

PARLIAMENT OF NEW SOUTH WALES



Joint Standing Committee on Electoral Matters

Public funding of election campaigns

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Membership and staff

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Terms of reference

That:

- (1) having regard to the June 2008 report of the Legislative Council Select Committee on Electoral and Political Party Funding which recommended, among other things, that all but small donations by individuals be banned and that further consultation be undertaken on increasing public funding of political parties and elections; and
- (2) noting that the Government has announced its support for the introduction of a comprehensive public funding model;

the Joint Standing Committee on Electoral Matters is to inquire into a public funding model for political parties and candidates to apply at the state and local government levels.

The Committee is to consider the following:

- (a) the criteria and thresholds that should apply for eligibility to receive public funding;
- (b) the manner in which public funding should be calculated and allocated, including whether it should take into account first preference votes, parliamentary representation, party membership subscriptions, individual donations and/or other criteria;
- (c) any caps that should apply, including whether there should be an overall cap on public funding and/or caps on funding of each individual party or candidate either absolutely or as a proportion of their total campaign expenditure or fundraising;
- (d) the persons to whom the public funding should be paid, including whether it should be paid directly to candidates or to political parties;
- (e) the mechanisms for paying public funding, including the timing of payments;
- (f) whether any restrictions should be imposed on the expenditure of public funding and, if so, what restrictions should apply and how should the expenditure of public funding be monitored;
- (g) whether any restrictions should be imposed on expenditure by political parties and candidates more generally and, if so, what restrictions should apply and how should expenditure be monitored;
- (h) how public funding should apply as part of the broader scheme under which political donations are banned or capped;
- (i) whether there should be any regulation of expenditure by third parties on political advertising or communication;
- (j) whether there should be any additional regulation to ensure that government public information advertising is not used for partisan political purposes;
- (k) any implications arising from the federal nature of Australia's system of government and its political parties, including in relation to intra-party transfers of funds from federal and other state/territory units of political parties;
- (l) what provisions should be included in order to prevent avoidance and circumvention of any limits imposed by a public funding scheme;
- (m) the compatibility of any proposed measures with the freedom of political communication that is implied under the Commonwealth Constitution;
- (n) the impact of any proposed measures on the ability of new candidates, including independent candidates and new political groupings, to contest elections;

Terms of reference

- (o) any relevant reports and recommendations previously made by the Select Committee on Electoral and Political Party Funding; and
- (p) any other related matters.

The Committee is to report by 12 March 2010.

Chair's foreword

The system of democracy in NSW is sound and robust and has resulted in a stable political system for over 100 years. But it is fair to say that although citizens are participants in our democracy, the machinations of government decision-making often remain a mystery to many voters.

This is all the more reason why the system of elections, rules for their funding and political donations need to have the confidence of our citizenry.

The referral to the Joint Standing Committee on Electoral Matters of the Terms of Reference for an Inquiry into public funding and donations reflected a growing sense within the community that the system of campaign financing is broken and needs fixing.

In response, the Committee has undertaken a comprehensive review of the issues contained in the terms of reference and considered evidence from a range of stakeholders, including registered political parties, academics with expertise in constitutional law and elections, third parties and independent Members of Parliament.

The Committee also considered the issues canvassed in the report by the Legislative Council Select Committee on Electoral and Political Funding.

The Committee also examined models adopted in other jurisdictions including Canada, the UK, New Zealand and the United States of America. While the system of government in NSW may have elements in common with other jurisdictions that have undertaken reform, the nature of our system is sufficiently different that no other existing model can simply be adopted.

The Committee also received evidence from the NSW Electoral Commission, Mr Colin Barry. Mr Barry's submission was invaluable in helping set the framework for our consideration and recommendations. In his evidence, Mr Barry outlined his view that the Committee should consider the submissions and evidence, and frame its response within four principles of public funding and disclosure.

The Four Principles Mr Barry outlined and which were endorsed by the Committee are:

1. Protecting the integrity of representative government;
2. Promoting fairness in politics;
3. Supporting parties to perform their functions;
4. Respect for political freedoms.

The Committee acknowledged the benefit of having a series of principles or guiding objectives by which various options, models and suggestions could be measured against. The Committee also agreed that these principles should be incorporated into an object clause in any legislation arising from this report.

The inquiry process benefited greatly from the views and recommendations contained in the 30 submissions it received as well as from the 23 witnesses who shared their knowledge and opinions with the Committee. On behalf of the Committee, I would like to acknowledge

Chair's foreword

all of the participants in this process, particularly the academics who gave their time and the benefit of their knowledge to this inquiry.

Given the prevailing sentiments within the community on campaign funding, it is not surprising this inquiry has generated strong interest and has been the subject of some media speculation. It is fair to say the Committee members have been very aware of the expectations of the electorate to draft a report that would fix once and for all the ills of the current system.

What has emerged through this process, and in examining the implementation of new electoral financing systems around the world is that there is no silver bullet. No system can expect to perfectly marry the competing interests of so many stakeholders and still deliver a practical and robust funding model. In fact, every system or reform that has been introduced in other jurisdictions has been further amended to address unforeseen problems or inconsistencies.

Whatever changes to the system of donations and funding that occurs in NSW arising from this report, if it results in a change of the culture and an end to the 'arms race' of campaign donations, it will have been a success.

The challenges highlighted above have been magnified as a result of the need to take submissions and evidence, consider systems and experiences overseas and attempt to achieve consensus on a report in a period of just over three months.

Notwithstanding the above, there was a genuine effort from all members of the Committee to deliver a report that will help guide the development of a substantially fairer, more robust funding and disclosure regime in NSW, that will also help to restore the community's confidence in the system.

To this end, I would like to acknowledge the willingness of the Committee members to work constructively towards a shared vision of developing better and fairer laws in this critical public policy area.

While agreement could not always be reached on every element, the report reflects the good will of members to put aside partisan interests and develop a system that will hopefully give more confidence to the people of NSW.

However, even with the good will of the Committee members, I'm sure my colleagues would agree that any success we have achieved as a result of this process could not have been achieved without the wonderful staff of the Committee.

No acknowledgement in this report can adequately reflect my admiration and appreciation of the Committee Secretariat. They worked long and hard to support and facilitate the work of the Committee and deserve our gratitude and respect for the professionalism and patience. To Helen Minnican, Carly Sheen, Amy Bauder, Dora Oravec, Emma Wood and John Miller thank you very much.

The Report of the Committee does not include a comprehensive model for electoral reform in Local Government. This should not be interpreted as a lack of interest in reforming this system, or a lack of support for public funding of local government. It does however reflect the complexity of the issues that need to be examined and the short time-frame within which

the report was required. The Committee intends to further explore this issue after any new legislation is enacted for state elections.

Finally, one of the issues faced by the Committee in its deliberations was the need to balance a fairer, more transparent system of donation reform, with the consequent requirement for increased public funding.

There will be some who question a report from a committee of politicians that recommends that political parties and candidates receive more public funding. However, the evidence contained in submissions and analysis from inquiry participants including constitutional experts strongly supports such a need.

People who are expected to cast an informed vote at elections require the political parties and candidates who are seeking their vote to adequately inform them of their platforms and agendas. It was the view of nearly all those who made submissions to the inquiry that if significant reforms to donation laws are introduced – as recommended in this report, public funding would need to be substantially increased.

I am confident the people of NSW will see this as a reasonable proposition. Restoring a sense of integrity and confidence in the decision-making processes of government should be one of its highest priorities. That this will require additional public monies should not be seen as a negative, but rather, the cost of good governance and transparency.

A handwritten signature in blue ink, appearing to read 'Robert Furolo'.

Robert Furolo MP
Chair

List of recommendations

RECOMMENDATION 1: While a national approach to electoral and political finance reform is preferred, the Committee recommends that the Premier introduce legislation to reform the electoral and political finance regime in New South Wales independent of action by the federal government, prior to the State election 2011.2

RECOMMENDATION 2: The Committee recommends that the Joint Standing Committee on Electoral Matters consider the operation of the reforms as part of its review of the State election 2011.....2

RECOMMENDATION 3: The Committee recommends that the Premier include the principles outlined by the Electoral Commissioner in the object clause of legislation to reform the electoral and political finance regime.3

RECOMMENDATION 4: The Committee recommends that the Premier incorporate in legislation to reform the electoral and political finance regime a cap on all donations from individuals, set at \$2,000 per political party, group or independent candidate per financial year, and all caps to be adjusted according to the CPI.

This cap should be subject to review by the Election Funding Authority after each New South Wales State election.4

RECOMMENDATION 5: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime that political donations from individuals be limited to those individuals on the New South Wales electoral roll and/or the Australian electoral roll.....4

RECOMMENDATION 6: The Committee recommends that the Premier incorporate in legislation to reform the electoral and political finance regime a cap on all donations from entities, set at \$2,000 per political party, group or independent candidate per financial year, and all caps to be adjusted according to the CPI.

This cap should be subject to review by the Election Funding Authority after each New South Wales State election, subject to guidelines published by the Premier.5

RECOMMENDATION 7: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime a requirement that those entities that are entitled to donate to a political party registered in New South Wales be limited to:

(a) a company with an Australian Business Number;

(b) a registered trade union; and

(c) an incorporated association which carries out the majority of its activities in New South Wales.

The Committee further recommends that the Premier require that an individual representative be nominated for each donation by an entity.....6

RECOMMENDATION 8: Given that the reforms to political donations recommended by the Committee address concerns about donations from developers, the Committee recommends that the Premier include in legislation to reform the electoral and political finance regime, the repeal of those provisions relating to a ban on developer donations.7

RECOMMENDATION 9: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime a requirement for registered political parties and groups to:

- (a) maintain separate funds for state campaigns, federal campaigns and administrative funds; and
- (b) submit annual audited accounts of the separate funds to the Election Funding Authority. 7

RECOMMENDATION 10: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime:

- (a) an exemption for party membership fees and party compulsory levies on parliamentarians, from the cap on political donations, and
- (b) a cap on party membership fees, set at \$2,000 per member, per financial year. 8

RECOMMENDATION 11: The Committee recommends that in preparing legislation to reform the electoral and political finance regime, the Premier ensure that where registered political parties receive affiliation fees, those fees only be used for administrative purposes (as with party membership fees) and not be used to calculate a reduction of that party's Administration Fund allocation. 9

RECOMMENDATION 12: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime that intra-party transfers of funds to political parties, candidates and groups in New South Wales are classified as political donations, except where deposited in the Federal Campaign Account. 10

RECOMMENDATION 13: The Committee recommends that in preparing legislation to reform the electoral and political finance regime, the Premier give further consideration to the regulation of funds generated by 'held assets'.

Registered parties and their associated entities are prohibited from using any income from held funds or assets for electoral expenditure.

RECOMMENDATION 14: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime provisions to:

- (a) allow candidates to contribute to their own campaigns consistent with any expenditure cap that is adopted
- (b) require candidates to certify that they have not directly or indirectly received a gift which has enabled them to self-fund, or outline the nature and source of any gift that has enabled them to self-fund. 11

RECOMMENDATION 15: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime an exemption for bequests to political parties and candidates from the cap on donations. 12

RECOMMENDATION 16: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime provisions to:

- (a) retain the requirement that loans over \$1,000 from sources other than a financial institution or credit card transaction be recorded with the Election Funding Authority

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(b) include any uncharged interest on such loans as a donation, subject to the caps of \$2,000 per political party, group or independent candidate per financial year.12

RECOMMENDATION 17: The Committee recommends that the Premier ensure that the existing reportable disclosure threshold amount of \$1,000 per donor, per financial year be retained in legislation to reform the electoral and political finance regime.13

RECOMMENDATION 18: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime provisions to:

(a) set the reporting period for disclosure of donations at 12 months, the same as the disclosure period

(b) align disclosure audits for donations to state campaigns with the Australian Electoral Commission’s system for disclosures.13

RECOMMENDATION 19: The Committee recommends that as part of comprehensive reform of the electoral and political finance system, the Premier introduce caps on expenditure for political parties, candidates and groups contesting state elections, to:

(a) create separate expenditure caps for general campaign expenditure, Legislative Assembly campaign expenditure and Legislative Council campaign expenditure.

(b) establish a cap for general campaign expenditure based on the number of seats contested.

(c) set identical caps for endorsed and unendorsed candidates to the Legislative Assembly.

(d) set consistent caps across all 93 seats for the Legislative Assembly.

(e) link the cap for Legislative Council expenditure to any cap on third party expenditure.

(f) resolve potential loopholes before caps are put in place.

(g) link expenditure caps to inflation.

(h) consider whether any proposed expenditure caps discriminate against independent candidates or new entrants.18

RECOMMENDATION 20: The Committee recommends that in developing legislation to reform the electoral and political finance regime, the Premier consider capping expenditure by political parties, candidates and groups from the beginning of the financial year in which the election is held.19

FINDING 1: That in developing legislation for appropriate expenditure caps, the Premier consider factors including:

(a) The impact of the definition on other aspects of the electoral and political finance scheme, such as:

- eligibility for reimbursement of campaign expenditure through public funding
- the third party activities to be captured under any cap on expenditure and
- the review systems for government advertising.

(b) The extent to which administrative and operational activities are included in the definition may affect the amount of public funding apportioned between campaign expenses and administrative and operational funds.

(c) The need to capture all relevant campaigning activities such as telecommunication costs, to prevent circumvention of expenditure caps.

(d) Definitions of 'electoral expenditure', including in other jurisdictions..... 20

RECOMMENDATION 21: The Committee recommends that the Premier, in introducing legislation to reform the electoral and political finance regime, ensure that if expenditure caps are placed on political parties and candidates, then advertising and communication by third parties is also regulated. 21

RECOMMENDATION 22: The Committee recommends that the Premier consult with a wide range of third party groups before introducing legislation to impose limits on third party advertising and communication..... 21

FINDING 2: That in introducing any legislation regulating third parties, the Premier should give consideration to:

(a) requiring all third parties to register with the Election Funding Authority

(b) requiring third parties to be subject to the same auditing and disclosure requirements as political parties

(c) adopting an expenditure cap that is significantly lower than that for political parties

(d) adopting both a state-wide expenditure cap and a maximum amount that can be spent in each district

(e) synchronising the timing of third party expenditure caps with the timing of expenditure caps for political parties

(f) preventing third parties from accepting donations from political parties and candidates 22

RECOMMENDATION 23: The Committee recommends that the Presiding Officers of the NSW Parliament ensure that claims by Members for reimbursement in relation to the Electoral Mailout Account, which are made during the regulated period prior to an election, are subject to independent scrutiny and an approval process undertaken and managed by the Parliamentary administration..... 24

RECOMMENDATION 24: The Committee recommends that the Premier present legislation making provision for the pre-review of government advertising by an appropriate independent body to:

(a) ensure there is no 'partisan' or 'party political' content, for the regulated election period.

(b) provide for the composition of the independent body to be a matter for consultation during the draft exposure phase of the legislation for the new scheme.

(c) include a workable definition of 'partisan' and 'party political' content to be used to regulate government advertising in the election period. The Committee notes that the definition should be consistent with the relevant principles contained in the current Department of Premier and Cabinet guidelines and bear in mind the existing definitions of

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‘electoral matter’ and ‘electoral material’ within the Parliamentary Electorates and Elections Act.

(d) require government departments and agencies, in the regulated period, to submit advertisements to the independent body for assessment against the definition and guidelines, prior to the commencement of the ‘peer review’ approval process that will continue to govern all types of government advertising.

(e) provide for a seven day turnaround time for completion of the pre-approval assessment and for automatic approval of government advertisements in cases where the process is not finalised within the seven days.

(f) require that government advertisements during the regulated election period be identified as having been the subject of the pre-approval process.....26

RECOMMENDATION 25: The Committee recommends that:

(a) the independent body not be involved in the ‘peer review’ approval process that follows the pre-approval assessment in the regulated election period;

(b) certain categories of government advertising, for example, job notices, notifications, public health and natural disaster announcements, are not to be subject to the pre-approval assessment process undertaken by the independent body.26

RECOMMENDATION 26: The Committee further recommends that the Premier consider the options for action to be taken by the independent body where government advertising is in breach of the definition of ‘partisan’ and ‘party political’ content contained in the Act and is not in keeping with the relevant guidelines. Possible options for amendments may include:

(a) the independent body reporting immediately to Parliament on the particular instance, including details of the advertisement and its cost;

(b) providing that it is a breach of the Act and an offence for a government department or agency to proceed with an advertisement where the independent body has determined that the advertisement is ‘partisan’ and ‘party political’ and that such a contravention of the Act should be subject to a penalty.....27

RECOMMENDATION 27: The Committee recommends that:

(a) the Auditor General conduct more regular reviews of government advertising outside of the regulated election period.

(b) the Premier report to Parliament in response to any recommendations arising from the Auditor General’s reviews of government advertising.27

RECOMMENDATION 28: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime an increase in the amount of public funding available to political parties, groups and candidates, in order to partly compensate for loss of income from donations.....30

RECOMMENDATION 29: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime a retention of the current eligibility threshold to receive public funding of 4% of primary votes, or a member elected.30

FINDING 3: In legislating to reform public funding, the Premier should give consideration to:

- (a) The strong arguments against a system premised on full public funding of election campaigns.
- (b) The need to consider public funding in relation to any expenditure caps.
- (c) The bicameral structure of the New South Wales Parliament, including that some parties contest both Houses of Parliament, while others contest only one House.
- (d) The current method of calculating public funding by reference to an amount per elector, apportioned according to first preference votes.
- (e) Ensuring a fair and level playing field.
- (f) Whether increased capacity for advance payments is required..... 31

RECOMMENDATION 30: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime provisions that any public funding model be based on reimbursement of electoral expenditure, rather than entitlement. 31

RECOMMENDATION 31: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime that the party or official agent be the recipient of public funding..... 31

RECOMMENDATION 32: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime, provision for public funding of the operational and administrative costs of political parties and that the level of funding be determined according to a tiered model on the basis of Parliamentary representation. 32

RECOMMENDATION 33: The Committee recommends that the Premier consider including in legislation to reform the electoral and political finance regime provision for a 'policy development fund' to help those parties ineligible for operational and administrative funding. 33

RECOMMENDATION 34: The Committee recommends that, as a matter of priority, the Premier give consideration to bringing forward legislation as follows, in consultation with the Electoral Commissioner, to:

(a) amend those provisions in the *Election Funding and Disclosures Act 1981* identified by the Election Funding Authority to be in need of clarification as a result of the amendments arising in the *Election Funding Amendment (Political Donations and Expenditure) Act 2008*, particularly in respect of definitional matters and the period for which obligations arising under the Act apply and expire. (The amendments are contained within Appendix 4 to the report); and

(b) amend s.96I of the *Election Funding and Disclosures Act 1981* to remove the requirement to establish 'actual knowledge' of an offence at the time it is committed, in order to facilitate prosecution of offences captured by this general offence provision.

The Committee further recommends that any amendment to s.96I should make express provision for the availability of a defence of 'reasonable mistake', or any other relevant defence, for offences covered by this section. 35

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RECOMMENDATION 35: The Committee recommends that the Premier clarify with the Electoral Commissioner the necessity for amendments to the *Election Funding and Disclosures Act 1981* in order to:

(a) ensure audit certificates are provided in accordance with the requirements of the Act; and

(b) provide for possible exemptions from the requirements, where considered necessary by the EFA, including where the cost to a small party, individual candidate or third party may be unreasonable.36

RECOMMENDATION 36: The Committee recommends that:

(a) the Premier consult with the Electoral Commissioner on the adequacy of the existing audit and inspection powers conferred on the Election Funding Authority to enable it to perform its functions under the *Election Funding and Disclosures Act 1981*; and

(b) the Electoral Commissioner inform the Committee of the outcome of consultations with the Department of Premier and Cabinet to remedy any particular problems in relation to the extent and exercise of the EFA's powers under the Act as stands.36

RECOMMENDATION 37: The Committee recommends that:

(a) the Premier consider including in legislation to reform the electoral and political finance regime a tiered penalty scheme for certain breaches of the requirements of the proposed new scheme, along the lines suggested by the Electoral Commissioner; and

(b) as part of the consultation process around the legislation for the new scheme, the Premier consult stakeholders on the specific amounts that should apply to the tiered monetary penalties.38

RECOMMENDATION 38: The Committee recommends that the Premier consider including in legislation to reform the electoral and political finance regime provision to make a registered political party, which fails to comply with the requirements of the proposed new scheme, ineligible for public funding. The Committee notes that there will be an avenue through the courts to prosecute offences for non-compliance.38

RECOMMENDATION 39: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime a requirement that parties, groups and individual candidates receiving public funding under the new scheme to furnish the Election Funding Authority with properly audited accounts of their financial dealings for review.39

RECOMMENDATION 40: The Committee recommends that, where there are reasonable grounds for the Election Funding Authority to believe breaches and offences have occurred under a new scheme, the Election Funding Authority be empowered to:

(a) compel the production of books, records and other information from any person or organisation;

(b) question any person in relation to possible breaches under the Act;

(c) engage the services of any person for the purpose of getting expert assistance,

for the purpose of performing its functions.40

RECOMMENDATION 41: The Committee recommends that the Premier ensure the Election Funding Authority receives additional funds and resources to support the enhanced compliance and investigative role the Committee has recommended for the Authority. 40

RECOMMENDATION 42: The Committee recommends that the Premier consider amending the *Parliamentary Electorates and Elections Act 1912* to include non-compliance with the legislative requirements under the new scheme, where this has affected the election result, as a specific ground for disputing that result through the Court of Disputed Returns..... 41

RECOMMENDATION 43: The Committee recommends that:

(a) the Election Funding Authority undertake educational initiatives targeting parties, candidates, third parties and the voting public about their responsibilities and obligations under the legislation; and

(b) the Authority be adequately resourced to do so..... 41

RECOMMENDATION 44: The Committee recommends that the issues of compliance with the scheme, proposed offences and penalties, and the enforcement system be included by the Premier as areas requiring specific attention in the consultations with relevant stakeholders on any draft legislation arising from the recommendations contained in this report, in particular:

(a) the extent of the investigatory powers to be conferred on the Election Funding Authority;

(b) the guidelines and criteria to apply in the exercise of the new investigatory powers, particularly in relation to areas of discretion. 42

RECOMMENDATION 45: The Committee recommends that in the drafting of any legislation brought forward to give effect to a new scheme for the regulation of electoral expenditure and political party funding, consistent with the recommendations contained in this report, the Premier consult closely with the Electoral Commissioner and the Election Funding Authority in formulating proposed amendments. 42

FINDING 4: The Committee finds that, while the enforcement system recommended as part of the new scheme for public funding of election campaigns is an important feature of the integrated package of reforms that comprise the scheme, particularly in terms of its deterrent value, the ultimate success of the scheme will turn on the extent to which the reforms achieve cultural change.

The Committee's goal in proposing the amendments contained in these recommendations is to improve the level of compliance under the existing legislation and the capacity to prosecute offences under the legislation as it stands, as well as making provision for an appropriate system of enforcement on the introduction of a new public funding scheme for election campaigns.

The Committee further finds that the extent to which implementation of a new enforcement system assists in achieving these goals is also dependent upon policy and other educational initiatives targeting parties, candidates, and the voting public about their responsibilities and obligations under the legislation. 42

RECOMMENDATION 46: The Committee recommends that the EFA report publicly on the use of its proposed powers by including statistical information and cases in its annual reports. 43

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RECOMMENDATION 47: The Committee recommends that the referral from the Premier to the Committee of the inquiry into the State election 2011 encompass as a specific area for examination the operation of the enforcement system and the use of the EFA's investigatory powers, as implemented in the new public funding scheme.43

RECOMMENDATION 48: The Committee recommends that the Premier implement the Committee's public funding model through new legislation and the *Election Funding and Disclosures Act 1981* be repealed.44

RECOMMENDATION 49: The Committee recommends that the public funding legislation be drafted to reflect the principles and objects recommended by the Committee, with an exposure draft of the bill being released for public consultation and comment.44

RECOMMENDATION 50: That the Premier include in legislation to reform the electoral and political finance regime an amendment to the composition of the Election Funding Authority to include a retired Supreme Court judge as Chairperson, the Electoral Commissioner and another independent office holder.....45

RECOMMENDATION 51: The Committee recommends that:

(a) public funding for local government elections be considered as a separate Committee inquiry process.

(b) the issue of public funding for local government be re-visited after the new public funding system has been introduced and tested at the state level.46

Chapter One - Recommendations and findings

Introduction

- 1.1 The Committee considers that any reform of the electoral and political finance regime must incorporate three elements: private income (including donations); levels of expenditure by political parties, candidates and groups; and public funding. As stated in evidence from the Electoral Commissioner:

‘To disregard any one, or to set it aside for consideration, will expose the scheme to possible abuse.’¹
- 1.2 Professor George Williams also argued for the importance of holistic reform:

There is no point, for example, in capping donations if the expenditure side of the equation is not also dealt with. It is also important that the reforms do not merely amount to changes in legal regulation, but also have an impact upon the culture within political organisations.²
- 1.3 The majority of submissions raised concerns about the current electoral funding system, highlighting that there is a perception that political donations buy influence.
- 1.4 The findings and recommendations outlined below should be considered as part of an ‘integrated package’. The Committee has sought to outline a policy and legislative framework for reform, while providing specific recommendations. As stated in the federal government Electoral Reform Green Paper:

No one set of changes affecting one element of regulation should be seen in isolation; changes to any one element need to be viewed for their impact on other elements of the system.³
- 1.5 Associate Professor Anne Twomey warned against ‘piecemeal approaches to political funding and expenditure’, as such approaches are ‘generally ineffective’ and ‘money and influence will simply be peddled the other way’.⁴ She also contended that ‘their selectiveness means that they are more likely to be vulnerable to constitutional challenge...’⁵ Instead, she argued that the ‘most effective way to achieve regulation of political donations and campaign expenditure, is to reach bipartisan agreement implement reform across the country at both the national and state levels.’⁶
- 1.6 The Committee recognises that ideally reform should be consistent across jurisdictions. However, in the absence of reform at a national level the Committee considers that New South Wales should play a leadership role in transforming its electoral and political finance regime, and pursue reform independently of action by the federal government. The Committee believes that reforms should be presented to Parliament for debate as soon as practicable so that they can be implemented for the 2011 state election.

¹ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 5.

² Professor George Williams, *Submission 1*, Attachment 1, p.1

³ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf (accessed 20 February 2010), p.73.

⁴ Associate Professor Anne Twomey, *Submission 2*, p. 1.

⁵ Associate Professor Anne Twomey, *Submission 2*, p. 1.

⁶ Associate Professor Anne Twomey, *Submission 2*, p. 1.

Recommendations and findings

- 1.7 In making its findings and recommendations, the Committee is mindful of the difficulties in regulating this difficult area, and the need for regular review and revision. As stated by Associate Professor Graeme Orr:
- Whatever form any new regulation takes, it must not expect perfection. As overseas experience and the experience of corporate regulation show, regulating in fields involving money is a cat and mouse game. There will be unintended consequences and a need to revisit regulations.⁷
- 1.8 The Committee considers that the review process could occur as part of the Electoral Matters Committee's review of the State Election 2011.

RECOMMENDATION 1: While a national approach to electoral and political finance reform is preferred, the Committee recommends that the Premier introduce legislation to reform the electoral and political finance regime in New South Wales independent of action by the federal government, prior to the State election 2011.

RECOMMENDATION 2: The Committee recommends that the Joint Standing Committee on Electoral Matters consider the operation of the reforms as part of its review of the State election 2011.

Principles

- 1.9 The Electoral Commissioner outlined the following general principles that should guide the development and implementation of reform of the political finance system:
- protecting the integrity of representative government
 - promoting fairness in politics
 - supporting parties to perform their functions
 - respect for political freedoms.⁸
- 1.10 Participants to the inquiry expressed general support for these principles, but warned of the need to recognise that there will sometimes need to be a trade-off between principles [paragraphs 4.19-4.20]. For example, in some instances promoting fairness in politics might interfere with the freedom of political communication. The Committee acknowledges that the principles are not absolute, and that the formulation of a new political finance system will require a balance between the different principles. However, the Committee is also of the view that there are a number of benefits in adopting some general principles to guide the development and implementation of reform of the political finance system. As advocated by the Electoral Commissioner, the principles can assist in evaluating the various models and reforms that have been proposed by stakeholders.
- 1.11 This method of policy development is also consistent with the approach currently underway in other jurisdictions and the principles proposed by the Electoral Commissioner are also not dissimilar to those being proposed elsewhere [paragraphs 4.13-4.16].

⁷ Associate Professor Graeme Orr, *Submission 23*, p.5.

⁸ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009.

- 1.12 As identified by the Legislative Council Select Committee on Electoral and Political Party Funding, the lack of a clear purpose and objectives in the current legislation make it very difficult to ‘...evaluate the effectiveness of the election funding scheme, and whether it is doing what it was designed to do.’⁹ [paragraph 4.12] Hence, the Committee considers that principles should be incorporated into the purpose and objective clauses of new election financing legislation. This would also aid the courts and participants in the electoral process in interpreting the legislation.

RECOMMENDATION 3: The Committee recommends that the Premier include the principles outlined by the Electoral Commissioner in the object clause of legislation to reform the electoral and political finance regime.

