REPORT OF PROCEEDINGS

PANEL OF EXPERTS - POLITICAL DONATIONS

ACADEMIC ROUND TABLE DISCUSSION

SESSION FOUR: CONSTITUTIONAL ISSUES AND REFORM OF ELECTION FUNDING LAWS IN THE WAKE OF THE UNIONS NSW CASE

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At Sydney on Monday 29 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 A. Twomey
Prof G. Williams AO
Dr D. Bennett AC QC
CHAIR: Welcome everyone. This is the fourth our round table panels in the investigation we are making into political donations and electoral laws in New South Wales; particular welcome to Professor Twomey on my left, Dr Bennett and Professor Williams.

The matters that the Panel will be discussing with our learned friends today is principally constitutional issues and reform of election funding laws and particularly in the wake of the Unions NSW case.

These hearings follow on round tables that have addressed in particular the regulation of political donations and electoral expenditure and the governance of political parties and associated entities and public funding.

We are really now down to the wire and you will all recall that the O'Farrell Government introduced changes which were taken to the High Court by Unions NSW whose case was upheld. What the High Court argued was that restrictions on unions and corporates so that they could not make donations was basically an abuse of freedom. While the constitution is relatively unclear around these matters, upholding freedoms within an Australian democracy the High Court heard was very important.

In the wake of that finding, any moves by New South Wales to restrict donations to political parties is being thought about very carefully of course. It is an issue that is very important to the direction that the Panel takes.

On that note, the particular implications of the Unions NSW v The State of New South Wales raised a number of issues, which was on the paper that we handed out—whether it is possible and advisable to introduce full public funding of election campaigns in a matter that satisfies the Lange test. This is an important question for the Panel because both the leader of the Labor Party and the Premier are on record as supporters at the moment of full public funding.

The second issue is what is the High Court's current approach to the implied freedom of political communication and the third, although I am sure we will range widely in our discussion, how would political donations to and expenditure by third party campaigners impact on a full public funding model and how could this be regulated?

Third party campaigners are particularly relevant at the moment where we have seen recently some very well funded third party campaigns, most notably mining companies in their opposition to the rent resource tax that the Federal Government attempted to instigate. In New South Wales at the moment the anti coal seam gas group are also extremely active. Those types of groups fall into the third party campaigners' issue.

The basic question then is based on the High Court's decision in Unions NSW would a complete ban on political donations together with an increase in public funding be likely to survive a constitutional challenge. Anne, I might start with you since you are closest.

Prof TWOMEY: The answer I think is probably not, you cannot give a determinative answer to it because there is flexibility in it and the High Court did recognise in Unions NSW that it was a different issue as to whether you banned political donations completely and did say that if you did so you would have to make an assessment or parties would have to argue whether that action was proportionate to the implied freedom of political communication's impact upon the implied freedom of political communication.

I think in terms of the Lange test we need to recognise that any such ban, total ban on political donations even if it provided commensurate public funding that took you up to an acceptable spending limit, even in those circumstances it would probably breach the first requirement of the Lange test to the extent that it would be some kind of an imposition or a burden upon the implied
freedom of political communication.

On the one hand you could argue that there is no burden on political communication because you are giving public funding up to the level of the expenditure caps and so long as you are doing that, there is no burden. But I think the other argument there is that that then incorporates the issue of expenditure caps into the question of whether the scheme is valid and the expenditure caps necessarily impose a burden on political communication.

I think that it needs to be recognised that you are going to move from the first step in the Lange step that is going to be breached, so you are going to move to the second part of the Lange test, which is the proportionality test. Is there a legitimate end which became an issue in Unions NSW and is the law reasonably appropriate and adapted to fulfil that legitimate end in a manner that is consistent with the system of responsible and representative government?

CHAIR: Can I just stop you there; can you refresh us all on what the elements of the Lange test are?

Prof TWOMEY: There are two elements to the test. The first question is does the law impose a burden on the implied freedom of political communication. Personally I think the Court should take that more seriously but I have to say in most of the cases, that one is usually a lay down misere. Usually the case does not even get to the court unless it is considered that there is some kind of a burden on the implied freedom of political communication.

The High Court has been, shall we say, quite liberal in deciding in what is or is not a burden on the implied freedom of political communication. They are more inclined to see burdens on the implied freedom than others might be. For example, my criticism of them in relation to the Unions NSW case is that they saw a burden on the implied freedom of political communication arising from the mere fact that the law reduced the number of potential sources for funding political campaign when there did not seem to be evidence that it would necessarily result in a limitation upon the funding available.

It may well have been that the parties could still have raised precisely the same amount of money up to their expenditure cap and there would have been no impact at all on our ability to fund political donations simply because there had been a restriction in the potential number of sources of them. Remember that under the O'Farrell law you could still get donations from individuals and there are many individuals on the electoral roll—I have forgotten the amount of figures but something like $3 million or $4 million in New South Wales and beyond New South Wales you could also take donations from other people on the electoral roll in Australia; something up to 15 million people.

There were lots of sources, there was 75 per cent for public funding anyway. The parties only had to fund 25 per cent and they could have got that from those other existing legal sources. Nonetheless, the High Court still found that even in those circumstances there was a burden on the implied freedom of political communication.

I think given that and given the High Court's willingness to see burdens on the implied freedom of political communication, any attempt to ban political donations is going to mean that you at least move over that first test in the Lange case whether there is implied freedom of political communication and the answer is going to be yes. Then you move to the critical second test, which is whether the law is for the purposes of a legitimate end, the fulfilment of a legitimate end in a manner that is reasonably appropriate and adapted to achieve that end in a manner that is consistent with the system of representative and responsible government.

That is where the killing ground is on this. That is where most of the cases live or die, is on that test.
CHAIR: David, do you want to add anything on that at this juncture?

Dr BENNETT: I will make a few short points. There was an argument that the payment of moneys itself was a form of communication, that did not get very far, but the way one should think about the first limb in this context is this: if you take the tobacco companies—now we all hate tobacco companies, we all want smoking to be inhibited and so on.

There is nothing to stop a state or federal government within the limits of its powers saying you cannot manufacture cigarettes, you cannot smoke cigarettes, you cannot smoke them in public, you cannot label them, you cannot advertise them or anything else they like to do; all that is fine. But there is one thing they cannot do, having passed a law in one or all of those categories, they cannot say and no one may agitate for repeal of this law. That is totally verboten. That is contrary to the implied freedom of political communication and that it can never say. It can never prohibit communication about repealing a law or making a law or anything like that. That is the way to think about it in relation to the first limb.

In relation to the second limb, where one is talking about a tendency to corruption and so on and you can imagine what will be said by unkind people about developers and so on, but the point here is this, there are two completely situations that one has to distinguish. The first is, assume a politician says I am in favour of Australia developing a widget industry and I think we should have subsidies for locally made widgets, bans on importation of widgets and general encouragement to people who want to manufacture widgets.

If I am a widget manufacturer and some politician standing for office has said that, I am going to want that politician to get elected. Obviously I should be able to support him or her by financing the campaign, putting advertisements myself in in favour of that person and so on. All of that is perfectly legitimate; no suggestion of corruption there.

Now suppose another situation, a politician who does not have any particular interest in widgets and the manufacturer goes to him and says I will give you a million dollars if you will promise to vote in favour of my pro-widget legislation. That is corruption. That is an offence at common law and it is contrary to the Secret Commissions Prohibition Act in New South Wales.

When one talks about making political donations, one needs to distinguish very carefully between those two situations. There is a tendency in the public mind and the press to lump them together. One has to realise that one is as pure as the driven snow, the other is evil. They would have nothing to do with each other and must not be confused. That is the first thing about it.

The question of the need for political donations, of course, is interesting. In the stated special case in Unions NSW, there were pages of statistics of how much was given to the various political parties, various sources in various different campaigns and how much they spent on advertising showing that they needed the contributions to be able to advertise and stand for office. In the United States of course it is said that you have to be a millionaire to stand for president or vice president and that is probably true.

It had all those figures and in our draft special case in McCloy we have uplifted those paragraphs and copied them into ours. So we have got all the same evidence about the importance of political advertising. That is obviously part of the case one has to show.

So far there is no suggestion that the other side is going to seek to prove that all or most developers are corrupt, but apart from anything else in relation to developers, it is hard to see why a developer would have a motive to bribe a State Parliamentarian. They might have a motive to bribe a local councillor to pass a particular development but the number of cases where a development is so big that it goes to the government as opposed to the council is pretty rare. Barangaroo is the only one I can think of; there may be others. It is hardly a major social problem and developers really are no
different to any other group, whether tobacco manufacturers or widget manufacturers or anyone who has a financial interest in particular legislation.

One does not need this sort of electoral funding prohibition to achieve the defeat of corruption because that is done already by the common law and the Secret Commissions Prohibition Act. In my second category, if it is for the purpose of persuading a politician to vote in a particular way by paying him or her money, bribing, then it is already prohibited and we do not need this legislation.

If it is the other category, this politician has policies which I happen to like because they are financially good for me, therefore I will support that politician, then it is the innocent category and it is not corruption.

So it is very hard to see how this legislation has anything to do with corruption and that is emphasised by the fact that when the Liberal Party is in power the legislation tends to have the effect of restricting contributions by unions and when the Labor Party is in power it tends to have the effect of restricting of contributions by large corporations. What a funny coincidence? I wonder why that is?

Of course, that demonstrates very clearly the real purpose of this legislation, which is an impermissible purpose, to try and influence and prevent the freedom of the community and people in the community and politicians to advocate particular causes and make it harder for them.

CHAIR: I take it from that that you consider it quite unfeasible to introduce full public funding?

