REPORT OF PROCEEDINGS

PANEL OF EXPERTS - POLITICAL DONATIONS

ACADEMIC ROUND TABLE DISCUSSION

SESSION TWO: THE REGULATION AND GOVERNANCE OF POLITICAL PARTIES AND ASSOCIATED ENTITIES

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At Sydney on Wednesday 24 September 2014

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The Panel met at 1.00 p.m.

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PRESENT

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

Academics - Prof R. Smith
Dr A. Gauja
Dr J. Tham

Transcript provided by Karen Russell
CHAIR: This second session of our round tables is focusing on the regulation and governance of political parties and their associated entities. Just to put this in context, a lot of the difficulties that we have seen at ICAC can be sheeted back to not so much the law, which in New South Wales is very strict, but to people either blatantly apparently skirting around the law and breaking it or actually culturally having no regard for trying to comply.

One of the issues around compliance really gets down to party governance and also the culture within parties. It is that matter, governance within parties; that this session is really focused on. We have got three general questions that we, as a panel, wanted to roll across but of course, the conversation could take us a little further.

Those three matters were how are the political parties constituted and governed? We did have a working paper that looked at this a little bit. To my personal surprise most of the political parties in New South Wales are actually corporates, so they have a corporate structure, with the exception of the major parties, that do not; who are voluntary associations.

That gets to what is in the constitution and what sort of rules does the constitution lay down for parties, what legal status do the parties have and does whatever that is mean that enforcement is much more difficult?

The second general question is around the regulation of political parties and what role the State should have in that, because political parties are, after all, collections of people who have got together because they have similar views and who are trying to do things within the community. So what role does the State Government in regulating that and there surely must be some sort of balance.

The third thing was really around the checks and balances that are needed on compliance with the law. Of course there is a law but what checks and balances do we have around that?

I might first of all begin by welcoming Professor Rodney Smith, Dr Anika Gauja again, thank you and Dr Joo-Cheong Tham, thank you. Anika and Joo-Cheong were here for our first session as well, thanks for the long day you are both putting in and welcome Rodney.

We have been looking forward to this session this morning because we got onto this topic a little bit and then stopped because we knew we were coming back to it after lunch. Just in terms of kicking off, I might start with you Rodney and ask you to comment on the political parties' constitution and governance arrangements.

Prof SMITH: I am probably not the right person to start on this in some ways.

CHAIR: Feel free to pass the football.

Prof SMITH: No, I will say a few things; I am an academic, I can get by. A few years ago Anika and I wrote a paper about the constitution of the parties in New South Wales, looking at all the parties, major and minor. You are right about the way they are structured broadly. What we also found was that the parties had tended historically to develop their constitutions as they have encountered different stages of success shall we say. The most basic constitutional structures come with parties which have, by and large, little prospect of getting someone elected, probably a reasonably small prospect actually of receiving funding under the New South Wales funding regime, but which are there nonetheless as a kind of a vehicle for interested members of the community to run for office. Some of them do not even manage to get that far. Most of them do manage to put up a candidate somewhere for election.

Then as the party's functions become more complex, in other words, they get enough votes to get funding or they actually win a seat in Parliament or their preferences become relevant to other candidates, then their constitutions generally expand. The party with the longest constitution is the
Liberal Party of New South Wales, the New South Wales division of the Liberal Party of Australia, which has a very, very long constitution and a lot of that has to do with the fact that large parts of it are designed to control all sorts of factional shenanigans that were going on in the early 2000s.

In some ways what that implies is the parties do not set out to constitute themselves in particular ways. I know there are traditions around this. The Labor Party has a very clear tradition of how it thinks it should be constituted, having to do with affiliation with the trade unions, having to do with members, having rights to some control over the policy and platform of the party, the relationship between the Parliamentary party and the non-Parliamentary party and so on. But for most parties there do not seem to be those kinds of deliberate traditions.

The Greens would be another example of a party which reflects those traditions in its constitution and the Liberal Party to some extent. But many of the parties, the smaller parties, do not reflect those kinds of traditions. Many of the constitutions appear to be designed to concentrate power relatively narrowly and involve a relatively small number of people in fact in the case of the Christian Democratic Party, which is in the hands pretty much of one person.

There is no overall template. They seem to develop organically in response to different challenges. Few of them reflect what you might say is a clear founding vision and they often change in response to circumstance.

CHAIR: Anika, do you want to add to this, because you have done quite a lot of work on this? Just looking at party constitutions, a lot of them read—I think Andrew commented on something yesterday, it is a bit like reading the Gettysburg Address. It is very high minded and so on but it is actually by and large not about governance or things that would be required by the party.

Dr GAUJA: Party constitutions, as Rodney mentioned, have developed organically. They have developed from the standpoint that political parties are voluntary associations, that they are membership organisations to some degree and that the purpose of the party constitution is twofold. First and foremost it is to regulate intra-party affairs; more specifically dividing up functions between the central party and the party membership.

The second role or use of the party constitution is—this is where the Gettysburg Address thing comes from—to broadcast the party's principles to the public because we do not have in Australia a history of having election manifestos, so party constitutions actually take that particular role.

The way in which the document develops is geared towards regulating intra-party conflict rather than engaging with the broader law and stating how political parties can be compliant with the law, in particular election funding laws.

Going back to the original question that is listed here on the paper, it seems to be as a party scholar quite odd that you ask what checks and balances are there on the compliance with the law including election funding laws because that is not the objective party constitutions as they are currently constructed at all.

CHAIR: It struck me when I was looking at this that the Australian Labor Party, the Liberal Party and the Nationals are not incorporated, though other less major parties are. Because they are not incorporated they therefore do not have a legal status that is clear, but nor do they have all of the disciplines that being a corporate structure brings with it. I was just wondering whether you had a view on whether that was a good idea, sort of deeming parties to be some legal status, for example, a corporation?