Caps and bans on donations

- 1.13 The terms of reference of this inquiry require the Committee to consider ‘how public funding should apply as part of the broader scheme under which political donations are banned or capped’ having regard to the ‘June 2008 report of the Legislative Council Select Committee on Electoral and Political Party Funding which recommended, among other things, that all but small donations by individuals be banned’.
- 1.14 While the amendments to the donations and disclosure regime in 2008 and 2009 [paragraphs 3.3-3.10] may have gone some way to alleviating community perceptions of corruption, evidence to this inquiry indicates that further reform is supported. Key stakeholders suggested that there remains a perception in the community that large donations from business, trade unions and wealthy individuals have undue influence on policy direction and electoral outcomes [paragraphs 5.30-5.38].
- 1.15 The Committee considers that the currently unregulated amount that an individual or entity can donate does not measure up to the *first principle* outlined in Chapter 4 of this report – of protecting the integrity of representative government by reducing the potential for political corruption [paragraphs 4.2-4.3]. Research by Dr Joo-Cheong Tham into the sources and amounts of political funding in New South Wales indicates that the two main political parties in NSW rely on a small number of donors for a relatively large percentage of their total donations [paragraph 5.26]. This leaves political parties vulnerable to the public perception of undue influence or corruption.
- 1.16 In considering bans and caps on political donations, the Committee is also mindful of the *fourth principle* outlined in Chapter 4 – respect for political freedoms [paragraphs 4.9-4.11]. Deliberative democracy requires that citizens have the right to be involved in the political process, including by expressing their support for political parties, candidates and groups in the form of a political donation.
- 1.17 The Committee also recognises that caps or bans on donations will impact on the implied freedom of political communication under the Commonwealth Constitution, in that it may reduce the ability of political parties and candidates to raise funds for communicating with the electorate. Therefore, the Committee has recommended that provision be made for increased public funding to offset some of the loss of private

⁹ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.193, para 11.7.

funding [Chapter 7]. The constitutional implications of capping and banning donations are discussed in detail at Chapter 4 of this report.

Caps and bans on donations from individuals

- 1.18 A significant majority of evidence heard by the Committee did not support a ban on donations from individuals, rather calling for donations from individuals to be capped at a relatively low level to reduce the potential for undue influence and corruption.
- 1.19 For this reason and those outlined above, the Committee does not support a ban on donations from individuals, but considers that such donations should be capped at *\$2,000 per party, candidate or group per financial year*. This amount is seen as small enough to carry little danger of actual or perceived undue influence or corruption, while being sufficient to allow for freedom of political communication.
- 1.20 The Committee considers that, in order to ensure that the level of the cap is appropriate and takes account of inflation and any above inflation increases in the cost of campaigning, the level of the cap should be subject to review after each NSW general election. The Election Funding Authority should undertake this review, with guidelines published by the Premier as to the factors to be considered.

RECOMMENDATION 4: The Committee recommends that the Premier incorporate in legislation to reform the electoral and political finance regime a cap on all donations from individuals, set at \$2,000 per political party, group or independent candidate per financial year, and all caps to be adjusted according to the CPI.

This cap should be subject to review by the Election Funding Authority after each New South Wales State election.

- 1.21 The Committee heard a great deal of evidence that donations from individuals should be limited to those who are on the NSW electoral roll. This requirement would have the effect of placing a ban on donations to NSW political parties and candidates from Australian citizens not on the New South Wales electoral roll and foreign nationals. The Electoral Commissioner in particular considered that this would strengthen the disclosure scheme by allowing donors to be more easily identified. Also, there was a perception amongst some witnesses that only those individuals that are eligible to vote in a NSW state election should be able to influence its outcome.
- 1.22 However, in some cases those living outside NSW may have an interest in the NSW election. For example, it is common in towns along the NSW border for residents to maintain an interest and involvement in the politics of both State jurisdictions. Some NSW registered political parties allow cross-border membership in those areas. Some NSW residents retire interstate but wish to continue to support parties and candidates from NSW. Furthermore, to limit donations to those individuals enrolled in NSW would limit the capacity of interstate residents to donate to the federal election candidates of NSW registered political parties. Such a provision may be vulnerable to constitutional challenge. For these reasons, the Committee believes it is appropriate to limit political donations to individuals on the NSW electoral roll and/or Australian electoral roll.

RECOMMENDATION 5: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime that political donations from

individuals be limited to those individuals on the New South Wales electoral roll and/or the Australian electoral roll.

Caps and bans on donations from entities

- 1.23 The Committee heard evidence both for and against banning donations from entities. Some contended that all donations from entities should be banned, as entities do not have the right to vote and therefore should not be allowed to influence the democratic process through donations. The Liberal, Nationals and Greens members of the Committee were also firmly of this view. As well, there were arguments that entities are able to make donations through a range of related corporations, subsidiaries and associations, thereby undermining any caps on donations by enabling entities to donate large amounts, which opens up the potential for actual or perceived corruption and undue influence. In seeking to combat this potential loophole, the Electoral Commissioner put forward that an individual be nominated for each donation by an entity.
- 1.24 Conversely, the Committee heard evidence that entities play an important role in the New South Wales economy and have a justifiable interest in government decisions and hence should be entitled to make donations. Also, some argued that if donations from entities were banned, political parties would be unable to raise sufficient funds to communicate with the electorate without a very significant increase in public funding, as a high proportion of current donations are from entities. It was felt by some witnesses that this would place an undue burden on the taxpayer, as it might require a very significant increase in public funding.
- 1.25 If donations from corporations are capped at the same level as those from individuals, that is \$2,000, on balance the Committee sees little scope for actual or perceived corruption and undue influence. This cap would reduce the reliance by the main political parties on a small number of large donors and might encourage parties to broaden their funding base and engage more widely across the community. This would also balance the need to minimise the risk of corruption and undue influence with the demand on the public purse. Hence, the Committee considers that donations from entities should be allowed, but capped at the same low level as for individuals.

RECOMMENDATION 6: The Committee recommends that the Premier incorporate in legislation to reform the electoral and political finance regime a cap on all donations from entities, set at \$2,000 per political party, group or independent candidate per financial year, and all caps to be adjusted according to the CPI.

This cap should be subject to review by the Election Funding Authority after each New South Wales State election, subject to guidelines published by the Premier.

- 1.26 The Committee agrees with the Electoral Commissioner that there should be some regulation of which entities are entitled to donate, in order to ensure the integrity of the system. The Electoral Commissioner recommended that donations from entities be limited to those from:
- a political party registered in NSW, or
 - a company with an ABN which carries on business in NSW, or
 - a trade union affiliated with Unions NSW, or

Recommendations and findings

- an unincorporated association of two or more people which carries on the majority of its activities in NSW¹⁰
- 1.27 The Committee considers that the current legislation providing that companies must have an ABN to be eligible to donate should be retained, as outlined in the Electoral Commissioner's model. While there are potential opportunities for abuse, the Committee considers these are minimised by the proposed relatively modest cap on donations. The Committee agrees with the Electoral Commission that, in order to combat some of the problems associated with donations by related entities and sub-entities, an entity wishing to make a donation should nominate an individual representative to appear on the disclosure documentation. The Committee also agrees with the Electoral Commission that only one company in a group of related companies should be able to make a donation each financial year.
- 1.28 The Committee understands that the Electoral Commissioner's rationale for requiring trade unions to be affiliated to Unions NSW was in order to ensure that only legitimate organisations are entitled to donate. However, while Unions NSW represents over 67 affiliated unions, it does not represent all registered unions operating in NSW. The Committee considers that a more appropriate requirement would be that trade unions wishing to donate to a political party or candidate must be registered under New South Wales or Commonwealth legislation.
- 1.29 The Electoral Commissioner has included 'unincorporated associations' on the list of entities that are eligible to donate, however, the Committee considers that only incorporated associations should be eligible to donate. The Committee understands that an 'association' in this context is a group of people who 'come together to pursue a common interest' such as a 'hobby, social or cultural exchange or to provide a community benefit'.¹¹

RECOMMENDATION 7: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime a requirement that those entities that are entitled to donate to a political party registered in New South Wales be limited to:

- (a) a company with an Australian Business Number;
- (b) a registered trade union; and
- (c) an incorporated association which carries out the majority of its activities in New South Wales.

The Committee further recommends that the Premier require that an individual representative be nominated for each donation by an entity.

¹⁰ Electoral Commission NSW/Election Funding Authority, *Submission 30*, 'Funding and Disclosure Model', p. 6.

¹¹ New South Wales Government, Office of Fair Trading, http://www.fairtrading.nsw.gov.au/Cooperatives_and_associations/Associations.html (accessed on 10 March 2010).

Ban on property developer donations

- 1.30 As detailed in paragraph 3.9, legislation was introduced in late 2009 to ban donations by property developers. The Committee considers that its recommendations to limit donations from both individuals and entities to \$2,000 per political party or candidate per financial year would remove the need for a separate ban on developer donations. This is because such a regime should effectively limit the capacity of any individual or entity to make a donation of an amount that would lead to actual or perceived undue influence.

RECOMMENDATION 8: Given that the reforms to political donations recommended by the Committee address concerns about donations from developers, the Committee recommends that the Premier include in legislation to reform the electoral and political finance regime, the repeal of those provisions relating to a ban on developer donations.

Quarantined accounts

- 1.31 In the absence of reform at the federal level, the Committee considers that political parties should be required to maintain separate accounts for federal campaigns, state campaigns and administration. Such a system should ensure that reform does not interfere with federal elections and that differences between federal and state regulations are respected. While requiring parties to maintain separate accounts might place an additional administrative burden on some parties [paragraph 5.99], it is necessary in order to minimise the risk of constitutional challenge as outlined by Associate Professor Anne Twomey [paragraph 5.93]. The Committee recognises that any law passed by the NSW Parliament restricting an individual from giving more than \$2,000 to a federal candidate of a NSW registered political party may be vulnerable to constitutional challenge.
- 1.32 In order to ensure compliance with the scheme, political parties and candidates collecting funds for both state and federal elections should be required to submit annual audited accounts to the Election Funding Authority.
- 1.33 There was disagreement amongst Committee members as to whether the current requirement, whereby donations made for both state and federal election purposes are subject to state disclosure laws, should be maintained. Some Committee members considered that with a move to quarantined accounts, federal disclosure laws should be applied. Others considered that this would be a backward step in terms of transparency, given that the disclosure limit in New South Wales is significantly lower than that which applies federally.

RECOMMENDATION 9: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime a requirement for registered political parties and groups to:

- (a) maintain separate funds for state campaigns, federal campaigns and administrative funds; and
- (b) submit annual audited accounts of the separate funds to the Election Funding Authority.

Other sources of income

- 1.34 In moving to a system in which donations to political parties are capped, it is important to regulate other sources of income and funding to political parties and candidates.
- 1.35 To leave other sources of income unregulated would fall foul of the *first principle* of protecting the integrity of representative government and reducing the potential for 'political corruption' [paragraphs 4.2-4.3]. For example, allowing for funding from unregulated sources such as intra-party transfers could enable political parties and candidates to circumvent the regulations, leaving open the possibility of large donations leading to actual or perceived undue influence and corruption.
- 1.36 Regulation in this area is also justified on the basis of the *second principle* of promoting fairness in politics [paragraphs 4.4-4.5]. This requires that there be fair rivalry between parties. If caps are placed on donations but other sources of income are unregulated, this could provide parties and candidates with significant income and investment outside of donations to gain an unfair advantage.
- 1.37 However, the Committee also recognises that political parties should be adequately supported in performing their legitimate functions (the *third principle*) [paragraphs 4.6-4.8]. The Committee considers that parties need to be appropriately funded to allow for on-going administrative and operational costs. They should also have a participatory function, by being a vehicle for citizens to become involved in the political process, debate and agenda setting. Any regulation of membership and affiliation fees must be considered in light of these issues.

Membership fees

- 1.38 The Committee considers that membership fees should be treated differently to political donations. The Committee was persuaded by the arguments that:
- To include membership fees paid to political parties within the cap on donations would mean members would be unable to contribute to a campaign to the same degree as individuals who are not members of political parties.
 - Membership of political parties is a different form of support to political donations, as it allows individuals to participate in the political process from within political parties.
- 1.39 In order that membership fees are not artificially inflated to circumvent the cap on donations, the Committee recommends that they be capped at the same amount as donations, that is, \$2,000 per political party per financial year.

RECOMMENDATION 10: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime:

(a) an exemption for party membership fees and party compulsory levies on parliamentarians, from the cap on political donations, and

(b) a cap on party membership fees, set at \$2,000 per member, per financial year.

Affiliation fees

- 1.40 Opinion amongst both inquiry participants and Committee members was divided over the treatment of affiliation fees. While the need to respect different party structures and histories was generally recognised, some argued that affiliation fees should be treated separately from membership fees, while others put forward that affiliation fees are essentially membership fees and should be treated as such.
- 1.41 Arguments that affiliation fees be treated as separate from membership fees centred around the following points:
- ‘to allow affiliation fees without any constraint would simply invite trade unions to make their donations in the form of significantly increased affiliation fees’¹²
 - an ‘exception for organisation membership fees has the potential to create a large loophole in the regulatory regime, for example, it could encourage all parties to accept corporations as organisational members at inflated membership prices’¹³
 - the individual [member of the affiliated union] in question may not have authorised the payment of the affiliation fee in writing¹⁴
 - ‘people who are members of unions can themselves voluntarily become members of a political party’¹⁵
- 1.42 Arguments that affiliation fees are in essence membership fees focussed on the fact that affiliation fees are an amount paid per union member that confer voting rights at Labor Party conferences. It was also argued that unduly fettering affiliation fees could:
- ‘detract from the participatory function of parties’; and
 - be an unjustified limitation of the freedom of political association, which rests on:
 - the individual’s right to form political associations, act through such associations and to participate in the activities of these associations; and
 - the association’s ability to determine its membership, the rules and manner of its governance and the methods it will use to promote its common objectives.¹⁶
- 1.43 The Committee agrees that affiliation fees should not be unduly fettered for the reasons outlined above. To treat affiliation fees as donations would be an unjustified interference with the ability of the parties to structure and organise their membership as they see fit. The Liberal and Nationals members of the Committee strongly disagree with this view.

RECOMMENDATION 11: The Committee recommends that in preparing legislation to reform the electoral and political finance regime, the Premier ensure that where registered political parties receive affiliation fees, those fees only be used for administrative purposes (as with party membership fees) and not be used to calculate a reduction of that party’s

¹² Liberal Party of Australia (NSW Division), *Submission 17*, pp.16-17.

¹³ Associate Professor Graeme Orr, *Transcript of Evidence*, 1 February 2010, p.48.

¹⁴ NSW National Party, *Submission 18*, p.7.

¹⁵ Associate Professor Anne Twomey, *Transcript of Evidence*, 1 February 2010, p.48.

¹⁶ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 67,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Financ_e_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

Administration Fund allocation.

Intra-party transfers

- 1.44 Intra-party transfers include ‘donations from a party’s national head office to its state and territory branches [or affiliates]¹⁷, and donations from one state and territory branch [or affiliate] to another.’¹⁸
- 1.45 In order to ensure that money from potential sources of undue influence is not funnelled into NSW and to provide for a level playing field, the Committee recommends that intra-party transfers of funds into New South Wales should be treated as a donation. These transfers would then be subject to the same cap as that placed on political donations, thus reducing the potential for undue influence and corruption and limiting the advantage of political parties with well-funded state and federal branches. However, this should not prevent local party branches within NSW transferring funds to the state party branch, subject to state political finance laws.
- 1.46 In the absence of reform at the federal level, the Committee considers that transfers between the proposed Federal Campaign Account and a federal political party should be allowed.

RECOMMENDATION 12: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime that intra-party transfers of funds to political parties, candidates and groups in New South Wales are classified as political donations, except where deposited in the Federal Campaign Account.

Held assets

- 1.47 The Committee only received two submissions dealing with the issue of regulation of funds that are generated by ‘held assets’ (which include ‘funds or assets held in trust for a recognised party, including income earned on those funds or assets’¹⁹). The NSW National Party submitted that:

The principal motivation for the imposition of expenditure caps is to limit the ability of the parties to use pre-existing assets and future income from these assets to outspend newer parties or independent candidates who are prevented from using pre-existing assets to fund their campaigns by new supply-side regulation imposed as a result of this reform.²⁰

- 1.48 The Liberal Party submitted that:

Held assets provisions should be introduced in NSW which prohibit registered parties or their associated entities from depositing any income from held funds or assets in their State Campaign Account(s) and, thus, from funding their electoral expenditure.²¹

- 1.49 They argued that:

¹⁷ The reference to affiliates has been included to take into account the particular constitutions of the NSW National Party and the Australian National Party.

¹⁸ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.108.

¹⁹ Liberal Party of Australia (NSW Division), *Submission 17*, pp.17-18.

²⁰ NSW National Party, *Submission 18*, p.17.

²¹ Liberal Party of Australia (NSW Division), *Submission 17*, pp.17-18.

An equivalent amount to any income deposited in the Administration Account(s) from the held assets of State-registered party should be deducted from their allocation from the Party Administration Fund...²²

- 1.50 The Committee considers that such a provision could encourage political parties to rely on public funding for their operational and administrative costs, rather than seeking to be self-sufficient and minimise the burden on the public purse. However, there may be merit in the proposal that 'held asset' income only be used for administrative purposes. This is an area that may warrant further investigation.

RECOMMENDATION 13: The Committee recommends that in preparing legislation to reform the electoral and political finance regime, the Premier give further consideration to the regulation of funds generated by 'held assets'.

Registered parties and their associated entities are prohibited from using any income from held funds or assets for electoral expenditure.

Self-funding

- 1.51 One of the terms of reference of the Committee is to consider the impact of any proposed measures on the ability of new candidates, including independent candidates and new political groupings, to contest elections. In light of evidence from some of the independent Members of Parliament, the Committee is concerned that treating a contribution by a candidate to their own campaign would disproportionately impact on independent candidates and new entrants and undermine their role in the democratic process.
- 1.52 Some Members of Parliament also regularly contribute a portion of their income to their own campaign expenses and political parties. The Committee does not consider that this practice leads to the risk of undue influence or corruption.
- 1.53 Consequently, the Committee considers that individual candidates should be able to contribute to their own campaign, consistent with any caps on expenditure that are adopted.
- 1.54 The Committee is mindful of the potential for abuse of such a provision, in that it might allow donors to circumvent the caps and bans by giving 'personal' gifts to the candidate, who could then use these funds to cover campaign expenses. Hence, the Committee recommends that candidates should be required to certify that they have not directly or indirectly received a gift which has enabled them to self-fund. If the candidate is not able to so certify, then they should be required to outline the nature and source of the gift. Penalties should apply for any false declarations.

RECOMMENDATION 14: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime provisions to:

- (a) allow candidates to contribute to their own campaigns consistent with any expenditure cap that is adopted
- (b) require candidates to certify that they have not directly or indirectly received a gift which

²² Liberal Party of Australia (NSW Division), *Submission 17*, pp.17-18.

has enabled them to self-fund, or outline the nature and source of any gift that has enabled them to self-fund.

Bequests

- 1.55 Political parties and candidates will sometimes receive funding in the form of a bequest. In these circumstances, the Committee considers that there is little danger of undue influence or corruption. Hence, the Committee recommends that donations in the form of a bequest be exempt from the cap on donations.

RECOMMENDATION 15: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime an exemption for bequests to political parties and candidates from the cap on donations.

Loans

- 1.56 The *Election Funding and Disclosures Act 1981* already creates requirements in relation to loans to candidates or parties of \$1,000 or more from one source in the same disclosure period.²³ With the exception of loans from a financial institution or a credit card transaction, details must be recorded with the Election Funding Authority.²⁴ The Committee considers that this requirement should continue. In order to ensure the integrity of caps on donations, the Committee recommends that any uncharged interest forgiven by the lender on such loans should be counted as a donation, and subject to the \$2,000 cap.

RECOMMENDATION 16: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime provisions to:

- (a) retain the requirement that loans over \$1,000 from sources other than a financial institution or credit card transaction be recorded with the Election Funding Authority
- (b) include any uncharged interest on such loans as a donation, subject to the caps of \$2,000 per political party, group or independent candidate per financial year.

Disclosure

- 1.57 One of the principles for a democratic electoral and political finance regime outlined in Chapter 4 concerns preventing corruption (the *first principle*). The Committee recognises that disclosure requirements are necessary to promote transparency, and to assist in ensuring that parties, candidates and donors comply with donation caps. However, under a system in which donations are capped at a low level, the potential for undue influence and corruption is reduced, and the relative importance of disclosure diminishes.

²³ Election Funding Authority, http://www.efa.nsw.gov.au/nsw_parliament_candidates_and_groups#pd (accessed 20 February 2010).

²⁴ Election Funding Authority, http://www.efa.nsw.gov.au/nsw_parliament_candidates_and_groups#pd (accessed 20 February 2010), see also section 96G, *Election Funding and Disclosures Act 1981*.

1.58 The Committee also considers that disclosure and auditing requirements should not be so burdensome as to prevent parties and candidates from performing their functions (the *third principle*). The Committee heard evidence that the current requirements are a significant administrative and financial burden, particularly on smaller, less well-resourced parties and independent candidates.

Disclosure level

1.59 Some of the evidence received by the Committee recommended that, if donations are capped at a figure over the existing disclosure amount, then the \$1,000 disclosure limit could be retained. Given that the Committee has recommended that donations be capped at \$2,000 per financial year, the Committee considers that the current level of \$1,000 is appropriate. This level should be adequate to ensure transparency and that candidates and donors comply with the \$2,000 cap, while minimising the administrative burden for political parties.

RECOMMENDATION 17: The Committee recommends that the Premier ensure that the existing reportable disclosure threshold amount of \$1,000 per donor, per financial year be retained in legislation to reform the electoral and political finance regime.

Reporting

1.60 The Committee agrees with evidence from the Electoral Commission, the Independent Commission Against Corruption and other stakeholders [paragraphs 5.150; 5.153-4] that if donations are capped at a relative low level, such as \$2,000, then the reporting period for disclosure should be increased to 12 months and aligned with the disclosure period.

1.61 This would have the advantage of significantly reducing the administrative burden for political parties, candidates and the Election Funding Authority while still allowing for sufficient disclosure of donations to ensure transparency and accountability.

1.62 As recommended by the Electoral Commission, the Committee considers that disclosure audits for donations to state campaigns should be aligned with the Australian Electoral Commission's system for disclosures. This would reduce the administrative burden on political parties by allowing the same report to be used for both audits, although some additional annual statements may need to be supplied.

RECOMMENDATION 18: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime provisions to:

(a) set the reporting period for disclosure of donations at 12 months, the same as the disclosure period

(b) align disclosure audits for donations to state campaigns with the Australian Electoral Commission's system for disclosures.

Caps on expenditure

- 1.63 The terms of reference of this inquiry require the Committee to consider ‘whether any restrictions should be imposed on expenditure by political parties and candidates more generally and, if so, what restrictions should apply and how should expenditure be monitored’.
- 1.64 The Committee considers that caps on expenditure are an important aspect of electoral and political finance reform. Most inquiry participants advocated for caps on campaign expenditure, in order to:
- Address concerns about the escalating costs of campaign spending.
 - Promote a fair contest between parties and candidates.
 - Enhance other regulatory measures, for example, to ensure that an increase in public funding does not artificially inflate campaign expenditure.
 - Enhance the operation of caps on donations, by reducing the demand for private donations [paragraphs 6.23-32].
- 1.65 Some of these arguments accord with the *first principle* of protecting the integrity of representative government and reducing the potential for corruption and undue influence, and others with the *third principle* of promoting fairness in politics.
- 1.66 The arguments against expenditure caps revolved around difficulties in addressing third party spending and in penalising those who breach the caps.²⁵
- 1.67 In formulating expenditure caps, regard must be had to the *fourth principle* of respect for political freedoms, including the implied freedom of political communication under the Commonwealth Constitution. The constitutional issues surrounding expenditure caps are discussed in Chapter 4.
- 1.68 While the operation of expenditure limits has historically been unsuccessful in Australia, there are a number of international precedents of more effective implementation of caps, including in the United Kingdom, Canada and New Zealand. However, all these jurisdictions differ from New South Wales in that there is only one popularly elected house of Parliament. This has allowed the implementation of two, relatively simple, caps on expenditure in these jurisdictions— one cap for political parties, and another for candidates. In examining regulatory options for campaign expenditure, regard must be had to the different way in which the Parliament is structured and organised in New South Wales.
- 1.69 The New South Wales Parliament comprises a popularly elected Legislative Assembly (Lower House) and Legislative Council (Upper House). There are 93 elected Members in the Legislative Assembly, each representing an electoral district of New South Wales. Members of the Legislative Assembly are elected for a maximum term of four years. If a seat becomes vacant between elections, it is filled at a by-election in the electorate where the vacancy has occurred. Government is formed by the political party which has the majority of Members in the Legislative Assembly.²⁶
- 1.70 The Legislative Council is comprised of 42 members elected by the people under a system of voting known as proportional representation. Unlike members in the

²⁵ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.126.

²⁶ New South Wales Parliament, <http://www.parliament.nsw.gov.au/prod/web/common.nsf/V3Home>.

Legislative Assembly, who each represent the voters of a particular electorate, members of the Legislative Council are elected by all voters with the whole state as one electorate. One-half of the members of the Council (21) are elected each four years, so that members have an eight year term.²⁷

- 1.71 Some political parties and candidates stand only for election in either the Legislative Assembly or the Legislative Council, and some parties stand in both houses. Hence, the Electoral Commissioner has proposed a model including three separate expenditure caps: a general campaign expenditure cap; an expenditure cap for each Legislative Assembly district; and an expenditure cap for the Legislative Council.
- 1.72 Under the Electoral Commissioner's model, the total amount available to a political party that contests each Legislative Assembly district and the Legislative Council is \$10,935,073. The Committee identified problems with the way in which this amount was apportioned between the different expenditure caps, which are discussed below.

Expenditure limits for general campaign expenditure

- 1.73 A number of stakeholders advocated for a separate cap for general campaign expenditure by registered political parties, as in the UK, Canada and New Zealand. As outlined in the *third principle* of supporting political parties to perform their functions [paragraphs 4.6-4.8]:

There is no doubt that political parties are the major players in the Australian representative democracy. They are the main opinion framers and the agenda setters. At Federal and State levels the Parliaments are party Chambers. The lawmakers are party members and, without doubt, the majority of people who participate in politics in Australia do so through the party system. The parties are central to our system of representative democracy, and in moving forward they will remain as such well into the future. Consequently, the political finance framework that the Committee recommends should acknowledge the key role played by the political parties.²⁸

- 1.74 The Electoral Commissioner put forward that the cap on general campaign expenditure be calculated as:

\$0.50 per elector for whichever is the greater of:

- the total number of electors in Legislative Assembly district(s) where RPP [Registered Political Party] has endorsed candidate; OR
- the total number of electors in NSW when RPP has endorsed group/candidate at Legislative Council election²⁹

- 1.75 The Committee considers that the amount put forward by the Commissioner of \$0.50 per elector may not sufficiently recognise the role that political parties play in the democratic process or allow for sufficient campaigning on a party's general campaigning costs. This in part depends on the amounts allowed for other components of the expenditure caps, and whether they are transferable to state-wide general campaign expenditure.

- 1.76 In examining options, the Committee discussed allowing unspent amounts from Legislative Assembly expenditure caps (as discussed below) to be transferred to the general campaign expenditure cap. For example, if there was an expenditure cap of

²⁷ New South Wales Parliament, <http://www.parliament.nsw.gov.au/prod/web/common.nsf/V3Home>.

²⁸ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, pp. 3-4.

²⁹ Electoral Commission NSW/Election Funding Authority, *Submission 30*, 'Funding and Disclosure Model', p. 1.

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\$100,000 per Legislative Assembly seat, but a party elected to only spend \$25,000 in that seat, then an extra \$75,000 could be allocated to state-wide general campaign spending.

- 1.77 The Committee considers that there should be differential general campaign expenditure caps, reflecting the extent to which different political parties engage in the election. For instance, for those parties only contesting election to the Legislative Council, the cap could be based on the number of seats contested, that is 21, multiplied by the number of electors in the average Legislative Assembly electorate (47,032 electors), multiplied by a set amount. Using the Electoral Commissioner's example of \$0.50 per elector, this would allow for \$493,836 for general campaign spending for each political party contesting the Legislative Council only. For political parties contesting Legislative Assembly seats, a formula along the lines proposed by the Electoral Commissioner, based on a dollar amount multiplied by the number of electors in the districts where the party has an endorsed candidate, may be appropriate.

Expenditure limits for candidates for the Legislative Assembly

- 1.78 The *second principle* outlined in Chapter 4 is promoting fairness in politics. Currently, at the high end of the spectrum, some candidates spend in excess of \$200,000 on campaigning in an individual Legislative Assembly electorate [Table 12]. The Committee considers that this level of spending does not meet with the principle of promoting fair rivalry between candidates.
- 1.79 Inquiry participants put forward a number of different amounts for caps on expenditure for Legislative Assembly candidates, ranging from \$20,000 to \$100,000 per electorate [paragraphs 6.96-6.122]. The Electoral Commissioner's model allowed for \$1.00 for endorsed candidates and \$2.00 for each unendorsed candidate per elector on the District electoral roll.³⁰ This equates to approximately \$47,032 for endorsed candidates and \$94,064 for unendorsed candidates per electorate (based on the number of electors for the 2007 state election). The Commissioner's model does not allow for unspent amounts to be transferred between electorates by political parties.
- 1.80 The Committee disagrees with the proposal by the Electoral Commissioner of a separate cap for endorsed and unendorsed candidates, which would allow unendorsed candidates access to double the amount that endorsed candidates can spend on campaigning at a local level. In the Committee's view, candidates in each electorate are directly competing against each other, and it would be unfair to allow one candidate to spend twice as much as another on local campaigning.
- 1.81 In considering this proposal, the Committee felt that the issue of unspent funds was particularly relevant. If unspent funds are transferable, the issue of a higher cap for unendorsed candidates would have to be revisited. The Committee is concerned that the practice of transferring funds could lead to an unfair contest whereby political parties could contest a number of seats in order to artificially inflate their expenditure limits in a few key districts. This could disadvantage independent candidates, as they would not have access to transferred funds.
- 1.82 Given current levels of expenditure [paragraphs 6.16-6.22] the Committee considers that the figure of \$2.00 per elector, if applied to both endorsed and unendorsed

³⁰ Electoral Commission NSW/Election Funding Authority, *Submission 30*, 'Funding and Disclosure Model', p. 1.

candidates, would seem to allow for a competitive, but fair, contest. In order to allow for ease of administration, consideration could be given to a more rounded amount of a cap of \$100,000 per candidate in each Legislative Assembly district.