Dr BENNETT: That is another means of achieving it. It has advantages and disadvantages, the obvious disadvantage being the expense to the public purse. Why would the government pay for something if the community is prepared to pay for it?

When one looks at how little funding is given to bodies which depend on charity on the basis of let the public do it, this seems to me a much stronger case for that sort of approach.

Public funding in one sense makes it simpler but it requires very difficult calculations as to how you work out how much each party gets and you get all the problems of defining the situation, people creating situations to try and get the public funding and so on.

Mr ANDREW TINK: Is there not a more fundamental problem with public funding and just focusing on the major parties, one of the issues seems to me to be what do you do with potential new entrants? Under a system where there is not quite full public funding there will always be a little bit of room for private money to be raised. So if you are a new entrant, you decide to stand for Parliament for the first time or a new group that wants to stand candidates or whatever, you have the freedom to raise your own money. Then whether you get to the four per cent for public funding that is the threshold; then may take you further but at least with that little window at the bottom of the system that allows people to fund raise privately there is room for new entrants.

If you go to full public funding, it seems to me that you either close off the availability of private money for new entrants and therefore there are no new entrants or you end up with some extraordinary system where literally anybody who wants to come and put their hand up to run for public office is immediately entitled to public money.

Dr BENNETT: That pre-supposes that the only available test for eligibility and quantum of public funding is how many votes you got last time and it may be that there are other ways of measuring eligibility. That certainly is the one that seems to have been adopted.

Mr ANDREW TINK: But this is a reimbursement scheme, it is nothing to do with how
many votes you got last time.

**CHAIR:** In New South Wales it is a reimbursement scheme.

**Mr ANDREW TINK:** This is a reimbursement scheme here. It strikes me that is a really fundamental problem? Is that right? Am I in the right ballpark here?

**Prof TWOMEY:** You are absolutely in the right ballpark. One of the real problems in this is how do you deal with, particularly individual candidates who are not party aligned, particular the hopeless candidates, what do you do with them? Because there will be many people out there who if they are offered a bucket of money to fund their campaign, of course every man and his dog is going to want to run a campaign because you are funded for doing it. It is crazy.

**Mr ANDREW TINK:** Can I suggest this then, in terms of what the High Court might think, this is really critical is it not? One thing they would have in mind fundamentally and this is what we have got to balance, is whether or not it is capable of accommodating new entrants.

**Prof TWOMEY:** Yes.

**Mr ANDREW TINK:** Even new entrants who are spending their own money to get in in the first place.

**Prof WILLIAMS:** I think that is right and that is where you look at the Australian Capital Television case where in that case the High Court was very much concerned about exactly that type of problem, that it removed a level playing field. My analysis is very similar to what has been said, in that it is very hard to see how you could design a full public funding model that would survive constitutional muster and for me it is not the parties that is the problem. I think the two paragraphs in the judgment are paragraphs 38 and 59 if you want to look at them at some point.

What the court says in paragraph 38 is that if there is a gap in funding that the parties need to fill and that this limits their sources, then that is a problem. There is certainly a burden there but if you remove that gap, if you completely fund the parties to the top of the expenditure cap and that cap itself is proportionate, as is likely, then you do not have a problem with the parties. You can just give them every cent.

The real problem arises with new entrants, people who are standing for office without any realistic chance or even to a larger extent the third party campaigners. You have got to completely fund them as well in the same way otherwise you simply have the same problem with other groups.

**Mr ANDREW TINK:** I suppose the one way around it—I am just trying to put the other case here for a minute—would be to say new entrants can fund themselves.

**Prof WILLIAMS:** I think that would be disproportionate. You cannot have a system that in any way privileges the incumbents over new entrants and that goes not to Unions NSW but the earlier case. It is very hard to see how you can design, at a reasonable public expense, a model that gives everyone who ought to be able to participate all of the money they can reasonably need without any requirement that they will need to source external funds to campaign.

The High Court has recognised that those who are campaigning goes well beyond the political parties or even candidates, to in fact any group who may have something to say to influence the votes that people wish to cast.

I think if you are looking at a full public funding model it has got to incorporate those third party campaigners because if you either ban them from participating—well you cannot do that or you fully fund them, well that is going to be too expensive, or you simply do not subject them to the
scheme at all, that is the most likely but then all the parties will simply use the third party campaigners
to raise funds externally and you will just have proxies for the parties.

**Prof TWOMEY:** And that is the US system.

**Prof WILLIAMS:** Exactly. They are your options; it just does not work.

**Dr BENNETT:** In relation to the small hopeless things, in Mulholland v Australian Electoral
Commission, the High Court upheld—I think it was 500 signatures to form a political party and the no
doubling up rule, so if you are one of the 500, you cannot be one of the 500 for another party. That
was designed to defeat preference harvesting of the type that was done in the New South Wales Upper
House a few years earlier.

What you do is, you get 20 mates and you form 20 parties. Each one is named for an issue
where at least one per cent of the population feels so strongly about that issue that it is more important
to them than Liberal or Labor, so you have the Gay Marriage Party, the Anti-Gay Marriage Party, the
Legalise Pot Party, the No Drugs Party, the Let's Build a Dam at Warrumbungle Party, the Let's Not
Build a Dam a Warrumbungle Party and you have all these parties on trivial little issues—well some
of them are not trivial—but on issues where at least one per cent of the population is going to feel
really strongly about it and vote for you.

Then of course they all give their preferences go guess who, and you get elected. That was
done in the Upper House some years ago and the ballot paper stretched the length of this table. I had
great fun tendering copies of that ballot paper to the High Court.

The High Court has said that it is permissible to have regulation which discourages that sort
of activity and now how far that extends in relation to discouraging any new entrant or the hopeless
new entrant who has no support is a different question. In a sense, the preference system makes it
easier for people in those categories.

**CHAIR:** Yes.

**Mr ANDREW TINK:** Can I just ask another question, suppose the system of full public
funding is introduced. Suppose the Parliament decides in both houses that the law will be passed to
allow full public funding and it is proclaimed and a pot of money is then aside for the running of such
an election. Such an election is run and a Parliament is elected out of such a system. Then the High
Court decides that it is unconstitutional, what are the consequences?

**Prof TWOMEY:** As a general principle they never decide that the entire Parliament is
invalidly chosen. Although when these issues have arisen, largely tangentially in Australia in the past,
even if they have found that the Electoral Act was invalid in some way, it is never used to invalidated
a Parliament or an election because of it, for practical reasons.

Realistically no, they would not say all of a sudden, your Parliament is invalid, every law it
has enacted since it was elected is invalid. They just do not do that. They might well say that the
particular law is invalid.

**Mr ANDREW TINK:** It is good to get that on the record.

**Prof WILLIAMS:** I think you are safe in that regard.

**Prof TWOMEY:** Realistically that is what they would do. They might well hold that the
legislation is still invalid and you need to change it next time, but they will not take the further step of
a consequence of saying that the entire Parliament is invalidly elected; they just do not do that.
The Hon. JOHN WATKINS: I figure part of our role is to see whether or not there is a system under which the full public funding regime could work. The Premier has certainly made that clear and the Leader of the Opposition says that he favours that and I think there is a level of community support for it as well.

I am not trying to be clever here but the issue is not so much full public funding, it is actually banning private donations. That is where the High Court is going to step in.

Prof WILLIAMS: It is also the full public funding for whom and what is the problem and I think that is one of the unanswered questions. The leaders talk about full public funding for candidates and parties but third party campaigners and others.

The Hon. JOHN WATKINS: Let us just leave third party aside for the moment because the first hurdle is with regard to the major political parties or those that are involved in the process seeking to be elected to Parliament, can we create a scheme there by which the High Court would not knock it out?

The thought I had the other day was the only way that I could see that it could work would be that there are caps on expenditure, $10 million for example to the Labor Party and public funding is provided up to that level. So the Labor Party could dip in and take that full $10 million. We do not ban independent private donations but what we say is that if the Labor Party wishes to take private donations they can—and maybe from whoever, that is a different issue. But if they do take private donations they reduce the amount of public funding that they take. If they take half a million dollars, therefore they get $9.5 million from the public funding purse. Is that a viable scheme? Would the High Court agree with that?

Dr BENNETT: There are a few problems with that. One reason why public funding may not be sufficient as a means to avoid invalidity and prohibitions is that however much you are given to spend on political advertising for an election; you could always spend a little more. There is always something else you could say; someone else you can get to convince and so on. So, once any limit is imposed as it impliedly is if you say political funding and no private donations, you are restricting the entire freedom.

In the way you suggest, that you have the public funding but you can go privately if you want and then you get less, there are two problems. First, there is no incentive to collect money privately.

Prof TWOMEY: Unless you can go over the limit. That is the United States issue with Barack Obama and all the rest of it. They have the same system in the United States in funding presidential elections. You can get public money or you can choose to go privately and get no public money. Barack Obama and Romney at the last election both decided to ignore the public money and go privately because they could get more.

We are now getting into the situation in the United States where nobody is accepting money at the presidential level because they can get more privately and it just washed out the public funding.

The Hon. JOHN WATKINS: The difference here is that we place expenditure caps. As far as I understand the High Court accepts expenditure caps, so there is simply no incentive—

Prof WILLIAMS: That is the thing, it has not been tested, but I think you are right. If expenditure caps are valid, as is likely, then I actually think your scheme could pass muster, limited as it is to the political parties. I do not even think you would need the capacity for separate private donations. The High Court recognises in its judgment that a complete prohibition is something that they would consider on the proportionality ground; they are quite explicit about that.

