REPORT OF PROCEEDINGS

PANEL OF EXPERTS - POLITICAL DONATIONS

ACADEMIC ROUND TABLE DISCUSSION

SESSION ONE: THE REGULATION OF POLITICAL DONATIONS AND ELECTORAL EXPENDITURE

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At Sydney on Wednesday 24 September 2014

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The Panel met at 10.00 a.m.

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PRESENT

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

Academics - Prof G. Williams AO
           Dr A. Gauja
           Dr J. Tham

Transcript provided by Karen Russell
CHAIR: Welcome everyone. This is the first of a series of round tables which the Panel are running through. The two sessions today are focused on regulation. The one this morning is focused on the regulation of political donations and electoral expenditure and the one after lunch is focused on really the regulation within parties and how they govern themselves.

Before I commence any comments I will introduce my fellow Panel members - John Watkins, previous Labor Party member and Deputy Premier.

The Hon. JOHN WATKINS: Still a Labor Party member.

CHAIR: Andrew Tink. Andrew has been very helpful I might say because he has a legal background and a good knowledge of matters legal.

This morning the academics who are taking part in the discussion are Prof George Williams, Dr Anika Gauja and Dr Joo-Cheong Tham. Each of these academics are very well known in this particular space and we are very pleased to have them here.

The session this morning is really around the rules governing election funding under the 1981 Act which was introduced by the Wran Government and has been revised and morphed into various changes as we go ahead.

I think the background to the Panel's establishment has been the revelations at the Independent Commission Against Corruption (ICAC) first of all in Operation Credo that really focused on alleged illegalities within the Labor Party and really drew attention to governance within that party. That was followed rapidly by Operation Spicer, which as you know, focused on alleged wrongdoings within mainly the Liberal Party particularly around election funding and political donations and in particular donations from property developers, particularly in the Central Coast and Londonderry.

What those inquiries have exposed actually was not just a one-off breach of matters but actually something that was quite systemic and co-ordinated. That, I think was the most shocking both to the present Premier but also to the Panel and the community more generally, and more importantly.

A lot of this is driven by the fact of the knowledge that money and resources do win elections. There is obviously a limit to that but there is no doubt that throwing a lot of money and resources at advertising and getting messages out and running a very well orchestrated campaign does win seats more than if you do not have that money.

The apparent disregard for the electoral system and the breaking of the laws that are there around it is a really serious breach of public trust and it really does erode our trust in government, in parties and it is an extraordinarily serious matter for democracy in this State.

To rebuild public faith I think there is a lot of integrity that needs to be brought back into the system. It is these factors that led to Premier Baird appointing this Panel. We have been tasked with investigating various options for long term reform and there has been a bit of criticism about why we are not reporting earlier.

I would say in response to that that where we do make up our mind earlier, we will let everybody know. There are some matters that are easier than others to come to a conclusion on, but everything does tend to be interconnected. Some of the issues that we have got arise from kneejerk responses to problems and I do think it is actually better for everybody to just sit back and have a bit of a distant think about the issues and then hopefully what we put down at the end of the year really will set out a long term reform agenda for the Government.

We will report to the Premier by the end of the year on everything and as I mentioned, if we
come to conclusions about matters, we will certainly report.

Before we continue I would just really like to thank the academics who are here today. For the community and those of you in the public, the Panel has been doing some work for months and there are a number of discussion papers up on our website, which is a DPC, Department of Premier and Cabinet website, if you wish to find it.

What those papers did really was to first of all explain what the system is, how much elections cost, actually what is going on, what is the state of the world, as well as some work that we asked Professor Twomey to do to update some previous work that she had done for Premier Rees. That was a really good legal based survey of the general world which I commend to you.

Where we are at in New South Wales is quite interesting. Before we begin, we have had over 70 submissions from members of the public as well as from the parties; some of them quite short. Most of them two or three pages long and I do commend you to have a look at them. Some of them are very interesting from people who deeply care about this matter and have thought about it. Some of the submissions from the major parties are longer, as you would expect they would be, because they are right in the thick of it.

ICAC in thinking about what has happened has basically drawn our attention to the way that they think about it, which is we have got a set of laws, are those laws okay? Let us comment on that and then in regard to those laws, is the enforcement of those laws adequate? They would probably, given the new recent inquiry, say it does not look like it.

The second question is a cultural question, which is what is it that encourages people to break these laws? Is it more than parties wanting more money or is it more than people who are making illegal donations wanting a favour in return or just exactly what is going on? Is it culture that is encouraging those issues?

I will now welcome the speakers and I would like to commence the morning session. The format is informal and we will do a question and answer and hopefully we will have a free flowing and interactive debate.

The first general question really to our visiting experts is what do you think the aims of our election funding regulation in New South Wales ought to be and what is the best way of achieving those aims? George, if I can start with you.

Prof WILLIAMS: I think it goes back to the community's desire at heart for elections to be run in a free and fair manner. I think that captures many of the elements that people are looking for. I can refer specifically to the submission of Graeme Orr, who identifies four categories that I think are a good starting point to understand better what free and fair elections are. Then I might add another one as well.

The goal I think is that the regime must foster participation and of course, we want people to be actively engaged in the political life of this State. That not only means people should be running for office, it means people should be supporting those running for office. I think also it means that we should recognise there is a legitimate aspect of the system that involves people being able to donate money to candidates within reasonable limits to demonstrate their support for those candidates, to enable those candidates to put forward their message effectively. Generally participation or liberty as Graeme calls it; is one of those key aspects. We do not want to close down the system in the name of dealing with other problems; we want the system to be as open as possible in terms of fostering broad based participation.

The second thing that is mentioned is that the system needs to be fair. We do not want the system to be open to manipulation. One possibility that we have seen in other contexts is that,
particularly rich individuals may be able to load up the system one way because they can take advantage of their personal finances that skews the system, I think unfairly. But that concept of fairness is very important. We want a level playing field as much as possible for participants so that what tells in that system is not the pre-existing advantages they may have, but the strength of their ideas and their ability to connect with the community.

The third thing is integrity or anti-corruption. Of course, that is one of the main motivators of this process, and that is extremely important, that the system itself does not give rise to people's ability to manipulate the system, to take advantage of it to break the law. But that is one of those criteria and I think one of the dangers we need to be alive to is that that desire to stamp out corruption, which is very important, does not override the other interests as well. We do not want to remove the ability to participate in the name of removing corruption; we need to get the balance right between those things.

The fourth one that Graeme mentions is the realistic resourcing of party activity. We want to avoid the arms race that is often talked about in this area. We do need public funding at an appropriate level. I am not someone who supports full public funding, but nonetheless I think realistic resourcing is appropriate within the framework that we are talking about.

The other thing that I would add on the table, what I think is an important principle, is that the scheme as a whole ought to be well designed to maintain public confidence in democracy in this State and we should have an eye to the design of the scheme in a way that makes citizens and voters feel as if the scheme is one that they can support and produces a Parliament that they can have confidence in.

I think it is very much that erosion of public confidence that is of great concern at the moment, because that has a range of follow on effects in terms of the health of the democracy that needs to be considered.

CHAIR: Dr Tham, do you want to add anything to that comment?

Dr THAM: I think this question throws up a very important central issue. As we approach the question about how do you design a democratic regulation of political funding. There needs to be a microscopic view, that focuses on technicalities and specifics, but also a macroscopic view that has at its forefront the key objectives and principles. So I think this question actually puts that squarely before us.

For some years I have argued that the election funding laws should be based on four objects and these four objects largely overlap with the ones that George and Professor Orr have mentioned. It overlaps with the ones identified by your Panel in the issues paper. It also overlaps with the objects provision that was just recently introduced this year.

The four objects are these—firstly to protect the integrity of representative government and this includes of course, preventing corruption and undue influence.

The second object is promoting fairness in politics, particularly in elections. The third object is based on an important recognition of the unique and important role played by political parties in this democratic system. The third principle or third objective is to support political parties to discharge their democratic functions.

The fourth principle, which actually overlaps with the first mentioned by George, is respecting political freedoms, in particular the freedom of political expression and the freedom of political association.

I think these principles are relatively uncontroversial. As I mentioned, I think they overlap with quite a few that have been mentioned, but they have also been specifically endorsed by the Joint
Standing Committee on Electoral Matters of this Parliament. They have also been endorsed by the New South Wales Electoral Commissioner who I think in the submission to this Panel referred to these four objectives as the four pillars of the New South Wales election funding laws.

Let me echo what George mentioned in his opening remarks, that it is quite understandable that the issue of corruption or the anti-corruption rationale has received prominence as a result of the ICAC hearings, but there is a real danger here as we approach the democratic regulation of election funding, that this part either receives the sole focus or receives prominence in a way that overrides or marginalises other competing public interests.

**CHAIR:** Dr Gauja, do you want to comment further?

**Dr GAUJA:** I broadly support both what George and Joo-Cheong have said and particularly Joo-Cheong's last point about corruption because of the circumstances that have occurred in New South Wales' politics recently and the terms of reference of this inquiry echoing that. That really is an important concern but should not be our overriding concern.