- 1.83 A number of stakeholders argued for differential expenditure caps for rural and regional areas [paragraphs 6.124-6.128]. The Committee recognises that the cost of campaigning can vary widely between electorates, based on factors such as geography, demographics and advertising costs. Given that unique factors will affect campaigning in most electorates, be they rural or metropolitan, the Committee considers that consistent caps should not unduly disadvantage any candidates. On balance, the Committee agrees with the Electoral Commissioner [paragraph 6.128] that differential caps could create an unduly complicated scheme and recommends that expenditure caps be consistent across electorates.

Expenditure limits for groups and ungrouped candidates for the Legislative Council

- 1.84 The Electoral Commission's model allows for an expenditure cap of approximately \$4.3 million for groups and ungrouped candidates in the Legislative Council [Table 18]. The Committee considers that this provision would be open to abuse, in that current law allows candidates to nominate for election to both the Legislative Council and the Legislative Assembly. This could create an incentive for a candidate wishing to circumvent the expenditure cap in the Legislative Assembly to stand for election to both houses of Parliament. There is also the risk that third parties wishing to avoid third party expenditure caps [paragraph 6.99] could stand for election in the Legislative Council.
- 1.85 To avoid this loophole, the Committee recommends that the expenditure cap for groups and ungrouped candidates for the Legislative Council be set at the same or similar level as for third parties.

By-elections

- 1.86 For by-elections, the Electoral Commissioner proposed that expenditure caps be the same as for candidates to Legislative Assembly seats, with no provision for general campaign expenditure.
- 1.87 Given that the timing of by-elections is unpredictable, the Committee considers that any caps on expenditure should apply from when the seat is declared vacant.

Issues and potential loopholes

- 1.88 The Electoral Commissioner outlined a number of measures to prevent loopholes. Firstly, he recommended that, if a registered political party stands more than one candidate in a district, the expenditure cap should remain the same as for a single candidate. Otherwise, parties may be perverse incentives for parties to endorse a number of candidates in order to artificially inflate their allowed expenditure.
- 1.89 Secondly, the Electoral Commission considered that registered political parties should not be able to make donations to unendorsed candidates. The Committee supports this provision, as it would prevent political parties from bank-rolling unendorsed candidates to increase allowable expenditure. For instance, a party may provide the funding for a sham independent candidate to engage in a negative campaign against one of its opponents.
- 1.90 One of the issues identified by the Committee relating to caps on expenditure for individual electorates is the potential incentive to conduct three-cornered contests, Parties and candidates that may be in coalition would have the opportunity to

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effectively outspend their opponents who are restricted by a cap on expenditure by pooling their caps in support of one or other of their preferred candidates. This would have the effect of disadvantaging candidates who cannot match the expenditure of their opponents who, working together have undermined the parity objectives of expenditure caps.

- 1.91 The Committee notes the problems that have emerged in New Zealand, where expenditure caps have not been indexed to inflation. In order to ensure that the level of any expenditure caps remains relevant and realistic, the Committee recommends that the caps placed on expenditure be indexed to inflation, and adjusted at the beginning of each regulated period.

RECOMMENDATION 19: The Committee recommends that as part of comprehensive reform of the electoral and political finance system, the Premier introduce caps on expenditure for political parties, candidates and groups contesting state elections, to:

- (a) create separate expenditure caps for general campaign expenditure, Legislative Assembly campaign expenditure and Legislative Council campaign expenditure.
- (b) establish a cap for general campaign expenditure based on the number of seats contested.
- (c) set identical caps for endorsed and unendorsed candidates to the Legislative Assembly.
- (d) set consistent caps across all 93 seats for the Legislative Assembly.
- (e) link the cap for Legislative Council expenditure to any cap on third party expenditure.
- (f) resolve potential loopholes before caps are put in place.
- (g) link expenditure caps to inflation.
- (h) consider whether any proposed expenditure caps discriminate against independent candidates or new entrants.

Timing of expenditure caps

- 1.92 A number of options for the timing of expenditure caps were put forward by participants to the inquiry. Some, including the Electoral Commissioner, advocated for the full four-year election period and others for a period of nine, six, or three months before the election [paragraphs 6.81-6.93].
- 1.93 In examining the timing of expenditure caps, the Committee is mindful of the *fourth principle*, of respect for political freedoms [paragraph 4.9-4.11]. While the implied freedom of political communication is not absolute, it does require that regulation should be proportionate and reasonable.
- 1.94 To this end, the Committee recommends that any expenditure caps be in place from the beginning of the financial year (1 July) in which the election is held, for a period of approximately 9 months. In making this recommendation, the Committee seeks to balance the need for a scheme that effectively regulates campaign expenditure, without inappropriately fettering the implied freedom of communication. This is

especially so given that the Committee considers that if the spending of political parties and candidates is regulated, then third parties should also be regulated for the same period as political parties.

- 1.95 A number of international jurisdictions make provision for expenditure on an item occurring partly during, and partly outside of the regulated period. For example, in the UK, any items purchased before the regulated period, but used during the regulated period, are included in the spending limit. Where an item is used partly during the regulated period, and partly outside it, a reasonable estimate of the proportion of the expenditure used during the regulated period is made. Such arrangements should be considered when formulating expenditure caps for NSW, including how such provisions could be enforced.

RECOMMENDATION 20: The Committee recommends that in developing legislation to reform the electoral and political finance regime, the Premier consider capping expenditure by political parties, candidates and groups from the beginning of the financial year in which the election is held.

Definition of electoral expenditure

- 1.96 The definition of electoral expenditure is crucial in determining appropriate levels for expenditure caps. If a wide definition is adopted, expenditure caps will need to be higher than for a narrow definition.
- 1.97 The Committee heard from a number of stakeholders that expenditure should be defined narrowly and be limited to the more public forms of campaigning such as electronic and newspaper advertising.
- 1.98 Participants highlighted the following issues when considering the definition of 'electoral expenditure':
- The definition will impact on other aspects of the political finance scheme, such as eligibility for reimbursement of campaign expenditure through public funding, which third party activities are captured under any cap on expenditure, and the review systems for government advertising.
 - The extent to which administrative and operational activities are included in the definition might affect the amount of public funding apportioned between campaign expenses and administrative and operational funds.
 - The need to capture all relevant campaigning activities such as telecommunication costs, to prevent circumvention of expenditure caps.
 - Definitions of 'electoral expenditure' in other jurisdictions.

FINDING 1: That in developing legislation for appropriate expenditure caps, the Premier consider factors including:

(a) The impact of the definition on other aspects of the electoral and political finance scheme, such as:

- eligibility for reimbursement of campaign expenditure through public funding

- the third party activities to be captured under any cap on expenditure and
- the review systems for government advertising.

(b) The extent to which administrative and operational activities are included in the definition may affect the amount of public funding apportioned between campaign expenses and administrative and operational funds.

(c) The need to capture all relevant campaigning activities such as telecommunication costs, to prevent circumvention of expenditure caps.

(d) Definitions of 'electoral expenditure', including in other jurisdictions.

Regulation of advertising and communication by third parties

- 1.99 The terms of reference to this inquiry require the Committee to consider whether there should be any regulation of expenditure by third parties on political advertising or communication. In this context, third parties are 'individuals or organisations that are not candidates, groups, parties or associated entities, such as lobby groups and individual, corporate or institutional supporters.'³¹
- 1.100 In one of the few submissions received from a third party, Unions NSW argued that expenditure caps on third parties are 'unnecessary', an unfair import on freedom of political communication, and impractical [paragraphs 6.144].
- 1.101 However, evidence from political parties, independent candidates and academics indicated that if political parties, candidates and groups were to be subject to expenditure caps, the expenditure of third parties should also be capped, in order to:
- Preserve the integrity of expenditure caps, by preventing political parties and candidates from using 'front organisations' to circumvent caps.
 - Prevent political communication by parties and candidates from being 'swamped' by third party advertising and communication [paragraphs 6.136-6.143].
- 1.102 While the Committee found these arguments to be persuasive, it is important that any regulation of third parties respect the legitimate role that they play in the democratic process. Given the concerns expressed by Unions NSW and the implications for the implied freedom of political communication [paragraphs 6.187-6.201], the Committee considers that any regulation of third parties should be carefully formulated and include further consultation with a variety of third party organisations.
- 1.103 A unifying theme running through the evidence on third parties was the need for openness and transparency. The Electoral Commissioner submitted that all third parties should be required to register with the Election Funding Authority [Table 20]. Another option presented to the Committee was that third parties be required to register once they spend over a certain amount, for example, \$5,000, as is the practice in Canada. It was also felt by some that third parties should be subject to the same disclosure and reporting requirements as political parties and candidates. The Committee considers that there is some merit in these proposals, and further

³¹ Callinan, R, *Election Finance Law: Public Funding, Donations and Expenditure*, New South Wales Parliamentary Library Research Service Briefing Paper 15/2001, p.13.

consideration of these issues is warranted as part of more extensive consultation with third parties.

- 1.104 The Committee heard a variety of evidence on the appropriate level of any expenditure cap for third parties. There seemed to be general consensus that the expenditure cap for third parties should be lower than that for political parties and candidates. The Electoral Commissioner suggested an amount of \$200,000 for state-wide campaigns, with a 'maximum of \$0.50 for each elector on the District electoral roll [which] can be spent in respect to any one District' [Table 20]. The Committee agrees with the Electoral Commissioner that district expenditure caps would be necessary to prevent a third party (or group of third parties) from concentrating the whole of its expenditure in a particular area and swamping local candidates.
- 1.105 Associate Professor Twomey indicated that in assessing the constitutional validity of third party expenditure caps, a court might examine whether the cap allowed for a 'modest campaign' in which a third party would be able to clearly contribute to the political debate and express their views [paragraph 6.188]. The amount put forward by the Electoral Commissioner seems to the Committee to be a reasonable amount to engage in a degree of state-wide advertising. However, the Committee considers that this is an issue that should be further explored in consultation with third parties.
- 1.106 The Electoral Commissioner recommended that third parties be prevented from accepting donations from political parties and candidates. The Committee strongly supports this provision on the grounds that it would assist in preventing political parties and candidates from colluding with third parties or establishing front organisations.
- 1.107 The Commissioner also recommended that:
- Registered third parties must seek the prior approval of the EFA to their proposed schedule of electoral expenditure to ensure that they will not exceed the cap for third parties in any one particular district or overall.³²
- 1.108 The Committee does not support this proposal as:
- it could prevent timely communication of political messages and be seen as an overly bureaucratic and unjustified burden on freedom of political communication
 - it would place stricter regulations on third parties than those placed on political parties and candidates

RECOMMENDATION 21: The Committee recommends that the Premier, in introducing legislation to reform the electoral and political finance regime, ensure that if expenditure caps are placed on political parties and candidates, then advertising and communication by third parties is also regulated.

RECOMMENDATION 22: The Committee recommends that the Premier consult with a wide range of third party groups before introducing legislation to impose limits on third party advertising and communication.

FINDING 2: That in introducing any legislation regulating third parties, the Premier should

³² Electoral Commission NSW/Election Funding Authority, *Submission 30*, 'Funding and Disclosure Model'.

give consideration to:

- (a) requiring all third parties to register with the Election Funding Authority
- (b) requiring third parties to be subject to the same auditing and disclosure requirements as political parties
- (c) adopting an expenditure cap that is significantly lower than that for political parties
- (d) adopting both a state-wide expenditure cap and a maximum amount that can be spent in each district
- (e) synchronising the timing of third party expenditure caps with the timing of expenditure caps for political parties
- (f) preventing third parties from accepting donations from political parties and candidates

Electoral Mailout Account

- 1.109 *The nature of the Electoral Mailout Account (EMA)*- The purpose of the additional allowances and entitlements provided to elected members is to '[facilitate] the efficient performance of their parliamentary duties as members of the Legislative Assembly or recognised office holders'³³. The EMA is a special purpose expense reimbursement account enabling members to prepare and distribute letters or newsletters to all constituents in their electorate.³⁴
- 1.110 The EMA has a total value that equates to the cost of issuing two newsletters per enrolled voter each year and members can issue additional newsletters or letters, subject to funds being available in their account. The reimbursement of expenses may be sought by members or documentation can be forwarded to the Parliament to pay third party providers directly. Given the high cost of a single mailout, members have been encouraged to have newsletters or letters vetted and approved by the Parliamentary administration prior to the actual mailout. All costs associated with a newsletter that cannot be approved under the EMA guidelines are paid for by the member concerned.³⁵
- 1.111 The Parliamentary Remuneration Tribunal issues general guidelines for the use of members' allowances and also imposes specific requirements for the use of individual entitlements. The Clerk of the Legislative Assembly has noted that: 'the guidelines and specific requirements imposed by the Tribunal are overlaid by administrative arrangements made by the Presiding Officers to allow the Parliamentary administration the confidence that a Member's claims and use of the entitlements are within the guidelines and requirements'.³⁶
- 1.112 *Recent developments* - Following an external review by the Internal Audit Bureau in 2008, which recommended streamlining the administration of Members' entitlements,

³³ *Parliamentary Remuneration Act 1989*, s.2A(1)(d) .

³⁴ Russell D. Grove, Paper presented at the 55th Commonwealth Parliamentary Conference, Society of Clerks-at-the-Table, 28 September to 6 October 2009, "Member's expenses – New South Wales Perspectives", p.3.

³⁵ *ibid*, pp.3-4.

³⁶ Russell D. Grove, Paper presented at the 55th Commonwealth Parliamentary Conference, Society of Clerks-at-the-Table, 28 September to 6 October 2009, "Member's expenses – New South Wales Perspectives", pp.7-8.

the NSW Parliament moved from an accountability framework centred on compliance checking by parliamentary staff to a system of self-assessment and certification by Members. The Department of Parliamentary Services administers Members' entitlements, and claims are now processed by the parliamentary administration on submission from a Member that certifies the expenditure was used to support their parliamentary duties and that they have sufficient funds to cover the expenditure. Members may take the option of submitting Electorate Mailout proposals to the Parliamentary administration for review to ensure compliance with guidelines and indication of pre-approval.³⁷

- 1.113 A strengthened audit program underpins the new system and is understood to include random internal audits, to cover all the allowances in any given year. The aim of the program is to detect patterns and trends rather than instances of specific abuse, and external audit. Each Member is audited at least once in a four-year period. The new system also includes 'member education, better information and recording systems, an advisory service and a strengthened audit programme'.³⁸
- 1.114 *Use of the account in the context of a new scheme* – One of the issues raised in submissions and Committee deliberations was the use of allowances available to elected members as a potential loophole in a new public funding scheme. The EMA is one such allowance available to Members of the Legislative Assembly, the inappropriate use of which should be recognised as a way in which expenditure caps could be circumvented, thereby creating an unfair advantage for a sitting member in an election campaign.
- 1.115 In relation to the use of such allowances, the Committee notes evidence from the Electoral Commissioner that this area is a matter for the Tribunal and the Parliamentary administration and that a Member of Parliament can approach the EFA for guidance at any stage on what may be classed as electoral material.³⁹ However, the Committee believes that there is a public interest in providing as much reassurance as possible that specific allowances provided to elected members cannot be abused to influence election outcomes.
- 1.116 Consistent with the responsibility of the Parliamentary administration for providing guidance on the use of such allowances, the Committee recommends that, during the regulated period for an election, the use of the Electoral Mailout Account should be subject to an independent scrutiny and an approval process in which the Parliamentary administration certifies that the proposed use of the account is in accordance with the relevant guidelines and does not constitute electioneering or political campaigning.
- 1.117 Such a process would reintroduce a level of independent scrutiny and review to the approval process that, in the view of the Committee, will provide greater certainty to Members, that their use of the account is appropriate, and to other stakeholders, that there is a safeguard against the account being used to unfairly advantage incumbents. The Committee notes that the pre-review process recommended for the

³⁷ Russell D. Grove, Paper presented at the 55th Commonwealth Parliamentary Conference, Society of Clerks-at-the-Table, 28 September to 6 October 2009, "Member's expenses – New South Wales Perspectives", p.12.

³⁸ Russell D. Grove, Paper presented at the 55th Commonwealth Parliamentary Conference, Society of Clerks-at-the-Table, 28 September to 6 October 2009, "Member's expenses – New South Wales Perspectives", p.11.

³⁹ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript in-camera evidence*, 22 February 2010, p.16.

regulated election period is not intended to replace the existing audit cycle to which the Electoral Mailout Account and other allowances are regularly subject.

RECOMMENDATION 23: The Committee recommends that the Presiding Officers of the NSW Parliament ensure that claims by Members for reimbursement in relation to the Electoral Mailout Account, which are made during the regulated period prior to an election, are subject to independent scrutiny and an approval process undertaken and managed by the Parliamentary administration.

Government advertising

- 1.118 Submissions and evidence to the Committee indicate that misuse of government advertising is seen as a potential loophole that could be used by the governing party to avoid expenditure caps and gain advantage during an election campaign.
- 1.119 An approval process already exists in relation to government advertising. It involves a peer review process, and agencies should also observe certain principles and criteria for the appropriate use of publicly funded advertising. The criteria include a wide range of matters such as accuracy, objectivity, sensitivity to cultural needs, and consistency with Government procurement policies. One of the principles for government advertising is that ‘a reasonable person should not interpret the message as serving party political interests’.
- 1.120 *Proposed model* - The Committee considered a number of models for the regulation of government advertising during election campaigns, including that put by the Electoral Commission in its submission to the inquiry.
- 1.121 While Committee members held divergent views about the specific body that should be responsible for pre-approving government advertising as part of the scheme for regulating expenditure during an election period, the Committee did agree on the following matters:
- in addition to the existing ‘peer review’ approval process for government advertising, a pre-approval assessment process, conducted by an independent body, should be introduced for government advertising in the regulated election period;
 - the time taken to conduct the pre-approval assessments should be relatively short, so as not to unnecessarily delay government advertising, and seven days is an appropriate period within which an assessment should be able to be completed;
 - any assessment not completed within the seven day period should be considered to be approved;
 - there is a need to devise a workable definition of ‘partisan’ and ‘party political’ content for the purpose of regulating publicly funded advertising by departments and agencies in the election period and the definition should be consistent with the principles contained in the current Department of Premier and Cabinet guidelines, as they relate to inappropriate advertising that serves party political interests;

- there should be some indication that government advertising during the regulated election period has been approved by the independent body.

1.122 The various options put to the Committee regarding the composition of the proposed independent body are contained in the report at paragraphs 6.245 – 6.255 and it is the view of the Committee that these options should be considered closely by the Premier in developing any legislation. The Premier also should highlight this as a matter for attention during the consultations on the draft exposure bill. In this regard, the Committee has noted that the Auditor General gave evidence that he did not want to perform the approval role and that the Electoral Commissioner, having considered the Auditor General's position, advised that the EFA would be prepared to undertake such a role.

1.123 *Definitional issues* - The current definitions of 'electoral material' and 'electoral matter' are contained in sections 151B and 151F in the *Parliamentary Electorates and Elections Act 1912*. In relation to the section of the Act dealing with the exhibition or display of election posters, s.151B(6) provides the following definition of 'electoral matter':

electoral matter means any matter which is intended or calculated or likely to affect or is capable of affecting the result of any election held or to be held under this Act or of any referendum of the electors held or to be held in accordance with the provisions of any Act or which is intended or calculated or likely to influence or is capable of influencing an elector in relation to the casting of his or her vote at any such election or referendum.

electoral matter also includes the name of a candidate at any election, the name of the party of any such candidate, the name or address of the committee rooms of any such candidate or party, the photograph of any such candidate, and any drawing or printed matter which purports to depict any such candidate or to be a likeness or representation of any such candidate.

1.124 In respect of the registration and distribution of any electoral material on polling day for an election, s.151F(3) provides the following definition of 'electoral material':

electoral material means a "how to vote" card, handbill, pamphlet or notice containing:

- (a) electoral matter as defined in section 151B, or
- (b) without limiting paragraph (a), an express or implicit reference to or comment on:
 - (i) the election or referendum, or
 - (ii) the Government, the Opposition, a previous Government or a previous Opposition, of the State, or
 - (iii) the Government, the Opposition, a previous Government or a previous Opposition, of the Commonwealth or any other State or a Territory, or
 - (iv) a member or a former member of Parliament or the Parliament of the Commonwealth, any other State or a Territory, or
 - (v) a political party, a branch or division of a political party or a candidate in the election, or
 - (vi) an issue submitted to, or otherwise before, the electors in connection with the election or referendum.

1.125 Utilising these definitions for the purpose of defining political advertising in the context of the regulation of government advertising may not be possible, as they would appear to be cast too widely. The question of an appropriate definition for use by the independent body during the proposed regulated election period is also a matter warranting detailed examination in the development of any amendments to the

legislation, and the Premier should consult the Electoral Commissioner and other stakeholders closely for this purpose.

RECOMMENDATION 24: The Committee recommends that the Premier present legislation making provision for the pre-review of government advertising by an appropriate independent body to:

- (a) ensure there is no 'partisan' or 'party political' content, for the regulated election period.
- (b) provide for the composition of the independent body to be a matter for consultation during the draft exposure phase of the legislation for the new scheme.
- (c) include a workable definition of 'partisan' and 'party political' content to be used to regulate government advertising in the election period. The Committee notes that the definition should be consistent with the relevant principles contained in the current Department of Premier and Cabinet guidelines and bear in mind the existing definitions of 'electoral matter' and 'electoral material' within the Parliamentary Electorates and Elections Act.
- (d) require government departments and agencies, in the regulated period, to submit advertisements to the independent body for assessment against the definition and guidelines, prior to the commencement of the 'peer review' approval process that will continue to govern all types of government advertising.
- (e) provide for a seven day turnaround time for completion of the pre-approval assessment and for automatic approval of government advertisements in cases where the process is not finalised within the seven days.
- (f) require that government advertisements during the regulated election period be identified as having been the subject of the pre-approval process.

RECOMMENDATION 25: The Committee recommends that:

- (a) the independent body not be involved in the 'peer review' approval process that follows the pre-approval assessment in the regulated election period;
- (b) certain categories of government advertising, for example, job notices, notifications, public health and natural disaster announcements, are not to be subject to the pre-approval assessment process undertaken by the independent body.

RECOMMENDATION 26: The Committee further recommends that the Premier consider the options for action to be taken by the independent body where government advertising is in breach of the definition of 'partisan' and 'party political' content contained in the Act and is not in keeping with the relevant guidelines. Possible options for amendments may include:

- (a) the independent body reporting immediately to Parliament on the particular instance,

including details of the advertisement and its cost;

(b) providing that it is a breach of the Act and an offence for a government department or agency to proceed with an advertisement where the independent body has determined that the advertisement is 'partisan' and 'party political' and that such a contravention of the Act should be subject to a penalty.

- 1.126 The Committee recognises that its recommendations may be criticised for not involving pre-approval for a period extending beyond the proposed regulated election period of nine months. In particular, the Electoral Commission's submission proposed that government advertising should be regulated as part of an integrated scheme for regulating campaign expenditure over a four-year period and that government departments would be classed as third parties and subject to the same expenditure limits in the Commission's model, that is, a limit of \$200,000 electoral expenditure for the duration of the four-year parliamentary term.
- 1.127 On balance, the Committee does not consider there to be a need for an independent body to regulate government advertising, to prevent its use for 'party political' purposes, for a period longer than the regulated period of nine months recommended in the report. There are several considerations that shaped the Committee's perspective on this question. Firstly, the extent to which government advertising may influence an election campaign will depend on both the content of the advertisement *and* its proximity to an election campaign. The Committee is inclined to the view that advertisements appearing earlier than the proposed nine-month regulated election period are less likely to influence the outcome of an election. Outside of this period, the existing principles and 'peer review' process for preventing the use of government advertising for political party purposes would come into play.
- 1.128 Secondly, the Auditor General's reviews of government advertising also provide oversight of government advertising throughout the four-year period and, as such, serve as an ongoing safeguard against misuse of public funds in relation to publicly funded advertising. The Committee is, however, of the view that more frequent reviews of government advertising by the Auditor General would deliver a more robust level of accountability. The Committee also notes the Audit Office's advice that, in cases where the guidelines for government advertising are breached, penalties under the Public Finance and Audit Act may apply and this also serves as an additional deterrent for abuses.
- 1.129 Finally, the Auditor General's previous reviews have resulted in amendments to the guidelines for government advertising.
- 1.130 Consequently, the Committee is persuaded that the additional oversight that the Auditor General can bring to the unregulated period, if undertaken with greater regularity, would be a sufficient check on inappropriate use of government advertising for party political purposes.

RECOMMENDATION 27: The Committee recommends that:

- (a) the Auditor General conduct more regular reviews of government advertising outside of the regulated election period.
- (b) the Premier report to Parliament in response to any recommendations arising from the

Auditor General's reviews of government advertising.

Public funding

- 1.131 The inquiry's terms of reference require the Committee to inquire into a public funding model, considering the following:
- the criteria and threshold for public funding
 - the manner in which public funding is calculated and allocated
 - any caps that should apply, such as the overall cap on public funding and/or caps on public funding to individual parties and Members
 - the persons to whom public funding should be paid
 - mechanisms for paying public funding
 - any restrictions on expenditure of public funding.
- 1.132 The Committee heard evidence that the existing public funding system is in need of reform. Inquiry participants told the Committee that factors including an increasing reliance on private donations to fund campaigns, perceptions of corruption and undue influence and the rising costs of modern campaigning mean that reform to the current system is required. Many participants who supported a restriction of private sources of funding argued that such a measure would necessitate an increase in public funding [paragraphs 7.23-7.30]. If donations are capped at a relatively low level, there are also strong constitutional reasons for increasing public funding [Chapter 4].
- 1.133 Many participants to the inquiry argued against full public funding [paragraphs 7.52-7.61]. The Committee was persuaded by the arguments that there is a legitimate role for well-regulated private contributions in the political finance system. It is considered that the requirement that parties and candidates seek grass-roots support enhances the democratic process.

Criteria and thresholds

- 1.134 There was broad support for the retention of the current 4% (or member elected) threshold for eligibility for public funding, including from independent Members of Parliament. Ms Clover Moore MP noted that the current threshold does not appear to disadvantage independent and first time candidates [paragraph 7.66]. The Committee agrees that the current threshold be maintained.

Calculation and allocation

- 1.135 The Committee heard various proposals for the way public funding could be allocated, with some participants suggesting that primary votes gained could continue to be used to determine public funding entitlements.
- 1.136 The Electoral Commissioner's model for public funding provides for reimbursement of expenses as a percentage of expenditure. The model incorporates two thresholds, at 4% and 8% of the primary vote. Parties and candidates who received above 4% of the vote would be entitled to 50% reimbursement of their expenditure. Those who received above 8% would be entitled to 100% reimbursement of their expenditure. The model is contingent on caps on campaign expenditure, which limits public funding liability. The Committee considered this option in some detail, as well as variations of this model with additional thresholds and reimbursement percentages.
- 1.137 The following problems were identified:

- Some parties and candidates with low levels of expenditure would receive a smaller reimbursement of their expenditure compared to the current public funding model.
 - Based on examples from the 2007 state election, lower ranked candidates with high expenditure could receive higher amounts of public funding than the candidate with the highest primary vote.
 - Reimbursement to 100% of expenditure could create an incentive for candidates to spend more money and be an unjustified burden on the public purse.
- 1.138 The Committee also heard evidence supporting the current model for public funding, with changes to address issues arising from capping donations and thus limiting candidates and parties ability to effectively communicate with the electorate. The Committee considered a number of options for public funding of Legislative Assembly candidates, based on various increases in the Constituency Fund in each electorate. The Committee looked at establishing constituency funds based on the amounts of \$2, \$2.50 and \$3 multiplied by the average number of enrolled votes in each electorate (as at the 2007 state election). The Committee applied these amounts to a number of electorates, based on the results and expenditure at the 2007 state election, and these tables appear in Appendix 1. Based on these examples, the Committee considers that such an approach would address some of the concerns outlined above regarding the Electoral Commissioner's model.
- 1.139 This approach retains the condition of the current model, that no one political party or candidate be eligible to receive more than 50% of the pool of public funding, which was broadly supported by inquiry participants. Some Committee members were unclear as to what purpose this arbitrary cap achieved, and the Committee suggests its retention or otherwise be considered further if this type of model is adopted in the new political finance system.
- 1.140 The public funding model that is adopted will need to be considered and developed with careful regard to the introduction of expenditure caps. It is the Committee's view these two issues need to be developed together to ensure consistency with the four principles outlined by the Electoral Commissioner.
- 1.141 The public funding model needs to be developed at such a level to offset the reduction in private funding for candidates and political parties through the introduction of caps on donations. The notion that public funding for the reimbursement of campaign expenses within a cap on expenditure could be as high as 75% received general support from Committee members.
- 1.142 Difficulties arose when attempting to quantify public funding formulas that took into account the bi-cameral nature of the NSW Parliament (there is no international precedent considered by the Committee for such a model) and the fact that some candidates and political parties contested both Legislative Assembly elections and Legislative Council elections, while others contested one or the other, but not both.
- 1.143 The adoption of a public funding model needs to provide a fair and level playing field regardless of where candidates and political parties nominate, and needs to be at a sufficient level to enable contestants to articulate their platforms to the electorate(s).
- 1.144 Some inquiry participants considered that eligibility for funding should be calculated by reference measures of public support other than election results, for example, party membership numbers. The Independent Commission Against Corruption

(ICAC) strongly opposed such a system, arguing that using party membership numbers to determine public funding:

... could create an incentive for membership numbers to be corruptly misrepresented. It would also be expensive and time-consuming for a body such as the Election Funding Authority or the Commission to investigate any alleged misrepresentations.⁴⁰

The Committee agrees with the ICAC's assessment of this proposal.