Dr GAUJA: I think for the purposes of enforcement it is; not necessarily saying that they need to be incorporated or create some sort of legal recognition for the purposes of enforcement. I
think that that would be a reasonable way forward. I think the choice to incorporate or not incorporate for a political party, I would expect smaller developing parties not to incorporate because it requires a fair degree of sophisticated legal knowledge to actually understand what the distinction is and probably Joo-Cheong can explain that better than anyone else here.

As a developing party you do not have resources. You just do what is the easiest option available. If you look at the constitutions that are out there, a lot of them - they have got the detailed constitutions of the Labor Party and the Liberal Party which have hundreds of years of history but then you have got the much smaller parties that just basically want a template so they can fulfil the minimum requirements of the Act.

At the moment those are that you just need to have a written constitution with some basic outline of the governance principles but there is no mandate as to what those principles are. You need to field candidates for public office and you need to have a certain number of members.

Before we get onto the question of whether or regulation of the internal organisation of parties is desirable, it is just important to note at the moment there is very little of it.

**Dr THAM:** Just to add to what Rodney and Anika have said, the current situation is a diverse situation. It partly reflects, as Anika and Rodney mentioned, the histories and ideologies of the parties, but it also reflects the absence of the law prescribing uniform requirements for political parties. I suppose that is one of the key issues for the Panel.

What you have in terms of laws is really laws that indirectly impact upon governance. Under election funding laws, for example, the provisions dealing with management of donations and expenditure, would have some kind of indirect impact upon the governance, so would the scheme of agents, so would the rules governing liability. There is some kind of indirect impact upon governance within the parties.

As I mentioned, from my point of view there are two broad approaches that we can think about. One is that we look at a direct approach where we prescribe specific governance requirements on political parties, I think that was canvassed in the issues paper; do we impose duties analogous to director's duties upon the management committee of political parties? That is one route we take.

Another route we can take is that called the indirect route which basically is strengthening the rules of liability; in my view scrapping the scheme of agents and then really beefing up the penalty regime, the compliance regime. Then leaving up to the political parties to decide how to adapt to those effective rules of liability; effective rules of penalty.

I support the more modest approach for now because I think that one important principle we need to bear in mind is the principle firstly called the objective of ensuring the parties comply with the law; absolute compelling important public interest. At the same time it is the principle respecting the diversity of party organisations. I think at this point in time prescribing specific governance requirements for diverse party structures undermines respect for party structures.

**Mr ANDREW TINK:** I think we have got a bit more assertive about this. we have got a situation where bodies are accepting literally millions of dollars worth of taxpayers' money and where most other bodies that I know of who are in receipt of large amounts of public money, are required to have some rules around their governance which ensure that the money is spent according to law. It strikes me as a bit odd that the organisations which actually have as their prime business putting people in to Parliament to make laws for everybody else do not themselves have governance rules relating to themselves.

I have said this many times, it is like the major parties have got rules that are not too much advanced beyond the local tennis club or the local sailing club.
In terms of what you would do though, it does not strike me that you necessarily have to be over-prescriptive and start trashing the Liberal side or the Labor side or both. Just say for argument’s sake we introduce a corporate structure where we have the Liberal state executive as people with the powers of directors, the Labor administrative committee with the powers of directors and the responsibilities of directors within the case of receipt of public money, especially for administration expenses, involve them with strong duties as to how they spend that money.

You then have a trickle down where once they are impressed with those duties; they have an incentive to make sure that the rest of the party is doing the right thing as well.

CHAIR: I think New South Wales is quite different in the amount of public money that goes into the administration, particularly of the major parties. We asked the parties how much they spent each year on their administrative costs and the answer from the two major parties was about $4.5 million; about the same for each of them. We know from the public funding that about half of that roughly, a bit less, is publicly funded.

I agree with Andrew that it does seem very odd that taxpayers are putting out money to actually assist in the administration of political parties which is fine, but if we were giving money to almost any other group that I can think of, you would expect to have quite close auditing if that was happening and what it was being spent on; that it was being properly used.

So there is the protection of public money but I think the other issue is—and this is an issue that ICAC have raised—how can it be that in both the major parties there have been allegations of quite serious corruption but neither party internally picked it up before it was at ICAC? With the systematic corruption that appears to have occurred, then there would be chatter about that or gossip or people within the party would have some knowledge that there is some rumour that Person A and B was up to the wrong thing.

If that sort of thing is happening in a company or in somewhere that has got obligations back on the top panel, the first thing they do is get somebody in to investigate whether this scurrilous rumour they have heard actually has any substance to it.

There seems to have almost been—and this is no doubt overstating it—a choice to not go looking at whatever gossip that was round and about and I do not doubt that there would have been some, given this was not a one off thing that people were hiding. There were a lot of people that must have known about these activities in both the Labor and the Liberal Parties and nothing happened.

Dr THAM: I agree with your point about the awkwardness of giving substantial amounts of public funding in a largely unconditional way; aside from vouching that their expenditure be directed to particular purposes. That is why in the 2012 report I did for the Electoral Commission what I recommended was that there be what is called candidate and party compliance policies.

The way this would work is simply as an eligibility condition for receiving public money; that is before they can receive public money political parties every year need to submit a policy that basically lays down their internal arrangements; so how they are going to comply with the election funding laws.

The Electoral Commission has the duty to actually decide whether to approve that policy and they approve that policy when the commission forms the view that these internal arrangements will likely result in compliance with the laws.