I also am cautious when we talk about the need for reform in New South Wales. We talk about the political system, political finance, we talk about elections, we talk about fairness in politics, as if of these terms are somehow equal or interchangeable. I think that they are not necessarily interchangeable; we have three separate issues that are going on at once here.

The first is how do we regulate—if that is desirable at all—political parties and their governance when it comes to politics in New South Wales? How do we regulate election campaigns specifically? Then how do we deal with this issue of corruption and influence both in elections but also in public office?

If we are talking about reforms to the Electoral Act; that can go so far as dealing with predominantly elections, but it may not be the best mechanism to deal with corruption in a wider sense in terms of public office. That is the first point I would make.

The second point I make is I agree with the principles entirely. I would also say when we make these reforms we have to think, as Joo-Cheong said, from a macro perspective and what we would like politics in New South Wales to look like.

The first thing to consider is what we mean by fairness? Fairness may be equality; fairness may not be equality and how we determine fairness. I think transparency is a very large principle and issue that needs to be addressed specifically.

Also, Joo-Cheong mentioned that we need to support the functions of political parties in election campaigns and I think that is a very conscious choice that electoral regulation has made in New South Wales and Australia, but we also need to consider that the political parties are not the sole actors in election campaigns. Do we want to support the activities of interest groups, third parties? How do we support parties relative to candidates, to independent candidates for example and can we support political parties equally; the distinction between major and minor political parties? Who do we want to actually participate in the electoral contest?

**CHAIR:** There are a lot of issues in that. If we just start off with the fairness issue. The general concept there seems to be that we set limits on political donations so that some billionaire cannot come along and basically take over the system by lobbing a big bag of money on the table.

What are your views about the current caps on political donations which are—to remind everyone—$5,700 for an entity and $2,400 for an individual? Do you think that is about right or too low and wherever it is set, does it encourage good behaviour or does it just encourage everybody to go round it?
**Prof WILLIAMS:** I suppose I can start again. There is a very strong rationale for having those caps and I think that the caps can certainly be effective in achieving many of the goals that we have set out. In particular, they can deal with the integrity issue, because they remove the possibility of the undue influence that can follow from very large donations. We have seen significant evidence of that. It also can play to the fairness aspect because it means that people can have a say in the political process without it being so dependent upon their personal wealth and it levels out the field somewhat. But as to whether those caps are effective—and that comes to a point we will come to a bit later I imagine—and that is in theory they can, but of course enforcement is the key with respect to that. No law can achieve its goals unless it is actually embedded within the political culture in a way that it fosters compliance and there is actually adequate enforcement of the law as well.

In terms of the size of the caps, I think we need to recognise that as a starting point that caps, and indeed the system in New South Wales, is quite strict compared to other jurisdictions in Australia. So we are not starting with a laissez-faire system in New South Wales where we are a long way behind other systems. In fact, we are quite strict and it is a highly regulated system in New South Wales compared to elsewhere.

I think that often goes against the public perception that in fact there are enormous gaps in the regime. There are certainly some problems that need to be addressed but it is not a regime that can be described as generally lax. The donations levels are $5,700. I personally would be happy to see that level lowered. It is a somewhat arbitrary question as to what it should be lowered to but I think given the public concern about these issues and the statements made by the Premier and others about the willingness to consider greater levels of public funding, that we could move a bit more along that spectrum of saying let's lower the cap and recognise that the taxpayer may be prepared to pay a little more in order to reduce the level of influence that people may be having at the higher level of those donations.

That might mean, in my view, that your Committee might consider a recommendation of lowering it to a bit more than half, say perhaps $3,000. I recognise that there is no perfect figure here. Professor Orr has recommended $1,500, which to me seems a little low in terms of what the extra cost to the taxpayer would be. But I think also it may want to be informed by some more precise analysis of how much money is coming between $3,000 and $5,700. My instinctive judgment is that the amount of money received between those levels is perhaps the amount that the taxpayer may appropriately consider paying. That is what I would be looking at, lowering it to roughly that level.

**CHAIR:** Do you think the level for entities and individuals should be the same?

**Prof WILLIAMS:** I do not have any firm views on that except to say that you would certainly consider a pro rata shift because those levels have been chosen obviously to be relative to each other and I cannot see any strong reasons why you would not be making a pro rata shift. It may even be that Dr Tham on this, given the work he has done more extensively for the Electoral Commission, might have a firmer view on the relativities there.

**Dr THAM:** Can I broach the broader question about fairness. It clearly stems from a foundational principle of any democratic system which is the principle of political equality, which states quite emphatically that each citizen shall have equal status regardless of their wealth or class. It is that principle that really translates to the question of fairness.

That fairness of course has different meanings in different contexts. I think it is probably quite important to distinguish at two levels. There is fairness in terms of influencing the political process, particularly those in power and of particular concern here is the use of political money to actually influence those in power.

Secondly, there is a fairness in elections in terms of how parties and candidates actually
compete in those elections.

Why I think there should be a distinction between those two levels is that we can see the regulation to tackle the question of fairness at those levels is actually different.

Fairness in terms of over the political process, particularly those in power, I think we're looking more at questions of regulation; there is a disclosure, caps on political donations. Fairness in elections in terms of how political parties and candidates can compete on a level playing field, we are looking more at caps on election spending.

Circling back to the question of caps on political donations, which in part is aimed at securing fairness in the political process, I have taken the view for some years that the level of the caps currently are a bit too high. Again, as George says, there is some arbitrariness about where you pitch the number but as George comments indicate, where you pitch the number has to be in the recognition that any lowering of the cap will probably be accompanied by an increase in public funding to compensate for the reduced funding of the political parties. So that has got to be borne in mind.

I think what George has suggested in terms of $3,000 for political parties and a pro rata deduction for candidates and third party candidates, I think that is not unreasonable.

Mr ANDREW TINK: I just want to go back to what George Williams said right at the beginning, the four principles, to which you added a fifth and then what I took to be the broad agreement of the Panel with that sort of scheme.

The first one was to foster participation. I just want to cut right to the chase—the reason why in some ways we are having this inquiry is because of what emerged from Operation Spicer and so forth down at the ICAC, which gets us to the question of developer donations. What interests me in the submissions we have received is there is a broad range of submissions saying that there should not be a prohibition on developer donations.

If I can refer to three to give some specifics about this; the Australian Manufacturing Workers Union is saying we should reject as a matter of principle prohibitions on certain classes of persons or organisations donating to parties or spending in election campaigns.

Another one is from Brett Walker SC, who would be probably the most eminent constitutional lawyer in Australia and was counsel in the Unions New South Wales case. He says there is something deeply anti-democratic about allowing a school teacher to donate $1,500 to a party but prohibiting his or her neighbour, who happens to be a real estate developer, from the same conduct.

The third one is from the Electoral Commissioner who says in his submission to us:

"I am of the view that the existence of donation caps negates the need for certain entities and individuals from making political donations."

I am just seeking your views on those. If the law is to change on this—putting aside what the High Court might do for a moment—does the Electoral Commissioner provide the key, which is to say if the donations are of a low enough level, then there is not a problem with buying influence. If you link that also to the issue of transparency of donations, so people can tell that it is a developer donation that is coming in and where it is going to. Do you have some views on that?

Prof WILLIAMS: Yes I do. I certainly gave evidence in fact to a few inquiries of this Parliament dealing with exactly those issues, these specific bans. The point I made at that stage was that I was concerned about the arbitrariness associated with banning particular groups, even though I
could understand the political imperatives driving those bans in light of concerns and at that point I said it would be much better to have a more general system of caps limits and the like, and of course, that is what we have ultimately got, with the specific bans as well.

**CHAIR:** They followed one another in a different order.

**Prof WILLIAMS:** That is right. I think I would be concerned with removing those specific bans if we retained the $5,700 level limit, because I think at that limit there are reasonable perceptions about the level of influence that might be exerted, particularly through multiple donations from associated entities and the like who might be connected to the one development for example. Indeed, you could imagine the situation where they may aggregate to quite large levels, if you look at all the people there involved.

If it was reduced to something like $3,000, if we had appropriate transparency, if we moved beyond the reporting levels at the moment, I think that I could see a good rationale for removing those specific bans and simply seeing it as part of the caps as applied.

I think that is obviously fortified by the fact that I think there is a very real prospect that the developer ban will be struck down by the High Court and we will talk about that at a different session. But I think the key is having the caps low enough that that undue influence is negated as a strong possibility.

**CHAIR:** Anika, you have done some work on this, what do you think?

**Dr GAUJA:** Well my thought is that if we take a principled approach—I agree with George's recommendation, the whole premise of having caps on political donations is that you avoid that influence irrespective of who the person is that is making the donation.

**CHAIR:** As long as the cap sat at a relatively low level.

**Dr GAUJA:** As long as the cap is at a relatively low level and at the sort of level where an individual or an entity could show their support for a political party or a policy principle through financial means but those means not being so high that it would be perceived as a mechanism for influence. So that is where drawing that figure is crucial.

On the issue of broader donation caps, I think that they are a very, very necessary part of the political system but I also think that individuals and entities should have the ability to donate to parties and candidates because I have some work on party organisations and political participation and it is true that party memberships are falling, but it is also true that individuals are finding different ways to become engaged in the political process and donations are a key part of that. So placing a blanket prohibition on donations I think would be detrimental to the political system.