Recipient and method of payment

- 1.145 Most participants favoured the retention of a model that provides for the public funding of campaign expenses through reimbursement, rather than funding being allocated on an entitlement basis, as is the case federally.
- 1.146 The Electoral Commission argued for centralising responsibility for all aspects of campaign finances with the party or official agent, including receipt of public funding. The Committee agrees with this proposal, given the complex requirements of a more regulated political finance system and responsibilities outlined in the proposed enforcement scheme [paragraphs 1.171-1.175].
- 1.147 In terms of the timing of payments, the Electoral Commission's funding model provides that 'mechanisms and timing for payment remain as presently provided for in the *Election Funding and Disclosures Act 1981*.'⁴¹ Other submissions suggested that election funding should be paid after the declaration of the poll, with full payment to recipients within 21 days of electoral returns being lodged,⁴² or that payment occur 'as soon as administratively practical after the final results of the election are known.'⁴³ Further consideration might need to be given to advance payments of portions of public funding, given the reduced capacity of candidates to raise large sums of money from donations.

Restrictions on expenditure of public funding

- 1.148 The definition of electoral expenditure is discussed at paragraphs 1.96-1.98. As any public funding would be based on a reimbursement model, eligible expenditure will need to be defined in the Act. If public funding is available for operational expenses (discussed below), then consideration should be given to whether these types of expenses should be included or excluded from the definition of electoral expenditure.

RECOMMENDATION 28: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime an increase in the amount of public funding available to political parties, groups and candidates, in order to partly compensate for loss of income from donations.

RECOMMENDATION 29: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime a retention of the current eligibility threshold to receive public funding of 4% of primary votes, or a member elected.

⁴⁰ Independent Commission Against Corruption, *Submission 14*, p. 3.

⁴¹ NSW Electoral Commission NSW, *Submission 30*, p. 2.

⁴² NSW National Party, *Submission 18*, p. 15.

⁴³ Christian Democratic Party, *Submission 28*, p. 10.

FINDING 3: In legislating to reform public funding, the Premier should give consideration to:

- (a) The strong arguments against a system premised on full public funding of election campaigns.
- (b) The need to consider public funding in relation to any expenditure caps.
- (c) The bicameral structure of the New South Wales Parliament, including that some parties contest both Houses of Parliament, while others contest only one House.
- (d) The current method of calculating public funding by reference to an amount per elector, apportioned according to first preference votes.
- (e) Ensuring a fair and level playing field.
- (f) Whether increased capacity for advance payments is required.

RECOMMENDATION 30: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime provisions that any public funding model be based on reimbursement of electoral expenditure, rather than entitlement.

RECOMMENDATION 31: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime that the party or official agent be the recipient of public funding.

Operational and administrative funding

1.149 Most participants in the current inquiry agreed that a reformed scheme would need to provide for public funding of parties' administration costs, with some arguing that administration funding would have to be increased if private donations were restricted. The Committee heard various suggestions for determining eligibility for administration funding, including proposals to publicly fund administration costs in an equitable way that does not disadvantage emerging parties.

1.150 The Electoral Commissioner felt that operational funding should be allocated based on the following:

The RPP qualifies for an entitlement for operational support where either:

- the total first preference votes obtained by all endorsed candidates of the party for all districts contested in the Legislative Assembly at the last two State General Elections is at least 4% of the total first preference votes; or
- the first preference votes obtained by endorsed groups/candidates for the Legislative Council election at the last two State General Elections is at least 4% of the total first preference votes; or
- a candidate is elected.
 - RPP required to submit annual audited financial returns to be eligible for next twelve months funding (based on a financial year).

Recommendations and findings

- The RPP to satisfy the annual continued registration requirements to be eligible for the payment of the operational funding allowance.
- RPP would receive \$1 each financial year for the average of the total first preference vote received for the LA or the LC (whichever is the greater) at the last two State General Elections.
- This funding applies to RPP's registered for State purposes and would replace the existing Political Education Fund.⁴⁴

1.151 The Committee members had different views on this model. Some Committee members identified that, although based on results at the previous two elections, it might not adequately accommodate periods of electoral downturn for parties and that it might adversely impact on parties operating as a coalition. Others argued that taking an average of the primary vote over the past two elections was a fairer system as it is based on votes received rather than seats won. It was further argued that taking the average is fair as it takes into account a period of reduced support.

1.152 Another model presented to the Committee was based on the following four tier system, based on Members elected to both Houses:

Tier One Parties with 25 Members of Parliament or more

Tier Two Parties with 10 - 24 Members of Parliament

Tier Three Parties with 5 - 9 Members of Parliament

Tier Four Parties with 1 - 4 Members of Parliament.⁴⁵

1.153 Under this proposal, funding would be annually indexed, commencing at an initial level to be provided for in the legislation establishing the funding scheme. The following figures were suggested as appropriate initial amounts:

Tier One \$2,000,000

Tier Two \$750,000

Tier Three \$500,000

Tier Four \$250,000⁴⁶

1.154 It was submitted that this model would achieve the following objectives:

- Enabling the governing party and the largest opposition party (in Tier One) to have stable, ongoing support for their administrative and other needs, at a level that would be sufficient to replace funding from corporations, trade unions and other organisations.
- Continuing to ensure that the two principal parties remain viable during periods of electoral downturn, while not being too high a threshold to preclude new entrants winning eligibility at this level.⁴⁷

1.155 The Committee considers that this model could provide greater stability and parity than that outlined by the Electoral Commissioner.

RECOMMENDATION 32: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime, provision for public funding of

⁴⁴ Electoral Commission NSW/Election Funding Authority, *Submission 30*, 'Funding and Disclosure Model'.

⁴⁵ Liberal Party of Australia (NSW Division), *Submission 17*, p. 24.

⁴⁶ Liberal Party of Australia (NSW Division), *Submission 17*, pp. 24-5.

⁴⁷ Liberal Party of Australia (NSW Division), *Submission 17*, p. 24.

the operational and administrative costs of political parties and that the level of funding be determined according to a tiered model on the basis of Parliamentary representation.

Political Education Fund

- 1.156 Some inquiry participants submitted that the Political Education Fund should be abolished. The Committee considers that if operational and administrative funding is made available under a public funding system then the Political Education Fund should be eliminated.
- 1.157 However, the Committee considered the impact that capping donations may have on smaller or newly established parties and believed some consideration should be given to establishing a 'policy development fund' for those parties ineligible for operational and administrative funding.

RECOMMENDATION 33: The Committee recommends that the Premier consider including in legislation to reform the electoral and political finance regime provision for a 'policy development fund' to help those parties ineligible for operational and administrative funding.

Compliance and enforcement

Remedying problems with the existing legislation

- 1.158 *Existing offence provisions* – The Electoral Commissioner has clearly identified matters of interpretation with the Election Funding and Disclosures Act, and the construction of the offence provision found at s.96I, as significant obstacles to the efficient management and administration of the current scheme and the ability to successfully prosecute offences for non-compliance with the requirements of the Act.
- 1.159 It is evident to the Committee that the offence provisions within the Act, as they currently operate, are ineffective. Not only do there appear to have been an excessive number of breaches reported since the introduction of the new legislation relating to disclosure requirements, there also have been no successful prosecutions. The Electoral Commissioner has concluded that 'the amended Act is in need of considered and comprehensive revision'.⁴⁸ If, as the Electoral Commissioner has suggested, the terms of the amended Act do not meet the intended policy objectives, the Committee can see little option but to amend the legislation further to attain clarity around the relevant provisions. The Committee is particularly concerned that the difficulties with interpreting and administering the legislation, as it currently stands, should be remedied as a matter of priority, especially given the proximity of the 2011 State general election.
- 1.160 During the Committee's inquiry into the 2008 local government elections, the EFA provided the Committee with a schedule of proposed amendments to the Act to clarify the definitional issues in the legislation arising from the 2008 amendments, and the resulting inter-relationship between the amending and original statutory provisions (see Appendix 4).

⁴⁸ NSW Election Funding Authority submission to the inquiry into 2008 local government elections, Submission no. 68, dated 15 June 2009, p.10; also Election Funding Authority, answers to Questions on Notice (Question no. 3), dated 19 August 2009 re the 2008 Local Government Elections Inquiry.

Recommendations and findings

- 1.161 The proposed changes are aimed at improving the operation of the Act by giving greater clarity to provisions concerning disclosure and other reporting obligations under the legislation. They appear to the Committee to be primarily matters of clarification relating to definitions and the period for which obligations arising under the Act apply and expire.
- 1.162 The Committee has noted the advice received by the EFA from the Crown Solicitor about the serious burden s.96l places on the prosecution to prove ‘actual knowledge’ of an offence to which section 96l of the Act applies, at the time the offence is committed. Consequently, the Committee also supports amendment of s.96l to overcome this difficulty. The Electoral Commissioner has recommended that the ‘knowledge element’ of s.96l be removed to facilitate the EFA’s ability to prosecute offences under the Act as it currently stands. Mr Barry has not proposed any change to the common law defence of ‘reasonable mistake’, which is available in relation to a strict liability offence (unless it is expressly stated that this defence does not apply). Mr Barry has indicated that he considers such matters would be for the courts to determine.⁴⁹
- 1.163 The Committee strongly supports the availability of this defence in the event that the amendment proposed by the Commissioner to s.96l proceeds. However, the Committee is mindful of the principles previously adopted by the Legislation Review Committee of the NSW Parliament in respect of bills containing ‘strict liability’ offences. It concurs with the views expressed by the Legislation Review Committee that such provisions should only be used where ‘there are sound and compelling public interest justifications for doing so’ and that they should not apply to offences carrying a penalty of possible imprisonment. In addition, the Committee was of the view that any amendment that would involve strict liability for serious offences, which are subject to significant financial penalties, should be given very careful consideration.
- 1.164 The Committee does have concerns about the creation of strict liability offences for persons who must by necessity rely on information from third parties, particularly volunteers, to fulfil their disclosure obligations under the EFD Act. As noted in Paragraph 9.121, the Legislation Review Committee urges caution when using strict liability offences in these circumstances. Volunteers may also incur obligations under the EFD Act, with which they are unfamiliar. This would be another factor to consider when making amendments to this general offence provision.
- 1.165 In this regard, the Committee notes that the only existing offence captured by s.96l, which carries a possible prison sentence and would be affected by the Commissioner’s amendment, relates to the prohibition on property developer donations. This provision would not apply if the related part of the EFD Act is removed, consistent with the Committee’s recommendation for the repeal of that part of the legislation.

RECOMMENDATION 34: The Committee recommends that, as a matter of priority, the Premier give consideration to bringing forward legislation as follows, in consultation with the Electoral Commissioner, to:

(a) amend those provisions in the *Election Funding and Disclosures Act 1981*

⁴⁹ Letter from Mr Barry to the Committee Manager, dated 3 March 2010.

identified by the Election Funding Authority to be in need of clarification as a result of the amendments arising in the *Election Funding Amendment (Political Donations and Expenditure) Act 2008*, particularly in respect of definitional matters and the period for which obligations arising under the Act apply and expire. (The amendments are contained within Appendix 4 to the report); and

(b) amend s.96I of the *Election Funding and Disclosures Act 1981* to remove the requirement to establish 'actual knowledge' of an offence at the time it is committed, in order to facilitate prosecution of offences captured by this general offence provision.

The Committee further recommends that any amendment to s.96I should make express provision for the availability of a defence of 'reasonable mistake', or any other relevant defence, for offences covered by this section.

Audit certificates and the EFA's audit capacity

- 1.166 Another area of uncertainty raised by the Electoral Commissioner in relation to the current operation of the Act concerns the audit certificates that must accompany disclosures under Part 6 and claims for public funding under Part 5 of the Act. The Electoral Commissioner has advised that there is a significant distinction to be drawn between the level of assurance provided by an 'audit review' compared to an 'audit certificate'. At present, the EFA apparently receives audit reviews rather than audit certificates and the Authority has expressed a preference for the latter, particularly as it is still developing its compliance capability to conduct desk-top audits. In this situation, the Authority has emphasised that the audit certificates assume greater significance as an accountability mechanism and it has raised doubts about the efficacy of relying upon audit reviews for this purpose.
- 1.167 Within the constraints upon the inquiry, the issue of audit certificates has not been one on which the Committee has had an opportunity to receive submissions or take evidence. Nevertheless, the ramifications of the Electoral Commissioner's advice are significant and the Committee has decided that they warrant drawing to the attention of the Premier as the Minister with carriage of the Election Funding and Disclosures Act. Based on the advice given to the Committee, it appears that although the legislation specifies that an 'audit certificate' is to accompany certain documents, in effect, the EFA receives an audit review opinion instead. This suggests to the Committee that the problem lies not with the legislative provision but with its interpretation and application.
- 1.168 The Electoral Commissioner should be further consulted to clarify the situation. The Committee is of the view that the requirement under various sections of the Act for audit certificates to be provided to the EFA should be observed. In the event that the requirement is administratively onerous for small parties and independent candidates, the Committee suggests that consideration be given to allowing for exemptions to be sought where the cost of meeting the requirement can be demonstrated to have a detrimental effect on the ability of a party or candidate to operate and participate in the election process.

RECOMMENDATION 35: The Committee recommends that the Premier clarify with the Electoral Commissioner the necessity for amendments to the *Election Funding and Disclosures Act 1981* in order to:

(a) ensure audit certificates are provided in accordance with the requirements of the Act; and

(b) provide for possible exemptions from the requirements, where considered necessary by the EFA, including where the cost to a small party, individual candidate or third party may be unreasonable.

1.169 In the latter stages of the inquiry, the Committee received advice from the EFA that suggested the existing powers of inspection the Authority may exercise pursuant to the EFD Act, in relation to the appointment of inspectors, are 'unworkable'. This is a significant matter that the Committee would seek to have addressed. The inspection powers under the EFD Act are limited and if, as has been suggested, it is not possible for the EFA to properly utilise these powers, the Committee would have serious concerns about the capacity of the Authority to carry out its functions. The EFA also has suggested that any proposal to strengthen the audit and compliance provisions under the Act should consider expanding the information that may be obtained from stakeholders and auditors, and requiring an auditor to undertake additional tests in relation to a disclosure.

1.170 The Committee holds the view that the EFA should have an audit capacity and related powers sufficient to be able to effectively scrutinise expenditure and donations for registered political parties, candidates and groups, in keeping with the objectives of the EFD Act, and that it should be adequately resourced for this purpose. Any problems in relation to the Authority's auditing and other powers should be resolved as soon as possible, so that the EFA is not impeded in the performance of its functions. The Committee would request the Electoral Commissioner to inform it of the outcome of consultations with the Department of Premier and Cabinet in this regard.

RECOMMENDATION 36: The Committee recommends that:

(a) the Premier consult with the Electoral Commissioner on the adequacy of the existing audit and inspection powers conferred on the Election Funding Authority to enable it to perform its functions under the *Election Funding and Disclosures Act 1981*; and

(b) the Electoral Commissioner inform the Committee of the outcome of consultations with the Department of Premier and Cabinet to remedy any particular problems in relation to the extent and exercise of the EFA's powers under the Act as stands.

Compliance and enforcement under a new scheme

1.171 The overall structure of a new scheme for the regulation of election campaign expenditure and political party funding, and the specific limits and obligations it imposes, will have significant implications for compliance. If the proposed scheme is

too complicated then parties, candidates and electors will struggle to comply with the legislation. An overly complex scheme will also be administratively burdensome to police and enforce, and difficulties are likely to ensue with regard to the successful prosecutions of offences. The terms of the legislation also may create in-built incentives and disincentives for compliance.

- 1.172 The compliance regime that currently exists under the EFD Act primarily focuses on disclosure of donations and electoral expenditure, and related breaches of reporting provisions. On the basis of experience in other jurisdictions, it is apparent to the Committee that a shift from the current system to one that involves regulation of donation and expenditure caps, increased public funding and the regulation of third parties, will necessitate strengthening the compliance role of the EFA and affording it wider investigatory powers. As the Electoral Commissioner has indicated, it will be necessary for the EFA to have access to expert assistance. Such assistance may include auditors, trained investigators, forensic accountants, specialist lawyers.⁵⁰
- 1.173 The range of offences and applicable penalties under a new scheme also will need to be subject to comprehensive review. Other jurisdictions have established flexible enforcement regimes, incorporating low-level monetary penalties, civil penalties that do not result in criminal convictions, compliance agreements and criminal offences. Civil sanctions allow for a wide range of regulatory responses proportionate to the types of breaches and offences that may be encountered. As the Australian Government Green paper on electoral reform notes, a key challenge for any scheme 'is to ensure that there is 'the right mixture of tools' to enable an adequate and prompt response to the circumstances of each case.⁵¹ The comments made previously concerning the Committee's views on strict liability and the availability of defences where such liability may apply in the existing legislation would also hold for the creation of any offences under a new scheme.
- 1.174 The Electoral Commissioner has proposed the following measures to strengthen the offence provisions of the Act and enforce new legislation:
- Strengthening the current audit requirements in relation to disclosures of donations and electoral expenditure.
 - Introducing a range of penalties for breaches of the requirements under the new public funding scheme.
 - Increasing the compliance capacity of the EFA and its powers to compel the production of information to investigate offences arising from the imposition of the bans and caps, and other requirements under the new public funding scheme.
 - Allocating adequate resources to support the EFA's enhanced compliance role.
- 1.175 The Committee considers that the Electoral Commissioner's recommendation for a tiered approach to penalty provisions is sensible and should be adopted.

⁵⁰ Ministry of Justice, *Party finance and expenditure in the United Kingdom – The Government's proposals*, White Paper, June 2008, Cm 7329, p.26 This is the types of expertise identified by the Hayden Phillips review as that needed by the UK Electoral Commission in its new regulatory role.

⁵¹ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf (accessed 20 February 2010), p.207.

RECOMMENDATION 37: The Committee recommends that:

- (a) the Premier consider including in legislation to reform the electoral and political finance regime a tiered penalty scheme for certain breaches of the requirements of the proposed new scheme, along the lines suggested by the Electoral Commissioner; and
- (b) as part of the consultation process around the legislation for the new scheme, the Premier consult stakeholders on the specific amounts that should apply to the tiered monetary penalties.

- 1.176 *Liability for offences* – Increasing the levels of public funding for election campaigns and imposing limits on campaign expenditure leads to issues concerning liability for abuses of the system and failure to comply with legislative requirements. The Committee notes the options canvassed in the Australian Government’s Electoral Reform Green Paper to enable political parties to be prosecuted, notwithstanding their possible lack of corporate status. The desire to enable prosecution of political parties recognises the unfairness and impracticality that seems inherent in imposing liability on party agents who could frequently be in a position to deny knowledge of unlawful conduct and who may have no responsibility for particular unlawful acts. In the view of the Committee, it is inappropriate to impute liability to a party agent, when that liability more properly rests with a party organisation as a whole. While the Committee believes prosecution of political parties is feasible and warrants consideration by the Premier of possible amendments to the *Election Funding and Disclosures Act 1981*, the method for achieving this end is not readily evident to the Committee. Options canvassed in the Australian Government’s Green Paper are to impose on registered political parties the capacity to be prosecuted before a court or to require them to become legal entities.
- 1.177 Under the model proposed in the NSW Electoral Commission’s submission to the inquiry, breaches of the campaign expenditure caps by a registered political party, candidate, group or third party may be subject to a fine three times the overspent amount. However, the Committee is concerned that a financial penalty may not serve as an effective deterrent if it merely becomes another ‘cost’ to factor into the campaign. The level of any fine would need to have the desired deterrent effect and be reasonable. The Committee notes that the Act currently provides that a party, group or candidate may be ineligible for payment of public funding in respect of a general election, in circumstances where they have failed to lodge a declaration required under the disclosure provisions of Part 6 of the Act. It appears to the Committee that the preferable option may be to adopt a similar approach as the most appropriate way to deal with breaches of the legislation and certain offences by registered political parties, without unnecessarily encroaching on the internal functioning of the parties.
- 1.178 It also is necessary to ensure an appropriate fit between newly created electoral offences and existing statutory provisions relating to disqualification of Members and eligibility to nominate and stand as a candidate

RECOMMENDATION 38: The Committee recommends that the Premier consider including in legislation to reform the electoral and political finance regime provision to make a registered political party, which fails to comply with the requirements of the proposed new

scheme, ineligible for public funding. The Committee notes that there will be an avenue through the courts to prosecute offences for non-compliance.

1.179 *Annual audited statements* – The provision of public funding on an increased scale carries with it a concomitant obligation to ensure that there is auditing of expenditure by participants in the electoral process, including political parties. The ability to examine and scrutinise this expenditure is also fundamental to enforcing the obligations and responsibilities imposed under the legislation. Consequently, the Committee recommends that those receiving public funding under the proposed new model should be required to furnish the EFA with properly audited accounts of their financial dealings for review. As noted by Mr DeCelis in evidence to the Committee, this proposal would be consistent with the requirement that applies at federal level and is a matter on which some coordination could occur between the New South Wales Election Funding Authority and the Australian Electoral Commission, to avoid any unnecessary duplication in relation to the provision of records.

RECOMMENDATION 39: The Committee recommends that the Premier include in legislation to reform the electoral and political finance regime a requirement that parties, groups and individual candidates receiving public funding under the new scheme to furnish the Election Funding Authority with properly audited accounts of their financial dealings for review.

- 1.180 *Investigations and prosecutions* - The Committee fully supports an increased capacity for the EFA to audit compliance with any requirements introduced as a result of expenditure caps and limits on donations, and the regulation of third parties in a new scheme, as well as the requirements of current legislation.
- 1.181 In order for the EFA to undertake effective inquiries of financial activities it needs to have powers to compel the production of books, records and other information from *any* person or organisation for the purpose of verifying disclosures and reports made in accordance with the requirements of the Act, provided there are reasonable grounds for the exercise of such powers. The Committee recommends that the Premier amend the Election Funding and Disclosures Act accordingly, and that the proposed powers also would be given to the EFA for the purpose of exercising its functions in the new scheme. The EFA also needs to be funded to undertake the proposed review of the annual audited accounts.
- 1.182 The Committee is of the view that the case for conferring additional powers beyond those proposed would require further assessment and justification. Indeed, while the Committee envisages a wider regulatory role for the EFA under the new scheme, it is anticipated that investigations of criminal offences and corrupt conduct may still be undertaken by the police and the ICAC, in accordance with their respective jurisdictions, as appropriate.
- 1.183 The EFA's proposed regulatory role would fill the obvious enforcement gap that would occur in relation to the investigation of a wide range of electoral offences under the new scheme. These offences would fall between high end criminal offences and minor breaches of the legislation but may still involve serious matters. The types of offences to be investigated by the EFA are unlikely to constitute corrupt or become

Recommendations and findings

the subject of a police investigation. Appropriate consultative arrangements, such as a memorandum of understanding, to deal with the potential for jurisdictional overlap or coordination of investigative efforts may need to be put in place between the EFA, ICAC and law enforcement authorities in this model.

- 1.184 The Committee is not contemplating that the EFA would supplant the role of the Office of the Director of Public Prosecution with regard to the conduct of prosecutions. The Committee contemplates that the EFA would only have responsibility for initiating a prosecution by arranging for prosecution action to be taken. In this process the Committee understands that there would be a necessity for the EFA to compile any evidence arising from its investigations that supports a prima facie case and submit the evidence to the prosecuting authority. The Committee considers that a thorough assessment would need to be made of the resources that would be needed by the Authority to undertake such a role and for the Authority to receive adequate funding.

RECOMMENDATION 40: The Committee recommends that, where there are reasonable grounds for the Election Funding Authority to believe breaches and offences have occurred under a new scheme, the Election Funding Authority be empowered to:

- (a) compel the production of books, records and other information from any person or organisation;
- (b) question any person in relation to possible breaches under the Act;
- (c) engage the services of any person for the purpose of getting expert assistance,

for the purpose of performing its functions.

RECOMMENDATION 41: The Committee recommends that the Premier ensure the Election Funding Authority receives additional funds and resources to support the enhanced compliance and investigative role the Committee has recommended for the Authority.

- 1.185 As a further deterrent, the Electoral Commissioner has recommended the *Parliamentary Electorates and Elections Act 1912* be amended to enable the Court of Disputed Returns to consider overspending of the expenditure limit by the successful candidate as a basis for challenging the result of the election. The Committee considers that this proposal warrants consideration as a measure commensurate to the extent to which non-compliance with the legislation may alter election outcomes and impede a free and impartial election process.
- 1.186 The Committee notes that the proposal to include unlawful acts in the new scheme, for instance, breaching the expenditure caps, as a ground to enliven s.164 of the *Parliamentary Electorates and Elections Act 1912* may need careful consideration. In particular, the Committee is keen to avoid any unintended consequences arising from the construction of an amending provision. It is particularly concerned to ensure an appropriate fit between the range of newly created offences under the proposed scheme and s.164 as constructed. It would be highly undesirable in the view of the Committee if, by creating new offences, s.164 was enlivened unintentionally, possibly

as a result of a lack of clarity around the meaning of such terms as 'corrupt conduct' and 'undue influence'. In the case of the former, the Committee notes that the definition of corrupt conduct in the ICAC Act is complex and a matter open to some interpretation.

- 1.187 It also is necessary to ensure an appropriate fit between newly created electoral offences and existing statutory provisions relating to the disqualification of Members and eligibility to nominate and stand as a candidate.

RECOMMENDATION 42: The Committee recommends that the Premier consider amending the *Parliamentary Electorates and Elections Act 1912* to include non-compliance with the legislative requirements under the new scheme, where this has affected the election result, as a specific ground for disputing that result through the Court of Disputed Returns.

- 1.188 Enforcement issues did not feature prominently in the course of the inquiry and the Committee did not have an opportunity to canvass widely the views of witnesses on possible enforcement systems. Nevertheless, the Committee is of the view that a new scheme for regulating electoral expenditure and political party funding will only attain public support and confidence if it operates in a transparent and accountable way and is robustly but fairly enforced. It is the duty of stakeholders in the new scheme to meet their obligations and the requirements under the legislation, and the EFA will need to provide adequate information on the new scheme as part of its regulatory role.

RECOMMENDATION 43: The Committee recommends that:

- (a) the Election Funding Authority undertake educational initiatives targeting parties, candidates, third parties and the voting public about their responsibilities and obligations under the legislation; and
- (b) the Authority be adequately resourced to do so.

- 1.189 While the Committee believes that the EFA is best placed to undertake compliance, the regulatory role under a new scheme would necessitate significant increases to the Authority's existing powers and jurisdiction, and the exercise of new discretions. Extensive policy consultation processes, admittedly in relation to national schemes, have preceded similar developments overseas.
- 1.190 In the event that the regulatory role under a new scheme is not conferred on the Election Funding Authority, there will need to be considerable attention to drafting the legislation and instituting policy measures to ensure existing law enforcement authorities and investigative commissions, such as the ICAC and the NSW Police Force, are equipped and supported to commit to undertaking the regulatory and enforcement responsibilities needed in the new public funding scheme.
- 1.191 As the Federal Government's 2008 Green Paper on electoral reform outlines, there are some difficult issues to resolve when trying to develop an enforcement regime. In light of these significant considerations, the Committee is of the view that compliance with the proposed scheme for the public funding of election campaigns is a matter for

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detailed consideration during the consultation phase and drafting of any new legislation to give effect to the scheme. In particular, there is an obvious need for the Premier to consult with affected stakeholders, including the Election Funding Authority, the NSW Electoral Commission, NSW Police Force, Director of Public Prosecutions and the Independent Commission Against Corruption, on the issues outlined in the report.

- 1.192 Another possible reform, which was not canvassed during the inquiry, would be to combine the offence provisions in both pieces of legislation so that offences under electoral law in New South Wales can be found in the one statute. However, such an approach would require close consultation with the Electoral Commission in order to assess the relative merits of combining the relevant sections of the two statutes into one piece of legislation. The Committee envisages that, at a minimum, it may be desirable to amend the Election Funding and Disclosures Act to consolidate the offence and related penalty provisions under that act into one part dealing with offences, compliance and enforcement.

RECOMMENDATION 44: The Committee recommends that the issues of compliance with the scheme, proposed offences and penalties, and the enforcement system be included by the Premier as areas requiring specific attention in the consultations with relevant stakeholders on any draft legislation arising from the recommendations contained in this report, in particular:

- (a) the extent of the investigatory powers to be conferred on the Election Funding Authority;
- (b) the guidelines and criteria to apply in the exercise of the new investigatory powers, particularly in relation to areas of discretion.

RECOMMENDATION 45: The Committee recommends that in the drafting of any legislation brought forward to give effect to a new scheme for the regulation of electoral expenditure and political party funding, consistent with the recommendations contained in this report, the Premier consult closely with the Electoral Commissioner and the Election Funding Authority in formulating proposed amendments.

FINDING 4: The Committee finds that, while the enforcement system recommended as part of the new scheme for public funding of election campaigns is an important feature of the integrated package of reforms that comprise the scheme, particularly in terms of its deterrent value, the ultimate success of the scheme will turn on the extent to which the reforms achieve cultural change.

The Committee's goal in proposing the amendments contained in these recommendations is to improve the level of compliance under the existing legislation and the capacity to prosecute offences under the legislation as it stands, as well as making provision for an appropriate system of enforcement on the introduction of a new public funding scheme for election campaigns.

The Committee further finds that the extent to which implementation of a new enforcement system assists in achieving these goals is also dependent upon policy and other educational

initiatives targeting parties, candidates, and the voting public about their responsibilities and obligations under the legislation.

1.193 The Committee also is of the view that as a measure of transparency and accountability, the EFA should report publicly on the use of its proposed powers by including statistical information and cases in its annual reports. The Joint Standing Committee on Electoral Matters has within its terms of reference, responsibility for inquiring and reporting into any matter relating to the following electoral laws as referred to it by either House of the Parliament or a Minister that relate to:

- (i) Parliamentary Electorates and Elections Act 1912 (other than Part 2);
- (ii) Election Funding Act 1981; and
- (iii) Those provisions of the Constitution Act 1902 that relate to the procedures for, and conduct of, elections for Members of the Legislative Assembly and the Legislative Council (other than sections 27, 28 and 28A); and the administration of and practices associated with these electoral laws.