The real issue would be are the expenditure caps set at a reasonable level such as full public...
funding up to that level is seen as a proportionate regulation of what has been done? I think it would likely be.

As I said earlier, I do not think that is where the constitutional problem lies and in all likelihood I think you could do that, so long as the caps were not so miserly as to cause a different type of problem.

CHAIR: Is there not a political issue here though John because if you basically put an incentive in place that is not going to encourage private fund raising or people helping you with a donation of their services and the like, the demise of the political parties as we know it would be even more complete. It has political incentives.

The Hon. JOHN WATKINS: I have to say that I find some of the submissions that we have received idealistic and practical and totally unrealistic about the reality of what is happening today with regard to political operations. To think that there is something that we can do that is going to bring back the glory days of the Labor Party in the 1950s and fund raising from local branches and local communities is naïve in the extreme. There are two or three of those submissions that I just wonder what they are actually thinking that they can achieve.

One aspect of the political parties is about fund raising for elections. There is a whole bunch of other things that a modern political party should be about—policy formation, involvement of members and all of the rest. I actually do not think that fund raising is a magic bullet to a healthy political or party or culture in this day.

Prof TWOMEY: I just wanted to add to that, and this is where I think we need to be clearer in what we are talking about when we talk about public funding, because you are not just talking about public funding of elections. What we have got currently in the law is an expenditure cap on electoral communications expenditure during an election period, six months up until the election but if you are banning private donations full stop, completely then you have also go to fund your political party in everything that it does, not just in the six month campaign, not just in relation to electoral communication expenditure, you are funding all the administration of the party, the people who work for the party, the people who are employed, the people who develop policy. All those sorts of things are going to have to be funded out of public money.

Prof WILLIAMS: Assuming you are banning membership fees though as well.

Prof TWOMEY: Yes, okay. Apart from membership fees, query that. But if you have got no private donations and no ability to raise any other money, then that public funding has to go a lot further than just election campaigns.

The Hon. JOHN WATKINS: You are describing what we virtually have in New South Wales now. We have got membership fees, say for the Labor Party because I know it best. Then we have got this massive subsidy provided by the taxpayer of New South Wales for the Labor Party to undertake its operations and administrative funding.

Prof TWOMEY: But the question is how much of the donations that you get at the moment get used in relation to party administration? How much of it goes into funding election campaigns? Because if any of it is used in funding of the party and how the party works, that is going to have to get funded by public funding as well under any new public funding scheme.

From the political point of view, the point that Kerry was making, is that effectively that means that Parliament and the law will decide how much money any political party has to administer itself. So it will effectively dictate how many staff you can employ, what you can do because you are limited in terms of the money to what you are being given by public funding. You have no capacity to raise anything yourself.
The Hon. JOHN WATKINS: Which is the very criticism that Rodney Cavalier has with the current system, because of the amount of public funding that goes into the operations of political parties; they just become absolutely dependent—

Prof TWOMEY: But at least you have got flexibility with private things at the moment. Without that you have got none. You have got nothing; you are completely reliant on the Parliament and what it decides to give political parties—and by the way, if your party does not have control over both houses and—

Mr ANDREW TINK: That is the Canadian problem.

Prof TWOMEY: Exactly, the Canadian problem. If some other person is in government and has control over both houses and can manipulate what money goes to one party and to another, then you have got no control and no hope.

Dr BENNETT: There is another possible source which is very relevant in the American context and probably not relevant in ours, and that is the candidate's own resources. That raises another political debate, do you want only very wealthy people to be able to become president, which at least makes them immune from bribes, but obviously is a political bias, or do you want only people who are going to be totally dependent on the salary who may be more vulnerable to bribes and cheating on their tax affairs, which also has a political effect at the other end.

The Hon. JOHN WATKINS: But if you put in place limitations or caps on expenditure within local electorates, which is what we have now, that is not an issue.

Prof WILLIAMS: Yes.

The Hon. JOHN WATKINS: The other way to make something like full public funding work is actually not full public funding but it is what the Liberal Party suggested to us a couple of weeks ago, is that we design a system whereby a percentage, 80, 90, 95 per cent of the funds required are provided by the State and then an amount of private funding be allowed that will enable the High Court to say this is not an effective ban and let it through the gate.

How you determine what level of private funding you need to satisfy the High Court I do not know.

Mr ANDREW TINK: Can we go there?

The Hon. JOHN WATKINS: Both George and Anne, you are on record as pretty strongly opposed to a full public funding scheme. I am not sure of your position David and that is fine but part of our remit is to actually see if there is a mechanism by which something like a full public funding model would live.

Mr ANDREW TINK: Can we just go there and get to some specifics? Anne, your big paper, and thanks very much for it, on page 22 you are talking about a gap between $6.97 million in election campaign costs and $9.3 million, which would be the maximum spend; so the gap is $2.32 million.

Prof TWOMEY: Something like that, yes.

Mr ANDREW TINK: That is coming at it in terms of the big picture of total that you get publicly, the amount the parties can legally spend and the gap; that is the sort of macro?

Prof TWOMEY: Yes.
Mr ANDREW TINK: The micro might be along the lines of what The Greens have put in their submission to us, which is reduce annual caps on donations to $1,500 for a party and $500 for a candidate. I think at the moment it is $5,700 for a party and $2,000 for a candidate; so that is a very substantial reduction.

The corollary of that they would say is increase public funding to 85 per cent of expenditure. So you are trying to put dollar values on what will the High Court wear and what will they not wear; if you see what I am trying to say.

Prof TWOMEY: Yes.

Mr ANDREW TINK: Can we explore that a bit or is it a fallacy to look at in simply numerical terms of closing gaps?

Prof TWOMEY: I guess my question is what are you trying to achieve with it in the bottom line? Is it true that a donation of $1,500 is less likely to lead to corruption than a donation of $5,000?

Mr ANDREW TINK: I would say yes.

Prof WILLIAMS: I think the answer is not necessarily.

Prof TWOMEY: I do not know; I just want to know.

Prof WILLIAMS: I think you are approaching it the wrong way round; in that what needs to drive the answer to that is sound policy, considered analysis that is on the public record in a form that the High Court can see this is a well reasoned, justifiable limitation that does not look arbitrary. Ultimately the problem in the Unions NSW case was it did not even get to first base in terms of being able to demonstrate it had any discernible purpose. It was not seeking to do something the High Court could even judge it against.

So it is a very arbitrary decision in terms of which number you pick but it is important that presented evidence to the High Court suggests a rationale.

Mr ANDREW TINK: I guess what is driving me to at least test this is the number one term of reference that we have got is full public funding and if, as appears, there are insurmountable problems with it then in the policy sense as distinct from the legal sense for a moment, how close can we go? Your reply would be that does not get you anywhere in the High Court. How close can you go, it is just not irrelevant?

Prof WILLIAMS: The High Court recognises the possibility of a complete prohibition on donations and they recognise that and say they could see that that would have a legitimate purpose attached to it. The High Court says in their judgment a complete prohibition would require them to look at the proportionality issue and to ask whether it is justified. It may be it would not be, it would be very hard to justify I think but it just shows that even that is something that the High Court would need to look at carefully.

CHAIR: In terms of the cap that you might apply, it has been suggested by an institute that has done a lot of work on this that a reasonable amount might be what a small or medium sized business would give without expecting any quid pro quo in return, whatever that number is, certainly above $200 or $500 or those sorts of amounts.

But the other thing, while we are talking about these gaps and limits, the election campaign funding definition is actually quite narrow and it excludes market research, accommodation, travel and so on. The National Party have told us that they feel a bit disadvantaged by it because they have got huge electorates and they have got around and no one is paying for them to do that. It is not just
the gap between the defined amount—

Prof TWOMEY: It is more than that.

CHAIR: It is also the definition of what we are talking about. That is just within the six month period. Then you get into how much the taxpayers should be funding party administration, which is actually the principal concern for raising funds I think for the parties. There is a very intense election campaign period where you might spend $9 million or $10 million as a major party but then every year it is going to cost you $4 million or $5 million just to run your party.

Dr BENNETT: The other problem with having a cap on expenditure or an effective cap on expenditure is the point I made before, however much you are spending on advertising, you could always spend a little more. There is always something else you could say. I think that is the problem in the High Court of saying you can limit it. Remember that in the ACTV case a total ban on political advertising during the election period was overthrown.

It seems to me that there are problems with that solution. The only way public funding is really relevant is if one says if you have public funding it is not necessary for the parties to raise money for political advertising and therefore there is an alternative solution. To me the answer has to be that, that you cannot stop someone spending more. If someone who has the political interest is prepared to provide money for the purpose of more being spent; that is a legitimate form of political expression and a democracy.

Whether the person paying the money is a group of high income earners who want a party that has lower taxation or group of welfare recipients who want a party that favours greater welfare; a group of unions that favours union-friendly labour legislation or the widget manufacturers, all those groups have a right to express their view and express it by supporting advertising by politicians are like minded. I see great problems with all those solutions.

Mr ANDREW TINK: It is different to Canada.

Prof WILLIAMS: And I do not see a problem. You do not have a problem to solve because despite the circuses in ICAC, because we have breaches of the legislation, as I understand it, there is no real case that has been made yet publicly that anyone has paid money as a bribe for the purpose of achieving a particular result. We have legislation against that. We can prevent that without these caps and restrictions.

Mr ANDREW TINK: Just as a matter of interest, suppose you get up in the High Court on the McCloy case, where does that leave ICAC?

Dr BENNETT: With very little to do. It can investigate whether there has been an actual bribe or breach of the Secret Commissions Prohibition Act in that someone has been paid to vote a particular way or to do something.