Why I have suggested that goes to some of the sentiments you raised. You have got lots of public money and there should be probity measures attached to public money, so that is one reason. The second reason is because I think it respects the diversity of party structures. It puts the onus on the
political parties. They devise internal arrangements by subject of oversight; the commission basically says okay, for example, how is the Liberal Party going to deal with the decentralised system, where you have got hundreds of intro party units? So they need to explain how they can do it; the commission is the same. How is the Labor Party going to deal with its small centralised system and its associated entities? They need to explain how they are going to do it and it is ticked off and only after it is ticked off they receive the public money every single year.

Mr ANDREW TINK: Can I put it to you slightly differently? Directors’ duties are well known. They are pretty common sense when you think about it. They are to make inquiries where things are raised that are of a concern or where there are reasons of suspicion and so forth and to act in the best interests and all that sort of thing. They are just well understood generally around the community I would have thought; people who think about those things.

So the parties have different structures. Companies have all sorts of different businesses and different structures. Some of them have branches all over the place. Others are very tightly held financial corporations with just a head office. At the top, if they have got a corporate structure or the company rules apply, then the basic duties are the same. They trickle down in different ways, sure but the basic duty to inquire and act responsibly and so forth is there for all.

One of the concerns I have got with what you are putting is that if Electoral Commission goes to a party and says we want a policy that is acceptable to us and deals with your internal arrangements, you can still have the problem of it being who exactly is going to be responsible for implementing or overseeing the policy? There are too many loose ends.

If you have a corporate structure and a board or even if you do not have a corporate structure, you have a statutory regime on a governing body to act like directors, then you know who is responsible at the top and they are impressed with those duties.

Dr THAM: I think I mentioned this earlier; I of course support the political parties to be deemed bodies corporate for the purpose of actual funding laws. So we are not in disagreement there.

I am not opposed to what you are saying. I suppose I am just thinking that we should hasten slowly. There are certain areas which I think clearly need to be fixed up in terms of election funding laws that would help in terms of compliance—abolishing the scheme of agents, fixing up the rules of liability and then lastly a measure about introducing candidate policy compliance rules.

Mr ANDREW TINK: Is not good corporate governance something that will help with compliance? To my mind good corporate governance is about ground zero when it comes to compliance. It is having a structure where the body itself polices itself; where the body itself is alert to misconduct within itself; where those in charge of the governance, because their own hides are on the line to some degree at law, they are actively motivated to be internal assessors of compliance.

Dr THAM: I think the point of issue, we are both in agreement; good corporate governance is actually the key to this particular debate. The question is how do you want to achieve this in this area, which is actually quite a unique area. It is not only diverse party structures, but you all know much better than I do there is the administrative wing of the parties and there is the Parliamentary wing of the parties, are the Parliamentary wing is not necessarily officially represented in the administrative wing which under the model of corporatising political parties it would be the administrative wing that is actually subject to the duties; where the Parliamentary wing which holds important power and I would say important responsibilities, would be also out of the loop.

I am not necessarily opposed to what you are saying. I am just saying that we should hasten slowly out of respect for diverse party structures, have some of these measures come true, let them go through for one electoral cycle, if they need to be reviewed in terms of effectiveness and if they are found to be wanting and there are shortcomings, then we can take the stronger approach in terms of
specific governance duties.

**CHAIR:** Rodney, do you have a view on that?

**Prof SMITH:** I guess it strikes me that there is a bit of an assumption about the way the parties are structured, even with what you are saying. If one of the purposes of a party is to be part of the community, to have a branch structure that is throughout the community, to keep with other parties that are also represented there in the community, part of that would necessarily involve devolving responsibility for raising money and spending money to those branches.

I am not sure that a very centralised model of responsibility necessarily helps with that. I think we need to make a distinction between large amounts of money and if you look at the funding that goes to the larger parties, it is a lot of money when looked at en globo and the capacity of branches which are going to have more or less sophisticated collected executives or non-executives operating at a community level with relatively small amounts of money, so I am not sure that we want to necessarily set up an expectation that everything needs to be cleared through the head office because the party is going to find itself liable for the activities of its operation involving a fairly low level amount of funding.

It does not surprise me that responsible office bearers at the centre of a party do not hear about every time somebody accepts money that they should not accept for electoral expenditure. There is a distinction to be made there and I think that does speak to the expected structure of political parties. Large political parties are highly centralised already, do we really want to, through this expectation, centralise them further and in some ways disempower ordinary members and supporters even further?

I do not want to say that you let people off if they accept money that they should not accept but I think we have to focus on what scale of illegal/corrupt activity we want to hold different levels of the party accountable for.

**The Hon. JOHN WATKINS:** We have talked about structures quite a bit internally and we are trying to find ways that parties can change their culture. One of the things to do is perhaps go to the structure of the party and look at directorial duties and so on and so forth. That is an issue that we have debated quite a bit and I have to say I think we are attracted towards some change that ratchets up and increases the importance of appropriate behaviour of those who are making decisions.

But, I hear what you are saying. If it is not a change to the governance structure, what else can we do to change the culture that operates within the major parties which has shown itself to be wanting, especially in relation to appropriate behaviour in relation to donations, both in the Liberal Party and the Labor Party for example at the moment, if we just talk about those two? How else do we change the culture of the major parties so that they abhor corrupt behaviour when it comes to public moneys or donation?

**Dr GAUJA:** I am a believer in political parties being able to adapt to changed circumstances, so I agree with Joo-Cheong in that I think the main thing is if you strengthen the enforcement mechanisms, you strengthen the possibility that political parties and candidates are going to be held accountable for their actions and this will be a public accountability. I think that parties will then start to develop some sort of intra-party oversight of their candidates and their members' activities. I think that that is perhaps the best way to go about it from the onset rather than changing the governance arrangements. First of all, see how they actually adapt to the stronger threat of enforcement.

