurement for campaign expenditure is electorate spending, so I am a bit with you in terms of wanting to unpick that. I think the relevant unit of measurement is kind of channel. Is it going to be direct mail, is it going to be television, is it going to be door knocking? Now some of that is actually local but the television element is obviously not local. It is centralised from head office and so again I say a very effective cap on overall spending and arguably on policy deliberation would be to have a cap on television advertising.

Dr THAM: I suppose under the current laws the sub-category electorate level is set at a uniform level, based on the premise that every electorate under the current New South Wales electorate laws has approximate equality in terms of number of voters.

CHAIR: Yes.

Dr THAM: I suppose what I am taking the National Party submission to mean in a way to argue in principle is that rather than just the number of voters being the criteria determining the level of the cap, we should talk about the size of your geographical area. I think that is something worth examining.

Like I said, we do not have data across the whole State to determine whether this is a particular problem or a uniform problem or how big the problem is but I think it is just an issue.

Mr ANDREW TINK: Just in terms of what you do know and your sense of it, television advertising is way and above in a league of its own compared to say radio advertising and print media advertising?

Dr MILLS: Yes.

Prof SMITH: Where are you talking about, in rural electorates?

Mr ANDREW TINK: No, we are talking across the board.

CHAIR: It is just more expensive.

Dr MILLS: Generally yes, more expensive.

Mr ANDREW TINK: You would not necessarily contemplate a media spend cap, you are talking about a television spend cap?

Dr MILLS: I am just thinking, what is the largest budget item?

Mr ANDREW TINK: I am just asking rhetorically. I am going one step further and saying why would you not have a media spend cap?

Prof SMITH: Does it really matter?

Dr MILLS: It would be possible, although it would be administratively more complex. I think you achieve the same effect by going to the largest single item, which is the broadcast buy.
Mr ANDREW TINK: When you say broadcast buy, you include radio?

Dr MILLS: No, television broadcast buy, I beg your pardon.

Mr ANDREW TINK: Say you put a cap on the television broadcast buy, what is to stop them then having a little sub-set arms' race in radio advertising?

Dr MILLS: Well I think they probably would.

Mr ANDREW TINK: So why would you not do both?

The Hon. JOHN WATKINS: Because then you would have to go to social media.

Dr MILLS: How much do we want to control party campaigns I think is the problem?

Mr ANDREW TINK: Fair enough, so you are saying television is something that is inherently worth controlling because of the magnitude of the spend?

Dr MILLS: Yes.

Mr ANDREW TINK: But not radio?

Dr MILLS: Yes.

Mr ANDREW TINK: I am not passing value judgment here; I am just trying to ask the question.

CHAIR: If some party wants to spend all of their electoral funding on television advertising, why should they not?

Dr THAM: I agree.

CHAIR: It will drive the population mad.

Dr THAM: Again it goes back to what I said; the spending cap should control the level of spending and not determine the composition of spending.

CHAIR: Yes.

Dr THAM: I think once you move into sub-caps about media spend or television advertising, you are basically trying to determine the composition spending. I know that is a strong view about television advertising but—

The Hon. JOHN WATKINS: It is what is driving the machine. It is what has driven it always and the ramping up; it is all about what is driven by—

Dr THAM: But you can control that by the aggregate caps.

The Hon. JOHN WATKINS: That is right.

Dr MILLS: It is a blunter instrument though.

Mr ANDREW TINK: There is a side argument here—I have got to be careful—but you could just say hypothetically speaking in regional seats where regional television spend is important to have a cap on the overall level of spending but not on the television spending say might be a climate
conducive to some black money raising to spend more on television.

Dr THAM: But that goes to the level of the caps I would have thought. If you think the caps are encouraging extravagant television advertising, then you lower the caps so that they cannot buy enough television space. In fact, we are probably bringing in a bundle of problems that are more complex than this issue of the narrow definition of electoral communication expenditure.

Mr ANDREW TINK: So we keep it simple?

Dr THAM: Keep it simple; capture everything, let the parties decide. If you think it is too high, we lower the level.

Mr ANDREW TINK: Choice within caps.