Mr ANDREW TINK: So the structure of corruption around the ICAC Act falls away if the High Court upholds you?

Dr BENNETT: Precisely.

Prof TWOMEY: No, it does not David.

Dr BENNETT: Because the word corruption is one of the things that legislature does from time to time, which is unfortunate, they use words which are loaded and define them in a very broad way. Corruption is defined as including committing a breach of this legislation.
Prof WILLIAMS: That is where you would have still donations made in excess of the caps, would you not?

Prof TWOMEY: Exactly.

Prof WILLIAMS: Put aside the developer, you have still got donations that are too high and that is still a finding of corruption.

Prof TWOMEY: That is still an offence under section 96HA. Even if David's claim in the High Court is successful that the provisions banning donations from property developers—

Dr BENNETT: We are attacking the caps too.

Prof TWOMEY: —is invalid, then section 96HA also says that a person who exceeded the caps, which allegedly Mr McCloy did in making his grants.

Mr ANDREW TINK: He is attacking the caps.

Dr BENNETT: We are attacking that too. We are attacking that and we are attacking the indirect donation. We are attacking all of it.

Mr ANDREW TINK: So this case is really quite profoundly important for us, is it not?

Dr BENNETT: Yes.

Mr ANDREW TINK: That is putting it mildly. If you are attacking the caps, that is the whole system. It is really the whole current legislative framework that is in question. This is really important, it is not just whether developers as a class should be banned or not banned or whatever, when I say attack, it is a legal attack; it is a legal attack on the whole framework of the legislation. I did not understand that before, I do now.

Prof TWOMEY: It was not in your initial statement of claim David, so have you changed it?

Dr BENNETT: It has been changed, yes.

Prof TWOMEY: Because the initial action as commenced was only on the property developer ban.

Dr BENNETT: It has been amended and widened in that respect.

CHAIR: Of course, the reason why caps are there is to stop a wealthy party or person being able to exert undue influence and in that way distort the democratic process.

Dr BENNETT: But you could have a group of non-wealthy people doing it. You could have something like ACOS or a union. It is not only wealthy people.

CHAIR: That is right.

The Hon. JOHN WATKINS: You talked about the difference between a $5,000 donation and a $1,500 donation. I think for a local member and probably they have been most in the frame in some of these ICAC investigations, even though that is about something different. I do not think it matters a great deal; $1,500 is as alluring and as corrupting as $5,000 or $10,000. If you are a local member, and we heard from some of the political parties they are given targets to reach, $50,000 that they should reach across a period of time, $1,500 goes some way towards doing that.
I think what we need to try and arrive at is a system where the politician, the candidate is separate as far as possible from the money, because if we do not have that, the likelihood of a donation, the $1,500 or $2,000 will mean that members of Parliament entertain issues that they should reject earlier. It means that political parties will put pressure on members of Parliament and ministers to meet people that perhaps they should not. I think it has this vague negative impact on the behaviour of an elected official if they are also in the business of raising cash and as far as possible we need to separate that.

**Dr BENNETT:** When you say meeting people they should not, you could not constitutionally prevent members meeting people they should not. Anyone is entitled, if the member wants to talk to him or her, to talk to a member and endeavour to persuade them.

**The Hon. JOHN WATKINS:** Of course they are.

**Dr BENNETT:** That is part of the democracy.

**The Hon. JOHN WATKINS:** As a local member if you are approached by a developer who wants to get a development up, I think initially you should see those people but then if there is a whole list of others that they send to you, invitations to come to a restaurant, have a meal so we can further discuss this issue, there is a point that you arrive at as a member of Parliament where you feel undue pressure being placed on you and you should step back from that.

**Dr BENNETT:** There are all sorts of things, as you know, that members do short of voting in the house; writing letters on behalf of people to local councils or government departments or anything else. There is nothing wrong with that.

**The Hon. JOHN WATKINS:** There is something wrong if those people ask you to intervene and the member of Parliament then says leave it with me and I will go and have a chat to the mayor, who happens to be in the same political party, talks to councillors on that council and exerts pressure, as often they can, because as the member of Parliament those councillors may want to be a member of Parliament some day or want to stay in good graces with the member of Parliament. A lot of it is that subtle influencing that causes problems.

**Dr BENNETT:** But is not one of the main functions of a member of Parliament to see constituents and then act as a sort of ombudsman making representations to government departments?

**Mr ANDREW TINK:** I think this is actually the key and the danger that you and I run into here—and it is understandable in a way—is that we think like members of big parties, which we are and I think the bit that is missing—I will speak for myself. The bit that I am always in danger of missing is the position of members of Parliament generally rather than members of Parliament who happen to be members of big parties with access to ministers and all the rest of it that perhaps others do not get.

It strikes me that one of the minefields you have got to traverse in the way the High Court would see it, is you have got to see everybody else. You have got to see people who are in minor parties, people who are independents, people who are candidates who are never going to be members. Unless you see all of them and you have got a system that somehow includes all of them, then you are in a constitutional minefield. Am I wrong?

**Prof TWOMEY:** You are not. The constitutional problems largely arise, as George said, not so much with major parties. You could fund them up to a cap if you worked out what an adequate cap was and I disagree with David, I do not think caps themselves are necessarily unconstitutional, so long as the cap is reasonable. Remember, the second part of the Lange test is is the law reasonably and appropriate and adapted to achieve a legitimate end? If your legitimate end is anti-corruption and your
caps are reasonably appropriate and adapted to achieve that end, they are okay.

Mr ANDREW TINK: It is the rotary four way test, there are four points there under Lange, are there not?

Prof TWOMEY: Yes, there are. That in itself is not the problem but there is a real difficulty in terms of where you are most likely to fall down. It is all very well talking about full public funding but nobody actually knows what the scheme of full public funding is and it is when you start putting down the little bits of details as to Joe Bloggs wants to run as an independent member of Parliament, what money does Joe Bloggs get? You cannot wait until after the election is over to find out what money Joe Bloggs gets and have it allocated in retrospect by reference to how many votes Joe Bloggs gets, because Joe Bloggs does not know in advance then what money that Joe Bloggs spend on advertising.

If Joe Bloggs spends $20,000 on advertising or whatever the cap might be and then afterwards discovers that Joe Bloggs got less than four per cent and gets nothing and cannot have raised anything by way of private donations, then what does Joe Bloggs do—go bankrupt. It is not practical. You have got to be able to know in advance what you can spend.

If you have to know in advance what you can spend, you need to have some kind of way of working that out by reference to some notion of public support. That is when you end up in trouble with the ACTV case where they said you cannot just do it by reference to the previous election because that has disadvantages for new entries, it does not take into account change in political support, et cetera. You cannot rely on opinion polls because they are notoriously hopeless at actually assessing opinions. You cannot necessarily rely on the number of members of parties and if you did, you would end up with all sorts of horrible branch stacking issues.

It is really, really hard to find any kind of formula that the High Court would assess as fair and reasonable to achieve this anti-corruption end that allows you to know in advance what money you should allocate to new entry small party independent person, anyone campaigning. That is the point at which you are going to fall down. That is what killed ACTV. Those laws actually were pretty reasonable, the idea of getting rid of political advertising and requiring free advertising on the electronic media. That is something that is done in the United Kingdom, New Zealand and other places and it is a perfectly reasonable thing to do.

The thing that killed it however in the High Court was that it favoured incumbents because it relied on your previous vote, so whoever was in government mostly tended to have a larger vote at the last election and therefore it was going to favour them; so they did not like that, and because of the effect on third parties. It banned third parties from campaigning. It was those two things that killed the law in ACTV.

That is where you are most vulnerable. If you are setting up any law for full public funding, where you are most vulnerable is in relation to ensuring fairness, you do not favour big parties or incumbents or whatever, that you deal fairly with independents and small parties and where you are most vulnerable is how you deal with third parties. That is where you are going to end up in trouble in the High Court.

Prof WILLIAMS: I think that is spot on. Anne is spot on in terms of the difficulties of determining how much money a candidate should receive, but the really intractable problem is third parties. Because how do you possibly determine relative between them.

Mr ANDREW TINK: It gets to this basic High Court approach, that it is the implied freedom from. It is freedom from something, not a right to something.

Prof TWOMEY: It is not a personal right, you are right.
Mr ANDREW TINK: A freedom from something, a television company or something. They would see it as their implied freedom from—

Prof WILLIAMS: As the High Court says, actually quoting Anne's work in that case in saying this is not a human right, it is a general protection of the ability to have, if you like, a system of public communication operating throughout the community that lets people make the decisions they need to make as to who to vote for.

Mr ANDREW TINK: Can I just say from my point of view, this has been on my mind since the beginning of all this. We operate under a different system, different constitution, there is no charter of rights, et cetera, et cetera but the consequences of this implied freedom unfortunately are incredibly messy and not fair. You look at the Canadians and I just think the Canadians have nailed it.

Prof TWOMEY: They had lots of problems there too I have to say.

Mr ANDREW TINK: If I just go to your paper. Perhaps I am indulging myself here but there are some phrases that really leap out at me from what they are able to do, I better give you the page numbers, 35, "promoting equality in political discourse" and then a little bit further down, "if one person 'yells' or occupies a disproportionate amount of space, it becomes increasingly difficult for the other person to participate in that discourse."

All I can say is, that is what the Canadians do. It makes common sense to me and that sort of this, this implied right that the High Court has got, that is just not on for us. Similarly at page 56 there is again a reference to the implied freedom in Australia as distinct from the Canadian system, which balances freedom of speech against equal participation. I just think the Canadians have nailed it again. That seems to be something, that from my point of view, we are locked out of on this implied freedom and I think personally it is a dam shame.