**CHAIR:** John, do you want to add anything?

**The Hon. JOHN WATKINS:** It seems to me that it is under a system of bans and caps that we have had this grievous breach of public trust and abuse of the electoral system that has been highlighted at ICAC. Has it caused it? Has our attempt to control, limit, bring fairness to the system actually led to some of these grievous breaches of public trust?

**Dr THAM:** I am sorry, I do not subscribe to that view.

**The Hon. JOHN WATKINS:** It is a question.

**Dr THAM:** It seems to me to be analogous to saying that criminalising murder causes murderers to breach the law. I am sorry; I mean the structure of the reasoning, saying that putting
down some prohibitions means that people breach the laws.

CHAIR: No, the issue I think—

Dr THAM: Or have I misunderstood.

CHAIR: Partly the problem is that the federal jurisdiction is so different from New South Wales that if you are a banned donor, like a property developer and not only do you want to make a donation, you want to make a large one, then you can do that through the federal system and you see the transporting of money around.

The Hon. JOHN WATKINS: It has actually caused a push to circumnavigate the electoral laws.

Dr THAM: This is sometimes dubbed the hydraulics problem in election funding laws, in the sense that if you regulate one area and one other area is actually not regulated, then money, like water, is pushed through the other parts of the system. It is an issue that is particularly acute in any federal system like ours, like the United States.

What we are seeing is those allegations coming out in Operation Spicer; that is partly due to that. In an ideal world we would see complementary legislation at a federal level. That, if you like, plugs the hole that is the federal system.

CHAIR: I am so deeply sceptical about co-ordination across the federation of Australia about anything. We have got an ongoing issue I think.

Dr THAM: Of course and that is why I am saying in an ideal world but in a less than ideal, less than perfect world I think it is a problem that we have to live with and there is still significant gains in terms of integrity and fairness for actually regulating New South Wales' State elections at the State level and the local government level even with this particular problem.

The Hon. JOHN WATKINS: I think probably the horse has bolted with regard to bans and caps; probably, we cannot unmake it, but I am just wondering that if we pushed further down and placed more pressure by reducing levels, would that create that desire in our political environment for people to circumvent? You cannot answer that but it is a worry, because my understanding is that in Victoria they do not have caps and bans and it just does not seem to be an issue in Victoria. We certainly do not have the public debate, as I understand—advise me otherwise—that there is a breach of public trust in the electoral system in Victoria, but here in New South Wales where we actually do have some fairly detailed and constraining legislation, this is where the debate is. Is that because New South Welshmen are more corrupt than Victoria?

Prof WILLIAMS: I think that is what they would say, yes.

Dr THAM: It is not a view that I would subscribe to.

The Hon. JOHN WATKINS: What is the cause and effect?

Dr THAM: Political parties can freely accept money from property developers in Victoria and that money is not properly disclosed to any adequate standard of transparency. So that is another part of the response of saying why we are not having that debate in Victoria.

CHAIR: Are you saying that is because we do not know?

Dr THAM: We do not know and also what I see is some of the Victorian politicians seem to think that they are cut from a different cloth from the New South Wales politicians.
In terms of pressuring and dealing with loopholes, I think the hydraulics problem with the federal system is a difficult one.

**The Hon. JOHN WATKINS:** It is a real problem.

**Dr THAM:** I agree.

**CHAIR:** And their cap is $10,000 so there is plenty of room for manoeuvre.

**Dr THAM:** That is not caps, it is just a disclosure and now it is $12,000 plus. But what we are saying in terms of the allegations being added in Operation Spicer is also the use of organisations like the Free Enterprise Foundation, which are dubbed in legal parlance as associated entities.

For some years now I have argued that this is one loophole because of New South Wales election funding laws; that there are no dedicated provisions to deal with associated entities. Yes, what we are saying is partly the pressure of the regulation pushing that money through to the federal system, but we are also seeing the money pushed through loopholes within New South Wales election funding laws and this is something this Parliament can deal with.

**CHAIR:** What has happened there is illegal; it is not covered by the law.

**Prof WILLIAMS:** That raises a related question that yes, it is people working around the law but partly it suggests the law has changed but the culture has not, because people do not believe that there is a high enough cost that they will pay if they actively disobey the law. That is an enforcement problem that suggests that we have gone through this process but the message has not gotten through.

A couple of other quick things I was going to say; I think also when you talk about caps and property developers and the like, if you are minded to remove the bans on those people, then perhaps even $3,000 might be a bit high. I mentioned $3,000 in the context of retaining those but I think you would need to think again. I have just been looking at Brett Walker's submission and it marries say with Professor Orr and others who suggest a lower level and that may well be appropriate if you remove those bans. Maybe you should be looking at $2,000, $1,500 or along those lines because $3,000 is quite high given some of those interests and their ability to organise around donations.

With the Victorian situation, I think there are a couple of explanations. One is they just do not have the problem. They do not have the political culture that has emerged that suggests the problem here that the community is so concerned about, or perhaps they do have a problem but they have not had a longstanding corruption body that has brought it to light.

I do not know the answer to that but I think it is difficult to draw conclusions. But I wonder what we will see in Victoria in the longer term given that the incentives are of course exactly the same there as they are here, to actually receive donations and the possibility of influence that comes with it.

**Dr THAM:** Can I echo what George said. When Victorian journalists asked me about the New South Wales situation and they raised of course our issues; are we talking about different political cultures here? I said maybe, maybe not, but the point to be made is that this State has stricter election funding laws and also the strongest anti-corruption commission.

You may probably know that there is a continuing controversy for how toothless the Independent Broad-based Anti-corruption Commission (IBAC) in Victoria is, particularly with what is considered to be an excessively high threshold for investigation. It is not only myself saying this, this is what the commissioner actually has reported to the Parliament. So I think that is part of the context of determining differences between Victoria and New South Wales.
Can I just add my support to actually repealing the ban on property developer donations.

**CHAIR:** And presumably tobacco, gambling and liquor and all that?

**Dr THAM:** Yes. In the report I did for the New South Wales Electoral Commission 2012, my central recommendation was Division 4A, which provided for all those recommendations to be repealed. I made that recommendation based on two grounds; one is a lack of necessity, if you have got caps pitched at the right level and I think as Dr Schott pointed out, the ban on property developer donations and anachronistic was introduced before the caps, yet it still remains part of the regulatory landscape.

The second ground for actually repealing Division 4A is actually acute difficulties in administering complying with these prohibitions. In a way stepping back you can see why. There are structural differences between a cap on political donations, the touchstone of which turns on the amount of donations. That amount of donations is necessarily apparent to both the giver and the recipient of that donation.

But when you have a ban or restrictions that turn on the status or the industry background of the particular donor, that is not necessarily apparent to the recipient, neither is it necessarily apparent to the donor, because it turns on the activities of that particular donor.

Those particular difficulties are compounded because, as you know, Division 4A does not just extend to property developers, gambling, tobacco companies, it also extends to close associates like spouses of directors and so on and so forth; people who might not actually know they are caught within this particular prohibition.

This is a recommendation put out by the Joint Standing Committee on Electoral Matters of this Parliament and I strongly endorse it.

**CHAIR:** Can I just ask your views about third parties. Anika, you have done some work on this and just thinking about third parties in the context of if we have a low cap and we have already got quite a tight system and third parties are part of that. But is the level right with them? With membership of political parties falling, third parties are certainly currently very active politically on all manner of topics.

**Dr GAUJA:** Absolutely and GetUp! is an excellent example of a third party that has essentially taken members from political parties and it is expressing its views. It is a significant spender as well in election campaigns.

The approach internationally, using the United Kingdom, Canada and New Zealand as examples, is to impose donation caps and election expenditure upon third parties as well. So basically take them in to the electoral contest; treat them as not equal participants, but as recognised participants in that contest as well. Typically expenditure caps will be much lower for third parties than they are for political parties and donation disclosure limits are roughly the same. That sort of approach recognises that third parties have a place in the electoral contest but political parties are in fact the privileged actors.

The actual levels of third party spending I think support that as a good general approach because third party spending never really comes anywhere near political party spending. The exception to that is what occurred federally with the mining tax and the opposition surrounding that.

I have gathered some data from the last 10 years or so in those democracies; third party spending is not necessarily an issue, so we have not seen those levels. So there is justification for a much lower expenditure cap for third parties.
Mr ANDREW TINK: I would just like to put something specific on this which has been raised in the submission by The Greens. I will just quote from their submission.

"The third party expenditure cap of $1.1 million should be reduced substantially to an amount of about $250,000 State-wide and $20,000 per seat."

Then the justification for that is:

"It is unacceptable that wealth can buy an election outcome through a massive advertising campaign when an election should be won or lost by voters assessing the merits of parties and candidates. Reducing the third party expenditure cap would still allow a third party campaigning but weaken the unfair influence that third party wealth could currently buy."

If I could add to that a personal observation of my own, which is if you go back to basics, what should the system be about? My sense of it is that it should be primarily about representative government and the representative government is primarily the interaction of citizens and candidates and those who support citizens and candidates directly as distinct from other parties. When I say other parties, I mean other interests.