Regulating intra-party governance I think is a dangerous area because it is difficult to, as Rodney mentioned, tease out the party organisation and just concentrate on one particular aspect because we have parties that are comprised of local branches; we have parties that are essentially federal organisations and parties that have an administrative component, a membership component, a
Dr THAM: I think it is fair to say in terms of changing the culture of political parties; quite a lot of the important measures actually fall outside the providence of election funding laws. I think Senator John Faulkner, in a way, made this connection in his recent address to the Australian Labor Party at their conference when he was arguing for change to the pre-selection rules within that party. He was basically arguing that the current pre-selection rules have resulted in a number of people being investigated by the ICAC who have been pre-selected numerous times.

That is part of the picture that is outside election funding laws. Election funding laws should be kept in perspective I suppose, that is my point.

The other point I would make, picking up on George's point from earlier on, is that of course ICAC investigations and hearings have prompted a lot of disquiet, a lot of outrage and so on and rightly so. But there is also another perspective one can take about this, and that is in a way this is part of the cleansing process that New South Wales politics needs to have after the introduction of robust election funding laws, where there is a time lag between introduction of laws and the change of the culture and this Panel to is part of the process actually, if you like, bedding down these laws.

Mr ANDREW TINK: Let me ask you this question, under our laws the major parties get a couple of million dollars a year in administration funding and in the lead up to an election they get a substantial amount more of money relating to campaigns. If we just focus on the administration funding, which is for administration purposes of the party year in, year out; who is responsible for that spending at law at the moment?

Dr THAM: It is a diverse situation.

Mr ANDREW TINK: With respect, I do not think that is an answer. I think the answer has got to be when parties are getting multi millions year in and year out, there has to be some group, some governing group that have got some directorial duties or some such attached to them of a standard type—nothing special, nothing that seeks to interfere with the party uphill and down dale and all its multi-various branch structures and so forth, but just some clearly known and understood legal duties at least in relation to the expenditure of that money.

So you can say, just as you can with any other organisation I assume which receives large sums of money, these people are responsible for it. It seems to me we are having great difficulty of answering the question of just who is responsible. Without traversing in any detail the evidence down at ICAC, they seem to have had some trouble with this too; where they go to key people who have given evidence and ask who is responsible? It is not me; it is somebody else. I just think that is unacceptable.

Dr GAUJA: Currently there are not any real conditions attached to that administrative funding, so then it negates the question of responsibility because responsible for what essentially?

Mr ANDREW TINK: No, the administration under the Act, at least in the broadest terms, it has got to be said, broad purposes, but at the end of the day we are struggling to say that, for example, the president of a party is responsible for it or that the state executive and the president and the office bearers are responsible for it or the administration committee. We are struggling with any of that. It should not be, I do not think.

Dr THAM: A very fair point you make. There is an issue first identifying who is responsible and then secondly the issue about determining who is responsible. I suppose I agree with you, there
needs to be a clear identification of who is responsible. I suppose with the second set of issues about how you determine who is responsible, one is to leave it to the parties to nominate who is responsible. The other one is for the law to prescribe who is responsible. I suppose for the time being, like I said, my approach of hastening slowly, I think we should leave it to the parties to nominate who is responsible, for them to determine who is responsible and they be held responsible.

**CHAIR:** Accepting that, I can see where you are coming from but this morning we discussed the role of the agent and I think there was some general disquiet about the current role of the agent who is the person who appears to sit there and take responsibility when no one else does. Then if we change the role of the agent, it gets back to the who question, we change it from the agent to, for example, the candidates, then they are for election funding or for the administration fund, whoever it is that is in charge of administering within the party, without interfering in what they are doing.

But it then raises the question of what is it that taxpayers would be happy to have that money spent on.

**Dr GAUJA:** I think that was the question I was trying to raise. You can have the issue of responsibility but responsibility for what exactly? At the moment I think it has been a very conscious choice on the part of lawmakers not to really assign that money for anything in particular. There is broad spending and parties can choose to spend it as they wish as long as it is for their administration.

**Mr ANDREW TINK:** In accordance with the law, it has got to be in accordance with the law.

**Dr THAM:** I suppose the other way to think about this set of issues, we are talking firstly about responsibility of the party as an organisation and responsibility that individuals within the party itself for the activities of the political party. I think that we need to nail down that first set of issues properly in the beginning, which is a shortcoming of this current law. We need to make sure that whatever, the party is held collectively responsible and the rules are loud and clear on that.

I suppose where we are having a disagreement about this is about the individual responsibility and who the individuals are and what their responsibility should be.

**CHAIR:** I am not in disagreement with you particularly but I think we have got a problem with the general funding of the parties and I am not talking about election campaign funding, which is another set of issues. It is almost like a free gift and it is almost treated as such. I do not think from a public money point of view that is appropriate.

**Dr GAUJA:** I would say more than almost, I would say essentially it is because there are no conditions that are really attached to it. That is one way you can think about it. Parties exist to contest elections, having political parties is in the public interest because they develop policies, they present those policies to the electorate, so they are inherently important in the system of representative democracy. On that basis we can give them money for their very existence and not much else.

The other view is that we can give them money as taxpayers but they have to abide by certain conditions and this is where you could potentially theoretically implement conditions on governance, conditions on structure, conditions on the way they perform functions. The list is endless. You could basically control what you want to do with the parties.

**CHAIR:** Or you could be very general and say whatever it is you are spending the money on as a party we are not going to interfere with but you must not break the law and if you break the law then your funding is going to be questioned.

**Dr GAUJA:** That is the current approach basically. I think it is a philosophical question to decide which way you want to go; how much of the party's organisation you want to control and how
much you want to leave alone.