Finally, at page 82 you have got in here this idea in Canada, Harper v Canada, "voters must be able to hear all points of view." Again, I go yippee!

Prof TWOMEY: The High Court is sort of saying that here as well. One of the problems that the High Court has is it says that you need to have that free flow of communication about political matters, you need to be able to hear all those points of view. One of their concerns was in Unions NSW that by taking out unions, corporations and other bodies from participating you were reducing their communication and people's capacity to hear those things.

The High Court actually said it is not just freedom of communication for voters, it said that other people in Australia who are governed also have the right to participate and influence. That would include permanent non-residents for example and it includes unions and it includes corporations and all the rest of it, so everybody has the capacity to have their say. They do look at it in that sort of context.

Prof WILLIAMS: Can I just say on this, this is probably why the replacement provision to section 96D that Parliament put in recently is invalid.

Prof TWOMEY: Yes, I think there is a real problem with it.

Prof WILLIAMS: They actually got it wrong in revising the section because what that section does, and I note that the Law Society of New South Wales' submission deals with this explicitly, is it actually locks out people who are not on the electoral roll from actually being able to make a donation. That is exactly what the High Court said you cannot do and as Anne said, the question is not do I have a personal right, but are there people who might contribute in a way that would be part of the massive money required to actually run campaigns? There seems to be somewhat
of a limited understanding behind this amendment as to exactly what the nature of the problem is.

Prof TWOMEY: I think they just put back in the old one on the basis that the old one must have been okay.

CHAIR: Yes.

Prof TWOMEY: I can understand why they did that but I think to the extent that your Committee recommends anything on this, if it does, I think they need to go back to section 96D. I think they need to give consideration as to whether permanent residents are able to donate. They can in Canada, the United States and New Zealand. I think that that really is the issue.

The other thing is, and this is what the Law Society raised, although I am not quite sure that they nailed it exactly, but the Law Society also raised the fact that for entities, like corporations, unions, whatever, you needed to have an ABN or another number recognised by ASIC. My recollection is the reason that that was put in was not to prevent clubs or unincorporated societies from donating, the point of that was about making sure that you had some kind of Australian presence. It was about stopping foreign involvement. I think that in itself is probably constitutionally okay, requiring some kind of Australian basis, that in itself is pretty common in other countries too. But I think they just need to tidy that up a bit so that it does not excluded unincorporated associations.

Where I think the Law Society's point perhaps goes a bit too far is the suggestion that it completely excludes them. Lots of unincorporated bodies can have ABNs simply because they are involved in some way in trading. I am an individual, I am not a corporation, I have an ABN because I sometimes do consultancy work. There would be lots of unincorporated groups that have ABNs, presumably even if they run their own café and sell coca cola or something, I am guessing they have an ABN.

So I suspect most of them have it, but you would probably want to include some kind of a facility for any unincorporated body that had an Australian presence that wanted to donate, that was not able to have an ABN, maybe that you can register with the Electoral Commission or something like that.

Because I do not think the purpose of the provision was to exclude them, I think it is just accidental to the extent that there are any that are excluded and that would easily fixed.

Prof WILLIAMS: I think Anne that is where this provision runs into exactly the same problems as Unions NSW, its purpose is not clear. It was not on the amended version and it is not on this version. It may well be you can exclude foreign corporations from donating but you would need a rationale for that. It is not apparent on the face of the statute what that is. I think it actually risks falling down just at that first hurdle again; it has no discernible purpose.

CHAIR: There are plenty of international comparisons that would provide suitable rationale around that.

Prof WILLIAMS: I think it needs to be in the Second Reading Speech, it needs to be a body of evidence that the High Court can say we can understand by virtue of these clear legal materials why this is done and that it has a purpose that we can assess being the operation of the law against. Reading some of those materials, it has not taken that lesson up about getting the evidence trail right within the drafting and within the authoritative legal materials that accompany the statute.

Mr ANDREW TINK: Just on third party aggregation—

CHAIR: I really want to get into that.
Mr ANDREW TINK: There seems to be a sense that the Australian Capital Territory provision is the way to go.

Prof TWOMEY: It is more likely constitutionally valid than the New South Wales one. You would not want to put 100 per cent guarantee on it but it is better than the other one.

Mr ANDREW TINK: That seems to be the view.

Prof WILLIAMS: I think the notion they have there is a sensible one. There actually must be some discernible and reasonable connection between the groups that justifies them being aggregated as opposed to it simply happening automatically when in fact people may actually be opposing themselves, arguing for different things.

Anne and I both gave evidence at the Australian Capital Territory process and unless Anne has got a better idea, I cannot think of a better way of doing it. It seems sensible to me as an approach.

Prof TWOMEY: You could also have a look at some of the other provisions in other countries that do those sorts of things. You need to have something that shows that there is some kind of concerted campaign; that you are actually doing it together. You are using your money together to achieve the same campaign; there is some sort of co-operation with you. There are other examples in other countries that I think you could look at. Again, I think you cannot rule out aggregation provisions.

Prof WILLIAMS: No.

Prof TWOMEY: I think it was just done clumsily and badly. Again, that was raised in the Parliamentary committee before they enacted the law. The point was made, they just did it badly and they got caught out, but it does not mean you cannot have an aggregation provision. Indeed, you should have aggregation provisions. It is really important that you have a law that does not involve people setting up oodles of different front organisations and then running their campaigns out of them. It is very sensible to have such a law.

The Hon. JOHN WATKINS: Overnight I saw some advertisements on television from the Nurses and Midwives Association about the proposal to have a private operator of the northern beaches hospital; very political, very direct, presumably six months prior to an election. That would be sufficient for it to be aggregated?

Prof TWOMEY: Well it would depend very much on whether they were in collusion with a political party for the purposes of doing that. I would have thought a nurses association would have every interest of their own to run that campaign regardless of whether the Labor Party or whoever, The Greens or whatever, also had a similar policy or not. I would have thought that would be a core type of political communication. That is exactly the sort of thing that the implied freedom of political communication protects. It is people who have got together and genuinely have a political view and they represent that view.

Prof WILLIAMS: And it is likely to affect how people vote in a particular electorate.

Prof TWOMEY: Yes.

The Hon. JOHN WATKINS: But if The Greens or the Labor Party came out very strongly with that policy, which presumably they both have, so what, it does not matter?

Prof TWOMEY: No, sorry, I just do not know whether they have. It may well be that they have a similar policy. There is nothing, as David would no doubt say, to stop different groups with their own self interests pursuing the same policy, but if it is a concerted thing, if the Labor Party or
The Greens or whoever else had that policy went to the Nurses Association and said we would really like you to use your money to run this campaign and can you direct your advertisements in this sort of way and send out this particular message, if it was that sort of thing then sure, you would aggregate.

But it may well be that two separate groups with their own interests both have interests in the same policy and that is not necessarily collusion.

Prof WILLIAMS: It is very difficult. You might even look outside electoral law to trade practices law and other areas where they are always dealing with these problems of price collusion and all sorts of things. They have very elaborate tests but I am not sure they work very well because in the end it is so hard to determine whether people are acting in concert or not.

Mr ANDREW TINK: You end up with fence provisions where it always gets to be a matter of opinion.

Prof TWOMEY: And it is extremely hard to prove. That is another problem with all of this, to actually get evidence to prove any of these sorts of things is very difficult.

Prof WILLIAMS: People learn to operate at arms' length, but nonetheless to pursue a common purpose and do so very effectively sometimes to evade the provisions but it is not clear you could catch those people.

CHAIR: Even if the nurses are an affiliate of the Labor Party?

Prof WILLIAMS: I think what you might have is a range of contextual factors which might strengthen the case. Say you were an affiliate, you were pursuing a common purpose, it is during election time and rather than being a set of hard and fast rules which are very hard to apply, it may be some sort of discretion taking into account what might be considered relevant factors have to be applied.

Mr ANDREW TINK: To put a prohibition then on something like that, which has all those factors, it does create enormous problems if you are going to attempt to apply the criminal law to breaches of that sort of thing, does it not?

Prof WILLIAMS: Yes. You see it with price fixing with petrol stations. It is fraught. It is very, very difficult and that is why often these cases tend to be very expensive to run, prosecutions are not often launched because the evidence is so difficult to mount and if you have got experts within the field who are well versed in the law, they find the gaps and they work out ways of doing things that appear to be at arms' length. It is very hard.

Dr BENNETT: In Levy in Victoria of course the free speech was protected, was demonstrating against the shooting of birds. It can extend way beyond things that are current, specific political issues.

Prof WILLIAMS: I think the answer is, as Anne is saying, you do need an aggregation rule, very clearly. You have just got to be realistic about how far it can go. There is no perfection in this area. What you can do is take things considerably further in having the relevant factors there, as the Australian Capital Territory does or other jurisdictions do and that at least will provide some form of disincentive to acting very clearly in concert.

Prof TWOMEY: It needs to apply across the board. One of the problems with that particular aggregation provision was it was directed at a particular structure, a particular party. That was never going to fly. That was about the most stupid thing you could possibly put in your legislation and asking for a challenge if ever anything was.
As I said to them in the Parliamentary committee, while the bill was going through, I said, really if you want to do something like that, it had to be much broader; had to pick up any sort of body that was connected to the Liberal Party or The Greens or whatever, any of those sorts of things.

Mr ANDREW TINK: It has to be a test that applies generally.

Prof TWOMEY: Yes.

CHAIR: That is right.

Mr ANDREW TINK: As simple as that.

Prof WILLIAMS: Yes.