I am sort of in agreement with The Greens in the sense that they seem to hit on this question of what is it all about and if your starting point is representative government, that leads you to certain conclusions I think about where the focus should be. Does that make any sense?

Dr GAUJA: It does make sense. I think it is a valid view. Some other points to consider though is that I do not think you can necessarily assume that all third parties are wealthy entities or wealthy individuals. The United Kingdom electoral commission recently did a survey. It changed its third party provisions at the beginning on the year and it did a survey of all of the different third parties that were registered with the commission that had interaction with the commission. It showed that there was actually a great level of variation in the sorts of groups that were registered as third parties. Some were charities; some were small interest group organisations. Some were wealthy individuals and some were unions.

There is a large diversity, so you cannot necessarily assume that it is wealthy third parties that could potentially control the electoral contest. That said, it also comes down to the issue of where do you draw the boundaries of what is an election and what is not an election.

Mr ANDREW TINK: Sorry, I do not mean to interrupt but just on that very point you just made, if you again take The Greens' proposal, most of the less wealthy third parties would fit comfortably within that without any disadvantage. They are saying here it would be $250,000 as distinct from $1 million, so most of those less wealthy third parties—how would I know—but $250,000 on the face of it does not seem to be an issue.

CHAIR: I think the NRMA may have spent $480,000 or something at the last election. I think they were the biggest spender, but they were nowhere near the cap.

Dr GAUJA: Exactly. You have third parties also that are membership organisations and that are an aggregate of 100,000, 200,000 individuals. Conceivably that could be a democratic argument for allowing a higher expenditure cap to cover those sorts of third party organisations.

The general principle that a third party expenditure cap should be substantially lower than the political party expenditure cap is a sound one.

The point that I was going to make is where do you draw the boundaries of what is an election and regulating an election period. In Australia federally third party expenditure has been
greatest in periods leading up to elections, not election periods, so it has not been regulated in that sense and given that third parties would, I suppose, by their nature as interest groups, campaign on the basis of particular policy or political issues, it makes sense that the spending would occur during that timeframe, not necessarily during elections supporting a particular candidate.

The Hon. JOHN WATKINS: I wonder at the nature of the union movement in that it has a special and unique relationship with the Labor Party, part of the Labor movement. Is it the same; should it be treated the same as the mining council? It never has; should it be? That is an issue for debate I think.

Dr THAM: My view of that particular question is that you can make a distinction between the funding the trade union movement makes to political parties and the campaign spending it engages in. I have been for a long time strongly of the view that trade union affiliation fees should be treated as membership fees and as is correctly recognised by the current Act, such exemptions provided to individual membership fees. So there is a different treatment, if you like, based on the same principle.

When it comes to election spending, I think the union movement should be the subject of third party regulation like any other third party.

CHAIR: It is a definitional issue though, is it not, because if a union is running a campaign about something like workers' compensation, they will be off running their campaign and it may happen to be in an election period and it is actually quite a political issue. Is it an election issue or is it just a political campaign that happens to be happening very close to an election date?

Dr THAM: Yes and often people make a distinction between issue advocacy or party advocacy/candidate advocacy and of course, come election time, as Dr Schott correctly pointed out, it is very hard to draw the line.

My view in terms of caps on election spending is to have a very broad definition that captures all of them, but you pitch it at the right level and you have it start at an appropriate time, as was currently provided by the Act, of six months in the lead up to the election. That is not unreasonable. I think we can not unreasonably say that campaigning in that period, even though you might say I am opposed to workers' compensation laws or I want better roads and so on and so forth, you are really seeking to influence the choices of voters when you are engaging in a campaign at that particular time.

I suppose the point I make about that, and this is the point I made in the 2012 report, is that the current definition which tries to narrow it down to something narrower than just electoral expenditure, I think is not justified in principle but has given rise to problems because of the line drawing exercises.

Mr ANDREW TINK: Can I go off on a bit of a tangent to this. It arises out of the issue of third party so to speak, making direct donations and it goes to the Unions New South Wales case and the consequences of that.

One of the submissions we have had is from Bruce Hawker, who was Kevin Rudd's chief of staff and prior to that Bob Carr's chief of staff. He says this:

"The interests of democracy by definition are best served if the major political parties can draw their legitimacy and campaign funds primarily from their members, rather than institutional interests like companies and unions."

Then just in case anyone missed the point he is trying to make, he expresses—I think I am putting his case here fairly—regret that the Unions New South Wales case went the way it did and then says:

"I would submit that in the absence of a complete ban on institutional donations, the best way to guarantee the integrity of political decisions and long term robustness of our parties is by making it as difficult as is legally
Then he goes on to say, given that the High Court said donations cannot be legislated against, that the caps should be at a very low figure and he is suggesting $200.

Then finally in terms of the bigger picture as he sees it, what is it all about, he says that to do that would have the dividend of forcing the parties to get back to where they ought to be, which is growing their membership; the encouragement being on party membership and growing funding that way rather than through third parties where it basically makes parties lazy really. It has them out running around getting third party donations and not actually focusing on building up their own parties.

In Canada where these things were banned, corporate and union donations were banned, his final point is that as a result Canada has a much more robust and democratic party structure than we have got here, in either of the major parties.

Sorry, that is a speech. I apologise.

CHAIR: Andrew is very keen on Canada.

Prof WILLIAMS: I am not sure the Canadians are at the moment. I think the difficulty in this area is you have got not only one but two hands tied behind your back. The first is that you can only control New South Wales, not the federal scheme or the other states and that is a massive problem in terms of setting up an effective regime.

The second is that the High Court has set down some very significant legal limits on what you can do that have a big impact upon the design of your scheme, particularly in that area. It means that a range of, what I would actually agree with you, are desirable policy choices, are not available.

When it comes to corporate and union donations, we have had a very clear High Court decision and I think there are grave risks in now setting the cap for those entities at being different to others. There would be a clear level of discrimination involved there that I think would give rise to the possibility of another High Court case and my advice would be set the cap low but do not differentiate. I think that will apply both to the nature of the donors, developers and others and as well to corporate and union interests.

Perhaps if it is set low enough then that will provide a very strong incentive to receive multiple donations, that is from as broad a cross section of the community as possible to build up your membership base so that you encourage donations from that source and perhaps it might have that impact.

I wonder also whether there is merit even in some of the ideas that I know Rodney Cavalier has put in one of his submissions, that in return for receipt of public funding that should come with the requirement that you can demonstrate that your political organisation is ultimately controlled by members.

Mr ANDREW TINK: You should come back this afternoon.

Prof WILLIAMS: That is why I thought I would get in now, because I will not be here this afternoon.

It may be that if a party is going to receive public funding that certain obligations should flow from that in terms of party transparency, in terms of membership control and the like. That is another way of coming at that problem.
CHAIR: Rodney's particularly concerned about the public funds that go to the parties in the administration fund at the moment and ensuring that if that flow of funds is going to continue, then the conditions on scrutiny, audit and how it is used and so on be—in his words—as onerous as possible. He would rather not have that money there at all and has clearly been upset about it since 1981, but if it must be there, then his view that it really should be, as you know, very onerous.

Prof WILLIAMS: We do that for companies routinely.

CHAIR: Yes, I know.

Prof WILLIAMS: The principles I think that have some merit are membership control being demonstrated through appropriate rules and that includes all positions of power being referrable to the members in some way, members having some form of enforceable independent complaints mechanism to actually challenge decisions to ensure they are in accordance with the rules of the organisation and also providing an appropriate level of transparency.

I think these are reasonable things, particularly if, as in this context, we are talking about taxpayers money being used to an even greater extent to fund political parties and it is a massive investment of taxpayers' money, I think there is a reasonable return taxpayers should expect in terms of those entities receiving the money, as is the case for other non-political entities that typically receive taxpayers' money, that they are subject to certain democratic safeguards.

Mr ANDREW TINK: That ought to be corporate governance basically.

Prof WILLIAMS: I agree.

Mr ANDREW TINK: The parties that have received millions of dollars in public funding ought to have imposed on them, if necessary, corporate governance of a level which is imposed on just about every other body that receives public money.

CHAIR: We are into this afternoon's discussion, but while we are on the matter of enforcement and disclosures, do you have comments on the disclosure regime. Practically every submission that has come to us has said it really does need to get, if not real time, somewhere closer to it because at the moment it is such a long period of time. Perhaps let us just discuss disclosure and then move onto the enforcement issue.

Dr THAM: I think it is important to distinguish it in the role of a disclosure regime where the disclosure obligations are the main mechanism if there is a problem with integrity, as in the federal system, as distinct from the New South Wales system where there are caps on political donations, because I think if the caps on political donations are effectively complied with, and let us say $3,000 per political party per annum, that means there is a public assurance that political parties are receiving no more than $3,000 per annum obviously.

In that context the disclosure regime really plays a supplementary role. Then the question becomes what supplementary role should play. I would support real time disclosure but really in the lead up to the election date and I would support that real time disclosure being accompanied by—and this is something I recommended in the 2012 report to the Electoral Commission—analysis provided by the Electoral Commission that really provides a longitudinal view in terms of patterns of donations to various political parties.