**The Hon. JOHN WATKINS:** In our discussions there really has not been an appetite to jump in and intervene in every aspect of the life of the party and I do not think that is necessary. So long as the people who run the party—and we know who they are, there is the administrative committee of New South Wales and the Liberal Party has the state executive—they are the decision makers. They have got a structure and they have got a president. If those people have on their shoulders corporate responsibility to behave appropriately in all aspects of their duties, which is the burden I carry in not for profit organisations I am involved with, I think that would be as far as we needed to go.

I think there is a legitimacy in the funding that is provided by the State to the political parties because they do provide an important function in the community, but we have at base level an expectation that their behaviour will be governed by certain duties of responsible behaviour, ethical behaviour, legal behaviour. At the moment that is not imposed.

**Mr ANDREW TINK:** Just in a tiny way I am involved in the Library Council and Sydney Living Museums. I am on the board of each. My duties are not director's duties as such but they are set out by statute. What does it mean? What it means is that it puts us on active inquiry without interfering in the day to day running of the organisation but it puts us on active inquiry in relation to issues that might arise. It puts us in regular and hopefully appropriate contact with the senior office bearers. It keeps us in touch, hopefully in an appropriate manner, with the staff. We are out there actively, hopefully constructively and co-operatively working with the organisation. But it is proactive. It is not designed to be head in the sand stuff; somebody else's problem. I just think there is a tendency for "it's not my responsibility to be the prevailing reaction" that we have seen down at ICAC. There has to be that proactive responsibility taken by a group of people.

You might say what does it mean in relation to administrative fund, it's Part 6A of the Act which seems to me to set out a few benchmarks. Just for a starting point would be a check list of what a governing board should concern itself with as to whether or not the administrative money that they receive is being handled appropriately or not. Sorry, I get excited about this.

**Dr THAM:** Can I ask a question?

**The Hon. JOHN WATKINS:** We are supposed to be asking you the questions.

**Dr THAM:** Because with administrative funding, the party needs to vouch for any expenditure before it actually receives the money, so I am just seeking clarification. Somebody at the party needs to be responsible before they can get the money, you need a voucher. Election funding has to be ticked off before they get the money. What would those director's duties be beyond that; that is already achieved by that requirement?

**Mr ANDREW TINK:** They contemplate the active oversight of the little system you have described.

**CHAIR:** I think where we have been headed is some remedies around non-compliance because I think if you tapped a member of the community on the shoulder and asked them whether they thought it was okay to be giving public money to someone who has been entertaining corruption for years within their ranks, the answer would be pretty straightforward.

The responsibility for that occurring though when you try to land it, it seems to be the agent and the agent is relatively low in the pecking order and is really not the person who can do that, which is why we keep coming back to these peak administrative bodies. I do go back to the point that it is very different in the minor parties where they are set up as corporations and they do therefore get hit by the governance laws that go with that. I am not necessarily enamoured to going down that route but...
that is a discipline that is being imposed on the minor parties by their choice actually at the moment.

Mr ANDREW TINK: I am not suggesting that a party director would necessarily take the blame for every error, mistake or deliberate mistake down the line somewhere in a branch where something has gone badly wrong, but as a bare minimum you might say some of this administration fund perhaps, to promote good governance, ought to be spent maybe getting the electoral commissioner or one of their employees to come in and talk to the branches about what should and should not happen under election funding laws. Maybe some of the money ought to be spent getting somebody from the Electoral Commission to come in and talk to members of Parliament.

I think it is the same in the Labor Party, the leaders are represented on State executives, that it might be put about that this ought to be a compulsory parade for members of Parliament within the party to turn up and sign on, listen to whatever it is, the seminar or whatever that is being put on by the Election Funding Authority and take it seriously. In other words, some top down stuff, which to me is just basic common sense.

Prof SMITH: That is not just top down though. What you are talking about is much more what I am interested in, which is educating the parties, not necessarily from the top down but from the top, the middle and the bottom. I am perfectly happy with that kind of suggestion that the Electoral Commission or some other body with charged with that educative function and I do not think it should be limited to Parliamentarians or branches that are in trouble, it should be anyone who is liable to engage in activity that risks breaking the law.

Mr ANDREW TINK: But the problem can be no one turns up.

Prof SMITH: Yes.

Mr ANDREW TINK: So if you have a directorial type of arrangement within parties, so you have the highest level, the decision makers themselves saying jeepers, it is in our interest that people turn up. We will get the message down from the top that these people will turn up to these educative sessions. It is a way of having the whole organisation thinking about active ways of complying with the law, with people accepting that they have got this duty to comply with the law; that the whole organisation has got that duty to comply with the law.

Prof SMITH: I think everyone in the organisation has to take that responsibility; that is my point. I joked at lunch about our code of conduct but I bet I am one of the few people in my institution who knows what is in the code of conduct and that is because I have got a professional interest as an academic.

A lot of the cultural problem, it seems to me, that is being raised at the ICAC is with rogues out there and the classic argument which is used, for example, in the ICAC investigation into Rockdale Council, which is I did not know it was wrong to give this money to this person. You might say of course they knew it was wrong but it is a legitimate defence, it seems to me, if there is not an educative program at the grassroots level across the board. So I would like to see a very strong emphasis on that.

I think what you are saying about directors’ responsibilities for the large amounts of money that are assigned across to the parties as a big block, their administrative function, I am not sure whether there are any particular integrity issues there that we could point to. I do not think ICAC has uncovered any around that. It seems to me that what the ICAC has uncovered is much more around donations; it is much more around compliance with private money coming into the parties rather than use of public money.