CHAIR: Can I just ask you about the incorporation of the major parties, because one of the things that has struck the Panel, or me in particular, is that when you look at the parties in the Parliament, all of them are incorporated in some way or another, not necessarily under the Corporations Act but in some way or other, excepting strangely, the three major parties—the Liberals, the Nationals and the Australian Labor Party.

The consequence of that is that not being legal entities it is very hard for the party to be charged or chased and they frankly have a system of agents which is a form of protection rather than a person who is actually going to be a very senior person in the party and really take responsibility.

One of the things we have been thinking about is whether political parties should be required to incorporate in some shape or form without saying what sort of shape or form it should be. Do you think that interfering in the internal affairs of a party like that would be seen as a breach of implied freedom of political association?

Prof WILLIAMS: I do not think it would be and it is not clear if an implied freedom of political association has any great vigour to it anyway. In fact, recent cases in the High Court have not even dealt with that in a way that suggests that it is a particularly strong limit.

I think clearly you could design a law that would be a problem but I do not think that would be. I think in this area that where it is clear that non-incorporation can be a very effective avoidance technique, that it would be a reasonable thing for Parliament to legislate constitutionally to say if you wish to receive your public funding, this is the type of entity you need to have to receive it and you can elect not to receive your public funding but I think in fact via that mechanism of saying something comes in return for that funding, you can actually prescribe a large a number of things, including a requirement to incorporate. You could actually require that the entity has transparent dispute resolution processes. You could mandate that a certain level of membership control may be required and you could also require that it even has certain dispute resolution processes.

Mr ANDREW TINK: Rodney Cavalier will love this.

Prof WILLIAMS: My view is that if you are receiving public funding and the taxpayer is giving you an enormous amount of money, there needs to be a quid pro quo there and the taxpayer has a right to expect that the money will be spent as part of some sort of democratic structure that lives up to the sort of ideal that we would be expecting.

I recognise there are very significant limits as to how far you would want to go in this area. I am not suggesting anything in terms of outcomes. You would not touch policy, any of those sorts of areas at all.

CHAIR: No.
Prof WILLIAMS: It is simply saying that there is an appropriate structure for the receipt of that money.

Mr ANDREW TINK: Is there not the one other aspect too, to me in some ways is the most important and that is to have some sort of directors’ duties or something similar applying to the governing body?

Prof WILLIAMS: It is why you pick up the incorporation under the corporations legislation which itself builds in a number of potential protections.

Mr ANDREW TINK: To me that is one of the key dividends of doing this. In fact, it is possibly the most important dividend of all, that you get a trickle-down effect, if a board is required to act diligently and all the rest of it, then they are self-interested in addressing the very issues you just raised.

Prof WILLIAMS: Yes.

Mr ANDREW TINK: That is a fair comment, is it not?

Prof WILLIAMS: I think so and it raises the question as to whether parties themselves would decide to have an independent director at different times as well to provide some form of external scrutiny for their own operations, so that you have sometimes a dissenting voice internally to raise issues about this matters.

Given as I raised the other day, maybe there should be a reporting obligation upon parties for receipt of problematic donations. That again would play into those sorts of structures in requiring transparency and engagement with authorities as a risk mitigation exercise.

CHAIR: In the recent ICAC inquiries we saw that the Liberal Party had channelled a large amount of money through an associated entity called Free Enterprise Foundation. Do you think that it is possible to regulate election spending by associated organisations like that in the way that would satisfy the Lange test?

Prof WILLIAMS: Yes and I think the bottom line here is there is no per se unconstitutionality about anything. It is not an absolute freedom that says that you simply cannot do certain things. The question is what do you want to do; recognising that almost anything in this area will burden the freedom, but is it proportionate? Is it reasonable? Is it well tailored to the object that it is designed to meet? Is it consistent with the democracy that the freedom is designed to facilitate?

I think particularly when you get to those sorts of entities, you would have to regulate them in some way, because it is a bit like the aggregation problem, if you do not have an appropriate regulation in that space you are simply creating unregulated fields where the money will naturally go to and people will simply work around your regime.

CHAIR: This is assuming that we have caps on political donations and David's work in the High Court comes to nought in that regard, so we have got caps on political donations and then we have got measures being taken through associated entities to basically breach those caps.

Prof WILLIAMS: Yes.

Prof TWOMEY: I think one of the important things there is that the stuff that is going through ICAC happened in a period between two different things. You had the law banning the political donations from property developers but a lot of this happened before the caps came in.
CHAIR: That is right.

Prof TWOMEY: At that point you could funnel that money through places like the Free Enterprise Foundation and it could give large amounts back to the Liberal Party or whoever. Now they could not because if the Free Enterprise Foundation is confined itself to only being able to give $5,000 back then that as a method for funnelling the money just does not work anymore and that shows the critical nature of the caps. If you do not have the caps doing that, then it does allow that funnelling to go through from other bodies.

The Hon. JOHN WATKINS: Unless it breaks itself into a whole range of sub-entities.

Prof TWOMEY: That is the other thing, you have got to try and make sure it does not end up, as you say, proliferation of different entities.

Prof WILLIAMS: What you also need, as Anne says in her submission, a general avoidance provision as well that actually does not seek to regulate everything really specifically but indicates that where schemes are designed merely for the purposes of avoiding the caps and other regulations, then that itself is an offence.

Mr ANDREW TINK: This is where you make it a very serious offence.

Prof TWOMEY: Yes.

The Hon. JOHN WATKINS: You could specify that whole recycling of funds through a federal entity back to the State as being subject to that.

Prof WILLIAMS: Yes, and you should.

Prof TWOMEY: Yes.

Mr ANDREW TINK: You talk about an appropriate stiff penalty; we were having a look around the Crimes Act the other day, which is an interesting thing to do.

Prof TWOMEY: Yes, lots of odd things in there.

Mr ANDREW TINK: There is a division there on fraud of course and there is a provision that I think, from memory, it is 10 years for fraudulently uttering an instrument, that sort of thing. It strikes me on the face of it that is a relevant place to start; would I be right?

Prof TWOMEY: Yes.

Mr ANDREW TINK: So 10 years?

Prof TWOMEY: Well, I think what you need to do is have a range of different possibilities and there the Canadian legislation is actually quite good.

Mr ANDREW TINK: Five years?

Prof TWOMEY: It is quite complicated looking at it but with the Canadian material, they have it in two layers. So there is the strict liability offences and if you have strict liability offences, the good side of that is it makes it much easier to prosecute, because one of the things that the Electoral Commission no doubt has told you is that they have extreme difficulty being able to show intent in relation to all aspects of offences.

One of the reasons that nobody tends to get prosecuted is because of those technical
difficulties of proving intent.

So you could have layers of different types of offences. You can have strict liability ones that have lesser penalty because there is strict liability.

**Mr ANDREW TINK:** I think the way the electoral commissioner is looking at it, at least I understand it anyway, is that that category of offence is covered by the sort of offence where you get a penalty notice.

**Prof TWOMEY:** It may be or it may be a fine. In Canada it can be both a fine and a small level of imprisonment. You are talking three months or six months or something like that. Then you can have more serious offences where can prove intent and if you show intent, that they were deliberately intending to do X, Y and Z then you have much more serious offences.

Even within your offences you can have different sorts of things. Not only can you have fines and imprisonment but you can also have things like being banned from being a member of Parliament for X number of years or being banned from holding an office of profit under the Crowns or being banned from holding a government position. They are forms of punishment that are reflections on the fact that these types of offences are not only personal and criminal in nature, but they offend the democracy itself by undermining it.

There are different levels of things you can do and I think it would be appropriate not to just have one thing, but different sorts of levels and layers.

**Mr ANDREW TINK:** I personally would have some difficulty with a strict liability offence which might make you liable for imprisonment.

**Prof TWOMEY:** It would have to be very, very tightly controlled.

**Mr ANDREW TINK:** Which is not to say that a very stiff prison term is not an appropriate penalty for the more egregious sorts of breaches of the law—how can I say, a system which might be developed with forethought, a conspiracy to defraud the revenue. That is in effect what you are talking about, one way or the other, or really attempting in a criminal way to tilt the playing field and get a massive advantage. That is something that should attract a significant gaol term.

**Prof TWOMEY:** I think when you are looking at the strict liability ones they need to be focused in a way that really do pick up not people who are accidentally doing anything, but people who are genuinely engaged in criminal enterprise. I think they are more focused at the issue that the Electoral Commission raised of not having to prove five different levels of I knew this, I knew this, I knew this, I knew this, I knew this; somehow just making it a bit simpler. That if you can show that they had intent to do X and all the other things follow and therefore you get done.

There are ways of doing it. You just need to be quite careful and sophisticated about it and reasonable and balanced in your—

**Prof WILLIAMS:** I think what you could do there is you could have a strict liability offence merely for exceeding the cap, for receiving more money than you should have but yes it should be a fine of some kind. Perhaps even you should be paying twice the amount than what you have actually received, a civil penalty-like provision. But if the intent can be shown, that is where the criminal and other actions come in.

**Mr ANDREW TINK:** Just on the question of expulsion, pardon my ignorance in this but is there anything in the New South Wales Constitution Act that is entrenched in relation to the question of expelling members? In other words, can it be legislated on or does it require a referendum to change the current rules relating to expulsion?
Dr BENNETT: Armstrong v Budd I think was the case on that, where they said that the Upper House could expel a member under the existing provision. I do not think there was anything in the constitution that dealt with it. There is no doubt some constitutional implications if you make it too easy. Obviously you cannot have houses expelling members for voting in particular ways.

Mr ANDREW TINK: But that is a bit different, is it not? That requires the house to decide to expel in a particular case.