On establishment by resolution of both Houses, following the commencement of a new Parliament, the Joint Standing Committee receives a standing reference in relation to any of the aforementioned laws and matters in respect of the previous State general election. It is recommended that the operation of the enforcement system under a new public funding scheme should be a specific area of attention in the next State general election inquiry by the Committee.

RECOMMENDATION 46: The Committee recommends that the EFA report publicly on the use of its proposed powers by including statistical information and cases in its annual reports.

RECOMMENDATION 47: The Committee recommends that the referral from the Premier to the Committee of the inquiry into the State election 2011 encompass as a specific area for examination the operation of the enforcement system and the use of the EFA's investigatory powers, as implemented in the new public funding scheme.

Legislative and administrative reform

Draft Exposure Bill and new Act

1.194 The Committee heard from several inquiry participants who stated that electoral and political finance reform should be implemented through a new Act, which would replace the *Election Funding and Disclosures Act 1981*. The Electoral Commissioner expressed the view that amending the current Act would not be an effective way to implement change and may serve to make the Act more unworkable and difficult to apply.

1.195 It is clear to the Committee that it may be impractical to implement major reform by amending an Act that is, by all accounts, outdated and unwieldy. If time allows, the current Act should be repealed, and a new Act introduced to give effect to funding reform.

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- 1.196 In addition to implementing the Committee's public funding model, the new Act should also reflect the proposals made to the Committee as part of its local government elections inquiry. In the Committee's view, the introduction of public funding legislation would provide an opportunity for streamlining and clarifying provisions that are currently difficult to administer. It is hoped that the implementation, management and administration of the new Act would therefore be more efficient.
- 1.197 As part of the implementation of such major reform, it is important to ensure that there is adequate consultation on the proposed scheme, to reflect the concerns and views of stakeholders and the public. The Committee heard evidence in support of an exposure draft of the public funding bill being released for public comment, so that public consultation is undertaken as part of the implementation process. Inquiry participants also stressed that legislation giving effect to reform should not be so complicated that it inhibits participation in the democratic process and results in an onerous compliance burden on participants. The Committee notes that consultation would be important in terms of seeking to ensure that the compliance burden is not significant and the legislation is easy for both stakeholders and the EFA to interpret and apply. It is also relevant to note that the Committee heard from experts in electoral law who expressed the view that any consideration of the constitutional validity of public funding legislation may take into account the extent to which consultation occurred as part of the drafting of the legislation.
- 1.198 The Committee heard evidence indicating that it may not be possible to draft and implement a new Act by the next state election. Some inquiry participants expressed concern at suggestions that reform would be delayed, with suggestions that a shorter consultation period or phased implementation of the legislation may offer a way for reforms to be introduced without delay. The Committee supports timely implementation of reform, and considers that there is adequate time for a short period of stakeholder consultation on a draft exposure bill.
- 1.199 The Committee is recommending that the *Election Funding and Disclosures Act 1981* be repealed and a new Act reflecting the principles and objectives of the Committee's public funding model be drafted and released for public consultation as an exposure draft bill. In drafting a new Act, the Committee recommends that consideration be given to ensuring those amendments to the *Election Funding and Disclosures Act 1981*, which were sought by the EFA as part of its submissions to the 2008 local government elections inquiry, are dealt with as part of the legislative reform package.
- 1.200 The objects of the Act should reflect the Committee's principles of a democratic political finance scheme, that is, protecting the integrity of representative government, promoting fairness in politics, supporting parties to perform their functions and respecting political freedoms.

RECOMMENDATION 48: The Committee recommends that the Premier implement the Committee's public funding model through new legislation and the *Election Funding and Disclosures Act 1981* be repealed.

RECOMMENDATION 49: The Committee recommends that the public funding legislation be drafted to reflect the principles and objects recommended by the Committee, with an exposure draft of the bill being released for public consultation and comment.

Composition of the Election Funding Authority

- 1.201 The Election Funding Authority is currently comprised of the Electoral Commissioner (as Chairperson), and two other members nominated by the Premier and the Leader of the Opposition respectively. The Electoral Commissioner submitted that although there had not been any problems in practice with this arrangement, the EFA's independence would be enhanced by a change in composition to remove the political appointments.
- 1.202 He put forward that a more appropriate composition might consist of a retired Supreme Court judge as chairperson, the Electoral Commissioner and either a statutory office holder such as the Auditor-General, the Information Commissioner, or a person from the St James Ethics Centre.⁵² This would be more in keeping with the practice for the Australian Electoral Commission, which consists of a Chairperson who is either a judge or a retired Federal Court judge, the Electoral Commissioner, and a non-judicial member, who is usually the Australian Statistician.⁵³
- 1.203 The Committee agrees that the composition of the Election Funding Authority should be more independent and not include political appointees.

RECOMMENDATION 50: That the Premier include in legislation to reform the electoral and political finance regime an amendment to the composition of the Election Funding Authority to include a retired Supreme Court judge as Chairperson, the Electoral Commissioner and another independent office holder.

Local government

- 1.204 The Committee notes that not all participants in the inquiry supported public funding for local government elections. As there is no current local government public funding system to commence from, there are several complexities and variations on the state model requiring consideration before a local government model is developed. The Committee notes that there is an 18 month period between the 2011 state election and the following year's local government elections, which may afford time to test out what are likely to be significant changes before a local government model is developed and implemented.
- 1.205 A detailed and wide ranging review of public funding for local government, as recommended by the Legislative Council Select Committee, has not been undertaken. Although the principles applicable to a state funding model apply equally to local government, the different context and variables referred to in Chapter 10 would mean that modifications would be required to take account of factors identified both by this Committee and the Select Committee. The Committee is unable to make specific recommendations for a model that would reflect the many circumstances that make local government elections unique.
- 1.206 The Committee is reluctant to recommend a model in the absence of stakeholder consensus and a model supported by the Electoral Commission – the key agency in

⁵² Electoral Commission NSW, *Submission 30*, p. 6.

⁵³ Australian Electoral Commission, *Organisational structure*, at http://www.aec.gov.au/About_AEC/index.htm, (accessed 20 February 2010)

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terms of the administration of a model. The Committee received very few submissions from former or current local council members, and did not receive a submission from the Local Government and Shires Association, or from any candidates that only contest council elections. Further stakeholder comment and consultation is needed to deal with issues specific to local government and to ascertain the level of support for local government public funding.

1.207 The NSWEC told the Committee that it had not had sufficient time to develop a funding model applicable to local government and stated its intention to submit a model, having had time to consider all the implications and complications associated with local government elections.

1.208 The Committee is recommending that the development of a local government public funding model should be considered as a separate inquiry process.

RECOMMENDATION 51: The Committee recommends that:

(a) public funding for local government elections be considered as a separate Committee inquiry process.

(b) the issue of public funding for local government be re-visited after the new public funding system has been introduced and tested at the state level.

Chapter Two - Introduction

- 2.1 The purpose of this inquiry is to examine reform of the election finance system for political parties and candidates in NSW, to apply at both state and local level. This chapter provides background information on the referral of the inquiry and terms of reference, and the conduct of the inquiry.
- 2.2 The inquiry is intended to build on the work of the Legislative Council Select Committee on Electoral and Political Party Funding (the Select Committee), which reported in June 2008. The Select Committee was established in June 2007 arising from community concern that donors were exercising perceived or actual undue influence over the decisions of government at a local, State and Federal level. Chapter 2 of the Select Committee's report records a chronology of key events, including the ICAC inquiry into allegations of corruption at Wollongong Council, relevant to electoral and political party funding that informed the Committee's work and recommendations. This inquiry is particularly focussed on the policy, legal and practical issues surrounding the Select Committee's recommendations that a ban be placed on all but small political donations from individuals, that limits be placed on election expenditure and that consultation be undertaken to determine a reasonable increase in public funding of political parties and candidates.

Background to the inquiry referral

- 2.3 On 17 November 2009 the then Premier published draft terms of reference for the inquiry, in order to allow for consultation with interested parties, including the leaders of political parties represented in the NSW Parliament and independent Members of Parliament. Comments received from interested parties were 'taken into account when finalising the draft terms of reference'.⁵⁴
- 2.4 The Committee received the formal referral for the inquiry from the then Premier on 3 December 2009. A number of additions (italicised below) were made to the final terms of reference, in response to the consultation:

That:

- (1) *having regard to the June 2008 report of the Legislative Council Select Committee on Electoral and Political Party Funding which recommended, among other things, that all but small donations by individuals be banned and that further consultation be undertaken on increasing public funding of political parties and elections; and*
- (2) *noting that the Government has announced its support for the introduction of a comprehensive public funding model;*

the Joint Standing Committee on Electoral Matters is to inquire into a public funding model for political parties and candidates to apply at the state and local government levels.

The Committee is to consider the following:

- a) the criteria and thresholds that should apply for eligibility to receive public funding;
- b) the manner in which public funding should be calculated and allocated, including whether it should take into account first preference votes, parliamentary

⁵⁴ Letter from Premier to Committee Chair referring the inquiry, 3 December 2009, p. 2 at <http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/C499102BD6B76127CA2576880001E6AC> (accessed on 22 December 2009)

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- representation, party membership' subscriptions, individual donations and/or other criteria;
- c) any caps that should apply, including whether there should be an overall cap on public funding and/or caps on funding of each individual party or candidate either absolutely or as a proportion of their total campaign expenditure or fundraising;
 - d) the persons to whom the public funding should be paid, including whether it should be paid directly to candidates or to political parties;
 - e) the mechanisms for paying public funding, including the timing of payments;
 - f) whether any restrictions should be imposed on the expenditure of public funding and, if so, what restrictions should apply and how should the expenditure of public funding be monitored;
 - g) whether any restrictions should be imposed on expenditure by political parties and candidates more generally and, if so, what restrictions should apply and how should expenditure be monitored;
 - h) how public funding should apply as part of the broader scheme under which political donations are banned or capped;
 - i) whether there should be any regulation of expenditure by third parties on political advertising or communication;
 - j) *whether there should be any additional regulation to ensure that government public information advertising is not used for partisan political purposes;*
 - k) *any implications arising from the federal nature of Australia's system of government and its political parties, including in relation to intra-party transfers of funds from federal and other state/territory units of political parties;*
 - l) *what provisions should be included in order to prevent avoidance and circumvention of any limits imposed by a public funding scheme;*
 - m) *the compatibility of any proposed measures with the freedom of political communication that is implied under the Commonwealth Constitution;*
 - n) *the impact of any proposed measures on the ability of new candidates, including independent candidates and new political groupings, to contest elections;*
 - o) *any relevant reports and recommendations previously made by the Select Committee on Electoral and Political Party Funding; and*
 - p) any other related matters.

2.5 In the letter referring the inquiry, the then Premier indicated that, since electoral funding reform is a '... significant issue that affects all participants in the electoral process, ... full consideration through the multi-party Committee's inquiry process is the most appropriate way to progress the reforms.'⁵⁵

Conduct of the inquiry

2.6 On 9 December 2009 the Committee held a preliminary hearing with the Electoral Commissioner, Mr Colin Barry. He gave a broad opening address outlining his initial views about the inquiry.

⁵⁵ Letter from Premier to Committee Chair referring the inquiry, 3 December 2009, p. 2 at <http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/C499102BD6B76127CA2576880001E6AC> (accessed on 22 December 2009)

- 2.7 The Committee also advertised for submissions on 9 December 2009, with a closing date of 22 January 2010. The Chair of the Committee wrote to all Members of Parliament and all political parties registered for both state and local government elections inviting submissions.
- 2.8 In total, 30 submissions were received from participants, including independent authorities such as ICAC and the Audit Office of NSW, political parties, Members of Parliament, academics specialising in constitutional and electoral law, as well as third parties such as Unions NSW and Urban Taskforce Australia. A full list of submissions and their publication status is at Appendix 1.
- 2.9 Following the preliminary hearing and call for submissions, the Committee held two further public hearings on 1 and 2 February 2010. Witnesses included representatives from political parties, third parties such as Action on Smoking and Health (ASH), as well as ICAC and the Audit Office of NSW. A complete list of all witnesses who appeared before the Committee can be found at Appendix 2. Transcripts of evidence from the public hearings held during the inquiry, along with other documents relating to the inquiry, are available on the Committee's website at www.parliament.nsw.gov.au/electoralmatters.
- 2.10 In order to explore the complex constitutional and legal issues associated with the inquiry, the Committee invited four prominent constitutional and electoral law academics to participate in a roundtable discussion on the afternoon of 1 February 2010. Dr Joo-Cheong Tham, Associate Professor Anne Twomey, Associate Professor Graeme Orr and Professor George Williams discussed matters including the implied freedom of political communication and its impact on expenditure restrictions, restricting campaign spending by third parties and political parties, as well as detailing their proposals for a public funding model.
- 2.11 On 22 February, the Committee took final in camera evidence from the NSW Electoral Commissioner, Mr Colin Barry. During the hearing Mr Barry outlined the Electoral Commission's proposed public funding model. The Committee resolved to provide the Electoral Commissioner with a copy of the in camera transcript from 22 February 2010 with those sections of the transcript it was anticipated the Committee may include in its report highlighted. The Electoral Commissioner was provided with an opportunity to comment on the proposed publication of these sections of the transcript and he did not object to publication of these sections, as necessary.
- 2.12 On 5 March 2010 the Chair wrote to the Premier to advise that the Committee was not able to report to the Parliament by the original specified date of 12 March 2010. The Premier's response of 11 March 2010 indicated support for a two-week extension to the reporting dates.
- 2.13 The Committee wishes to thank the organisations, parties and individuals who made submissions and gave evidence as part of the inquiry.

Chapter Three - Background

- 3.1 This inquiry follows from the Legislative Council Select Committee on Electoral and Political Party Funding (Select Committee) report that was published in June 2008. Since the report was drafted, there have been significant amendments to the electoral funding regime, and the government has published a report commissioned from Associate Professor Anne Twomey on the legal and constitutional issues surrounding further reform of election campaign funding, including donations and public funding. This chapter provides information on these developments.
- 3.2 New South Wales is not alone in looking at reform of its election-funding scheme. A number of other Australian jurisdictions are currently or have recently been examining and consulting on options for reform. This chapter also provides an overview of these activities.

Election Funding and Disclosures Act 1981 – Recent developments

- 3.3 The funding of election campaigns in NSW is governed by the *Election Funding and Disclosures Act 1981*⁵⁶. Chapter 5 of the Select Committee report outlines the current electoral funding scheme, key provisions of the Act, including amendments to the Act up until June 2008.
- 3.4 Since then there have been some significant amendments to electoral law in NSW. Firstly, in June 2008 the *Election Funding Amendment (Political Donations and Expenditure) Act 2008* and *Local Government and Planning Legislation Amendment (Political Donations) Act 2008* were introduced to ‘strengthen the regulation of political donations and electoral expenditure in relation to State and local government elections and elected members’.⁵⁷ These amendments implemented a number of the Select Committee’s recommendations, in whole or part.
- 3.5 The *Election Funding Amendment (Political Donations and Expenditure) Act 2008*:
- (a) requires biannual disclosures of political donations and electoral expenditure (instead of 4-yearly disclosures following a general State or ordinary council election), and
 - (b) extends reporting to elected members of State Parliament and elected local councillors (in addition to reporting by parties and candidates for election), and
 - (c) imposes (in line with Commonwealth proposals) an obligation to disclose the details of all political donations of or above \$1,000 (with separate donations from the same person over the same financial year being aggregated for disclosure purposes), and
 - (d) requires the disclosure of details of membership or affiliation fees of or above \$1,000 payable to a party by individuals, industrial organisations or other entities, and
 - (e) introduces new rules for the management of campaign finances that will prevent elected members and candidates from having personal campaign accounts or having direct involvement with the receipt and handling of political donations (with money paid into and from special campaign accounts for use exclusively for campaign and other authorised purposes and managed by the agent of the party concerned or other official agent of the member or candidate), and

⁵⁶ Formerly the *Election Funding Act 1981*. The name of the Act was amended by the *Election Funding Amendment (Political Donations and Expenditure) Act 2008*.

⁵⁷ Explanatory Notes, *Election Funding Amendment (Political Donations and Expenditure) Act 2008*

- (f) prohibits entities from making reportable political donations unless they have an ABN, and
- (g) prohibits the making of certain indirect campaign contributions, and
- (h) increases the penalty for failing to make disclosures or making false disclosures and confers increased investigative powers on the Election Funding Authority, and
- (i) applies the disclosure provisions (but not the election funding provisions) of the *Election Funding Act 1981* directly to local government elections (instead of those provisions being applied with modification of terminology by provisions of the *Local Government Act 1993*)⁵⁸.

3.6 The *Local Government and Planning Legislation Amendment (Political Donations) Act 2008* amended the *Local Government Act 1993* and the *Environmental Planning and Assessment Act 1979*:

- (a) requires the general manager of a council to record which local councillors voted for, and which local councillors voted against, each planning decision of the council (and makes that record publicly available), and
- (b) enables matters relating to political donations in connection with local councillors to be referred to the Pecuniary Interest and Disciplinary Tribunal, and
- (c) when any relevant planning application is made to the Planning Minister, Department or local council, requires the applicant (or any person making a public submission opposing or supporting the application) to disclose political donations and gifts made within 2 years⁵⁹ before the application or submission is made.

3.7 The local government amendments were ‘...designed to improve transparency in the planning approval process, consistent with a number of recommendations made by the Independent Commission Against Corruption... in its September 2007 Position Paper – Corruption Risks in NSW Development Approval Processes’⁶⁰ as advocated in the Select Committee report.

3.8 In its response to the Select Committee report, the Government explained that those recommendations that were not implemented:

...raise broader questions about the role that private funding should play, if any, in the electoral system, and who should bear the costs of election campaigns if private funding is banned or limited.

Bans and caps on private donations and expenditure raise complex constitutional, jurisdictional, and practical issues that must be dealt with if the statutory regime is to survive constitutional challenge and be workable.

...

The reform of political donations requires intergovernmental action... jurisdictional issues arising from bans and caps on donations in New South Wales could be overcome by a co-ordinated, national approach to campaign finance regulation. The government therefore considers that the Green Paper process is the best forum in

⁵⁸ Explanatory Notes, *Election Funding Amendment (Political Donations and Expenditure) Act 2008*

⁵⁹ Explanatory Notes, *Local Government and Planning Legislation Amendment (Political Donations) Act 2008*

⁶⁰ New South Wales Government, *Response to the Report of the Select Committee on Electoral and Political Party Funding*, at

[http://www.parliament.nsw.gov.au/Prod/parlament/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/\\$FILE/081219%20Government%20Response.pdf](http://www.parliament.nsw.gov.au/Prod/parlament/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/$FILE/081219%20Government%20Response.pdf) (accessed 24 March 2010) p.2.

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which to pursue issues relevant to the remainder of the Committee's recommendations.⁶¹

3.9 Secondly, in December 2009 the *Election Funding and Disclosures Act 1981* was amended by the *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009* to '...prohibit donations from property developers'.⁶² The Act provides that:

- (a) it is unlawful for a person to make a political donation if the person is a property developer or makes the donation on behalf of a property developer, and
- (b) it is unlawful for a person to accept a political donation that was made by or on behalf of a property developer, and
- (c) it is unlawful for a property developer or a person on behalf of a property developer to solicit another person to make a political donation.

[I]t... includes close associates of property developers as property developers for the purposes of these restrictions... [and] loans as political donations (other than loans from financial institutions).⁶³

3.10 This Act was explained by the government as a first step in seeking to 'remove a culture of donations from ...[the] political landscape'⁶⁴.

Report on legal and constitutional issues

3.11 In June 2008 the NSW Government announced that it had commissioned Associate Professor Anne Twomey to prepare a paper on the 'constitutional and legal issues surrounding the reform of election campaign financing – including donations and public funding'⁶⁵. Professor Twomey's report 'The reform of political donations, expenditure and funding' (the Twomey report), published in November 2008, raised a number of issues:

1. Jurisdictional issues

Funds raised by State branches of political parties are often used to fund candidates for federal elections as well as state elections... The consequence is that a State law that imposes limits on political donations made in New South Wales, or given to a NSW branch of a party, might be regarded as unconstitutional because it interferes with Commonwealth elections... A co-operative Commonwealth/State approach to the financing of political parties is therefore preferable.

2. Constitutional constraints

Laws that ban or impose limits upon political donations or election campaign expenditure are likely to be regarded as burdening the constitutionally implied freedom

⁶¹ New South Wales Government, *Response to the Report of the Select Committee on Electoral and Political Party Funding*, at [http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/\\$FILE/081219%20Government%20Response.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/$FILE/081219%20Government%20Response.pdf) (accessed 24 March 2010) p.11-12.

⁶² Explanatory Notes, *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009*

⁶³ Explanatory Notes, *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009*

⁶⁴ Mr Nathan Rees, Legislative Assembly, Agreement in principle speech, *Election Funding and Disclosures Amendment (Property Developers Prohibition) Bill 2009*, 25 November 2009, p.52

⁶⁵ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, at http://www.dpc.nsw.gov.au/publications/news/stories/election_campaign_finance_reform (accessed 17 December 2009).

of political communication... Such laws will only be held valid by the courts if they are reasonably and appropriately adapted to serving a legitimate end in a manner which is comparable with the system of representative and responsible government prescribed by the Commonwealth Constitution (the *Lange* test).

3. The principal aims of reform

Proposals will also need to be tested against the principal aims of reform. The primary aim, which has been accepted as a 'legitimate end' by the High Court, is to avoid the risk and perception of corruption and undue influence. Other aims might include the reduction of the advantage of wealth in campaigning, creating a more level playing field and improving the diversity and depth of information to which voters have access so they can be genuinely informed in exercising their choice.

4. Banning or capping political donations

An outright ban on political donations is likely to be struck down as constitutionally invalid on the ground that it is not 'reasonably appropriate and adapted' to serving the legitimate end of reducing the risk of corruption and undue influence. Banning small donations from individuals, for example, would not assist in achieving that end. Caps upon political donations are more likely to be constitutionally acceptable, but this would depend upon the level of the cap and its effect upon the capacity of parties and candidates to communicate with electors. There are a number of practical issues to be confronted about the sources and types of donations to be capped, the level at which caps should be set, and how to substitute for lost revenue to parties. The most difficult problem is how to prevent evasion of the caps through campaigning by third parties that are not limited in the sources of their funds and which may support political parties or particular policies.

5. Expenditure limits for political parties, candidates and third parties

Expenditure limits applied to political parties and candidates have a direct effect on their capacity to communicate with the electorate. Accordingly, any such law must be very carefully balanced in order to be held constitutionally valid. The most contentious area is the imposition of expenditure limits on third parties. If no such limits are imposed on third parties, the effectiveness of limits imposed on political parties or candidates will be undermined by third party electoral campaigning. If limits are imposed on third parties, there is a high risk of constitutional invalidity. Practical issues must also be considered, such as the periods for which expenditure limits apply, the types of expenditure to which they apply and the level at which they ought to be set. Expenditure limits may also need to be considered as part of an entire scheme, involving limits on donations and funding.

6. Public funding of political parties and candidates

Public funding itself does not burden freedom of political communication, but rather enhances opportunities for political communication. However, if it forms part of a scheme which involves limits on political donations or expenditure and therefore potentially burdens political communication, the whole scheme will need to be reasonably appropriate and adapted to serve a legitimate end, as required by the *Lange* test. Accordingly, great care would have to be taken with setting thresholds for receiving public funding and with setting the level of funding in a manner that does not unduly favour incumbents or discriminate against minor parties or new parties. Consideration could be given to using matching funding as one means of accommodating support for new parties.

7. Principle of equality

The High Court has not recognised any constitutional implication requiring political equality, and is unlikely to do so. However, where there is a burden on freedom of political communication and the High Court is considering the *Lange* test, laws that

Background

unduly discriminate against minor and new parties or favour incumbents will be vulnerable.⁶⁶

3.12 In its response to the Select Committee Report, the NSW Government indicated that:

A key message to emerge from Dr Twomey's Paper is that in order for fundamental reform of the State's donation laws to be effective, a co-ordinated national approach is vital. To this end, the NSW Government is working closely with the Commonwealth and other States as part of the Commonwealth Government's Electoral Reform Green Paper process.⁶⁷

Developments in other Australian jurisdictions

3.13 Chapter 4 of the Legislative Council Select Committee report provides details of the public funding and disclosure arrangements in other Australian jurisdictions.⁶⁸ The Commonwealth, New South Wales, Victoria, Queensland, Western Australia and the Australian Capital Territory (ACT) provide public funding for elections, while the remaining states and territories do not. While broadly similar in design and scope, there are some significant differences between the public funding schemes in Australian jurisdictions. For example, in some jurisdictions (including NSW) public funding is paid on the provision of receipts for expenditure, while in others public funding is made automatically in accordance with entitlement. While most jurisdictions require political parties to disclose certain donations, in Victoria, South Australia and Tasmania, there are no requirements to disclose donations.⁶⁹

3.14 While different election funding and donation disclosure schemes operate across Australia, political fundraising across national, state and local government is interconnected. Intra-party transfers allow for funds raised by state branches of political parties to fund candidates for federal elections, and for donations from one state or territory branch to another.⁷⁰

3.15 A number of Australian jurisdictions are looking to reform their electoral laws and examining political funding, expenditure and disclosure reforms. The various inquiry and consultation processes either underway or recently completed are outlined below.

⁶⁶ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, at http://www.dpc.nsw.gov.au/publications/news/stories/election_campaign_finance_reform (accessed 17 December 2009), pp.1-2.

⁶⁷ New South Wales Government, *Response to the Report of the Select Committee on Electoral and Political Party Funding*, at

[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/\\$FILE/081219%20Government%20Response.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/$FILE/081219%20Government%20Response.pdf) (accessed 24 March 2010) p.3.

⁶⁸ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008.

⁶⁹ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.19.

⁷⁰ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, at http://www.dpc.nsw.gov.au/publications/news/stories/election_campaign_finance_reform (accessed 17 December 2009), pp.1 and NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.108.

Commonwealth

- 3.16 On 19 December 2008 the Australian Government released the 'Electoral Reform Green Paper: Donations, Funding and Expenditure' (the Green Paper)⁷¹. The Government invited submissions by 23 February 2009 on the issues that need to be considered in improving and modernising electoral funding and disclosure requirements. To date, 50 submissions have been published on the Department of Prime Minister and Cabinet website.⁷²
- 3.17 The Green Paper describes a number of drivers for reform of campaign funding at a Commonwealth level:
- Spiralling costs of electioneering have created a campaigning 'arms race' – heightening the danger that fundraising pressures on political parties and candidates will open the door to donations that might attempt to buy access and influence.
 - New media and new technologies raise questions of whether our legislation and regulation remain appropriate and effective.
 - 'Third party' participants in the electoral process have played an increasing role, influencing the political contest without being subject to the same regulations which apply to political parties, raising concerns about accountability and transparency.
 - Australia has overlapping electoral systems, regulating different levels of government, creating uncertainty and confusion.⁷³
- 3.18 As well as considering reform to Commonwealth electoral law, the Green Paper discusses the advantages of harmonised national reform of election campaign funding, in that participants in the political process can lodge one disclosure return, rather than separate returns for federal, state and territory jurisdictions. 'Ultimately, harmonisation could enable the establishment of a single authority to administer a national disclosure scheme.'⁷⁴
- 3.19 A number of options for reform relating to public funding, private funding (donations and other contributions), and bans and caps were canvassed. The report makes clear that 'no one set of changes affecting one element of regulation should be seen in isolation...', but that 'each approach... could be combined in part or full with other approaches.'⁷⁵ Chapter 10 of the Green Paper outlines a number of possible models for reform:
- Expenditure constraint – placing expenditure caps on candidates and political parties.

⁷¹ See http://www.dpmc.gov.au/consultation/elect_reform/green_paper.cfm#how (accessed on 17 December 2009).

⁷² See http://www.dpmc.gov.au/consultation/elect_reform/submissions.cfm (accessed on 17 December 2009).

⁷³ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf (accessed 20 February 2010), p.1.

⁷⁴ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf (accessed 20 February 2010), p.24.

⁷⁵ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf (accessed 20 February 2010), pp. 73.

Background

- Donation constraint – imposing caps on donations to candidates and political parties.
- Systemic caps – imposing caps on both expenditure and donations.
- Complete donation ban and increased public subsidisation.
- Advertising regulation – imposing limits on the amount of television advertising expenditure allowed during election campaigns.
- Citizen-based – imposing a ban on political donations from anyone other than individual donors.
- Specific donor regulation – imposing a ban on donations from specific donors, such as property developers; tobacco, alcohol and gaming companies; organisations that obtain or seek Government contracts; or lobbying firms.
- Enhanced disclosure – requiring quicker reporting of donations.
- No change.⁷⁶

3.20 At the time of drafting this Report no further action has been taken in relation to the Green Paper.

Victoria

3.21 On 16 April 2008 the Victorian Parliament's Electoral Matters Committee received terms of reference to inquire into whether electoral legislation should be amended to introduce a system of political donations disclosure and/or restrictions on political donations. The Committee was asked to consider the outcome of similar reforms introduced in Canada, the United Kingdom and other relevant jurisdictions.

3.22 As part of its inquiry, the Committee travelled to Canada, the United States, the United Kingdom and New Zealand to learn about the outcome of legislative reform in those jurisdictions.⁷⁷ The Committee reported in April 2009, and while canvassing a broad range of issues, the Committee elected to 'not make a comprehensive series of recommendations... but instead await developments at the Commonwealth level'⁷⁸. One of the recommendations was that 'the Victorian and Commonwealth Governments consider how best to harmonise political finance laws to ensure a uniform and consistent approach'.⁷⁹

The Australian Capital Territory

3.23 On 19 November 2009 the Legislative Assembly of the ACT referred the matter of campaign finance reform to the Standing Committee on Justice and Community Safety for inquiry and report. The terms of reference for the inquiry cover the regulation of donations to political parties, campaign expenditure, financial disclosure laws, candidate and election funding, as well as Commonwealth and ACT laws.