Mr ANDREW TINK: I am not suggesting there is either but it is getting some of that administration fund used towards educating key people within the party.
Prof SMITH: Do not do it when you find a problem emerging, great or small, but do it as a matter of course so that everyone who takes on a role which is going to involve them signing off in some way under the Act or whatever version of the Act we have for receiving or giving money is aware of their responsibilities, not just the directors but all the people for whom that is a possibility.

Mr ANDREW TINK: But in terms of getting that trickled down, if you start with the group at the top who are and are seen to have that legal responsibility, there is just a better chance of it happening I guess.

The Hon. JOHN WATKINS: Who would be responsible for delivering that education?

Prof SMITH: I think there are two ways you could go. One would be to expand the responsibilities of the Electoral Commission, because under the old EFA model there was no educative role whatsoever built into their functions—I think that was a mistake. So you could have a division within the Electoral Commission to be tasked with that role and properly funded. In New South Wales we like creating new bodies, so that would be another option.

For myself, I would prefer the Electoral Commission to have a properly funded division with an identifiable budget for that purpose.

The Hon. JOHN WATKINS: Who should it apply to?

Prof SMITH: It should apply to anyone under the Act who is engaged in the transfer of funds for electoral purposes. We have got a list of donors; they ought to be part of this process. The education should be for the donors as well.

The Hon. JOHN WATKINS: Who are the prime people that should be educated and how do you do that? How do you ensure that it happens?

Dr THAM: That is why I suggested party compliance policy, because what it requires each party to do is provide evidence of systems they have in place tailored to their particular circumstances as to how they can comply with the laws. It picks up things like how they are going to make sure there is a minimum adequate level of knowledge amongst volunteers, different party officials about the laws. That should be dealt with in the party compliance policy.

The thing is, the way I have recommended it is as an eligibility condition before they can receive public money. So they are not going to get those millions of dollars unless they have an adequate policy.

CHAIR: This discussion reminds me a little bit about the safety culture in companies and some companies are much better at it than others, and it pervades the entire company from the board to the lowest level of employee and contractors. There is an enormous amount of effort that goes into it; an enormous amount of education but it really got most effective in practice when it was driven from the top. It was suddenly the directors who were going to land in gaol and in fact be personally liable and lose the houses if various compliance things were not met.

Mr ANDREW TINK: That is it; that is it precisely.

CHAIR: I take the point that this has got to be an education exercise across party members and branch leaders. I have got to say, the membership of parties is so low now that branch members is a dwindling number and it has got to pick up people who are trying to raise donations. But it really is a party responsibility and it is how you get the party to take that responsibility. In terms of penalties and compliance, you can penalise the party by holding back some of their administration fund if they are not behaving themselves. That would focus the mind.
Dr THAM: That is right and that is the difference between the occupational health and safety laws in this context. I take your point on the occupational health and safety laws. I work in the labour law context so I understand what you are saying but here you have got the huge carrot—millions of dollars in funding—you can use as a lever.

CHAIR: That is right.

Dr THAM: Without having to impose specific duties. Again, I am not opposed to this down the line; I just think we should hasten cautiously. I just think using these kinds of indirect measures first, see how they play out and if they are found wanting, let us move to something more assertive.

CHAIR: I am sure you are right that for the next four years or so there is likely to be more compliance, because it is in everybody's mind. But human nature being what it is and the arms' race to win elections being what it is; it will not last.

Dr THAM: No, exactly.

The Hon. JOHN WATKINS: Are there other things that can happen? You have done a lot of work imparting the knowledge to the parties. What else can we do to try to ensure cultural change happens within political parties? Are there other positive suggestions you have? Structure is one issue; education may be another one.

Dr THAM: Dealing with associated entities. This is where what is a political party is relevant. The Free Enterprise Foundation sets an example, the Labor Party, its own associated entities and so on. I think I mentioned this earlier this morning, this is a big loophole in New South Wales election funding laws—the absence of regulation of associated entities and I suspect it has facilitated some of the behaviour we are seeing ventilated before the ICAC hearings.

Dr GAUJA: I think that there are some quite positive changes that political parties are already making around campaigning and candidate selection that I think feed into this and that is the introduction of community pre-selections and primaries; borrowing from the Obama campaign and the American model, more grassroots' funding campaigns. I think the moves to restrict donations are already a step in that particular direction because then what you do is, you essentially send a message to candidates that in order to be a successful candidate, a successful political operator, you can mount a local grassroots campaign, soliciting donations from a wide spectrum of the community, not huge donations but also getting political support in that way. I think that allowing that process to occur is a step in the right direction.

The Hon. JOHN WATKINS: Is there anything we can do? That very much seems to me to be an internal issue for a party.

Dr GAUJA: It is an internal issue and the thing that you could do is to basically not adopt laws that say that parties have to select their candidates in any particular way; as long as you allow a certain amount of innovation in political parties.

CHAIR: That is an issue that I do not think the State should ever go anywhere near, that is a party matter.

Mr ANDREW TINK: That does not necessarily follow, that it would go anywhere near there if the governing bodies were given director's duties. You correct me if I am wrong on this, but director's duties are flexible to the extent that they will depend upon the legal—and I stress the legal—goings on of the organisation that they control. Having director's duties over a political parties does not necessarily mean you are going to mandate a form of pre-selection or any other thing like that, it is just within the legal workings of that party, which can be very different to the other party and both of
them can be entirely legal. That is basically the Liberal and the Labor Party.

So if they are going their separate ways, providing they are going within the law, there is no problem. But as they go their separate ways within the law, having directors with well understood general duties to make inquiry, to be informed and to deal actively with problems where they find them upon inquiry and so forth, that that is where I am at.