Prof WILLIAMS: And you have got disqualification rules in the constitution, but they are not entrenched, are they Anne?

Prof TWOMEY: To advertise myself, you have to read chapter eight of my book on the constitution which does actually deal with all this.

Mr ANDREW TINK: That is why I am asking you, because I know you know these things.

Prof TWOMEY: My only problem is I do not contain it all in my head, because it is a 900 book. You would have to look at the entrenchment provisions but from recollection there is a requirement that if you change the rules about disqualification you have to change them the same for both houses, you cannot do one and not the other. But if you change them equally for both I think you are okay in terms of legislation. I can come back and clarify that for the Committee later.

Mr ANDREW TINK: Because what we are talking about here, I would not have thought creating a situation where the house resolves to determine whether or not to expel anyone—

Prof WILLIAMS: A court would do it.

Mr ANDREW TINK: The Armstrong case notwithstanding, the Upper House is very reluctant to act against individuals, especially people who are brought to the Upper House by the judicial commission, if I can put it that way. So there is a great reluctance. What we would be looking for here is a situation where there is an Act of Parliament saying if you do this you are convicted of this, you are out. It is a question of whether you can do that.

Prof WILLIAMS: You are not changing the existing grounds, you are adding a ground and that has already been done at the federal level. There you have the entrenched grounds of disqualification and section 44 of the constitution but I think it is section 376 of the Electoral Act provides an additional ground of disqualification for electoral bribery.

Mr ANDREW TINK: Just let me understand this; so that is an additional ground that has been introduced by an ordinary Act of Parliament.

Prof WILLIAMS: That is right.

Mr ANDREW TINK: So it does not rely on the constitution; it does not require change to the constitution; it does not require a referendum.

Prof WILLIAMS: No.

Mr ANDREW TINK: You are saying by parity of reasoning in New South Wales we could—

Prof WILLIAMS: The only reason you could not is if the grounds in the New South Wales constitution were expressed to be exclusive, but they are not to my understanding.
Prof TWOMEY: But it also has to be equal for each house.

Prof WILLIAMS: Yes, it has got to follow that rule; that is right.

Dr BENNETT: One thing you could certainly do is have a provision which says if you are convicted of a bribery offence in relation to a member you may not in future give a political donation. You could probably justify that. That is one of the alternative ways in which you could achieve or partially achieve results which are sought. Although it is probably not necessary because as I say, you already have serious criminal offences that are involved with actual bribery and we have the Secret Commissions Prohibition Act.

Mr ANDREW TINK: If I can presume to say, I think the public wants to see some pretty stiff penalties.

Dr BENNETT: Ironically the Secret Commissions Prohibition Act is an Act which goes much further than is necessary for its purpose. There are many things which would be prohibited by it but which most people would regard as acceptable, such as an airline or hotel offering a travel agent a free trip or someone whose overdraft is being called up, taking his bank manager to lunch. Both those would be caught by that Act, whereas most people would regard both as totally acceptable conduct.

So it is a bit like not for constitutional reasons but just generally it is an Act which goes quite a long way. But it certainly is the Act which makes unnecessary this legislation because the evil is already an offence.

Prof TWOMEY: Just to put some nuance on what David said there, David is happily putting things into two very distinct categories but there is the obvious large area in the middle.

Mr ANDREW TINK: He is an advocate Anne.

Prof TWOMEY: Indeed.

Mr ANDREW TINK: He is running his case.

Prof TWOMEY: Just to put on the record, there is the obvious area in the middle which is where significant donations have been made in the past not on the basis of what the United States describes as quid pro quo corruption, which is I will give you this if you give me this decision but instead the area that we are trying to deal with is I will give you this money because I expect that you will give me greater access and influence and you are going to pick up the phone when I call and you are going to be more inclined to give active approval to the sorts of decisions that I want. That is the area that we are dealing with, not the issue of I directly bribe you; not the issue of I am giving money to a political party because I support its policy, but it is the area in between and that is what we have got to deal with here.

The Hon. JOHN WATKINS: On another matter, we have had discussion about the investigation, prosecution, enforcement capacity of the Electoral Commission and the EFA. Some of our judgment I think is that we need to do some things differently. We learnt that there is a piece of legislation that is pending about the EFA being folded back into the Electoral Commission. Do you have a view of how we should design things so that any new regime we introduce is going to be enforced and prosecuted appropriately?

Prof WILLIAMS: I made a couple of comments the other day indicating I thought the Electoral Commission should be resourced, that there should also be an expectation that perhaps there should be a new division of the Electoral Commission with, if you like, a higher public visibility about its role in this area of enforcing the law. That it seemed understood that the police were not going to be the appropriate primary agency for investigating these matters but as Anne has also said, the
electoral commissions have not tended to have brought many of these cases, in part because the law is very difficult to show. So I think you would need to twin the creation of appropriate resourcing and division there within the commission with actually rules that can be more easily enforced.

**CHAIR:** I think when we discussed this last week George you were putting the point that the EFA really needs to beef up its detection role as well as its enforcement role because it is just fanciful to think that the police are going to run around and do things unless someone comes along and says here is a case.

**Prof WILLIAMS:** ICAC is doing that work at the moment it seems.

**CHAIR:** Yes.

**Prof WILLIAMS:** That cannot be the primary mechanism and given the difficulties of securing enforcement out of ICAC and prosecutions, that risks public confidence I think.

**The Hon. JOHN WATKINS:** Anne, have you got a view?

**Prof TWOMEY:** Yes, the one thing I want to raise is something I put at the end of my submission and it is just another way of dealing with it but I think it does help resolve some of the problems and that is to have all donations made through the Electoral Commission, so not having members of Parliament deal with donations at all. Keep them away from the members of Parliament; keep them away from the parties.

That has huge benefits for parties and members of Parliament because they do not have all those concerns of administering the donations and declaring the donations and the risks of criminal offences if they get it wrong and all that sort of stuff. If you make the requirement that everybody who wants to make a political donation has to fill out a small form identifying who they are, the purpose of the donation, so whether it is for party administration, whether it is for a state election campaign or whether it is for a federal election campaign so you know where it needs to go and to which candidate or party you are making the donation.

That money and the form goes to the Electoral Commission. That is the only way donations can be made. The Electoral Commission then has accurate information directly from the donor instead of getting information from the party and information from the recipient, often which is conflicting anyway, so it has accurate information. You can have real time disclosure because the Electoral Commission can disclose it as soon as it receives it and allocates it and then it puts it into the relevant account.

If it is a donation for a state election campaign it goes into the state campaign account of that party. No other money can go into that account and only money from that account can go out to pay for the campaign. If you had that sort of a system it takes away a lot of these problems. Yes, the Electoral Commission would probably hate it because it would involve more administration and put pressure on them, but you would also be able to reduce the administrative spending money that you give to political parties because they do not have to run any of this anymore and remember, a lot of that money went to them to accommodate all this extra administration.

Take that money, properly resource the Electoral Commission and the Electoral Commission can then do a number of things. It can cross check, so it can make sure that the aggregation provisions are not breached. It can make sure that the cap provisions are not breached and if there is a breach you can send back the money to its source. So that keeps away from the political parties any of these risks of criminal offences. The political parties are clean. They do not have to worry about the declaration and getting right and all the rest of it, and all the money travels through the one source. I just think it is a better way of doing it.
Dr Bennett: Why in doing it that way do you need a cap on actual expenditure? Why cannot they spend their own money on that if they choose?

Prof Twomey: Sorry, why cannot who spend?

Dr Bennett: The parties spend their own money or the candidate's money if they want to.

Prof Twomey: On what?

Dr Bennett: On political advertising.

Prof Twomey: On campaigns, well it gets back to the point of influence. It is still possible to influence a political party by saying I am going to give you $100,000 through the Electoral Commission because I want you to look with favourable eyes upon my coal mine application or whatever. The influence issue is still there and you still need the caps for that.

Mr Andrew Tink: And there is the arms' race too.

Prof Twomey: And the arms' race issue.

Chair: I think one of the issues with your suggestion about the EFA is their level of competence in administrative areas.

Prof Twomey: It would need to grow.

Chair: We have had a number of submissions and presentations to the effect that it really does need to get a whole lot better. It was almost in the Dickensian era.

Prof Twomey: If you worked it out once, the other good thing about this is efficiency. You do not have every single political party trying to set up a system to administer this. You have got one system and one body; if you get it right—

Prof Williams: Let alone those parties that have no system, because they are new entrants. This would be very expensive what Anne says, but it would be a lot cheaper than full public funding though, that is for sure.

The Hon. John Watkins: It does not take away the burden on the Labor Party and Liberal Party; we would still have to have all that infrastructure in place for federal.

Chair: Yes, that is true.

Mr Andrew Tink: And they would have to have a lot of administration in place for the claims on expenditure, would they not? We heard the other day that one party—I better not say which one—send their documents in, was it on a quarterly basis—I cannot remember, but anyway, less than a year, on two pallets; a couple of forklifts going in with all the documents for auditing.

Chair: And this is 2014.

Mr Andrew Tink: There is a question out of this, which is is this an unavoidable by-product of running a reimbursement scheme? Is it inherent in reimbursement that you have to prove all claims or is there scope for what I understand they do in the Tax Office, which is people put in returns without the full paper chase but notionally with the fear of God in them that if they are subject to a full audit and they come up wanting, then they are in for the high jump.

Dr Bennett: Why not buy them a laptop; that would save their paper?
Mr ANDREW TINK: Is it implicit in a reimbursement scheme you have got to prove everything every time, every one hand have everybody spending the bureaucratic dollar ticking and flicking or can you relocate that bureaucratic dollar and say we are going to have some really hot shot auditing teams going around at random. We are just going to drill down all over the place and heaven help you if your return is dodgy. Is that an alternative way to run it?