What we have sometimes through the media reports is a single donation and then ad hoc reporting, if you like. I think what is important in terms of informed voting is really a contextualised and long term understanding of what are the patterns of funding that apply to political parties.

CHAIR: We have had some comment from people about the disclosure regime in some parts
of the United States where opponents in the political system will use what is disclosed about who has been giving money to candidates and draw attention to the electorate in which that has happened. If, for example, political donations of property developers was not banned but a candidate was getting a lot of money from property developers, their opposition is clearly going to stand up and say look at this. But it does depend on having disclosure during the election campaign period and having that disclosure relatively timely.

**Dr THAM:** It also depends on very robust civil society organisations that actually are analysing and providing information to the provider. This is what happens in the United States; whereas Australia is different; New South Wales is different. There are very, very few civil society organisations that firstly have the inclination, let alone the resources to actually analyse and segregate the data in that way that makes it meaningful.

**CHAIR:** So we are much more dependent on the—

**Dr THAM:** On the State. That is why I have recommended what I have recommended. In this particular context where we do not have that kind of civil society infrastructure to basically translate the data into political intelligibility, we need to rely upon the State and in particular the electoral commission.

**Prof WILLIAMS:** Here I think the submission of David Solomon is very interesting in terms of talking about what is happening in Queensland where there is evidence about disclosure on the day the donation is received being workable. If it works in the Queensland in the context there, I cannot see what the problem is here.

I agree with Joo-Cheong, you do not need this continuous disclosure over the longer period, but it should certainly be as continuous as possible, let us say within 48 hours at worst, given the possibilities of doing this, within the election period and if that means that people are raising questions about why candidates are receiving very large sums from a large number of property developers and if it turns out that that candidate is speaking in ways that reflect that influence, so that should be part of the debate.

**Dr GAUJA:** If I could add to that, there is going to be some administrative cost involved in establishing a disclosure regime that is going to be meaningful and is going to be workable as well, but with technological advances in the last however many years, we could easily get some sort of an internet site where people can click on, parties can click on, disclose, citizens can click on and also see what is occurring. So real time disclosure, technically, I do not think is an issue.

I think that it is true that it would practically take a secondary role to any expenditure caps but I do not think that its importance should be diminished because of that. Ian McMenamin has done research on the nature of political donations and he identifies there are two types of donations. There are the big donations but then there are also smaller systematic donations that, over time, lead to a particular type of political behaviour and culture and add up as well.

So there is value, I think, in disclosing smaller donations and requiring details from donors that are actually meaningful.

**Mr ANDREW TINK:** You mentioned there is a cost involved in bringing in such a real time disclosure system. I think there is probably also ultimately a monetary benefit possibly and that is it has been put to us that the greater the transparency, the more the policing goes on across the political boundaries.

In other words, in the United States where they have this working in some jurisdictions, the opposing candidates are really actively looking at each other's returns, especially during the campaign period and so they are acting as checks and balances on each other. You end up with a better informed
electorate about who is receiving money from where and also this sort of adversarial policing that goes on, as we see to some degree in question time, the adversarial system we have got would hopefully work to increase adversarial policing out of disclosure.

**Dr GAUJA:** I think the more entities that can actually access and interpret disclosure data, the better for democracy. The media have not been doing a particularly good job of it either in the last few years, but it is indicative that we as political scientists, lawyers and researchers need to actually apply for research assistance, money, to have the time and the resources to go and find this information ourselves. It is really not that easy.

**Prof WILLIAMS:** I think also if you want to hide something, the best way of doing it is dumping it as part of a really big wad of information, which is of course the system at the moment. As we know, media attention tends to be a short term thing and if you can concentrate all of that data in a really short period, then you are not going to get adequate debate about those things.

When people ask me why this strict New South Wales scheme does not work, my view is it is essentially because you have got problems with disclosure and enforcement. If you fix those things and fit all around the edges with a few other things about cap levels and things like that, then I think you have got a much more realistic chance that the system will work as it should and it will start to drive cultural change, where as you say, parties will start to scrutinise their opponents, but in doing so, they will be well aware of their own position.

**Mr ANDREW TINK:** It is a virtuous cycle.

**Prof WILLIAMS:** That is right.

**Mr ANDREW TINK:** You have to be careful about calling anything a virtuous cycle in New South Wales.

**Prof WILLIAMS:** But at the moment there is no incentive and no possibility of doing that. It is out of sight, out of mind most of the time.

**Dr THAM:** Mr Tink, you raise an important point in terms of the competitive politics providing an important level of scrutiny, but I will sound a note of caution—a caution that comes when companies or particular industries give to both the major parties. So this happens for property developers, it happens across the board with banks and so forth. Is the pot calling the kettle black? We are talking about the Australian Labor Party levelling criticism against the Liberal Party for receiving property developer moneys when they are receiving property developer moneys as well.

**Mr ANDREW TINK:** That is where you need the media; you need the non-government organisations and the media also playing a role.

**Dr THAM:** Exactly, you need something outside the party system.

**CHAIR:** But it gets back to the relationship between the candidates and the people who are going to elect them, because if you are looking at it at a candidate level, there would be differences.

**Dr THAM:** Yes, that is right.

**CHAIR:** Which actually gets to disclosure because a lot of the disclosure is at a party level and you cannot see what is happening at a candidate level.

**Dr THAM:** That is right, yes.

**Mr ANDREW TINK:** I take your point about how both parties might get donations from the
one corporation and therefore be nice and quiet about it, but I suppose the counter argument to that is transparency is transparency for all, hopefully.

Dr THAM: Correct, yes.

Mr ANDREW TINK: Therefore it is not just the policing between the parties; it is everybody keeping an eye on things.

Dr THAM: Sure. I think you raising Bruce Hawker's submission was quite important and without holding up the proceedings, I would like to make some quick comments. It is not an uncommon view to basically say that political parties should be really about individual members and that organisations or institutions should have no role in political parties. I think even within the Labor Party itself there are people arguing for the Labor Party to cut its ties with trade unions and so on and so forth based on what I see as an individualist view of political parties.

I am strongly opposed to that view. I think that collectives and organisations have a legitimate role in political organisations and I say this not simply because the Labor Party has trade unions as members, it is not simply a left and right issue because the Shooters and Fishers Party, for example, in this State has got shooting clubs and fishing clubs which are institutionally integrated into the political party.

I say this because having organisations, collectives within political parties is a legitimate of organising political parties. It provides for diversity of political structures and respecting that diversity I think is the important part of respecting freedom of political association.

The Hon. JOHN WATKINS: We have to accept the political system that we have got, that we have inherited. Clearly that has that involvement or association, like you say, of unions in the Labor Party.

Dr THAM: The question has been asked, what is wrong with banding in an organisation so that you can participate in that organisation? So long as there is proper accountability, there are proper measures of integrity; what is wrong with that?

The Hon. JOHN WATKINS: I am very conscious of the fact that what we do does not create other pressures—and it always does. I totally support having a system that has transparency, clarity and drives integrity and fairness. But a lot of the shock and horror that people have experienced recently is because people have actually stepped outside that and gone for black money. They have gone down the dark alleyways and deliberately tried to avoid this whole system that we are talking about. So, how do you stop that? That has attacked the integrity and the standing that politicians have in the community more than anything? They have actually, it seems, broken the law and then disregarded the system entirely. How do you drag them back? How do we stop the searching out the black money in the back alleys and bring them back into this system?

Dr THAM: I think you raise very important points. The ICAC investigations have raised this important issue about corruption but in terms of the specific issues into regulation, and I think George has mentioned this kind of thing, there are very specific issues actually that are defined. Some I have mentioned. One is the use of associated entities like the Free Enterprise Foundation, use of federal branches—that is another issue, which is called the hydraulics problem and then the third cluster of issues which I think you mentioned Mr Watkins is about non-compliance.

At times deliberately, but it seems at times through a failure to take due diligence. That third cluster of problems really points to us thinking about the compliance regime under election funding laws to both ensure there are adequate measures to deal with deliberate breaches, but also negligent breaches at the same time.
**Prof WILLIAMS:** Can I add a couple of things as well. I think in terms of what will change the system, one is the ICAC process itself. That is setting up a very major disincentive for people who might consider the same conduct again. People are obviously losing their positions within their parties and indeed, their political careers. But there is a real danger here of course that those processes will not lead to prosecutions and suggestions by one person that there is a less than one per cent chance that they might and that will, I think, undermine some of the value of that process.

We need to focus on whether indeed the law is in an adequate shape to move beyond findings potentially of corruption to actually moving to genuine enforcement of the law. Here I think there are some real problems. I would describe some aspects of the regime as being woeful, in that we have strong, rigorous caps, we have an elaborate scheme, yet the fact that, for example, someone cannot be prosecuted unless it begins within three years is very problematic.

It is not what you would expect in other areas of the law. It indeed sets up a situation where realistically you would not discover sometimes within three years. Is someone simply put beyond the ambit of the law? Indeed, that may be the case for many of these people within the ICAC proceedings at the moment.

I think, as Professor Twomey does, you should be looking at least a 10 year period. It should certainly extend beyond the current political cycle; otherwise you have the real embarrassments that you have got at the moment. But it should simply be drawn into line with other equivalent laws. There is no reason it should be less in this context, given the seriousness of these offences. I think also the fine is inadequate; $11,000 seems a small amount to pay, given that it can be very significantly less than the amount actually received as a corrupt payment. We are talking about much larger sums than that and $11,000 is not a significant disincentive.