It is not about saying you will do this and you will do that. Have your diversity by all means, it is a democracy but have above that, with the respect for the diversity, that duty to make the inquiry and make sure things are running according to law.

Dr GAUJA: One thing is acknowledging that parties come in all shapes and sizes. It may actually be difficult for parties to find people who are willing to take on that responsibility because basically everything rests on their head from a legal perspective and that parties are complicated organisations. I think that is an issue that is a difficult one, particularly for smaller political parties.

I also think if you are going to go down that route of potentially creating some sort of a body of directors, Parliamentarians really need to be pulled up into that, particularly the Parliamentary leader because a lot of the activities that ICAC is uncovering are corruption that rests on a position of power; corruption that derives from an incumbent position. I think that Parliamentarians are first and foremost in that.

CHAIR: Except people that have taken money and nothing has come of it. Within the Liberal Party there were offences, it is not clear that there was any gain, as distinct from some of Labor Party activities. But just to stop being so negative for a moment, what can we do that would help increase participation in political parties and increase membership and volunteering and the sorts of things that you would like to see in a vibrant party?

Prof SMITH: If you look at the decline, the standard argument that is made about why there has been a decline in the major parties at least is that ordinary grassroots' party members think that they do not have any role or the roles that they have are quite boring and you can get much more done by joining a pressure group or being part of a social movement or whatever, an online campaign, which is the second point that I was trying to make.

One of the things that party members used to, to some extent feel that they could do, was raise money for candidates. I guess one of the things that I am slightly concerned about would be a party saying we have got these new director's responsibility, there is an enforcement body, we are going to be audited, so what we better do is suck all of the money raising activity to the centre, because that is the only way we can really control this.

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We are not interested in local branches that want to raise money for us because we do not have the resources to properly find out whether all that money is clean money or whether some of it is dirty money in various ways; so we just do not want to be a part of that. We will survive on the funding that we can raise centrally, because we can control that, State funding, big donations in the context of the Act, whatever that limit is going to be, and we will just live within that.

I think one thing if you do not want to contribute to the decline in membership, would be to leave at least that kind of capacity for fund raising, the feeling that you are making a difference to a candidate that you like in your area, part of the big electoral fight against your opponents, whoever they might be, would be to leave that possibility open and not make risk averse party organisations say it is just too dangerous to let you folk do anything, just like it is to let you have any say in policy, because you come up with crazy ideas.

I guess that would be the kind of caution I would have about an unintended consequence perhaps of some of the suggestions. There are no doubt ways of dealing with that and clearly what
most local branches is going to raise is relatively small in the overall scheme of things but so are some of the matters that are in front of the ICAC. They are not 10s, 20s, hundreds of thousands of dollars, they are relatively small amounts, which it is within the capability of branches to raise. There may be a kind of an ultra caution to come into things; which may be what we want but I am not completely sure that it is entirely what we want.

**Dr THAM:** Moving a bit into, I suppose, tomorrow’s session on public funding, I think public funding is a good lever to use to try to increase engagement within the parties. I think there are some key defects in how the amount of public funding is calculated under the current regime. I propose a model that in part would base the amount of public funding according to the number of members that political parties have.

**CHAIR:** This is for the election funding?

**Dr THAM:** Administrative funding in fact. Say a certain amount of money from a number of members, the common response to that is that that would encourage branch stacking—maybe; possibly. There need to be probity measures to ensure that the membership list is a genuine membership list. To some extent the Electoral Commission is actually doing this now in terms of registering parties, where a certain number of individuals have to say they are members of a party before a party can be registered. Something along those lines could accompany public funding being based on number of members.

Another measure is actually having a matched funding system where say donations of small amounts—and I say small amounts meaning $50 or less—there might be some kind of matched public funding if you like, so the parties have an incentive to actually get big money in small sums.

**Dr GAUJA:** Can I just make a few points on that? Drawing on my knowledge of comparative party organisation and the work that has been done by scholars in Europe, the answer would be to address the problem of membership decline and decreasing membership activity would be to reduce the level of public funding and to reduce the level of regulation; two things that stand in opposition.

The rationale for that is political parties with high levels of public funding are less reliant or less likely to turn to their members to actually give donations and to engage in campaigning. If everything is paid for, why bother with members? That is the rationale there. In terms of regulation, the concern is the day to day administrative cost on individuals actually participating in party activity if they are faced with a mountain of party regulation, it just does not make sense to join a political party if all they are going to be doing is trying to work out how to comply with election funding rather than actually formulating policies. They are the two arguments that are usually put forth.

I do have sympathy for the first argument in terms of public funding and pushing that level too high. I think some level of public funding is appropriate and I do not think that there is any real problem with the current level that we have. This is going into tomorrow’s session, which I will not be here for so I will just say it now.

I think that there is a certain danger in pushing that too high. Also in terms of what Rodney spoke of, of the centralisation of campaigning and activity within political parties, if it is just one section of the party that is receiving the funding and working out how it is going to distribute it, that the temptation there is to conduct more centralised campaigns.

**CHAIR:** Just on the membership point, the submission from Bruce Hawker says that in Canada where they have a different constitution from us and they basically banned unions and corporates from giving anything, which forced a relatively moribund national democratic party which had had union affiliates and very low membership to actually go out and engage with its membership base and prospective membership base. It also had a very charismatic leader so it is difficult to
actually sort out what caused what, but they went from a very low percentage in representation back up to record levels with a much more vibrant and active membership.

**Dr GAUJA:** I think the Canadian case is interesting because it speaks to a number of things that we have just been talking about. First of all, the case of the national democratic party is quite unique and there are a number of things that feed into that political party's success, but it shows that parties can change the way that they operate in response to electoral regulation.