Prof TWOMEY: Well, even if you do that, you have still then got to have all the records. It does not stop you from having to have the records in case you get audited. You have still got all the work anyway.

Mr ANDREW TINK: As indeed you do with your taxation but it stops the need to send them all in on pallets and everybody checking.

Prof TWOMEY: The alternative is to do the federal system which is you just get X amount of money and you could either have spent it or not as would happen. My real concern with that is you end up with political parties and candidates who just profit out of the public funding campaign. I think the public are pretty angry about that and that is why I think the New South Wales system of you actually have to have spent the money is better.

Mr ANDREW TINK: That is in part because of the New South Wales scheme, let us just take the major parties are treated relatively equally regardless of the particular election result, which personally I quite like because it keeps the political discourse relatively even despite the swings and roundabouts. But if you had the Australian Capital Territory system where they are reimbursed based on a percentage of the vote, then you avoid the pallets of paper?

Prof TWOMEY: Yes, you avoid all the administration.

CHAIR: You can avoid the administration by just doing it properly actually, by just having audits and you do not have to double audit. You can have checks later. There are lots of efficient ways of doing this that would avoid the pallets.

The Hon. JOHN WATKINS: The EFA or the Electoral Commission has seen that as a concrete mechanism by which they can influence the parties to behave appropriately.

CHAIR: Yes, that is right.

The Hon. JOHN WATKINS: It is a pretty clumsy and expensive way of doing it; there may be better ways.

CHAIR: That is right. I think it is partly tied up with some of the problems they have got in enforcement because of strict liability and various other things. It is not just they are focusing on processing instead of other things.

George, before we break, do you want to add anything?

Prof WILLIAMS: No, I think I have got all the points out that I wanted to raise.

CHAIR: One thing we have not discussed because David has been open to discuss it another forum, is bans on particular groups and in particular the bans on property developers, and tobacco and gaming and all of that stuff. We have had a number of submissions arguing that since those bans came in there is now a cap on donations so there is therefore no need for a ban because there is a cap. Do you have a view about that?

Prof WILLIAMS: Yes I do. I think certainly there is a very credible argument that David
will be able to put to the High Court that the bans are unconstitutional. I think it is hard to predict the outcome but I certainly would not be surprised—

**CHAIR:** He is also arguing against caps.

**Prof WILLIAMS:** That is a different issue. I cannot see that being struck down.

**Prof TWOMEY:** I think the caps will survive, but it may well be that the property developer stuff goes down.

**Prof WILLIAMS:** We will see what the result is.

**CHAIR:** And with it would go the drinking and gambling and all of that.

**Prof WILLIAMS:** You would think so by implication, you do not know for sure though; that is the nature of this.

**Prof TWOMEY:** I guess it is a 50/50 chance of that.

**Prof WILLIAMS:** It may be the developer donation falls down because of drafting issues connected with the over-breadth of that particular ban and the nature of that in what a development application is and all sorts of things means that perhaps there is something wrong with that that is particular to that. That is a possible outcome.

**CHAIR:** While we have had that position put to us, we have also had positions put that other groups should be banned, like people seeking coal mining licences.

**Prof WILLIAMS:** Where do you stop?

**CHAIR:** It is never going to stop, that is right.

**Dr BENNETT:** What you are really doing is trying to prevent unpopular groups agitating for legislation which is in their interests.

**Prof TWOMEY:** I do not think so David, no one is wanting to prevent them from agitating for things. Your property developers and whatever can happily spend their money to advertise to say I want a law about X or I do not want a law about X; no one is stopping them from doing that, are they David? They are just trying to stop them from funding political parties and that is a very different thing.

**Dr BENNETT:** It is a different thing but it is part of the democratic process of being able to get one's view heard.

**Prof TWOMEY:** But why is your view heard more David if you are giving money to a political party than if you are directly advertising to the people? What does your money to a party give you more of and if it does give you something more, why is that not corrupt?

**Dr BENNETT:** Laborious, but to get the legislation passed these two steps is getting the person's vote in Parliament.

**Prof TWOMEY:** But is that not just influencing then members of Parliament? Is that not what your argument essentially is? My money is better placed in doing that.

**Dr BENNETT:** What do parties do? The whole point of a party is to influence a member in how to vote and expel the member from the party if the member votes against the party line? The
influencing in that sense is not necessarily corrupt. It is a legitimate form of influence.

Prof TWOMEY: So it is more legitimate, is it, to influence a party by giving it money in order to allow the party to advertise rather than to set out your view as to what you want in the legislation yourself independently?

Dr BENNETT: They are two ways you can achieve the same thing and they are both caught up by the political communication.

Mr ANDREW TINK: I have one more question, which you may not want to answer, I do not know. Why is it necessary to take on the constitutionality of caps in running the case?

Prof TWOMEY: Because otherwise his client will get into trouble from ICAC.

Prof WILLIAMS: That is right.

Dr BENNETT: That is right.

Prof TWOMEY: Because his client breached the caps.

Dr BENNETT: There are some admitted payments and there is intention we have pleaded, an intention to make political donations in the future to the extent permitted by law and that gives an interest. The same way that Croome had an interest in a slightly different context, because of the attention to engage in an activity which the State is seeking to prohibit.

Prof WILLIAMS: It is the only way to get a get out of gaol free card. It is like the removal of a lock, because as Anne said, the caps will potentially apply if the donation ban goes.

CHAIR: We have all been around political donations too long I think. John, have you got any further questions or comments?

The Hon. JOHN WATKINS: No Kerry, I am okay. Except that I do not think that we should give up on an almost totally public funding scheme just yet.

CHAIR: We keep looking for it.

Prof WILLIAMS: I think the message we are saying is in that case remember your new candidates, remember your third parties and be prepared to fund them as well.

The Hon. JOHN WATKINS: Yes, third parties is where I have some difficulty.

CHAIR: Yes, remember fairness of third parties.

Prof WILLIAMS: Well as Anne said, that is one of the key reasons the scheme in 1992 got knocked down, that they are seen as having just as much a legitimate role in participating in these debates as candidates do.

CHAIR: Yes.

Mr ANDREW TINK: And in the context of absolute full funding, the issue of new entrants.

The Hon. JOHN WATKINS: I think we can get around that.

Prof WILLIAMS: It is the third parties; they are the really hard ones.
The Hon. JOHN WATKINS: The problem that brought us together here today is not third parties.

Prof WILLIAMS: No but it will be the constitutional problem.

CHAIR: It will be, yes.

The Hon. JOHN WATKINS: So we are trying to dance around the High Court.

Prof WILLIAMS: You cannot I think. The answer is you must deal with third parties appropriately and as we said to you, you have got a few options as to how to do so but none of them are satisfactory unfortunately. Pay lots of money or give them laissez-faire.

The Hon. JOHN WATKINS: And we do not want to establish a scheme that leads to a proliferation of third parties. The growth of them is fine but if it becomes an effect of what we do, that is a problem.

Prof WILLIAMS: Which, if you like, the market plays a role in this area, that third party who feels strong enough will generate funds, will agitate, will be involved and it is really important that donations and the market place actually plays a role in filtering out which political views make it through.

Mr ANDREW TINK: It is, in a way, market place law, in a funny sort of way, is it not? It is all about regulating the market really.

Prof WILLIAMS: Or buying and selling all sorts of things, yes.

CHAIR: I think it is also important in the full public funding discussion to work out what it is we are fully public funding, if anything. So is it just the election campaign expenditure as currently defined?

Prof WILLIAMS: As Anne said, you cannot, you have got to fund the lot.

CHAIR: Is it going to be everything in that six month period for elections including accommodation, travel, market research and stuff. Is it also administration over the course of the years between elections and policy development for new entrants?

Prof TWOMEY: It just occurred to me, there was one other thing that we have not discussed and I just flag here, and that is the federalism issue as well. You cannot actually control donations to state branches of political parties to the extent that they are for the purposes of commonwealth elections. So no matter what you do, you will never be able to at the state level only ban political donations in New South Wales. You are just caught with that, that your property developer or your coal miner or whoever can still give money to the state branch of the Labor Party, Liberal Party, The Greens, et cetera if it is for the purposes of the commonwealth election and still that can be indirectly used to influence state politicians.

Prof WILLIAMS: Absolutely.

Prof TWOMEY: There is nothing you can do about that. To the extent that full public funding is seen to be the panacea for everything, it is not.

The Hon. JOHN WATKINS: You are right; you are dead right but it is not the major problem, again, that we are facing here in New South Wales. That is not what has brought us together.

Prof TWOMEY: But what the public will see is that there still donations going on, even
though they thought all donations were banned, and they are paying a motza for that as well.

Prof WILLIAMS: What you can stop is the money coming back again, as we have discussed. You can make sure it does not come back again but you cannot stop it going there in the first place.

Prof TWOMEY: Yes.

The Hon. JOHN WATKINS: I actually think the public of New South Wales will understand that. We can do what we can in New South Wales to solve the problem, that people believe is a problem here in New South Wales and that is as far as we can go.

Dr BENNETT: I just want to thank Kerry, Anne, Andrew, John and George for giving me a trial run for the High Court, helping me to prepare my answers to the questions I am going to get.

Mr ANDREW TINK: Well Anne is not on the bench so you might be right.

Prof TWOMEY: You are safe David.

The Hon. JOHN WATKINS: We will send you our invoice.

CHAIR: Thank you very much everyone. Thank you visitors and that is it for the day.

(Session concluded at 11.54 a.m.)