⁷⁶ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf (accessed 20 February 2010), pp. 73-8.

⁷⁷ Victorian Electoral Matters Committee, *Inquiry into Political Donations and Disclosure*, April 2009, *3rd Report to Parliament*, p.5.

⁷⁸ Victorian Electoral Matters Committee, *Inquiry into Political Donations and Disclosure*, April 2009, *3rd Report to Parliament*, p.ix.

⁷⁹ Victorian Electoral Matters Committee, *Inquiry into Political Donations and Disclosure*, April 2009, *3rd Report to Parliament*, p. 20.

Submissions are invited by 12 March 2010. Public hearings will be held in February and March 2010.

Queensland

3.24 As part of its review and public consultation on 'Integrity and Accountability in Queensland', the Queensland Government has stated that it will overhaul political donations and campaign funding if the Commonwealth does not act by July 2010:

The regulation of political donations is currently being examined by the Commonwealth Government. Given the desirability of achieving national uniformity on this issue, Queensland will have regard to the national debate, seeking to take a leading role in discussions. Queensland will seek to adopt nationally consistent policy in relation to political donations. However, if the Commonwealth does not act by July 2010, Queensland will lead the nation by introducing a cap on political donations of \$1000 per donor per year.

Any restriction on political fundraising activities will require parallel consideration of the need to increase public funding.⁸⁰

⁸⁰ Queensland Government, Response to Integrity and Accountability in Queensland, November 2009, at <http://www.premiers.qld.gov.au/community-issues/open-transparent-gov/integrity-and-accountability-review.aspx> (accessed 6 January 2010), p.13.

Chapter Four - Principles

Principles of public funding and disclosure

- 4.1 At the public hearing to the inquiry on 9 December 2009, Mr Colin Barry, the Electoral Commissioner and Chair of the Electoral Funding Authority, outlined high-level principles that 'should underpin the regime of public funding and disclosure' along with 'ideas for a framework for establishing a comprehensive and integrated system'.⁸¹ He argued that the Committee should firstly determine the underlying principles that any new scheme should embody in order to 'provide a framework for the Committee to test policy options in each of the 16 areas in the terms of reference'.⁸² Otherwise, he argued 'the Committee will have no guiding beacon to aim for and, as such, policy options and models that are proposed will only be tested in the public debate over perceived partisan outcomes.'⁸³
- 4.2 Mr Barry outlined the following four principles for a 'truly democratic political finance scheme'⁸⁴. The *first principle* he discussed was *protecting the integrity of representative government*, in that 'elected members of Parliament and local government councillors are accountable to the citizens whom they represent' and 'are expected to act in the interests of those citizens.'⁸⁵ Following from this principle, he argued that the legislative framework covering funding and disclosure must prevent corruption.
- 4.3 In discussing corruption in this context, Mr Barry referred the Committee to the analysis of 'political corruption' provided by Dr Joo-Cheong Tham, where he argues that corruption can manifest itself in at least four ways:

First is corruption of the electoral process. This occurs when the electoral laws are disregarded by participants...

The *second* is that graft is the most obvious and simplest concept to understand. This occurs when the receipt of money or gifts or a promise to advantage the recipient results in an elected official using his or her position to improperly advantage the contributor. The *third* is undue influence. This is more insidious and occurs when there is an act of delivering preferential treatment to financial donors rather than acting in the public interest. Typically, such behaviour involves giving preference to financial backers rather than acting in the public interest. The insidious nature of this form of corruption is that it is not necessarily linked to a specific transaction but, rather, is a culture of delivering preferential treatment to donors. Undue influence also arises when financial backers have preferential access to an elected official.

⁸¹ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 2.

⁸² Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 2.

⁸³ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 2.

⁸⁴ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 2.

⁸⁵ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 2.

The *fourth* is the misuse of public resources. This is where an elected official uses resources provided from the public funds for personal or political advantage.⁸⁶
[*emphasis added*]

- 4.4 The *second principle* advocated by Mr Barry was *promoting fairness in politics* in the sense that political freedom is made formally available to all citizens and that they have a genuine chance to make a difference.⁸⁷ In order to have leverage, citizens should have the ‘ability to act as a group’ and ‘access to the public space and the forums in which public opinions are voiced’, that is, the mass media. He argued that the electoral and political finance regime should address the risk that the financial strength of some allows them to drown out the voice of others or makes it impossible for others to be heard.⁸⁸
- 4.5 Another aspect of promoting fairness in politics as described by Mr Barry was that any scheme should promote ‘fair rivalry between the main parties’ to enable citizens to make meaningful choices.⁸⁹ Also, he pointed to the need to recognise the increasingly important role of third parties in the system of political finance:
- Third parties, for instance, should not get under the radar. They need to be seen as major players. They must not drown out the voice of the real players, the candidates and the political parties. Consequently, they need to be regulated and subject to rules.⁹⁰
- 4.6 The *third principle* outlined by Mr Barry is that public funding should *support parties to perform their functions*. He explained:
- There is no doubt that political parties are the major players in the Australian representative democracy. They are the main opinion framers and the agenda setters. At Federal and State levels the Parliaments are party Chambers. The lawmakers are party members and, without doubt, the majority of people who participate in politics in Australia do so through the party system. The parties are central to our system of representative democracy, and in moving forward they will remain as such well into the future. Consequently, the political finance framework that the Committee recommends should acknowledge the key role played by the political parties. The parties need to be appropriately funded in order for them to fulfil their functions as a party. This does not translate into giving parties what they think they need; it is more fundamental than this. It is to provide parties with adequate funding in order for them to do what parties ought to perform. The question I pose for this Committee is: What ought parties do?⁹¹
- 4.7 Mr Barry referred to Dr Tham’s analysis of the functions of political parties in a representative democracy:
- They should represent the diverse opinions in New South Wales and offer genuine choice and cater for different opinions
 - They should perform the function of agenda setting, by raising issues for debate and presenting ideas for consideration

⁸⁶ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 3.

⁸⁷ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 3.

⁸⁸ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 3.

⁸⁹ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 3.

⁹⁰ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 3.

⁹¹ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, pp. 3-4.

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- They should play a participatory role by being a vehicle for citizens to become involved in the political process, debate and agenda setting
- They should perform a governance role when their members are elected to office.⁹²

4.8 Mr Barry discussed the way in which public funding should be calculated and allocated:

The funding regime will need to be sufficiently flexible to enable parties to be financed on the basis of their activities in these key areas, not just on what the parties themselves consider is necessary. Simply funding parties only on the basis of votes received at the most recent election may not be appropriate; it may be too restrictive. The Committee may wish to consider including in the mix of funding such things as membership numbers, and special grants for policy development, training of officials and public information, all of which would assist parties to fulfil their functions.⁹³

4.9 The *fourth principle* proposed by Mr Barry was *respect for political freedoms*, which he described as follows:

In our representative democratic system it should not be the case that the winner takes all. Political competition is the joust of ideas, policies and ideologies. Whoever wins has to govern for all. Deliberation is the basis for citizens to become involved in the process of law making. Deliberation involves justifying, arguing for various positions, and seeking to influence.⁹⁴

4.10 He argued that free political communication is integral to democratic deliberation and that regulation of political funding should not unduly restrict political communication. However, he was clear in stating that this should not mean that there is no regulation, but that it should be 'careful, calibrated regulation based on legitimate outcomes'.⁹⁵

4.11 Another aspect of democratic deliberation as described by Mr Barry was informed voting. This includes adequate disclosure provisions so that citizens have '...access to information about the funding activities of the parties and candidates at the time of the election, and in between elections in the case of parties'.⁹⁶

Legislative Council Select Committee Report

4.12 The Legislative Council Select Committee considered the *Election Funding Act 1981* (the Act) in detail and they found that the lack of a clear purpose and objectives made it very difficult to '...evaluate the effectiveness of the election funding scheme, and whether it is doing what it was designed to do'.⁹⁷ They recommended that the Premier review the Act to clarify its purpose and objectives.⁹⁸

⁹² Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 4.

⁹³ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 4.

⁹⁴ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 4.

⁹⁵ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 4.

⁹⁶ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 4.

⁹⁷ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.193.

⁹⁸ Recommendation 40, NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.193.

Developments in other jurisdictions

New Zealand

4.13 The approach outlined by Mr Barry of adopting general principles to guide the development and interpretation of election finance reform is similar to the approach currently being undertaken by the New Zealand Government. While the New Zealand Government is still consulting broadly on a new election finance system, they have decided to adopt general principles to aid the interpretation of election finance law. The rationale behind this approach is explained in the New Zealand Ministry of Justice *Electoral Finance Reform: Issues Paper*, which states:

General principles are important to the development of new legislation, particularly in a complex area like electoral finance where the rules themselves can be very detailed. If there is widespread agreement on clear principles, then we will be in a good position to know what the law means and how people who participate in electoral campaigns should act.⁹⁹

4.14 Subject to further consultation, the following seven principles have been identified for incorporation into the purpose section of forthcoming New Zealand legislation: clarity; equity; freedom of expression; participation; transparency; accountability and legitimacy.¹⁰⁰

The Commonwealth

4.15 The Federal Government's *Electoral Reform Green Paper: Donations, Funding and Expenditure* (December 2008), which examines reform of the Commonwealth election funding and disclosure regime, identifies a number of principles that 'may be considered to be reflected, to varying degree, in the different approach to regulation of electoral funding and disclosure in place throughout Australia and in comparable countries internationally.'¹⁰¹ These are:

- Integrity – establishing conditions that minimise the risk or perception of undue influence or corruption in the system.
- Fairness – establishing, as far as possible, fairness in access to resources for participants in an election.
- Transparency – providing enough information to citizens about financial transactions of identified participants in the electoral process, including political parties and candidates, to inform their choice of representatives.
- Privacy – balancing citizens' interests in obtaining information with respect for individuals' right to privacy.
- Viability – ensuring that political parties and candidates have sufficient financial support to enable them to provide the electorate with a suitable choice of representatives.
- Participation – encouraging citizens to participate in the political process through a variety of different means.
- Freedom of political association and freedom of expression – avoiding unnecessary burdens or restrictions on these freedoms.

⁹⁹ New Zealand Ministry of Justice, *Electoral Finance Reform: Issues Paper*, May 2009, p. 10.

¹⁰⁰ New Zealand Ministry of Justice, *Electoral Finance Reform: Proposal*, 2009, p. 11.

¹⁰¹ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf (accessed 20 February 2010), p.17.

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- Accountability and enforceability – ensuring participants in the electoral process are accountable for relevant financial information.
- Fiscal responsibility – ensuring the public costs involved in democratic processes, including election costs and public funding costs, are not unreasonable.
- Efficiency and effectiveness – ensuring that regulation balances these principles against the costs of compliance and administration.¹⁰²

4.16 Similar to the approach advocated by Mr Barry, the *Green Paper* states that these principles ‘may provide suitable criteria for evaluation of existing electoral regulation, and evaluation of options for changing the system’.¹⁰³

Inquiry participants’ views

4.17 There seemed to be consensus among witnesses to the inquiry that the principles outlined by Mr Barry were both useful and appropriate.¹⁰⁴ However, Mr Besseling, an independent Member of Parliament, made a suggestion that there should be more emphasis on the role of independent candidates in the political system, as well as parties.¹⁰⁵

4.18 The Committee particularly sought evidence from the constitutional academics on the Electoral Commissioner’s proposed principles. Dr Tham in particular expressed support for the principles as:

The danger is that without any governing principles, without some kind of moral compass through this debate, we will delve into a morass of regulatory detail. Basically, we are having extended debates on questions about complexity and practicalities with no firm anchor as to how to guide us through these debates. These abstract principles are important. People are debating how to prioritise them but I think those principles should be at the forefront of any debate.

4.19 While all academics indicated that the principles were ‘unobjectionable’ and useful in guiding the debate about reform, they pointed to some practical issues in applying the principles. Dr Orr spoke of the difficulties in:

... balancing them [the principles] when you are not legislating in the abstracts, so you need to think about the nature of politics in New South Wales, the ongoing issues and concerns that have caused inquiries such as this to be underway for many years now and, practically, the things you are seeking to achieve in reforming the field. Principles are important to keep in mind but they are not the animating concerns.¹⁰⁶

¹⁰² Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf (accessed 20 February 2010), p.17.

¹⁰³ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf (accessed 20 February 2010), p.17.

¹⁰⁴ Liberal Party of Australia (NSW Division), *Submission 17*, p.6; Mr Ben Franklin, State Director, NSW National Party *Transcript of evidence*, 1 February 2010, p. 3; Mr Graham Freemantle, Acting State Manager, Christian Democratic Party, *Transcript of evidence*, 2 February 2010, p. 27; Associate Professor Graeme Orr, *Transcript of evidence*, 1 February 2010, p. 35; Dr Joo-Cheong Tham, Senior Lecturer, Melbourne University, *Transcript of evidence*, 1 February 2010, p. 35; Professor George Williams, *Transcript of evidence*, 1 February 2010, p. 35; Associate Professor Anne Twomey, *Transcript of evidence*, 1 February 2010, p. 36;

¹⁰⁵ Mr Besseling, Member for Port Macquarie, *Transcript of evidence*, 2 February 2010, p. 17.

¹⁰⁶ Associate Professor Graeme Orr, *Transcript of evidence*, 1 February 2010, p. 35.

- 4.20 Dr Twomey illustrated this point with the potential conflict between the idea of a level playing field as opposed to free speech, as has been seen in both Canada and the United States:

In the United States Supreme Court you see free speech winning out over notions of equality and level playing fields. In Canada you see them at a much more equal level, and equality may well override free speech. We can talk about having four sets of principles but, in the end, there will come a point where one may need to have primacy over the other.¹⁰⁷

- 4.21 Professor Williams expressed the view that while the principles could be very useful as object clauses for legislation, more specific principles might be needed in thinking about reform of campaign financing:

Firstly, I am looking for a system that changes the primacy to one of public funding away from private funding and the legislative scheme should reflect that. *Secondly*, when we are dealing with those non-public funds the scheme should be as comprehensive as possible in dealing with those funds, and that all potential participants, third parties and the like should be drawn in as part of that regulatory scheme.

Thirdly, I think that any scheme must deal with both demand and supply when we are dealing with political funding and donations. So I would be looking at both caps and expenditure as part of a system. I believe that unless you deal with demand and supply there is a level of futility in dealing with these problems. *Fourthly*, obviously I think it has to be constitutionally valid, so it must pass the key legal tests... The *last* principle that I would put on the table is that you have to minimise compliance costs, and it must be an efficient and cheap system to run...

Constitutional issues

- 4.22 The constitutional issues associated with reform of the political finance system need to be considered in light of whole reform package. The doctrine of implied freedom of political communication, as well as the potential for inconsistency between state and federal laws are particularly relevant to proposals for electoral and political finance reform.

Implied freedom of political communication and the NSW Constitution Act

- 4.23 In considering constitutional constraints, the Committee heard evidence that although it is unclear whether the New South Wales *Constitution Act* contains an implied freedom of political communication, funding reform should nevertheless be consistent with the doctrine. As stated by Associate Professor Twomey:

... The question then is whether the entrenched provisions in the NSW *Constitution Act* collectively impose a system of representative and responsible government from which implications, such as freedom of political communication, could be drawn.

The High Court has held that the Western Australian *Constitution Act* does contain an implication of freedom of political communication, because it contains an entrenched provision requiring that Members of Parliament be 'chosen directly by the people'. In *Muldoney v South Australia*, the Court did not need to consider the issue as the South Australian Solicitor-General conceded that the South Australian *Constitution Act* also contained such an implication.

The position is less clear in New South Wales, given the different nature of the entrenched provisions in its *Constitution Act*, including the absence of an entrenched

¹⁰⁷ Associate Professor Anne Twomey, *Transcript of evidence*, 1 February 2010, p. 36.

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requirement that Members of Parliament be directly chosen by the people. ... Given this doubt, it would be sensible to seek to ensure that any State law concerning political donations and expenditure would be consistent with the implications that might be derived from an entrenched constitutional system of representative government at the State level.¹⁰⁸

4.24 During the roundtable discussions, Associate Professor Twomey elaborated on this issue, arguing that although the implied freedom of political communication has not been tested in relation to the New South Wales Constitution Act, the High Court test should nevertheless be considered in the drafting of any relevant legislation:

... in the way you are framing your law, you should at least work on the cautious assumption that the High Court would find there is an implied freedom of political communication to make sure that your law is valid. It may well be that they find otherwise; but ... it is probably more likely than not that a court would find that there is an implied freedom of political communication in New South Wales. That is enough to make me to want to be cautious to make sure that any law is consistent with that to ensure that it is valid. There would not be much point in creating a system that got knocked down.¹⁰⁹

4.25 Professor George Williams also told the Committee that, although it was arguable as to whether freedom of political communication would be implied from the New South Wales Constitution, 'it very likely would be found that the Federal freedom that we know exists does apply to protect certain things that occur at the State level because of the way State parties and candidates are integrated with Federal political debates'.¹¹⁰

Relevant case law and its application

4.26 In noting the constitutional issues raised by electoral funding reform, the Federal Government's Green paper outlined the following relevant case law:

- *Lange v Australian Broadcasting Corporation*¹¹¹ - the High Court found that freedom of communication on matters of government and politics was an 'indispensable incident' of the system of representative and responsible government established by the Constitution. The Court found that the freedom of political communication is not an individual right, it is instead a limit on the Commonwealth's power to enact legislation infringing the freedom of political communication. The Court also found that the freedom of political communication is not absolute - it is limited to the extent necessary for the effective operation of Australia's system of representative and responsible government. A two-part test for determining whether a law infringes the implied freedom of political communication was outlined by the High Court in *Lange*, and later refined in *Coleman v Power*: First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

¹⁰⁸ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, <http://www.dpc.nsw.gov.au/publications/news/stories/election_campaign_finance_reform> accessed 17 December 2009, p. 7.

¹⁰⁹ Associate Professor Anne Twomey, *Transcript of evidence*, 1 February 2010, pp. 53-4.

¹¹⁰ Professor George Williams, *Transcript of evidence*, 1 February 2010, p. 54.

¹¹¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

- *Australian Capital Television Pty Ltd v Commonwealth*¹¹² - the High Court found that the *Political Broadcasts and Political Disclosures Act 1991*, which banned political advertising during election campaigns and provided for mandatory free political advertising time, was invalid as it breached the implied freedom of political communication and 'there were other less drastic means by which the objectives of the law could be achieved'.¹¹³

4.27 The Green paper noted that the limits imposed by the doctrine of freedom of political communication would have to be carefully considered in relation to proposals to cap or ban donations, stating that:

The identification of a broad statutory objective – for example, to require political parties to engage with their members to achieve their support to finance their campaigns, to promote fair competition for election by minimising the difference in financial resources between contestants, and to avoid contestants for election becoming dependent on a small number of large contributors, and vulnerable to undue influence or corruption – will not necessarily resolve all of the constitutional issues.¹¹⁴

4.28 The application of principles of constitutional law to proposed caps on expenditure was also considered in the Green paper:

One argument might be that a particular law that caps expenditure may not directly burden freedom of political communication 'because the immediate impact is on the spending of money'. On the other hand, the law might be said by others to indirectly burden freedom of political communication 'because the lion's share of such expenditure is spent on communicating political matters ...'.

From another point of view it might be argued that the purpose of introducing a cap on expenditure (namely to promote a 'level playing field' between contestants for election, to contain the increasing cost of elections and to minimise the risk of undue influence or corruption), is 'a legitimate end ... compatible with the maintenance of the ... system of representative and responsible government'.

... if Australia were to consider introducing a cap on political parties' and candidates' expenditure on elections, a key question would be whether a means exists of implementing the cap that is 'reasonably appropriate and adapted' to serve that end.¹¹⁵

4.29 The Green paper noted that various proposals for reform raised 'the possibility of constitutional difficulties in relation to the maintenance of the constitutionally prescribed system of representative and responsible government, although a scheme which is carefully constructed could be within power.'¹¹⁶

The *Lange* test

4.30 In her paper on funding reform, Dr Twomey argued that 'any proposal for the reform of political financing in Australia must take into account the ... elements of the *Lange* test' in order to address potential breaches of the implied freedom of political communication, noting that:

¹¹² *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106

¹¹³ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf (accessed 20 February 2010), p. 60.

¹¹⁴ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, p. 60.

¹¹⁵ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, p. 64.

¹¹⁶ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, p. 75.

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Laws that ban or impose limits upon political donations or election campaign expenditure are likely to be regarded as burdening the constitutionally implied freedom of political communication. This is because they have the effect of limiting the quantity and breadth of communication about political matters. Such laws will only be held valid by the courts if they are reasonably and appropriately adapted to serving a legitimate end in a manner which is compatible with the system of representative and responsible government prescribed by the Commonwealth Constitution (the *Lange* test).¹¹⁷

4.31 Dr Twomey's summary of the elements of the High Court's *Lange* test is outlined below:

1. whether the law burdens freedom of political communication;
2. whether the law serves a 'legitimate end';
3. whether the law is reasonably appropriate and adapted to serving that legitimate end; and
4. whether the manner in which the law serves that legitimate end is compatible with the system of government prescribed by the Commonwealth Constitution.¹¹⁸ [footnotes omitted]

4.32 According to Associate Professor Twomey in considering proposed reforms with regard to the *Lange* test, 'special attention must be given to the types of issues that have concerned the High Court in the past, such as laws that unduly favour incumbents or unreasonably limit political communication by third parties'.¹¹⁹

Jurisdictional issues

4.33 In her report for the state government, Associate Professor Twomey found that given the integration of State and Commonwealth fundraising by political parties, 'any State law that interfered with Commonwealth elections, by banning or regulating the receipt or expenditure of funds by a State-registered political party that would have been used to support candidates in Commonwealth elections, would be vulnerable to constitutional challenge'.¹²⁰

4.34 Dr Twomey identified three jurisdictional issues that would arise in relation to a law that sought to ban or cap donations to political parties:

Extra-territoriality

First, such a law would have an extra-territorial effect because it would apply to individuals, corporations or other bodies outside New South Wales that make donations to any party registered within New South Wales. The States, however, have a power to make laws with extra-territorial effect, as long as there is a sufficient nexus with the State and subject to any other implication derived from the Commonwealth Constitution and the federal system it implements. A law concerning the donation of funds to political parties registered in the State or donations made within the State would appear to have a sufficient nexus with the State. However, as discussed below, federal implications might affect such a law.

Inconsistency of laws

Secondly, there is the possibility of inconsistency of laws. This arises at two levels. A law of New South Wales concerning political donations might affect actions that take

¹¹⁷ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, at http://www.dpc.nsw.gov.au/publications/news/stories/election_campaign_finance_reform (accessed 17 December 2009), pp. 1, 12.

¹¹⁸ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, pp. 10-2.

¹¹⁹ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, p. 1.

¹²⁰ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, p. 5.

place in another State and conflict with the law of that other State. The Constitution does not contain a provision for resolving conflicts between State laws. In such a case, the High Court might derive an implication from the principles of federalism imposed by the Commonwealth Constitution and use it to limit the State's power to make laws which have an extra-territorial effect that leads to a conflict between State laws. A New South Wales law might also conflict with Commonwealth laws concerning political parties and political donations. At the moment there is no conflict because both Commonwealth and State laws require disclosures that can be made without there being any conflict. If, however, a State law banned donations that a Commonwealth law expressly permitted or if the Commonwealth legislated to 'cover the field' and the State law intervened in that field, s 109 of the Constitution provides that the Commonwealth law prevails to the extent of the inconsistency. Accordingly, any proposal for a State law must take into account whether it might give rise to an inconsistency with other Commonwealth laws (or the laws of other States) and the potential for future inconsistency in the absence of a co-operative arrangement.

Implications arising from federalism and representative government

The third issue concerns the constitutional powers of the Commonwealth and the States within the federal system. The Commonwealth Constitution is predicated upon the continuing existence of the Commonwealth and the States as polities with governments and Parliaments. The High Court has drawn an implication from the Constitution that the Commonwealth may not legislate to destroy or curtail the continued existence of the States, or restrict or burden them in the exercise of their constitutional powers. The Commonwealth, therefore, is limited in its power to interfere in the 'constitutional and electoral processes of the States'. 'Representative government in the states is a characteristic of their respective Constitutions, and the legislative power of the Commonwealth cannot be exercised substantially to impair' that representative government.

On the basis of this reasoning, unilateral Commonwealth legislation banning or regulating the receipt or expenditure of funds by political parties in a manner that impacts on the funding of State elections, might well be vulnerable to constitutional challenge. Equally, any State law that interfered with Commonwealth elections, by banning or regulating the receipt or expenditure of funds by a State-registered political party that would have been used to support candidates in Commonwealth elections, would be vulnerable to constitutional challenge.¹²¹ [footnotes omitted]

Evidence from constitutional academics

- 4.35 The constitutional issues raised by electoral funding reform were discussed in detail during the Committee's roundtable with academics.
- 4.36 Dr Twomey has noted that the validity of attempts to maintain the integrity of the electoral system by regulating to reduce actual or perceived corruption has been recognised by courts in various jurisdictions:
- One of the primary aims of political funding regulation is to reduce or eliminate the risk and perception of corruption and undue influence. The intention is to preserve the integrity of the electoral system and enhance public confidence in it. Such an intention has been recognised by courts in Australia, Canada, the United States and Europe as a legitimate governmental interest.¹²² [footnote omitted]
- 4.37 In his report for the Electoral Commission, Dr Tham cautioned against allowing constitutional considerations to dominate debate on political funding:

¹²¹ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, pp. 3-5.

¹²² Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, p.13.

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... policy-making in the area of political finance (or more generally) should begin with governing principles, an evaluation of the status quo and, finally, a prescription of changes (if necessary). Constitutional considerations tend to come at the end of this chain of analysis as they involve constraints as to what changes are possible. This point is worth stressing – constitutional considerations should not be front-ended in the debate concerning political finance.¹²³

4.38 Professor Williams argued that it was possible for the NSW Parliament to enact laws to regulate donations, which would be consistent with state and federal constitutions, noting that:

... There are undoubtedly impediments but I think it is possible to get around those impediments. In fact, the problems of enacting this type of scheme are far more significant in some other nations that have done it than they are in New South Wales. In particular, the freedom of speech rights in other nations bite far more significantly than they do in Australia. For me then, when I am asked whether the Constitution gets in the way of a scheme such as this, the answer is no, it is a matter of working through the problems and achieving an outcome. I see the main impediment to achieving a scheme of this kind as being one of political will, not constitutional limitations.¹²⁴

4.39 In terms of the goals of a reformed funding scheme, Professor Williams emphasised the importance of fair and reasonable measures:

I think constitutionally so long as you have a scheme that you have a sound and robust reason for enacting and that you can demonstrate is fair and reasonable and has caps that are appropriate then I think they are the sorts of goals you need to get to. For me here the issue again is not so much the constitutional impediment, although there is an issue here you need to address, but just how you design it in a way that actually achieves that goal of fairness without building in, as the prior scheme did, a bit of a loading one way or the other.¹²⁵

4.40 According to Professor Williams, in limiting donations it would be important to 'provide a careful and rational justification as to why any restriction serves to enhance the quality of democracy in the State as well as the quality of participation in democratic processes by electors and candidates'.¹²⁶

4.41 Associate Professor Orr argued that although constitutional considerations may in some ways constrain reform, they would not prevent reasonably justifiable laws:

... whilst legislators should bear in mind the potential constitutional issues, they should not be spooked by them. The Australian courts have a history of deference to parliamentary expertise and sovereignty when it comes to electoral law. The implied immunity between one level of government unduly interfering with the political essentials of another is certainly a constraint to be borne in mind. The other constraint is the implied freedom of political communication; however that constraint should not be overstated. It reached its high-watermark in 1992. Conservative courts have tended to retreat from it since. In any event, it is far from an absolute freedom, but merely a potential check on laws that are not reasonably justifiable. Justification can come in the form of principle and empirical basis. ...¹²⁷

¹²³ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 92, http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

¹²⁴ Professor George Williams, *Transcript of evidence*, 1 February 2010, p. 37.

¹²⁵ Professor George Williams, *Transcript of evidence*, 1 February 2010, p. 40.

¹²⁶ Professor George Williams, *Submission 1*, p.1.

¹²⁷ Associate Professor Graeme Orr, *Submission 23*, p. 5.

4.42 Associate Professor Orr also noted that in the absence of consistency with other jurisdictions, New South Wales public funding laws would have to apply only to state candidates, nevertheless, reform should not be delayed in the interests of uniformity:

A go-it-alone NSW law, restricting say political expenditure, would have to be limited to expenditure directed at the election of candidates or promotion of parties at a state election, or directed at issues in contention in state political and parliamentary debate or likely to affect electors in their state electoral choices. Such formulations have fuzzy boundaries, especially outside the formal campaign period.

However, this caveat aside, there is no reason for NSW or any other jurisdiction to wait years for the Commonwealth to act. Experimentation is a strength of federalism: indeed it was NSW that led the way in 1981 with public funding and disclosure laws. Further, even if uniformity were achievable in 2010, it will likely unravel in future years as governments of different hue come to power at different levels and as regulators in different jurisdictions react to different experiences.¹²⁸

Application of the Lange test

4.43 In evidence to the Committee, academics expert in constitutional and electoral law discussed the test that would be applied by the High Court to determine whether the implied freedom of political communication had been observed.