I am wary about gaol terms in this context and one of the questions before us is whether it should be increased to a five year gaol term to trigger the disqualification provisions in the New South Wales constitution. I am not convinced that a lengthy gaol term is the answer, though I can see perhaps a short gaol term may be appropriate in very serious cases. As I put in my submission, I think that if someone intentionally receives money in order to get an unfair advantage; that may well mean that they win their seat as a result; then disqualification is an appropriate consequence, not via the New South Wales constitution in the sense of it being disqualification for a period in gaol. But what you have already actually got in the Commonwealth Electoral Act in section 386 is if you receive a bribe, you lose your seat and you are disqualified for a two year period or if you show undue influence, it is an automatic disqualification.

My view is that someone who is found to rort the system intentionally to get an electoral advantage, the punishment should fit the crime in those circumstances and it should be written into the law that it is an automatic disqualification in those serious circumstances.

**The Hon. JOHN WATKINS:** Where would that go, out of interest?

**Prof WILLIAMS:** You could put it in the electoral funding legislation. As it is in the Commonwealth Electoral Act at all, you do not need to put it in the New South Wales constitution. You could do so if you wanted to, it is not entrenched; you do not need a referendum. An ordinary Act of Parliament would do it. But in asking what should be the consequence in this area, you have got to fit it to the advantage that someone is seeking to gain.

**Mr ANDREW TINK:** This goes to a fundamental issue I think. If we are talking about serious criminal penalties and I think for any deliberate activity that would be broadly characterised as fraud or fraud on the public revenue for gain, especially if it relates to political office, the penalty should be severe. However, we get to this fundamental issue in the current structure of the Act that most of the conduct and most of the breaches landed at the feet of the agent. It is almost as if the agent is out there as a convenient third party—I do not mean third party as we have been using it before
now, but—whipping person. What is missing here is that the people who benefit ought to be the people who are on risk. The people who benefit are the candidates, the people who are elected to party office as a result of the taxpayers' money being used for public funding to get them into office.

It seems to me that we have got to move away from the concept of the agent. We have got to move away from the separation and we have got to put the responsibility in the criminal sense for the way money is misspent squarely at the door of the people who benefit from it.

**Prof WILLIAMS:** I think there is a lot of merit in that. It is difficult under the current system where the recipient may not have adequate information to know someone is a developer or the spouse of a developer and that might be a rationale for saying we need a very simple system that you receive money over the cap and you know you have got a problem as opposed to not having information under the current law to sometimes adequately make that decision.

I would say that there is a provision already within the electoral funding law that does make it an offence to receive that money. It has not received a lot of public attention. But I agree, I think that is where the responsibility ultimately needs to lie and the system ought to be clear enough and simple enough that a person is well aware of their legal entitlements.

**Mr ANDREW TINK:** Just going back to your principles right at the beginning, a principle might be that the person who benefits should be the person on risk broadly speaking.

**Prof WILLIAMS:** Yes, I think that is the case. They should be armed with the information to make proper decisions about their compliance with the law.

**Mr ANDREW TINK:** Then if there is fraud involved, we could legitimately have a look at the Crimes Act to see the type of penalties that are imposed there say on fraudulently altering a document or things of that nature which carry quite severe penalties. I think it is 10 years.

**CHAIR:** Just in terms of enforcement again, what has struck me about the current situation we find ourselves in is that there is a system of penalties and lesser charges which do not seem to have been used, so we have gone from not much happening to the big bang of ICAC, which is really like the full stop at the end of the sentence. I am just wondering what your views are on what we should be thinking about with enforcement through the Election Funding Authority (EFA) or other channels that are active, that is lesser than the big bang of ICAC and public hearings and all of that stuff, but it is part of a tool kit. It seems to be a not very much used tool kit.

**Dr THAM:** I would support the beefing up of criminal offences in the way that George suggested. The other issue to point out and this is an issue that the Election Funding Authority has actually raised is the criminal offences are only made out when there is awareness of the facts giving rise to unlawfulness.

**CHAIR:** So it is about the intent?

**Dr THAM:** I would not say intent, awareness of the facts. I think there is merit in considering these strict liability criminal offences for, if you like, lesser offences to basically support integrity for this regime.

The other thing I would suggest is not just looking at criminal offences but looking at a robust civil penalty regime. What I mean by that is really a regime where things are proven on a balance of probabilities where you can have penalties basically calibrated to the unlawful amount. The laws in the Australian Capital Territory, for example, provide a good model. Generally speaking, if you receive an amount exceeding the caps; the starting position is double that amount can be recovered by the commission. If the party demonstrates they have taken reasonable steps to comply with the law, then it falls back to the same amount.
What we have under the current laws and it is a defect in terms of compliance regime, is generally the starting point is basically the same amount. It basically puts the party back the way they were before they breached the laws rather than actually providing adequate punishment for breaching the laws.

**Prof WILLIAMS:** I was just going to add one other thing that is not in my submission and that is that if you want to target the reason these things are not coming to light and that is because there may well be knowledge of them but there is no requirement to report. You could potentially put a requirement on party officials, a reporting obligation, that if they become aware that a donation has been received by a candidate of either party that breaches the law, there is an obligation to report.

I am wary about those but I think in the context of receiving public funding, that that is one of those obligations that the community would see as reasonable, that if you receive taxpayers' money and you are aware that you or one of your candidates has received an unlawful donation, then that should be notified to the authorities. That might bring these matters to light much, much earlier, because I think what we are seeing at the moment there is a permissiveness there, which is understandable, given the lax nature of the current regime when it comes to enforcement.

**CHAIR:** That is tied up a little bit with the role of the agent that Andrew just raised because it almost mitigates against clear reporting.

**Dr GAUJA:** Could I make a few points? Coming back to the ICAC and what the ICAC has taught us about political donations in New South Wales is that apart from the problems surrounding enforcement that we have identified, the loopholes and associated entities, the law, to me, is not really the big problem. The big issue that the ICAC has identified is clearly illegal behaviour and party culture.

So there are two ways that you can deal with it. You need to, as George suggested, address deliberate breaches of the law through strengthening enforcement mechanisms and then shifting party culture. Also, making it easy for political parties to comply with the law because all parties are not like the Labor and Liberal Party, they do not have the resources of the Labor and Liberal Party to actually administer these regimes. Parties are comprised of volunteers, people who spend their weekends trying to actually come to terms with what their obligations are.

That is one issue and it could be addressed in a couple of ways. One thing that was not in my submission but occurred to me and building on what Anne Twomey put in her submission, who should be responsible for reporting donations? I think Anne suggested that this could be something that the Electoral Commission regulated. Donations are made to the Electoral Commission and they tally those and funnel them to the political parties.

If parties are going to appoint an agent, it should not really be an empty role like it currently is. It just exists at the moment for registration purposes and not too much else. Perhaps we could think about maybe placing more requirements on party officials, how we fund the position of party officials even, just doing some blue-sky thinking here, because at the moment a party official is either a volunteer or somebody who is paid by the political party. If we could find out a way to separate a party agent as a quasi State position, that might be one way of actually dealing with the responsibilities.

The other issue I was going to raise is placing liability on the person or the entity that is going to benefit from the donation. I think in the case of candidates sometimes this is straightforward because a candidate will directly receive a donation. Other times not so much because people will donate to political parties and how parties choose to use that money is an issue.

I think some mechanism that we could actually recognise the political party as a legal entity...
for the purposes of enforcing the Act would be a step in the right direction, because then we could penalise parties for breaches.

**Dr THAM:** Just to agree with the sentiments of Anika’s comments, I think what we should be looking at is devising an effective compliance regime of which enforcement is only one part of it. So it is really a regime that is made up of carrots and sticks if you like. We need to fix up the issues that George talked about, but we also need proactive measures, dedicated measures to assist organisations and individuals who have lesser resources to comply with laws.

So again here the Electoral Commission actually plays an important role, and this is what I have suggested in my 2012 report, in supporting volunteers, third party campaigners and also minor parties which do not have the resources of the major parties.

In terms of the scheme of agents, again my report of 2012 recommended a scheme where agents be abolished, for the reasons that Mr Tink already mentioned. I think it is unfair. Why should individuals other than those who benefit, those who are actually primarily holding duties, be subject to liability? It is also ineffective. When the agents sometimes actually do not have knowledge or when they have knowledge, they do not have control over the activities of the duty holder. Why should they be subject to liability? It should be the duty holders or the beneficiaries that are subject to liability and this raises the issue that Anika mentioned, about how do you hold liable political parties when they are unincorporated?

What I suggest in that report is that they should be deemed bodies corporate for the purpose—

**Mr ANDREW TINK:** You are going to tell us this afternoon.

**Dr THAM:** That is right, yes; deemed body corporates for the purpose of election funding rules.

**Mr ANDREW TINK:** Can I just go back to something that you said before and get it clarified please. You were talking about strict liability. We have had a submission from the electoral commissioner on this where there is a view that the cut-off point for strict liability is distinct from showing that somebody has got intent is on offences which out there in voter land result in the issue of a penalty notice. In other words, they are regulatory type offences, because moving to strict liability legally is a pretty big step. Although it is widely accepted for minor offences as a balance point in terms of conveniently and relatively cheaply enforcing the law; but only the law up to a certain point. Do you agree with that?