CHAIR: Yes, that is right.

Dr THAM: Exactly.

The Hon. JOHN WATKINS: That is one of the principles, the simplicity that is necessary. It is when we over-regulate we create all sorts of problems.

CHAIR: Perhaps we should have a look at the constituency spend and see if the larger geographical areas are being unfairly treated by the candidate caps.

Dr THAM: Yes. I think one element of flexibility I did indicate in the 2012 regime is that currently the sub-caps applying separately to the party as distinct from the candidate which is endorsed by the party. This came out in the interviews of the party officials, what happens is they just move money around and you have things like the candidate invoicing the parties. This is ridiculous. This artifice is ridiculous. Again, it is by controlling the level of spending. We should just say if there is party and an endorsed candidate, they are subject to the one cap.

Mr ANDREW TINK: Does that make it less transparent though?

Prof SMITH: No, what makes it less transparent is not having access to the way the parties are spending the money.

Dr THAM: That is right, exactly.

Mr ANDREW TINK: No, but where a candidate might be spending money.

Dr THAM: There is a party and a party endorsed candidate and spending in that particular electorate. I think for all intents and purposes we should just treat them as basically one of the same kind.

CHAIR: You know that parties are going to move money in whatever way they can to focus their campaign on their marginal seats.

Dr MILLS: Correct.

CHAIR: In safe seats, they will not spend anything.

Dr MILLS: Exactly.

The Hon. JOHN WATKINS: But if we are providing such generous public money, should we take steps to ensure that some of that money is in fact spent across the electorate?
CHAIR: Yes.

Prof SMITH: Again, that is a party's decision, is it not? You cannot mandate where the party—

The Hon. JOHN WATKINS: You can but you may not want to.

Prof SMITH: I do not think you do want to mandate where parties choose to run or not run candidates for various reasons.

The Hon. JOHN WATKINS: But where they do run candidates is the responsibility on them to spend some of the public money in those communities. One of the chronic complaints we hear, if you live on the north shore of Sydney on the beaches, you never get anything. You do not even know who the local candidate is; whereas if you live in those areas where there are marginal seats, the people say stop, please stop. I do not know the answer to that one.

Prof SMITH: We have a system of single member electorates for the Lower House; some of them are going to be safe.

CHAIR: But if there is taxpayers' money going into this should there not be some onus on—

Prof SMITH: It is going to the parties I think to compete for seats in Parliament as they see fit.

The Hon. JOHN WATKINS: And that is a social good.

Prof SMITH: And that is a social good. Forcing the Labor Party to put a certain amount of resources into a seat that has no chance of winning and has not got a decent candidate because it is one of my students who has been press-ganged into running; that to me just seems perverse.

Mr ANDREW TINK: And it creates difficulties again with enforcement and administration. It would create a nightmare.

The Hon. JOHN WATKINS: And pressures to slip money around, dirty money.

Mr ANDREW TINK: The simpler it is, the easier it is to police.

Prof SMITH: I think that is the key.

Dr MILLS: It does raise the question as to campaigning for the Legislative Council. In other words, campaigning state-wide rather than electorate-wide; whether or not if you were looking to spread the campaign money beyond just a marginal seat, whether or not there is some merit in requiring or encouraging some minimum spend for the state-wide campaign.

The Hon. JOHN WATKINS: But again, that comes to the judgment of the party. If a party decides not to campaign at all in a large section of the State perhaps they are foolish and they should cop what comes with that.

Dr THAM: Exactly. Let the discipline of the election actually work its magic in that sense.

The Hon. JOHN WATKINS: Which is why the Labor Party does press-gang students of yours into standing for seats, so that there are people handing out how to votes to get the Legislative Council.
Mr ANDREW TINK: Can we come back to third party aggregates please? That is page 170 of your report.

Dr THAM: Yes. This is a complex but important issue to deal with. It is really when third party campaigners co-ordinate with a political party or a candidate or for that matter, with another third party campaigner. What do you do in terms of their spending and how does it count in terms of their caps election spending? I think this was a legitimate objective that was behind the aggregation provision that was struck down by the High Court but the flaw—and I have argued against that particular provision in principle—simply because it treated the mere fact that a trade union was an affiliate of the Labor Party as giving rise to a conclusive assumption that they were co-ordinating the campaign.