4.44 Dr Twomey went on to outline the application of the Commonwealth test, noting that legislation that is drafted so as not to impose a burden on political communication and which is made to achieve a legitimate end should be found to be valid:

... The test that the High Court uses to decide whether a law is in breach of the implied freedom of political communication, at least at the Commonwealth level, says that first of all you have to work out whether there is a burden on political communication. Any sorts of limitations on political communication on their face will amount to a burden. But then you have to work out that, even if it is burdened, is the law made to achieve a legitimate end? The High Court I think would accept that avoiding corruption is a legitimate end. The next level of test then says: Is this law reasonably appropriate and adapted to achieve that legitimate end in a manner that is consistent with or compatible with the system of representative and responsible government?

... You would say, yes, we are doing this for a legitimate end, which is to avoid corruption or the perception of corruption; that this is consistent with a system of representative and responsible government, and that therefore it is constitutionally valid. That is the process you need to go through to tick off all these things. If you can get there, regardless of whether the High Court holds that you have an implied freedom of political communication, you are home and hosed. ...¹²⁹

4.45 Professor Williams expressed the view that, while the application of the freedom of political communication doctrine is uncertain, the purpose of any law that it is applied to would be critical in a test of the law's validity:

... as to how it applies—even though I think it will apply some time—it is very, very uncertain. We are dealing here with a doctrine created in 1992. There is not one of the judges remaining on the High Court from that decision. It was then unanimously endorsed by the High Court in 1997. Again, the court has undergone a radical transformation.

I cannot think of a case since then when the High Court has applied the freedom to strike down a law. ... Nonetheless, the doctrine is solid and we are working on the back of a unanimous High Court decision, so we have that. In my view, the work of this

¹²⁸ Associate Professor Graeme Orr, *Submission 23*, p. 5.

¹²⁹ Associate Professor Anne Twomey, *Transcript of evidence*, 1 February 2010, pp. 53-4.

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Committee is central to that question of enhancement. ... What will the High Court do in assessing any law passed by the New South Wales Parliament? After discovering that the implied freedom exists in some form it will say, "What was the purpose? Was it for enhancement or to stifle political communication?" If it is the latter, end of story and the law will be invalid. It will look particularly at Hansard debates.¹³⁰

Caps and bans on donations and expenditure

- 4.46 The Committee also heard various views on the way in which constitutional constraints may apply to specific aspects of a reformed public funding scheme.
- 4.47 Associate Professor Orr commented that 'A ban on all donations ... would probably be unconstitutional, for the simple reason that small donations are not corrupting but are a simple form of political expression and association.'¹³¹ On the other hand, Associate Professor Orr submitted that in his view there is no constitutional impediment on capping donations and limiting those from particular sources, arguing that:

Outside this [banning all donations], there is no constitutional impediment to:

(1) Capping donations, provided the limit is at a reasonable level, such as A\$1000 pa or above.

(2) Restricting donations to political parties to those eligible to vote. Despite its strong 'free speech' guarantees, the US has long provided that corporate, union and foreign donations directly to parties are impermissible. There is, however, no justification for banning non-citizen residents from donating on the same basis as citizens/registered electors.

(3) Limiting or banning contributions from particular sources, such as property developers. Other submissions (eg Professors Williams and Twomey) suggest otherwise. I disagree. First, there is no constitutional principle of political equality. Rather there is a principle of freedom of expression. Donations are only indirectly a form of expression. Second, and more significantly, there is evidence that corruption and undue influence (and its perception) is chiefly sourced in donations from a couple of industries. *It is precisely that kind of evidence that a Court will look for in deciding whether any restriction on political freedom is justified. Justification here means tailored or 'proportionate' to the problem at hand. If anything, specific legislative surgery is easier to justify than a more general, swingeing ban.*¹³² [original emphasis]

- 4.48 Dr Tham's analysis of the elements of his proposed model demonstrates the factors that could be considered in assessing whether reforms are likely to meet the Lange test. He states that the chief factors in determining compatibility with the system of representative and responsible government, as prescribed by the Commonwealth Constitution, are 'the extent of the restriction, the nature of the interest served and the proportionality of the restriction to the interest served.'¹³³
- 4.49 Dr Tham's analysis of the application of these factors to his proposed low level donation limits is summarised below:

¹³⁰ Professor George Williams, *Transcript of evidence*, 1 February 2010, p. 54.

¹³¹ Associate Professor Graeme Orr, *Submission 23*, p.3.

¹³² Associate Professor Graeme Orr, *Submission 23*, p.3.

¹³³ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 99,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

- Extent of restriction: Contribution limits burden the freedom of political communication by: restricting the ability of citizens to communicate by making political contributions above the limit and; by reducing the income available to parties and candidates and therefore their ability to engage in political communication. The burden imposed in the first way is very limited, as contributions below the proposed annual limit of \$1,000 can still convey support to the recipient party or candidate. The burden on the ability of parties and candidates to engage in political communication is more significant. Specifically, contribution limits will significantly reduce the private funding available to the major NSW parties. However, this burden is offset by the exemptions for membership fees. Parties that are successful in attracting more members are likely to be able to retain, if not enhance, their ability to engage in political communication.
The burden placed by the limits is also offset by other elements of the reform. Public funding will compensate for the fall in private income and provide greater subsidies to newcomers than is currently the case. Election spending limits will limit the significance of the reduction of major parties' overall budgets by containing the costs of electioneering.
- Nature of interest being served: As a matter of principle, both the anti-corruption and fair value rationales of contribution limits go to the heart of representative and responsible government in New South Wales. They also have heightened importance given the corruption through undue influence that pervades the NSW political system and may get worse as election campaign costs escalate.
- Proportionality of restriction to the interest served: This concerns the design of the contribution limits and the extent to which they are properly tailored to their rationales. The reasons for the limits being proportionate to their rationales are: they do not impose a blanket ban on contributions, only prohibiting those that carry a significant risk of corruption (large contributions); and they provide an exemption for membership fees (where the risk is minimal or non-existent). In terms of the fair value rationale, prohibiting large contributions targets those that allow wealth to have a disproportionate influence.
In conclusion, there is a good chance that the contribution limits do not breach the implied freedom of political communication. Although the limits burden the freedom, they have the legitimate aim of preventing corruption and its risk and promoting the fair value of political freedoms. There are also strong arguments that they are reasonably appropriate and adapted to serve these aims due to the limited burden they place (in the context of the reforms), the importance of their aims and the proportionality of the limits to the aims.¹³⁴

4.50 In a report for the Electoral Commission, Dr Tham expressed the view that expenditure limits raise the most concerns in terms of constitutionality. Dr Tham also illustrated the way all aspects of a scheme can be considered in analysing their constitutional validity:

Of the various planks of the reform package, it is contribution and spending limits that raise the most concerns ... It should be noted that public funding as provided under state legislation, for instance, through a Party and Candidate Support Fund, does not *on its own* implicate the implied freedom of political communication. The implied freedom protects 'freedom from' (state regulation) in that it does not 'confer personal

¹³⁴ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, pp. 99-100.

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rights on individuals'; rather it 'preclude[s] the curtailment of the protected freedom by the exercise of legislative or executive power'. Providing money to political parties and candidates, whilst enhancing ability of these actors to communicate (and in this way promoting 'freedom to'), does not limit the formal freedom of others to communicate. This is not to say that public funding is irrelevant when analysing the constitutional validity of the reform package recommended. On the contrary, it becomes relevant when determining whether contribution and spending limits are constitutionally valid ...

... it is clear that limits on political contributions burden the freedom to communicate about government or political matters. This occurs in two ways. First, making a political contribution is, in most cases, a way of communicating support for the recipient party or candidate. Limits on contributions, therefore, burden the formal ability of citizens to communicate in this way through contributions that exceed the limits. Second, political contributions enable parties and candidates to communicate about government and political matters hence, limits on such contributions will impact upon their ability to do so.¹³⁵ [footnotes omitted]

4.51 In relation to the constitutional validity of expenditure caps, Associated Professor Twomey stated:

The lesson we learn from that case [the *Lange Case*] is not that political advertising cannot be regulated or limited, but rather that it can be done only in a reasonable and proportionate manner where the restriction on political communication is not disproportionately more than is necessary to achieve the legitimate end of preventing the risk or perception of corruption. Given that advertising on television and radio is by far the most expensive aspect of running an election campaign, and given that the current level of saturation advertising is far from necessary in order for parties to get their message across, it is probably time for some limits to be placed upon political advertising in election campaigns through the electronic media, as long as they are reasonable, meet the proportionality test and are not used as a means of favouring incumbents or particular political parties.¹³⁶

Regulation of third party advertising and communication

4.52 The constitutional implications of regulation of third party advertising and communication are discussed in detail at paras ?.

Jurisdiction Issues

4.53 In a paper prepared for the Electoral Commission, Dr Tham looked at whether 'NSW Parliament have the legislative power under the *Constitution Act 1902* (NSW) to enact the reforms' and found:

... most likely 'yes'. Section 5 of the *Constitution Act 1902* confers upon the NSW Parliament 'power to make laws for peace, welfare and good government of New South Wales in all cases whatsoever' subject to the provisions of the *Commonwealth Constitution*. It is established that the 'power to make laws for peace, welfare and good government of New South Wales in all cases whatsoever' is a plenary power to make laws in relation to New South Wales.¹³⁷

¹³⁵ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 96.

¹³⁶ Associate Professor Anne Twomey, *Submission 2*, p.5.

¹³⁷ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 93,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

- 4.54 He argued that this means that ‘the New South Wales Parliament has the power to make laws not only in relation to participants in NSW elections but more generally in relation to political parties, candidates and other political actors that physically operate in the State of New South Wales, including parties and candidates based in New South Wales even when they are contesting federal elections or are registered under federal electoral laws.’¹³⁸ He illustrated this point by reference to the current disclosure laws ‘requiring parties, candidates and third parties to disclose political donations received whether or not such money is directed towards state and/or federal election campaigns.’¹³⁹
- 4.55 As part of the roundtable discussion, Associate Professor Twomey disagreed with Dr Tham’s analysis stating:
- There is a difference between disclosure laws which can operate together without giving an inconsistency, so on that level of inconsistency they can operate together, but it is also a distinction between disclosure requirements that you shall disclose political donations and saying, "Thou shalt not give money to X." So they are prohibitive in nature and they are having a far more profound effect on the Commonwealth system of government.¹⁴⁰
- 4.56 Dr Tham countered this argument by pointing to the ‘the current regime, [in] Queensland, for example, [where] there are clearly bans on political contributions that could be used for Federal elections’, including a ‘ban on foreign source contributions’.¹⁴¹ He also cited examples from NSW:
- In New South Wales, as you already know, there is a ban on anonymous donations. There is a ban on receiving money from companies that do not have an ABN.¹⁴²
- 4.57 In his submission to the inquiry, Professor Williams stated that ‘a regulatory scheme would likely fall foul of constitutional limits should it seek to regulate political donations and other like matters in regard to federal elections...’¹⁴³
- 4.58 In evidence to the Committee, Dr Twomey commented on the way in which expenditure caps may raise jurisdictional problems:
- It would also be problematic if you extended your expenditure caps to general party activity because party activity would more likely cross the line between Commonwealth and State sorts of things. You need to confine yourself to State expenditure for State candidates in a State election. Once you start getting into the area of general party expenditure, you are going to end up with crossing problems with the Commonwealth.¹⁴⁴
- 4.59 Associate Professor Orr outlined the following practical difficulties in seeking to regulate state campaign expenditure only:
- Campaigning and candidate selection are conducted by state divisions of parties, who do not maintain internal structures respecting the legal nicety that state law tends to govern state elections and federal law federal elections.

¹³⁸ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 94.

¹³⁹ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 94.

¹⁴⁰ Associate Professor Anne Twomey, *Transcript of evidence*, 1 February 2010, p. 40.

¹⁴¹ Dr Joo-Cheong Tham, *Transcript of evidence*, 1 February 2010, p. 42.

¹⁴² Dr Joo-Cheong Tham, *Transcript of evidence*, 1 February 2010, p. 42.

¹⁴³ Professor George Williams, *Submission 1*, p. 1.

¹⁴⁴ Associate Professor Anne Twomey, *Transcript of evidence*, 1 February 2010, p. 53.

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This challenge is reinforced by the fact that political issues in Australia tend to bleed between jurisdictions. This is increasingly true as federal power broadens in fundamental areas such as the economy, education and the environment.¹⁴⁵

4.60 Dr Tham also considered the 'question whether federal laws will render them [the reform package] inoperative by virtue of s109 of the *Commonwealth Constitution* and outlined the three ways in which inconsistency between state law and the Commonwealth Constitution may arise:

- it is impossible to obey both laws ('simultaneous obedience' inconsistency);
- a law purports to confer a right, privilege or entitlement that the other purports to diminish ('rights' inconsistency); and/or
- the Commonwealth law evinces an intention to 'cover the field' ('covering the field' inconsistency).¹⁴⁶ [footnotes omitted]

4.61 He found:

If the reform package is enacted under *current* federal electoral law, there is little reason to believe that s 109 will be implicated. The *Commonwealth Electoral Act* currently does not provide for any limits on the amount of contributions; nor does it provide for any election spending limits.

Section 109 only becomes a live issue if the Commonwealth Parliament enacts laws similar to those found in the reform package, in particular, contribution and election spending limits.¹⁴⁷

4.62 This issue was also discussed by Associate Professor Twomey in her report on the legal, constitutional and practical implications of reform – see paragraph 3.11.

Other inquiry participants' views

4.63 The NSW Branch of the Australian Labor Party emphasised the importance of funding reforms that address the implied freedom of political communication:

Accordingly, NSW Labor supports the implementation of an expanded public funding scheme, with caps on donations and expenditure that are consistent with the right to freedom of political communication.

...

To this end, NSW Labor recommends that reforms be made to:

- Simplify disclosure;
- Expand public funding; and
- Cap donations and expenditure in a way that is consistent with the freedom of political communication implied under the Commonwealth Constitution.¹⁴⁸

4.64 The NSW Branch of the National Party noted that electoral finance reform would need to 'be framed so as to take account of principles and tests that ensure that

¹⁴⁵ Associate Professor Graeme Orr, *Submission 23*, p.5.

¹⁴⁶ Section 109 of the Commonwealth Constitution provides that 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of any inconsistency, be invalid', see Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 109,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

¹⁴⁷ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, pp. 109-110.

¹⁴⁸ Australian Labor Party (NSW Branch), *Submission 15*, p. 5.

political freedom is not undermined ... such legislation would need to pass the High Court's Lange test'.¹⁴⁹ The National Party submitted that regulation of electoral finance which seeks to address perceived corruption and influence should meet the Lange test, and that appropriate reforms should be developed with the aim of having a minimal effect on political communication:

Since regulation of campaign finance would most likely burden political freedom to some degree, any reforms be reasonable appropriate and adapted to serve a legitimate end, and serve that legitimate end in a manner which is compatible with the system of government prescribed by the Commonwealth Constitution.

This submission is made under the assumption that addressing corruption within our political system, both proven and perceived, is a legitimate end for the purposes of the Lange test. If the parliament decides to proceed with legislation in this area it will do so under this premise.

For such a law to be reasonably appropriate, it should achieve the desired end effectively whilst imposing the slightest possible burden on political communication. Whilst bearing this in mind, The Nationals believe that a comprehensive overhaul of both supply and demand in campaign finance is necessary in order to address the problem at hand without triggering consequences that would be considered to be incompatible with the system of government prescribed by the Commonwealth Constitution – for example, favouring one type of political party or candidate over another.¹⁵⁰

- 4.65 The NSW Division of the Liberal Party argued that 'it is possible for the NSW Parliament to enact comprehensive reforms that are consistent with the principles enunciated by the High Court'.¹⁵¹
- 4.66 Although acknowledging that laws which limit donations and expenditure may burden the freedom of political communication, the Liberal Party submitted that such laws could also be argued to serve a legitimate end. The Liberal Party reflected that it was important for electoral funding laws to address the latter aspects of the Lange test:
- From decisions of superior courts in Australia, Canada and the United States, it is clear that any law which limits the right of a donor or places limits on expenditure will be seen as burdening freedom of political communication in some way. Equally, a law which sought to cap political donations, limit campaign expenditure by political parties and third parties, and provide for disclosure of donations and spending, in order to promote integrity, fairness and transparency would almost certainly be found to serve a 'legitimate end'. The political advertising ban proposed by the Hawke Government was found to be serving a legitimate end but struck down by the High Court because of the third and fourth elements of the test. The High Court felt that the ban was not appropriate, as there were better alternatives for achieving the same end, and also took issue with the approach taken, viewing the particular scheme as unduly biased towards incumbents and against new entrants. ...¹⁵²
- 4.67 The Greens submitted that electoral reform must be constitutional, arguing that the High Court would find that:
- (a) The Constitution, of either or both New South Wales and/or the Commonwealth, implies that New South Wales will be a democracy and for such a democracy to be workable there is an implied right to freedom of political communication in New South Wales; and

¹⁴⁹ NSW National Party, *Submission 18*, p. 2.

¹⁵⁰ NSW National Party, *Submission 18*, pp. 2-3.

¹⁵¹ Liberal Party of Australia (NSW Division), *Submission 17*, pp. 10-1.

¹⁵² Liberal Party of Australia (NSW Division), *Submission 17*, pp. 10-1.

Principles

(b) Any law seeking to limit political donations or political expenditure would be found to burden the implied freedom of political communication; and

(c) Such a law would only survive challenge to the extent that it was reasonably appropriate and adapted to serve a legitimate end which is compatible with the maintenance of representative and responsible government.¹⁵³

4.68 The Greens expressed the view that restricting third expenditure as part of comprehensive reform would be ‘a reasonable and legitimate restriction’, stating that:

This is especially the case if they are done as part of comprehensive reform as suggested in this submission as the relative voice for such third parties will be significantly increased by reason of the lesser spending power of the registered political parties and their associated entities. Again, while real care must be taken in this regard, the caps proposed on third party expenditure in this submission are considered to be reasonable.¹⁵⁴

4.69 In terms of a total ban on private donations, the Greens stated that ‘such a position would likely not meet the constitutional test for validity’. The Greens submitted that modest caps ‘on donations for individuals that allows a citizen to express his or her support for a political party, without obtaining undue influence over that party, would, it is submitted, be likely to survive legal challenge.’¹⁵⁵

4.70 The Public Interest Advocacy Centre argued that ‘The implied right of freedom of political and governmental expression in the Commonwealth Constitution can be properly protected in a system that limits the impact of donations and expenditure on the integrity of the political and electoral process’.¹⁵⁶ In response to arguments that privacy and civil liberties may be breached by limitations on donations and expenditure, PIAC cited Article 21 of the *Universal Declaration of Human Rights*, which provides that:

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government: this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.¹⁵⁷

4.71 PIAC argued that, although freedom of expression is an important right, the equality of citizens is also critical to representative democracy:

While the protection of the freedoms of expression, association and assembly is critical in ensuring the enjoyment of this right, equally important to protect is the central principle of the equality of citizens. PIAC is of the view that to create a healthy representative democracy, the equality of citizens must be seen as the essential underpinning principle. ...

4.72 PIAC recommended that regulatory systems, such as those applying to electoral funding, should be evaluated against the following principles:

New regulatory systems, including those that apply to incumbents and government, must have structured evaluative mechanisms included in their design. The purpose of

¹⁵³ The Greens NSW, *Submission 19*, p.19.

¹⁵⁴ The Greens NSW, *Submission 19*, p.20.

¹⁵⁵ The Greens NSW, *Submission 19*, p.20.

¹⁵⁶ Public Interest Advocacy Centre, *Submission 26*, p. 14.

¹⁵⁷ Public Interest Advocacy Centre, *Submission 26*, pp. 13-5.

such evaluation is to assess how effective amendments and changes to practice are in: (a) improving the integrity, accountability and fairness of the system; (b) strengthening public confidence in the system; and (c) facilitating participation in it.¹⁵⁸

4.73 FamilyVoice Australia submitted that limiting electoral expenditure by political parties, candidates and third parties would be likely to breach the implied right to freedom of political communication, recommending that:

It would be undesirable for the Parliament to enact laws restricting freedom of political communication that would be likely to be found unconstitutional. For this reason, as well as because they would unduly limit the freedom of political communication, any proposal to regulate election expenditure by political parties, candidates or third parties should be rejected.¹⁵⁹

¹⁵⁸ Public Interest Advocacy Centre, *Submission 26*, pp. 13-5.

¹⁵⁹ FamilyVoice Australia, *Submission 4*, pp. 4-5.

Chapter Five - Caps and Bans on Political Donations

- 5.1 The terms of reference of this inquiry require the Committee to consider 'how public funding should apply as part of the broader scheme under which political donations are banned or capped' having regard to the 'June 2008 report of the Legislative Council Select Committee on Electoral and Political Party Funding which recommended, among other things, that all but small donations by individuals be banned'.
- 5.2 This Chapter considers the current regulatory regime for political donations, the current levels and sources of funding for political parties and options for reform. It also considers the regulation of other sources of income that contribute to funding for political parties, candidates and groups.
- 5.3 The Committee's recommendations relating to sources of funding should not be considered in isolation, but must be considered as part of an integrated reform package.

Current regulation of political donations

Definition of political donation

- 5.4 Under current legislation, a political donation is a 'gift (monetary or non-monetary) made to or for the benefit of a party, an elected member, a local government councillor a candidate or a group of candidates'.¹⁶⁰ This includes indirect donations in the form of gifts 'made to or for the benefit of an entity or other person, where the whole or part of the gift was used or is intended to be used by the entity or person:
- to enable them to make a political donation or to incur electoral expenditure; or
 - to reimburse them for making a political donation or incurring electoral expenditure'.¹⁶¹
- 5.5 As well as monetary gifts, political donations include (but are not limited to) the 'provision of a service at no charge or at a discounted charge, the purchase of an entry ticket, raffle ticket or other item at a fund raising event or function and the giving of a gift or property'.¹⁶²

Unlawful donations

- 5.6 Regulation of political donations in NSW has, until recently, been focussed on ensuring transparency through public disclosure rather than capping or banning donations. Recent legislative amendments in 2008 and 2009 in response to some of the recommendations of the Legislative Council Select Committee on Electoral and Political Party Funding have gone some way to introducing stricter regulation of the

¹⁶⁰ Election Finance Authority, http://www.efa.nsw.gov.au/donors/political_donations_and_electoral_expenditure2 (accessed 20 February 2010) see also section 84, *Election Funding and Disclosures Act 1981*.

¹⁶¹ Election Finance Authority, http://www.efa.nsw.gov.au/donors/political_donations_and_electoral_expenditure2 (accessed 20 February 2010) see also section 84, *Election Funding and Disclosures Act 1981*.

¹⁶² Election Finance Authority, http://www.efa.nsw.gov.au/donors/political_donations_and_electoral_expenditure2 (accessed 20 February 2010) see also section 84, *Election Funding and Disclosures Act 1981*.

donations and disclosure regime. However, these amendments did not address the Select Committee's primary recommendation relating to caps and bans, namely, that all but small political donations from individuals be banned.

- 5.7 Legislative amendments in 2008 and 2009 provide that the following persons or entities are prohibited from making political donations:
- entities that do not have an Australian Business Number¹⁶³
 - property developers and those acting on behalf of a property developer¹⁶⁴
- 5.8 Amendments to the *Election Funding and Disclosures Act 1981* in 2008 also prohibited certain types of indirect campaign contributions valued at \$1,000 or more in any financial year.¹⁶⁵ Indirect campaign contributions are 'where a political donor provides a gift or service at no charge or at a discounted charge to a candidate, a group of candidates, a councillor, a Member of Parliament or a political party in New South Wales'.¹⁶⁶ They include:
- the provision of office accommodation, vehicles, computers or other equipment for no consideration or inadequate consideration for use solely or substantially for election campaign purposes
 - the full or part payment by a person other than the party, elected member, group or candidate of electoral expenditure for advertising or other purposes incurred or to be incurred by the party, elected member, group or candidate (or an agreement to make such a payment)
 - the waiving of all or any part of payment to the person by the party, elected member, group or candidate of electoral expenditure for advertising incurred or to be incurred by the party, elected member, group or candidate.¹⁶⁷
- 5.9 The Election Funding Authority provides the following example of an unlawful indirect campaign contribution:
- For example, if a printer provides printing services valued at \$2,000 to a party and charges the party \$500 then the printer has made an indirect campaign contribution of \$1,500 (the contribution is the difference between the value of the service and the amount charged to the party). This contribution is unlawful because it is valued at \$1,000 or more.¹⁶⁸
- 5.10 The 2008 legislative amendments also prohibit political parties, councillors, members of Parliament, candidates and groups of candidates from accepting reportable

¹⁶³ Schedule 1, *Election Funding Amendment (Political Donations and Expenditure) Act 2008*, which inserted s96D into the *Election Funding and Disclosures Act 1981*.

¹⁶⁴ Schedule 1, *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009*, which inserted Division 4A into the *Election Funding and Disclosures Act 1981*.

¹⁶⁵ Section 96E, *Election Funding and Disclosures Act 1981*.

¹⁶⁶ Election Funding Authority,

http://www.efa.nsw.gov.au/donors/political_donations_and_electoral_expenditure2 (accessed 20 February 2010), see also section 96E, *Election Funding and Disclosures Act 1981*.

¹⁶⁷ Section 96E, *Election Funding and Disclosures Act 1981*. However, indirect campaign contributions do not include the provision of volunteer labour – Section 96E(3)(a).

¹⁶⁸ Election Funding Authority,

http://www.efa.nsw.gov.au/donors/political_donations_and_electoral_expenditure2 (accessed 20 February 2010)

political donations from a political donor unless the name and address of the donor is known or provided to them¹⁶⁹

- 5.11 As well, the 2008 amendments prohibit reportable loans, the details of which have not been recorded with the Election Funding Authority.¹⁷⁰ A loan is an advance of money, the provision of credit or any other transaction that in substance affects a loan of money.¹⁷¹ A reportable loan is a loan or total in loans of \$1,000 or more from one source in the same disclosure period, except for a loan from a financial institution or a credit card transaction¹⁷².

Disclosure requirements

- 5.12 Disclosure obligations have been in place since the introduction of public funding in 1981. In 2008 the threshold at which details of donations must be disclosed reduced from \$1,500 to \$1,000, with separate donations from the same person over the same financial year being aggregated for disclosure purposes.¹⁷³ This was to ensure that the disclosure limit matched proposed reforms at the Commonwealth level. As part of the same set of amendments in 2008, the disclosure period was altered from a 12-month period aligned with the financial year, to each 6-month period ending on 30 June and on 31 December, in order to increase transparency.¹⁷⁴

- 5.13 The Election Funding Authority provides the following example of a 'reportable donation':

A reportable political donation is a donation of \$1,000, or more or multiple donations from one donor to the same recipient in one financial year that total \$1,000 or more. For example, if a person makes a \$700 donation to a candidate on 1 October 2009, it is not a reportable political donation. If the same person makes a \$500 donation to the same candidate on 31 March 2010, then the total donation of \$1,200 becomes a reportable political donation.¹⁷⁵

- 5.14 The Election Funding Authority provides the following explanation of types of reportable donations:

Reportable political donations can be monetary or non-monetary. The value assigned to a non-monetary gift should be the current value at the prevailing commercial rate. Tickets valued \$1,000 or more purchased for fundraising functions or dinners are considered reportable political donations.¹⁷⁶

¹⁶⁹ Election Funding Authority, http://www.efa.nsw.gov.au/donors/political_donations_and_electoral_expenditure2 (accessed 20 February 2010), see also section 96F, *Election Funding and Disclosures Act 1981*.

¹⁷⁰ Election Funding Authority, http://www.efa.nsw.gov.au/nsw_parliament_candidates_and_groups#pd (accessed 20 February 2010), see also section 96G, *Election Funding and Disclosures Act 1981*.

¹⁷¹ This includes unpaid accounts and invoices where there has been an agreement with the supplier of a product or service to extend their standard payment period and/or payment terms. Election Funding Authority, http://www.efa.nsw.gov.au/nsw_parliament_candidates_and_groups#lo (accessed 20 February 2010)

¹⁷² Election Funding Authority, http://www.efa.nsw.gov.au/nsw_parliament_candidates_and_groups#pd (accessed 20 February 2010).

¹⁷³ Explanatory Notes, *Election Funding Amendment (Political Donations and Expenditure) Act 2008*.

¹⁷⁴ Schedule 1, *Election Funding Amendment (Political Donations and Expenditure) Act 2008* which amended s89 of the *Election Funding and Disclosures Act 1981*.

¹⁷⁵ Election Funding Authority, http://www.efa.nsw.gov.au/donors/political_donations_and_electoral_expenditure2 (accessed 20 February 2010).

¹⁷⁶ Election Funding Authority, http://www.efa.nsw.gov.au/donors/political_donations_and_electoral_expenditure2 (accessed 20 February 2010).

5.15 Once a reportable donation is made, disclosure obligations attach to both the political donor and the person receiving the donation (ie. the party agent in the case of a political party or the official agent in the case of an elected member, candidate or group of candidates). Both the donor and recipient are required to complete and lodge separate disclosure reports with the Election Funding Authority, which are then reconciled by the Authority.

5.16 As well as donations made, political donors are required to disclose reportable donations *received*.¹⁷⁷ The Election Funding Authority provides the following examples of political donations that a political donor might receive:

A person or organisation purchases ten tickets for a fundraising event held by a political party at \$1,000 per ticket. The person or organisation receives \$1,000 from each of the ten persons who attend the fundraising event. The amounts paid to the person or organisation from those ten persons constitutes gifts made to the person or organisation.

A person or organisation holds a fundraising event where the proceeds of the event are donated to a political party, elected member, candidate or group in NSW. The amounts received by the person or organisation from those who purchased tickets for the event constitute gifts made to the person or organisation.