**Dr THAM:** You have seen my 2012 report; I take issue with the commissioner’s position on this. I go some way along the lines of what you said earlier, for example, the failure to lodge a declaration. That should be a liability offence because it goes to the integrity of the scheme. It is a paradoxical offence. If you like, it is an administrative obligation but actually goes to the integrity of the scheme. That should be strict liability.

But I do not go as far as the commissioner’s position is about strict liability of criminal offences pervading the entire regime.

**Mr ANDREW TINK:** To be fair to the commissioner, I do not think the commissioner is asserting that.

**Dr THAM:** Sorry, I overstated it.

**Mr ANDREW TINK:** Their cut-off point is what they call regulatory offences, the sort of offences that would be covered by a penalty notice.
Dr THAM: So I think in that sense we overlap in terms of our position.

Prof WILLIAMS: Can I say I am certainly very wary about strict liability offences. This is an extremely complicated piece of legislation. It is hard for me to interpret, let alone a non-lawyer working for a new entrant party with low resources and unless the offence was only to apply to the most obvious situations where you have got a cap of X and you receive more than that and where it is blindingly obvious that the law has been breached, then I would not be keen to go down that track. I think it is more appropriate that the Act has simple more direct ways of being complied with than to put strict liability offences in place that I think are inappropriate given the complexities.

The Hon. JOHN WATKINS: Which is partly a call to simplify the Act, is it not?

Prof WILLIAMS: I think it is and again, if you are talking about compliance and a very good point has been made that yes, enforcement is a problem but this is a difficult Act to comply with and if more can be done to simplify that, then that would be highly desirable.

Dr GAUJA: Simplification, but also certainty as well and I think this is a very good opportunity for this expert panel to move forward. The legislation has changed so many times in the last four years notwithstanding High Court challenges. So some certainty and a greater education function or more resources to support the education function of the Electoral Commission.

CHAIR: Can you elaborate on that a little bit because we have been thinking about education and whether it should be for candidates as well as for members of Parliament; whose responsibility is it? Is it Parliament itself or the Parliamentary officers or is it the EFA?

Dr GAUJA: With respect to elections, I would say that it is crucial that candidates and political parties receive education. This could be seminars that are held by the Electoral Commission. Members of Parliament and their staff, they would also benefit from it. It would be education as widely as possible.

I think current members of Parliament face issues around corruption that go to elections, but they also go beyond elections. I am quite wary of thinking that we can address those issues through electoral regulation. There are issues surrounding lobbying, breach of public trust and public duties that reach beyond elections.

Prof WILLIAMS: I have to say, this is a very difficult Act to educate about. I must admit, I go back to the website and get the fact sheets, look at those and look at the legislation; it is very challenging to do so. I think in the end unless you can explain to people in clear terms these are your rights and obligations as a candidate, if you cannot get something that can be presented on one to two pages you have got to ask yourself about whether compliance is even realistic for some people, particularly for the large numbers of candidates participating.

That might mean that in your recommendations where difficult choices need to be made, that erring on the side of simplicity will be highly desirable. That might mean removing some of what seem difficult distinctions in some areas. Again, it may mean that when it comes to property developers and the others, very hard to educate about that because what is a development application? What is an associate? They are quite difficult technical concepts that I suspect are well beyond many people who participate in elections.

Dr THAM: I think a simplified Act is imperative. I think a recommendation made by the Joint Standing Committee on Electoral Matters of this Parliament in the review of the Election Funding Disclosures Act I endorse and I also think, simple definitions are the key. I think definitions that involve complex line drawing exercises should definitely be avoided.
The Hon. JOHN WATKINS: The split between the commission and the EFA, we talked a bit about that yesterday in the committee. Is there a clear split in responsibilities? Is it an appropriate division of responsibilities between those two bodies? Should there be some reform do you think of the EFA and the commission and how it carries out its work?

Dr THAM: The law passed this year is abolishing the EFA. So the functions of the Election Funding Authority when this law takes effect will be merged into the Electoral Commission, so there will be a single Electoral Commission administering both the Parliamentary electorates and—

The Hon. JOHN WATKINS: That makes it even more urgent to have clarity about the responsibilities and is that an appropriate decision? Should we have a separate or some almost independent enforcement investigative prosecutorial body that is some distance from the administration? Running an election campaign and making sure you have got the people with all the booths and the votes counted appropriately is an entirely different matter to prosecuting people who are deliberately in breach of the legislation.

Prof WILLIAMS: I would like to know what resources have the police got? What unit is responsible within the police? These are serious breaches of law. I do not know the answer to that but I think that is in some ways the answer to your question. These, in many ways, are not responsibilities of the Electoral Commission; they are law enforcement matters and it goes to resourcing and other issues that you know very well.

CHAIR: Just in terms of these sorts of split issues, most regulators while they have process and administrative type things they have got to do, they have very clear distinctions between that part of their organisation that does the process stuff and probably has quite friendly dealings with their clients. It does not matter if they have a cup of coffee but on the enforcement front and the investigative front, not only do you get different people in there, it is really quite a different culture.

Dr THAM: I support a single electoral commission. It is something that I covered at length in the 2012 report. Of course there are arguments on both sides but I think with a single electoral commission, the argument about different functions, yes they are. They are different functions but they are also overlapping functions. I suppose it goes to the point that you made Dr Schott, the question is is it undesirable to house these different functions within one body? I cannot see the conclusive argument against that.

Bear in mind too that with the recent introduction of laws regarding lobbying, that the Electoral Commission, when these laws take effect, will be responsible for administering the register of lobbyists. So it would have this particular function too added on, which actually is, in a way, close in kind to election funding laws.

Mr ANDREW TINK: Just on your point about the police, I think the reality with these sorts of bodies is that the police are pretty stretched and what they expect is they expect a prosecutable brief basically be handed to them before they will say we are going to devote resources to chasing up this election funding, even if it is a very serious election funding breach. In a lot of cases of complex fraud they expect the brief to be brought to them pretty much. So that responsibility has to realistically remain with people who are expert in the law in that area and the way it operates.

Prof WILLIAMS: That may well be and I think then we face the problem it is a truism in Australia, that electoral commissions very rarely are engaged in prosecution. It is extremely unusual to ever see at the federal level or at any state level electoral commissions pursuing these matters to the courts because they are stretched as well. There are the regulatory matters that have already been raised and unless you are actually going to put the resources that are not in the police and the electoral commission and essentially have a unit there that is actually responsible for these matters, I think the expectation should be you will not get that happening. It has never happened in Australia. I can give you a litany of examples where it has been raised in the media, here is a clear instance of a potential
breach of federal or state law and how many times has it ever gone to court? It is extremely rare.

Mr ANDREW TINK: It has been put to us that there is in fact a danger in a body like the Electoral Commission literally trying to police everything, but in fact what they should be doing is they should be targeting in on the bad behaviour. In other words, you get a sense after a while of where the hot spots are perhaps in relation to non-compliance or potential serious fraud and you zero on that. So you go with a strong high profile case and you then make an example through that particular prosecution which has a wider deterrent effect.

In other words, the body that is responsible for policing has to make decisions about where it is going to throw its resources to get the best return in terms of deterrence and seriousness of the offence.

Prof WILLIAMS: I think we have had a lot of hot spots but not a lot of action and I do not refer specifically to the New South Wales commission but in electoral law generally, they just do not tend to do this work. That would need quite a significant cultural change within those bodies. I think it would be a political direction.

Mr ANDREW TINK: Do you think that is a change worth contemplating.

Prof WILLIAMS: I accept what you say that it is unrealistic for the police to take at least the initial lead on these but if it is the Electoral Commission and they tend to be the body that you expect to do it, then I think there needs to be clear legislative and political direction to say we understand that you have not had the resources and have not done this in the past, but this does need to change and what does the commission need to actually fulfil that function in quite a different way than what has been done to date?

Mr ANDREW TINK: Put it another way, it is a little bit how I understand ICAC operates. They have a lot of complaints made to them and so forth but necessarily because their resources are limited, they do pick and choose. You can understand why. You go after a target where there will not only be significant deterrence in relation to the target, but there will be a wider message sent.

Prof WILLIAMS: Yes.

The Hon. JOHN WATKINS: I think this is most important. We have talked about ensuring a proper enforcement regime, tougher penalties because we think that is one of the reasons why people have stepped outside the electoral laws, because it is basically easy to get away with. If you just increase penalties, if you just improve the enforcement regime but do not do anything about the practicalities of investigation and prosecution, you are whistling in the wind.

To expect the police to do it is, I think, wildly inappropriate. They will not do it for a whole range of reasons and in some ways you do not want police so close to very highly politically charged decisions. To leave it to the Electoral Commission in its current form I think is inappropriate because their great expertise is in running election campaigns in their administrative bureaucratic capacity. If we are looking for an entity or a body to actually investigate, prosecute and so forth, it really needs to fall to someone separate, I think, who is appropriately funded. Unless we fix up that side of the equation, just increasing penalties is an easy thing to do, if you are not going to enforce penalties.