Of course we know that in reality that is not true. There are clear instances for example where unions in this State have campaigned against the Labor Party but under the provision were still counted towards the Labor Party cap. I think that is flawed, unfair and unconstitutional.

But I still think, and this is the argument I made in the 2012 report, that there should be a provision that aggregates the electoral spend when there is a co-ordinated campaign between these different actors and that the provision actually lists a number of inclusive factors for determining when there is a co-ordinated campaign. One of those factors would be whether that third party campaigner was a member of the party.

So let us say the trade union is an affiliated trade union of the Labor Party and is running a campaign. That would be an indicative factor but not a conclusive factor in terms of whether it is a co-ordinated campaign. Other indicative factors are suggested when a third party campaigner is office bearer of the party; that sort of happens too. That can be a factor determining whether it is a co-ordinated campaign.

This is really a provision where I have taken elements from both the Canadian and the United Kingdom electoral funding legislation. I think it is an important provision to have in the election funding laws and I think in a way deals with the issues that you raised Mr Tink in terms of the possible unfairness when trade unions engage in campaigns in co-operation with the Labor Party.

Mr ANDREW TINK: They are understandably concerned with the potential for asymmetric warfare is what I am trying to say. I understand what the High Court said about that. I understand the point you have just made too but I suppose what you are saying it is a question of degree.

Dr THAM: Yes.

Mr ANDREW TINK: It is a question of definition of the degree, which could be quite difficult.

Dr THAM: Of course. I think what the High Court is clearly concerned with in New South Wales was the selectivity of that provision because it dealt with co-ordination but only co-ordination in terms of trade unions related to the Labor Party and it made the assumption that affiliation equals co-ordination.

So in fact and this was a point made in Justice Keane's judgment that if you audited by these other political parties it will not be caught by the aggregation provision they struck now. So what I am proposing is driven by the same policy objective if you like but this is a broad based provision.

Mr ANDREW TINK: I have read what you wrote. It is an extraordinary submission; it is a wonderful submission. I just need to have my memory refreshed, have you actually referred in here to the Canadian and the United Kingdom provisions?
Dr THAM: Yes I have, yes. That is page 170.

Mr ANDREW TINK: I am looking at the same page, are they actually set out, are they?

Dr THAM: That is right, yes, page 170.

CHAIR: The other definitional problem with this is if a third party is conducting some sort of campaign themselves of a special interest sort of issue, and not actually linking it to the election campaign but it is very clear that one party would go with them and another party would not, the extent to which that becomes a part of the election campaign as distinct from just out there trying to sell your policy as a third party campaigner—

Dr THAM: This comes with the issue we spoke about yesterday. My approach would be a broad based definition based on electoral expenditure. I would not require that kind of expenditure to expressly advocate the vote for a party or a candidate to come within that definition. I think we would count that towards electoral expenditure and on the assumption basically if it happens six months out from election time, we can make a reasonable presumption that it is aimed at influencing the vote come election time.

CHAIR: The Police Association example that Andrew was using earlier would fall into that category.

Dr THAM: Yes, as I said, if they did a campaign and I think when I interviewed the Police Association their campaign was running two years before election time. That would be caught by the spending caps.

CHAIR: It has got to be in the election period.

Dr THAM: That is right, exactly. That gives rise to firstly I think fairness in terms of caps but ease of compliance. They know they are in. If there is an issue about the level being too low, then we think about increasing the level but not mucking around with the definition to deal with the question of the level of the caps, if you like.

Mr ANDREW TINK: Would you be prepared to give us a little bit more on this? I know you are on leave—a wonderful purpose can I say. Just for example, you have quoted here section 94 of the United Kingdom Act which itself refers back to section 85 of that Act, which we do not have here. No doubt a Google search will get it in two seconds, but is it possible you could put that together in just a slight addendum and expand your argument a fraction?

Dr THAM: Yes, no problems.

Mr ANDREW TINK: It would help me a great deal.