I think that capping donations has a similar effect in this context; that parties can seek out smaller donations from a broader base; that is something that is possible to achieve.

The other thing about the Canadian case is that membership in Canada fluctuates. There are huge fluctuations in the electoral cycle and that is all to do with the Canadian leadership contests, because their run is open primaries. So people will join a political party to vote in the leadership selection contest and then not renew until the next time. So there are massive, massive fluctuations.

In a way that goes to the point that Rodney made that if you want to increase party membership then you have to give members something to do or a say in something and leadership selection contest is the way in which the Canadian political parties have dealt with that.

I am not entirely sure that linking funding to party membership is a great idea, simply because I do not think that formal party membership in the way that it is constructed in the electoral legislation, you have to have a certain number of members that sign a membership declaration, is an accurate reflection of the way in which people want to engage with parties today and participate in party politics, because membership is less than one per cent. It is down everywhere. I have done lots of surveys of party supporters who say that they just do not want to join a party because they do not want to join, full stop.

I think that there are different ways that people are supporting and engaging with parties beyond party memberships. I think membership will probably cast that net too tightly.

**The Hon. JOHN WATKINS:** Whilst I think our political parties growing is a good concept, I actually do not think that the State should play a role in that. I just do not think that it is the role of the State to encourage or legislate means by which a political party can increase its attractiveness to members. I think that is just a bridge too far probably. That is surely the business of the party.

**Dr GAUJA:** I think the State already sends enough signals out to suggest that having a big or a vibrant party organisation and a membership is actually a good thing. I do not think that there are too many political parties that would want to say we do not want members altogether. I think there is a culture of trying to encourage membership.

**The Hon. JOHN WATKINS:** Effectively the State does intervene by providing that administrative assistance to enable it to look after itself but I do not think it should be taking active steps other than that.

**Mr ANDREW TINK:** Can I just ask a collateral question on this director's issue which you may or may not be able to answer; I do not know. The High Court made a decision a long time ago—I think it was in the 1930s—Cameron v Hogan that stated basically the State should keep out of internal affairs of parties. Do any of you have an opinion whether or not that would be likely to be the same result today or whether it could be said on the other hand that because since 1934 this State has supported political parties with millions of dollars worth of taxpayers' money, that the court would be less likely to say the management of parties is not the Parliament's business? Does anybody have a view on that or how things might have changed or whether they are just the same as they were in the 1930s and likely to be seen to be so?
Dr THAM: You are quite right about Cameron v Hogan. What has happened subsequently is a series of superior state court decisions. The decision from Justice Dowsett in Baldwin v Everingham is the prime example and a number of various other cases basically concluding that because public funding has been provided to political parties, that internal rules are justiciable, where as Cameron v Hogan found the opposite based on what you have just said. Because of the introduction of public funding since the early eighties, the legal position has changed through a series of cases.

Dr GAUJA: In Burston v Oldfield, which was a subsequent New South Wales Supreme Court decision, they started off on the basis that the internal rules of political parties are justiciable and where internal rules do not exist, they will apply principles of natural justice that come from administrative law.

Mr ANDREW TINK: This is really important. So the judges will apply judge-made law where there is a gap is what you are saying, in effect, apply common law as they see it? So the judges themselves are prepared to fill gaps?

Dr GAUJA: Yes, that is the way that it has been.

Mr ANDREW TINK: So they would be less likely to object where Parliament purports to fill a gap, providing they believe that Parliament is doing no more than filling a necessary gap I suppose.

Dr GAUJA: A very basic principle. I think in that case it was natural justice, there being a quorum at a particular meeting. So they are not really inclined to—

Mr ANDREW TINK: No, I understand.

Dr GAUJA: But certainly where a political party has its own comprehensive set of rules, so the Labor Party or the Liberal Party will enforce those rules.

Mr ANDREW TINK: Just again, say hypothetically director's duties, incorporation and so forth, is there potentially a constitutional problem because—I think it is true of the administrative committee too John, it doubles up with federal responsibilities, does it not?

The Hon. JOHN WATKINS: Yes, it does.

Mr ANDREW TINK: There is overlap. The one body is dealing with both federal politicians and state politicians. Is there a risk a High Court might say this is not a State legislative business to be interfering to create director's duties in relation to something that is partly federal? Do you see what I am trying to say?

Dr THAM: This goes to some jurisdictional issues that Professor Twomey raised in her paper. The election funding laws in New South Wales are directly restricted to New South Wales' elections, at a State level and local government level. Directors' duties actually framed accordingly I would not think there would be a particular problem in terms of those jurisdictional difficulties.

Mr ANDREW TINK: So the duties framed around the electoral laws as they apply within New South Wales are not beyond?

Dr THAM: Correct, yes. So I suppose if you had something like take reasonable steps to comply with the law, full stop, then that might run into some difficulties. But duty to take reasonable steps to comply with the election funding blah, blah, blah of New South Wales, that is clearly within jurisdiction.

Mr ANDREW TINK: The electoral commissioner took some legal advice about this and the
advice seemed to come back that there was not any problem. Quoting here:

"Requiring parties to incorporate would be simple from a legal point of view."

Dr THAM: Incorporate generally or be deemed body corporate for this specific set of rules?

Mr ANDREW TINK: I am just quoting here.

CHAIR: I think it is for this particular set of rules.

Dr THAM: I agree with that. I do not think being bodies corporate generally is necessary firstly but I think that raises more complex problems.

CHAIR: John, do you want to raise anything?

The Hon. JOHN WATKINS: No, thank you.

CHAIR: Andrew do you want to raise anything?

Mr ANDREW TINK: No.

CHAIR: We might conclude the session now then. Thank you very much.

(Session concluded at 2.30 p.m.)