Dr GAUJA: I think it needs to be seen within the broader issue of the cost of election campaigns and not be dwarfed by public funding. It is a question of resources and it is a question of where you allocate those resources. I think when I see arguments for spending more public money on election campaigns, the solution that has been put forward understandably by the political parties is that we put that towards public funding of parties but the other way that you could allocate those resources is to strengthening resources and enforcement mechanisms within the Electoral Commission, which I think is crucially important.
Dr Tham: I think it is important to bear in mind that according to statute you have got two separate authorities, Election Funding Authority and the Electoral Commission, that in fact even at present there is close integration between the two organisations. The electoral commissioner is one part of the Election Funding Authority. There is close operation co-operation between both those bodies. They are housed in the same premises for example. We should not be proceeding on the basis that two completely separate organisations as they are now and that is the base point; that is not the situation.

One of the important issues about whether you have a separate body to police election funding laws or combining it with the administration of elections, one is a question about functions and again, I cannot see a conclusive argument why you cannot house different functions in that same organisation. They both deal with elections. One deals with administering electoral rules, the other deals with election funding rules. They are both dealing with elections.

The other issue is whether if you involve the commission in compliance and prosecutorial activity, that risks undermining the perception of impartial administration of elections. That is an important issue. This was an issue with the 2012 report I put to all the serving electoral commissioners, I put to all the political party officials and with the political party officials, the question I asked them was do you think the performance or the functions of the New South Wales Electoral Funding Authority in relation to the funding of an election campaign risks undermining the perception of impartiality on the part of the New South Wales Electoral Commission in administering elections? All except for the Shooters and Fishers Party said no.

When it came to the responses from the electoral commissions, this perception you have that maybe dealing with the administration of elections is somehow less controversial than election funding laws, perhaps we can put it to bed now with the Australian senate elections. Indeed, the then serving Australian electoral commissioner said this when I asked him this question: Is one area more politically sensitive controversially than the other area, he said this:

"There are just as many politically sensitive decisions you make in dealing with elections as you would with funding matters."

So I think all this goes to say, putting it to one commission, dealing with the differences within one body.

Chair: I do not think that is the major issue. The major issue we have got is that as we have seen, there has been very limited investigation and prosecution before things end up down the road at ICAC, which is like the big bang. Why has there been little investigation and prosecution? We know the police will not do it unless they get handed a brief that is effectively off you go.

So it is a resource issue or a cultural issue, or both. I think that is where John is coming from. My comment earlier about regulatory regimes, the Australian Competition and Consumer Commission (ACCC) and other places where your administering, processing and doing that sort of function, it tends to be kept in a separate division from the attack dog division, if I can put it like that.

Prof Williams: It is not uncommon to find—

Chair: They are in the same organisation.

Prof Williams: I agree. I think that is the key question for the community and that is where the next big blow to public confidence is potentially coming from, where the community will say which part of government is responsible now for making sure these matters are followed up?

Chair: That is right.
Prof WILLIAMS: And which part of government is responsible for ensuring that these matters are investigated at an earlier stage next time?

CHAIR: Yes, that is right.

Prof WILLIAMS: The fact that there is no clear answer to that and Mr Watkins raised the question very well and I do not know the answer to that either, but that surely is one of the most important issues here. The best answer I could come up with is that I would think the electoral commission is the appropriate body with a separately funded area which is dedicated to this task with resources that are insulated from being removed to other parts of the commission so we have some confidence about it, and that indeed, if it gets to the point where matters are coming to light that we think should have been investigated, there is a level of responsibility that attaches to that division that we can say they have not operated as they should have because reasonably the community could have expected that something would have happened. But at the moment there is no place to pin that responsibility.

Mr ANDREW TINK: You might say it is about making the electoral commission itself transparent in the way it enforces the law and undertakes prosecutions and so forth. I do not mean the particular briefs but I mean the system and the overall outcomes.

Prof WILLIAMS: It has always been a problem for electoral commissions. I have extremely high regard for them but this is an area where the system has never worked well in any of the commissions in Australia in my view. It has been a perennial problem of identifying problems too late and then prosecutions have tended not to be launched because it has been seen to be outside their brief and I think there has been a willingness to see that as being an adequate excuse but in this area it no longer should be.

Dr THAM: I think the level of penalties as it goes to the discretion of why there is so little enforcement when you have got $2,000 maximum. There is a cost benefit of launching a prosecution. I think that would go to that too.

Prof WILLIAMS: These are minor offences in the way they are currently constructed on the statute, hardly worthwhile of the massive investment of resources that perhaps might be required.

CHAIR: There are some definitional issues in this too within the Act I think because when parties lodge required forms, it is almost as if the fact that they have lodged the cover sheet has ticked the box; the fact that they have left off about three or four things that ought to have been there does not open them up to even a slap across the wrist. It just opens them up to somebody sending them a note saying where is the rest of your notification and if they do not send it, then they do not send it.

Dr THAM: I think there is a strong case for making changes that essentially put the onus on the political parties and candidates to comply with the law.

CHAIR: Yes, that is right.

Dr THAM: The question becomes what measures you want to take rather than the onus upon state agencies to prove you intended to breach the laws or you know about it.

Mr ANDREW TINK: I think we are in heated agreement about that.

Dr THAM: For my part, like I said, the civil penalty regime that starts off with twice the amount being taken off unless the party or candidate demonstrates reasonable steps—

CHAIR: You will be pleased to know somebody suggested 10 times.
Mr ANDREW TINK: One party state. I just want to go back to one of George Williams' principles right at the beginning. He talked about a fair system, one where you cannot have a system where rich individuals can load up the system so to speak. I think more than one, but one of the major submissions to us in support of more public funding is that there ought to be an opt in/opt out system to get around the constitutional problem posed by the High Court. That is to say, a party can opt to accept full public funding or an individual can opt to accept full public funding or an individual or a party can opt to accept no public funding at all, in which case they are not bound by any caps. They are either in the system or they are not.

That would be a way of introducing, so to speak, optional full public funding. The reason I raise it is because if you then go to one of your ideas, which is the fair system—which I think is a very important principle—one of the huge risks with having an opt in/opt out full public funding system is that you can literally have a billionaire come in and without constraints of any caps at all, throw money around in an extremely serious way to at least get the balance of power and possibly quite a bit more, depending on the underlying circumstances.

Perhaps a little while ago such a scenario might have been seen fanciful. I am not sure that it is anymore. Is this a fundamental problem potentially with the opt in/opt out type of idea when it comes to a fair system?

Prof WILLIAMS: I think it is. I do not think a full public funding system will work and I do not think an opt in/opt out system will work. That is one reason it would not work. I think more broadly than that, even in the opt in/opt out, you have still got the problem of what do you do with third party campaigners? Are they going to be funded or are they going to opt in or opt out? Is the taxpayer going to pay for environmental and other groups to participate, because you cannot stop them participating? That would be a major constitutional problem.

I think there is a series of practical and legal problems that opt in/opt out would not solve unfortunately. I think the more likely answer is that you have got the scale of we can give more public funding and reduce the donations you can receive and you can recalibrate the system as you want to along that spectrum, but I do not think you would ever get right to the end of full public funding opt in or opt out or otherwise. The fact that I do not think there is any system in the world that has got there, even though many systems have suffered from these problems, it gives you pretty clear answers to it not being workable or feasible.

Dr GAUJA: I would argue strongly against an opt in/opt out system for those sorts of reasons. Essentially it does create two sets of rules and depending on your financial position coming into the election, you go with one set of rules or the other. Unless the State can match the resources of Clive Palmer for example, who would, I suppose maybe even want to opt out and fund his own election campaigns; then I think such a system is going to be unfair.

CHAIR: I am not sure how the United States presidential scheme worked but Obama opted out of public funding in the last campaign, which gets back a little back to the amount that is available and what goes with it, because his private funding was multiples in excess of what the funding option was.

Prof WILLIAMS: I think the winners always tend to opt out.

The Hon. JOHN WATKINS: In a sense the opt in/opt out is just trying to create a clever way around the High Court decision.

Prof WILLIAMS: I am not sure it does but I think even if it were, it does not avoid the more insoluble problems.
Dr THAM: The constitutional landscape we are dealing with in Australia is different from the constitutional landscape in the United States.

CHAIR: Yes, that is right.

Dr THAM: Where the First Amendment jurisprudence place much, much stricter limits in terms of what can be regulated in this area. For example, since Buckley v Valeo in 1975 spending limits have been seen to be in breach of the First Amendment, but that is not the case here in Australia.

CHAIR: John, is there anything else you want to ask?

The Hon. JOHN WATKINS: I think that covers off most of the ideas that we wanted to explore.

CHAIR: Andrew?

Mr ANDREW TINK: The same for me.

CHAIR: Anika, is there anything that you want to raise?

Dr GAUJA: No, I have got more to say but I think it is appropriate for the next session.

CHAIR: Yes, I am looking forward to party governance after lunch. Dr Tham, is there anything you want to say?

Dr THAM: No, I have spoken too much; thank you.

(Session concluded at 11.55 p.m.)