Dr THAM: That is no problem at all. I think the point you make Dr Schott about implementation is a good point, because it is a matter of degree when it comes to co-ordination.

CHAIR: Yes. We just do not want the Act having another five pages added to it because it is inflexible.

Dr THAM: No, that is right.

CHAIR: We are pretty much past our time. Does anyone have anything that they would like to add before we close?

Prof SMITH: I just want to add, the concern I have with the full public funding model,
which is what to do with new entrants. It seems to me there is a particular problem if you are a new political party or if you are an independent and you stand for the first time in an election under a full public funding model, where do you get your resources to run a campaign from?

If you say you are allowed to raise money and then have it reimbursed, what if you fail whatever test there is for provision of public funding? Are you breaking the law and subject to penalties? It is going to be a substantial problem because every party starts somewhere, some a long, long time ago so it is not really relevant but The Greens, the Christian Democrats, Shooters and Fishers Party in this State and some others that have come and gone, the Democrats and so on and let alone the independents. I cannot see a solution to it that works frankly. It seems to me that a full public funding model is retrospective and therefore new entrants risk coming foul of it, or it is prospective game the system. In other words, they just run for a lark.

CHAIR: Which has been known to happen.

Prof SMITH: Which has been known to happen, yes. Yet we do not want to keep new entrants because they have a contribution to make. I think there is a real conundrum there that I have not been able to work out a solution to.

CHAIR: Stephen, is there anything you want to add?

Dr MILLS: Just a very quick point. Mr Tink asked a question earlier at the start about the advanced payment process and I think it fell by the wayside. I regard that as an entirely appropriate measure to basically assist parties with their cash flow.

Mr ANDREW TINK: At that 30 per cent rate in the Act?

Dr MILLS: Thirty per cent seems reasonable although you would not want it to be too high. I am not quite sure how the system operates at present but there needs to be some proper reimbursement on a certification basis. Part of the strength of the idea is that it actually helps the smaller parties.

Mr ANDREW TINK: It is clear that it is then factored into the overall money they get at the end, so it is less 30 per cent when you get your payment at the end.

CHAIR: Yes that is right.

Mr ANDREW TINK: You are not getting anymore.

Dr MILLS: No, you are just getting it at a time when you would otherwise be running up the credit card debt basically.

CHAIR: Yes, that is right, it saves on interest payments.

Dr THAM: There is a set of issues we have not touched on really just to put it on the record, is local government.

Mr ANDREW TINK: It is not in our terms of reference.

Dr THAM: It was in the Issues Paper I think. The questions were about whether there should be caps at local government level.

CHAIR: While the local government is not in our terms of reference, we were discussing yesterday whether with a low cap we would just get rid of banning certain groups and that then raises the issue about property developers and caps at local government level because there are no caps and
if property developers were limited donors then this is really an area of government that is thick with zoning and planning and property developers and so on.

Dr THAM: Exactly.

CHAIR: We would probably just make a passing comment about somebody having a look at this space.

Dr THAM: I think it is crucial and this is in another report I did for the Election Authority on Local Government. We see a more acute risk of corruption at that level for structural reasons. I am not trying to impugn local government candidates, office bearers. One is that we have got low cost election campaigns so the amount of political donations goes much further in that particular context. We have got a lesser level of public scrutiny because focus is more on the State level politics and of course, as you mentioned Dr Schott, the centrality of local government in the planning process.

I am not trying to impugn anybody's character and so on but I think the structure and features of local government make the risk of corruption more acute and I think it is an important area to look at.

CHAIR: I think it is exacerbated in New South Wales because we have so many councils and it has been so difficult to persuade them to amalgamate. In other jurisdictions where the councils are quite large some of those sorts of small entity issues go away.

Dr THAM: That is right.

CHAIR: That is a bit like getting COAG to agree on things. John, do you want to say anything?

The Hon. JOHN WATKINS: No, I am right.

CHAIR: Andrew?

Mr ANDREW TINK: No, I am finished, thank you.

CHAIR: We are finished then. We have given you some homework Joo-Cheong. Thank you all for attending.

(Session concluded at 11.57 a.m.)