A person purchases a ticket to attend a fundraising event held by a political party. The person then puts in an expense claim with their employer to be reimbursed for the purchase of the ticket. The amount paid by the employer to the employee constitutes a gift made to the political party.¹⁷⁸

5.17 All disclosure returns, except for those lodged by donors, are required to be accompanied by an audit certificate.¹⁷⁹ Returns are required to disclose:

- various details of 'reportable political donations' (i.e. a donation to or for the benefit of a party, candidate or elected member exceeding \$1000);
- the total amount of donations where donations are not 'reportable political donations' (i.e. donations of \$1000 or less) and the number of persons making such donations;
- the total amount of annual party membership fees, the subscription rate/s and number of members paying such rate/s;
- details, including net or gross proceeds, of each fundraising venture;⁸⁰
- details of loans of \$1000 or more; and
- details of 'electoral expenditure'.¹⁸⁰

¹⁷⁷ Election Funding Authority,

http://www.efa.nsw.gov.au/donors/disclosure_requirements_includes_definitions_of_stakeholders (accessed 20 February 2010). Political donors who do not make or receive reportable political donations or incur \$1,000 or more in electoral expenditure during a six-month period are not required to lodge a disclosure for that six-month period.

¹⁷⁸ Election Funding Authority, Funding and Disclosure Guide: Political Donors,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0011/65198/F-and-DG_for_Political_Donors.pdf (accessed 20 February 2010, p.5).

¹⁷⁹ Section 96K, *Election Funding and Disclosures Act 1981*.

¹⁸⁰ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 34,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

- 5.18 The Election Funding Authority is required to maintain a website to publish disclosures of reportable political donations and electoral expenditure.¹⁸¹ It is required to publish all disclosure details on the website as soon as practicable after the due date for the making of the disclosures.¹⁸²

Current funding and political donations

- 5.19 The following information on levels and sources of political funding and donations is drawn from:

- the work of Dr Joo-Cheong Tham, which relies on returns submitted to the NSW Election Funding Authority¹⁸³;
- the work of Dr Anne Twomey and her advice to the NSW government on the reform of political donations, expenditure and funding¹⁸⁴; and
- the recent Federal government 'Electoral Reform Green Paper: Donations, Funding and Expenditure'.¹⁸⁵

While there are some limitations to the accuracy of this information, it serves to provide a broad overview of the amount and type of funding available to political parties.

The information from Dr Tham refers to funds provided for the 2007, 2003 and 1999 state elections. However, it is important to note that not all funds provided to NSW political parties are used for the purpose of state elections [see paragraph 5.94 on 'Fundraising for federal elections'].

Sources of funding

- 5.20 As well as funding from donations, political parties, candidates and groups rely on public funding and other sources of income. **Table 1** illustrates the split between private funding and public funding in NSW for the main political parties.

¹⁸¹ Section 95(1), *Election Funding and Disclosures Act 1981*.

¹⁸² Section 95(2), *Election Funding and Disclosures Act 1981*.

¹⁸³ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 24,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

¹⁸⁴ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, at http://www.dpc.nsw.gov.au/publications/news/stories/election_campaign_finance_reform (accessed 17 December 2009).

¹⁸⁵ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf (accessed 20 February 2010).

Table 1: Private and public funding of NSW parties: March 1995 – March 2007¹⁸⁶

Party	Total Private Funding (Political Donations)	Total Public Funding (Election Funding)	Total Funding	% Private Funding (Political Donations)	% Public Funding (Election Funding)
ALP	41,849,696	9,693,471	51,543,167	81.19%	18.81%
Liberal Party	38,728,278	5,176,279	43,904,557	88.21%	11.79%
National Party	12,507,845	2,642,165	15,150,010	82.56%	17.44%
Greens	3,052,419	1,188,384	4,240,803	71.98%	28.02%
Christian Democrats	2,465,870	865,039	3,330,909	74.03%	25.97%
The Shooters Party ¹⁸⁷	1,524,887	400,996	1,925,883	79.18%	20.82%

5.21 The Federal Governments 'Electoral Reform Green Paper: Donations, Funding and Expenditure' also provides information on the sources on funding for the major political parties in Australia, and states:

Approximately 80 per cent of the major political parties' funds come from private sources. Approximately three-quarters of major political parties' funds from private sources come from fundraising activities, investments and debt.¹⁸⁸

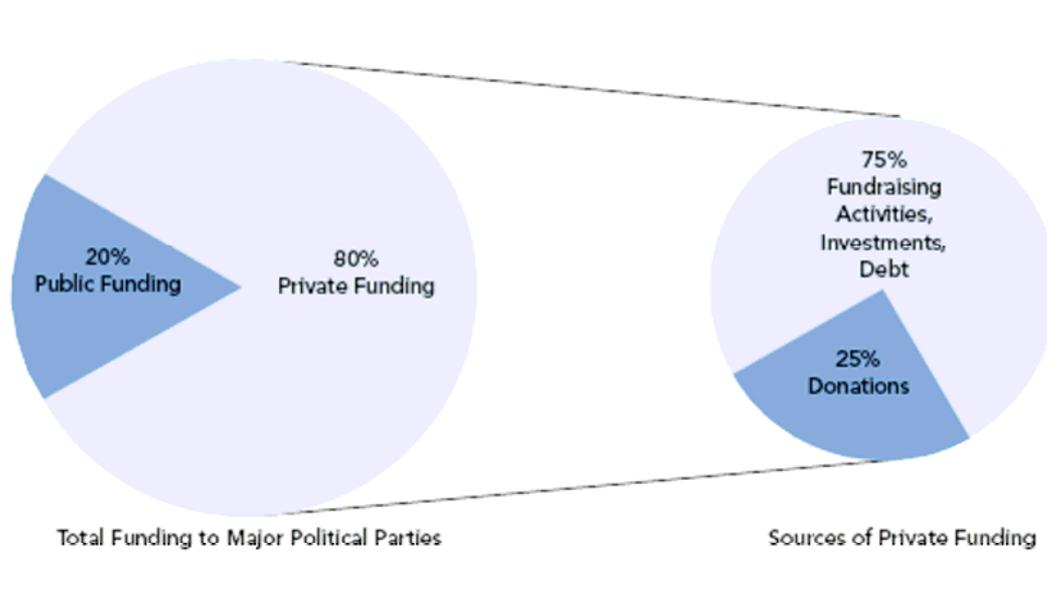
5.22 This is illustrated in the following chart:

¹⁸⁶ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 27, http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010). Based on an analysis of returns lodged by parties for the 1999, 2003 and 2007 NSW State Elections. The title of this table has been altered to reflect that not all funds raised by NSW political parties are for the purposes of NSW state elections. The original title of this table as provided by Dr Tham was 'Private and public funding of NSW parties: 1999, 2003 and 2007.'

¹⁸⁷ The Shooters Party was identified as 'John Tingle – The Shooters Party' in the 1999 State Election Summary.

¹⁸⁸ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf (accessed 20 February 2010), p.41

Chart 1: Major political parties' sources of funding¹⁸⁹



Number of donors by donation amount

5.23 The following Tables 2-4¹⁹⁰ give an idea of the number of donors to each political party for the following periods between state elections: March 1995 - March 1999; from March 1999 - March 2003; and March 2003 - March 2007. The accuracy of the tables is 'limited by the fact that the number of donors contributing political donations of less than \$1500 is not publicly reported'.¹⁹¹

¹⁸⁹ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf (accessed 20 February 2010), p.41

¹⁹⁰ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 27, http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010). Based on an analysis of returns lodged by parties for the 1999, 2003 and 2007 NSW State Elections.

¹⁹¹ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p.28, http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

Table 2: Number of Donors by Donation Amount: March 2003 – March 2007¹⁹²

Party	Total Donors for Donations \$1500 and More	\$1500 - \$5000 (number of donors / percentage of total donors)	\$5001 - \$10000 (number of donors / percentage of total donors)	\$10001 - \$15000 (number of donors / percentage of total donors)	> \$15000 (number of donors / percentage of total donors)
ALP	2458	1468 / 59.7%	430 / 17.5%	263 / 10.7%	297 / 12.1%
Liberal Party	3144	2082 / 66.2%	536 / 17.1%	334 / 10.6%	192 / 6.1%
National Party	254	196 / 77.2%	43 / 16.9%	11 / 4.3%	4 / 1.6%
Greens	81	58 / 71.6%	10 / 12.4%	1 / 1.2%	12 / 14.8%
Christian Democrats	33	29 / 87.9%	3 / 9.1%	1 / 3.0%	0 / 0.0%
Shooters Party	25	12 / 48.0%	4 / 16.0%	2 / 8.0%	7 / 28.0%

Table 3: Number of Donors by Donation Amount: March 1999 – March 2003¹⁹³

Party	Total Donors for Donations \$1500 and More	\$1500 - \$5000 (number of donors / percentage of total donors)	\$5001 - \$10000 (number of donors / percentage of total donors)	\$10001 - \$15000 (number of donors / percentage of total donors)	> \$15000 (number of donors / percentage of total donors)
ALP	294	109 / 37.1%	53 / 18.0%	27 / 9.2%	105 / 35.7%
Liberal Party	287	165 / 57.5%	54 / 18.8%	28 / 9.8%	40 / 13.9%
National Party	77	44 / 57.1%	22 / 28.6%	4 / 5.2%	7 / 9.1%
Greens	34	18 / 52.9%	8 / 23.5%	5 / 14.7%	3 / 8.8%
Christian Democrats	28	23 / 82.1%	3 / 10.7%	2 / 7.1%	0 / 0.0%
Shooters Party	20	15 / 75.0%	3 / 15.0%	2 / 10.0%	0 / 0.0%

¹⁹² Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p.28. The title of this table has been altered to reflect that not all funds raised by NSW political parties are for the purposes of NSW state elections. The original title of this table as provided by Dr Tham was 'Number of Donors by Donation Amount: 2007 NSW State Election'.

¹⁹³ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 29. The title of this table has been altered to reflect that not all funds raised by NSW political parties are for the purposes of NSW state elections. The original title of this table as provided by Dr Tham was 'Number of Donors by Donation Amount: 2003 NSW State Election'.

Table 4: Number of Donors by Donation Amount: March 1995 – March 1999¹⁹⁴

Party	Total Donors for Donations \$1500 and More	\$1500 - \$5000 (number of donors / percentage of total donors)	\$5001 - \$10000 (number of donors / percentage of total donors)	\$10001 - \$15000 (number of donors / percentage of total donors)	> \$15000 (number of donors / percentage of total donors)
ALP	124	36 / 29.0%	28 / 22.6%	10 / 8.1%	50 / 40.3%
Liberal Party	147	86 / 58.5%	30 / 20.4%	7 / 4.8%	24 / 16.3%
National Party	44	22 / 50.0%	15 / 34.1%	5 / 11.4%	2 / 4.5%
Greens	6	4 / 66.7%	0 / 0.0%	0 / 0.0%	2 / 33.3%
Christian Democrats	12	10 / 83.33%	1 / 8.33%	0 / 0.0%	1 / 8.33%
John Tingle – Shooters Party	15	10 / 66.7%	2 / 13.3%	2 / 13.3%	1 / 6.7%

5.24 Dr Tham provided the following analysis of this information:

Bearing this limitation in mind [that the tables do not record donations under \$1500], we firstly notice that the parties are reliant on a relatively small number of contributors. For the 1999 and 2003 NSW State Elections, the party that received the highest number of donors (for political donations of \$1500 and more) was the ALP and even then the number of donors only stood at 294. The number of donors significantly increased for the 2007 NSW State Election, reaching more than two and three thousand for the ALP and the Liberal Party respectively. That said, the numbers are still relatively small: the number of donors to the ALP and Liberal Party were 0.06% and 0.07% respectively of the total number of persons enrolled for the 2007 NSW State Election (i.e. 4 374 029).

Tables 2–4 also suggest that of those who make political donations, the majority tend to make donations at the lower end of the scale. Take, for example, the figures for the 2007 NSW State Election: more than half of donors (for amounts of \$1500 and more) to the ALP and the Liberal Party made donations within the range of \$1500 to \$5000; in the case of the National Party, Greens and the Christian Democrats, their respective proportions were more than 70%.¹⁹⁵

Importance of donations according to amount

5.25 Table 5 draws on returns lodged for the four year period prior to the 2007 NSW state election detailing the importance of donations according to amount.

¹⁹⁴ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p.30. The title of this table has been altered to reflect that not all funds raised by NSW political parties are for the purposes of NSW state elections. The original title of this table as provided by Dr Tham was 'Number of Donors by Donation Amount: 1999 NSW State Election'.

¹⁹⁵ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p.27.

Table 5: Importance of Donations According to Amount: 2007 NSW State Election ¹⁹⁶

Party	Total Amount of Donations Received Valued at \$1500 or More	\$1500 - \$5000 (Amount of donations / percentage of total donations)	\$5001 - \$10000 (Amount of donations / percentage of total donations)	\$10001 - \$15000 (Amount of donations / percentage of total donations)	> \$15000 (Amount of donations / percentage of total donations)
ALP	\$21 300 913	\$4 681 333 / 22.0%	\$3 140 796 / 14.7%	\$3,407,159 / 16.0%	\$10 071 625 / 47.3%
Liberal Party	\$22 326 609	\$6 039 182 / 27.1%	\$4 291 543 / 19.2%	\$3 840 006 / 17.2%	\$8 155 878 / 36.5%
National Party	\$1 045 596	\$517 285 / 49.5%	\$309 823 / 29.6%	\$133 507 / 12.8%	\$84 981 / 8.1%
Greens	\$679 465	\$158 615 / 23.3%	\$84 000 / 12.4%	\$11 143 / 1.6%	\$425 707 / 62.7%
Christian Democrats	\$123 406	\$82 906 / 67.2%	\$27 000 / 21.9%	\$13 500 / 10.9%	\$0 / 0.0%
Shooters Party	\$556 748	\$45 175 / 8.1%	\$29 940 / 5.4%	\$27 774 / 5.0%	\$453 748 / 81.5%

5.26 Dr Tham provided the following analysis:

... importance in terms of number of donors is not the same as importance in terms of amount. In the case of the ALP, the Liberal Party and the Greens, donations of \$10,000 or more respectively constituted 63.3%, 53.7% and 64.3% of the total donations of \$1500 or more. The number of donors contributing these amounts, however, respectively constituted 22.8%, 16.7% and 16% of the total number of donors (for donations of \$1500 or more).

It should, however, be noted that the patterns of political donations for the National Party and Christian Democrats are quite different – both can claim to be more reliant on smaller donations. Of the donations it received by the National Party (of \$1500 or more), 79.1% of this amount came from donations within the range of \$1500 and \$10,000; in the case of the Christian Democrats, the figure is even higher, standing at 89.1%.¹⁹⁷

5.27 The Federal Green Paper analysed the ‘annual returns for the major political parties’ federal, state and territory branches in the 2004/05 financial year’ which indicated that:

... over 80 per cent of the amount raised by donations came from donations of \$10,000 or more. Approximately 60 per cent of the money raised through donations came from donations of \$40,000 or more, and 45 per cent came from donations of at least \$100,000. This shows the importance of large donations to the major parties.¹⁹⁸

¹⁹⁶ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 30.

¹⁹⁷ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p.30.

¹⁹⁸ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf (accessed 20 February 2010), p.42.

Donations above and below \$1500

5.28 Dr Twomey put together the following table to show the total amount of money each political party received in donations both above and below \$1500 for the 2007 election:

Table 6: 2007 NSW general election – contributions received by parties¹⁹⁹

Party name	Donations \$1500 or less	Donations more than \$1500	Annual subscriptions	Subscriptions & donations below \$1500
Australian Democrats (NSW Division)	71,541 45%	34,048 22%	52,662 33%	78%
Australian Labor Party (NSW Branch)	2,857,354 10%	21,592,256 78%	3,197,778 12%	22%
Australians Against Further Immigration	5,536 60%	0 0%	3765 40%	100%
Christian Democratic Party (Fred Nile Group)	1,104,664 78%	123,406 9%	186,280 13%	91%
Horse Riders Party	61 100%	0 0%	0 0%	100%
Liberal Party of Australia NSW Division	5,298,785 18%	22,326,909 75%	2,271,397 7%	25%
National Party of Australia – NSW	1,414,435 32%	1,045,596 24%	1,918,966 44%	76%
Outdoor Recreation Party	7,533 45%	5,000 30%	4,320 25%	70%
Restore the Workers Rights Party	0 0%	0 0%	20,613 100%	100%
Save Our Suburbs	9,610 66%	5,000 34%	0 0%	66%
The Fishing Party	754 26%	0 0%	2,200 74%	100%
The Greens	946,143 45%	679,467 33%	468,109 22%	67%
The Shooters Party	110,622 13%	556,748 67%	166,405 20%	33%
Unity Party	206,436 41%	292,939 58%	6,155 1%	42%

Level of fundraising

5.29 Table 7 details the amounts that parties raised through fundraising in relation to the following periods between state elections: March 1995 - March 1999; from March 1999 - March 2003; and March 2003 - March 2007. Dr Tham provided the following analysis of the data:

[These figures]...indicate that fundraising is a crucial form of income especially for the ALP and the Liberal Party. It is likely, however, that these figures significantly

¹⁹⁹ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, at http://www.dpc.nsw.gov.au/publications/news/stories/election_campaign_finance_reform (accessed 17 December 2009), p.22.

understate the extent of fundraising by the parties as they do not include fundraising by 'associated entities'.²⁰⁰

Table 7: Declared Fundraising: 1999, 2003 and 2007 NSW State Elections²⁰¹

Party	1999 Election Cycle (\$)	2003 Election Cycle (\$)	2007 Election Cycle (\$)
ALP (NSW)	1 040 074	2 921 216	7 740 153
Liberal Party (NSW)	368 821	28 269	5 268 837
Christian Democratic Party (Fred Nile Group)	26 436	6081	2 751
Greens (NSW)	15 636	28 151	218 448
National Party (NSW)	40 986	114 796	819 600
The Shooters Party	6 526	17 882	Nil

Rationale for reform

5.30 The rationale behind caps and bans on donations is well documented in Chapter 2 and Chapter 7 of the Select Committee on Electoral and Political Party Funding Report. The report outlined the 'lack of [community] confidence in the existing regulatory regime, the unease over political donations and the perception of undue influence [which] have been reinforced by several recent events at the local and State Government level.'²⁰² The report particularly highlighted a number of high profile incidents regarding developer donations at both levels of government.²⁰³

5.31 As noted above, a number of recommendations in the report relating to donations and disclosure were implemented in 2008 and 2009. However, the government did not implement the main recommendation of the Committee in this area, which was:

That the Premier ban all but small political donations by individuals, to be capped at \$1,000 per political party per year, and \$1,000 per independent candidate per electoral cycle.²⁰⁴

5.32 The sentiments expressed about the inadequacies of the donations and disclosure regime as part of the Select Committee inquiry were further reflected in the evidence to the current inquiry. For example, Mr Draper, the Member for Tamworth stated in his submission:

Financial donations to political parties and candidates can be one of the most corrupting forces in our political system. Many in the community believe that big business, trade unions and wealthy individuals have undue influence on policy directions because of their contributions to political parties. Indeed, reform must address the findings of many

²⁰⁰ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 36, http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

²⁰¹ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 37.

²⁰² NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.7.

²⁰³ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, pp.10-12.

²⁰⁴ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.105.

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research projects that have discovered high levels of cynicism about the political process deeply entrenched in the wider community.

Any doubts about the integrity of political campaign funding, or in the trust we can place in free and fair elections, have the potential to badly undermine the strength of our democracy. It is important that steps are taken to make the electoral system fairer and more transparent.²⁰⁵

5.33 In evidence to this inquiry, the need for reform to restore public confidence in the integrity of the system was recognised by most of the political parties that are currently represented in the New South Wales Parliament, including the two major parties.²⁰⁶ Of the submissions and evidence received from state political parties, only the Shooters Party called for retention of the status quo regarding political donations.²⁰⁷ In a paper commissioned by the Electoral Commissioner, Dr Tham drew on comments from prominent NSW politicians and party administrators to show how 'disquiet with the NSW political finance regime cuts across party lines.'²⁰⁸

5.34 The Public Interest Advocacy Centre outlined the following concerns amongst the community relating to the current level and type of political donations:

- through large donations, donors purchase access that is not available to ordinary citizens or to smaller, particularly not-for-profit organisations that have only limited resources, and this access can result in actual or the perception of undue influence;
- reliance on private donations can create a conflict of interest for parties and candidates and can influence them to make decisions that keep donors on side, rather than serve the public interest;
- the perception of corruption in the political system;
- negative impact on grass-roots democracy both within parties and with the broader community.²⁰⁹

5.35 While recognising that there is 'no easy solution in preventing corruption stemming from political donations', the Independent Commission Against Corruption expressed support for a ban on all but individual donations by individuals 'in order to curtail the perceived influence that money has in politics'.²¹⁰

5.36 Dr Tham has provided a detailed analysis of the current system measured against the four principles outlined in Chapter 3 of this report.²¹¹ In relation to the first

²⁰⁵ Mr Draper, Independent Member for Tamworth, *Submission 10*, p.1.

²⁰⁶ Australia Labor Party (NSW Branch), *Submission 15*, p.3; Liberal Party of Australia (NSW Division), *Submission 17*, p.7; Mr Ben Franklin, State Director, NSW National Party, *Submission 18*, p.1; The Greens NSW, *Submission 19*, p.1; Christian Democratic Party, *Submission 28*, pp.10-11.

²⁰⁷ Mr Robert Borsak, Chairman, The Shooters Party, *Transcript of Evidence*, 1 February 2010, p.64.

²⁰⁸ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 7,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).. Included quotes from: Eric Roozendaal, NSW Treasurer; Senator Mark Arbib, former NSW ALP General Secretary; Nathan Rees, former NSW Premier; Kristina Keneally, NSW Premier; Andrew Stoner, Leader of the NSW National Party; Barry O'Farrell, NSW Opposition Leader; Michael Baird, Liberal Party Shadow Treasurer.

²⁰⁹ Public Interest Advocacy Centre, *Submission 26*, p.6.

²¹⁰ Independent Commission Against Corruption, *Submission 14*, p.1.

²¹¹ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, pp. 33-48,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

principle of *protecting the integrity of representative government* he argues that there are deficiencies with the disclosure scheme, which impact on the transparency of political funding and give 'rise to the appearance or perception of corruption through undue influence and graft' thus contravening the first principle.²¹² For example, he argues that there is a 'gaping hole in relation to 'associated entities' of parties, with these groups not subject to separate disclosure obligations'. Dr Tham stated that:

Such entities include groups that are controlled by one or more parties or that operate wholly or to a significant extent for the benefit of one or more parties. In colloquial terms, these are front groups for the parties.²¹³

5.37 Further, he contends that the current system 'allows the political process to be corrupted through the sale of access and influence.'²¹⁴ He argues this is particularly so in the case of fundraising events, which allow 'those who are able to pay' access to political decision-makers.²¹⁵

5.38 In relation to the third principle, that the political finance system should *support parties to perform their functions*, he argues that the current system of excessive fundraising means that a party's 'ability to effectively govern is undermined by the time consumed by subsequent rounds of fundraising.'²¹⁶ He claims that reliance on large donations by a relatively small number of corporations means that 'the agenda setting function of the party system is impaired as the policies of major parties are disproportionately influenced by a small band of businesses'²¹⁷ He further contends that 'fundraising practice may also lessen the ability of the major parties to act as vehicles for popular participation'.²¹⁸ In particular:

The fundraising practices of the major parties will lessen their appeal to ordinary citizens as they tend to hollow out the meaning of party membership. As these parties sell influence to moneyed interests, they send out a signal to their rank-and-file members that the voices that will be listened to are those with large purses rather than those who faithfully subscribe to party principles.²¹⁹

Donations in other jurisdictions

5.39 According to the Federal Green Paper on Electoral Reform, a number of other 'western democracies, including the United States, Canada and the United Kingdom, seek to balance the individual right to freedom of political association and expression against the public interest in minimising the risk of undue influence or corruption in their electoral systems, by limiting the amount individuals and organisations can

²¹² Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 35.

²¹³ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 36.

²¹⁴ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 33.

²¹⁵ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 41.

²¹⁶ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 47.

²¹⁷ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 47.

²¹⁸ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 48.

²¹⁹ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 49.

donate to political parties, independent candidates and others in the political process.²²⁰

5.40 The Green Paper highlighted the following lessons from other jurisdictions relating to caps and bans on donations:

Based on overseas experience, a ban or cap would be ineffective if it resulted in donors making a financial contribution by another, potentially less transparent means, such as fees for attendance at functions, fundraising activities or through payment of membership fees. Similarly, the provision of debt support needs to be considered given the potential influence resulting from debt holders' conditions on financing of debt incurred by political participants.²²¹

Canada

5.41 The Canadian electoral funding regime imposes caps on donations and prohibits donations from certain entities. Under the *Canada Elections Act 2000*, which governs contributions²²², the following caps and bans apply:

- Only individuals who are Canadian citizens or permanent residents can give a contribution to registered parties, candidates, nomination contestants, registered associations and leadership contestants.²²³
- Corporations, trade unions and unincorporated associations are ineligible to make a contribution.
- A Canadian citizen or permanent resident can donate:
 - No more than \$1,100 in any calendar year to each registered political party
 - No more than \$1,100 in any calendar year to the various entities of each registered political party (registered associations, nomination contestants and candidates)
 - No more than \$1,100 to the leadership contestant or the leadership contestants of their choice in a particular leadership contest
 - No more than \$1,100 to each independent candidate for a particular election.²²⁴
- Cash donations of over \$20 are prohibited.²²⁵
- A candidate may contribute an additional \$1000 of their own funds without it counting towards their contribution limit.²²⁶

²²⁰ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf (accessed 20 February 2010), p.57.

²²¹ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf (accessed 20 February 2010), p.58.

²²² The *Canada Elections Act 2000* refers to donations as contributions.

²²³ Section 404, *Canada Elections Act 2000*

²²⁴ Section 405, *Canada Elections Act 2000*. The Act provides for maximum contribution limits of \$1000, subject to an inflation adjustment on 1 April of each year. On January 1 2007 these limits were adjusted to \$1100.

²²⁵ Section 405.31, *Canada Elections Act 2000*.

²²⁶ Section 405(4)(a) *Canada Elections Act 2000* as cited in Elections Canada, Information Sheet: *Limits on Contributions by Individuals Under the Canada Elections Act*, <http://www.elections.ca/content.asp?section=loi&document=fs02&dir=gui&lang=e&textonly=false> (accessed 11 March 2010)

- Membership fees to a registered party 'not more than \$25 per year in relation to a period of not more than five years for membership in a registered party are not contributions.'²²⁷
- 5.42 Disclosure requirements and a number of anti-avoidance provisions accompany these limits and bans on contributions.
- 5.43 The current donation limits and prohibition on donations from corporations, unions and associations in Canada were introduced in December 2006 by the *Federal Accountability Act 2006*, which amended the Canada Elections Act. Prior to the passing of the Federal Accountability Act individuals were permitted to donate \$5000 to a party or candidate annually. Corporations, trade unions and associations were also permitted to make donations up to \$1000 but only to individual candidates or electoral district associations. They were not permitted to make donations to national political party organisations or candidates in the leadership contest for a party.²²⁸
- 5.44 The amendments to the Canada Elections Act were one of a number of other measures designed to improve 'the level of trust that Canadians have in their government.'²²⁹ As the Hon John Baird, President of the Treasury Board, stated:

...

There are a lot of methods about election financing. We believe that money should not have the ear of the government, and the Federal Accountability Act will help take government out of the hands of the big corporations and the big unions and give it back to ordinary Canadians. Our act will limit donations to \$1000 a year. It will ban contributions by corporations, unions and organizations.

I believe the primary concern of our debate on this subject should be what we can do to increase the transparency of the political process so that Canadians can feel more confident in the integrity of our democratic system.²³⁰

United Kingdom

- 5.45 There are currently no caps on donations in the United Kingdom, however there are laws that regulate who may make a donation. Donations to *registered parties* above £500²³¹ are prohibited, unless from a permissible donor. Donations to *candidates* above £50²³² are prohibited, unless they are from a permissible donor. A permissible donor is defined to include:
- an individual registered on a UK electoral register
 - a UK registered political party
 - a UK registered company

²²⁷ Section 404.2(6) *Canada Elections Act 2000*

²²⁸ Gareth Griffith and Talina Drabsch, *Election Finance Law: Recent Developments and Proposals for Reform* (NSW Parliamentary Library Research Service, June 2007), p 20

²²⁹ The Hon John Baird, President of the Treasury Board, Second Reading Speech: *Bill C-2 Federal Accountability Act*, House of Commons, April 25 2006, p 456

²³⁰ The Hon John Baird, President of the Treasury Board, Second Reading Speech: *Bill C-2 Federal Accountability Act*, House of Commons, April 25 2006, p 457

²³¹ The £500 threshold applies from 1 Jan 2010. For donations before that date the threshold is £200. Section 68 of the *Political Parties, Elections and Referendums Act 2000* places a duty on a donor who makes a number of donations to a party in a year, each of which is £200 or less but which in aggregate exceed £5,000, to report the donations to the Electoral Commission. See Explanatory Notes accompanying the *Political Parties, Elections and Referendums Act 2000*.

²³² Section 130 and Schedule 16 insert new section 71A and new Schedule 2A in the *Representation of the People Act 1983*

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- a UK registered trade union
 - a UK registered building society
 - a UK registered limited liability partnership
 - a UK registered friendly/building society
 - a UK based unincorporated association²³³
- 5.46 The definition of permissible donor and requirement for parties and candidates to be able to ascertain the identity of donors²³⁴ has the effect of prohibiting foreign donations (above a certain amount) and donations received anonymously.
- 5.47 The issue of caps and bans on donations has been an ongoing topic of discussion in the United Kingdom.²³⁵ Most recently there have been renewed calls to review political party funding after ‘details emerged of loans made during the 2005 election which appeared to circumvent the relevant statutory requirements.’²³⁶ Following on from these developments a review of the funding of political parties was conducted by Sir Hayden Phillips, *Strengthening Democracy: Fair and Sustainable Funding of Political Parties*.²³⁷ In his review Sir Hayden makes a number of recommendations, with one of his proposals being the introduction of a cap on donations of £50,000 for both individuals and organisations.²³⁸
- 5.48 In June 2008 the British Government published a White Paper responding to the proposals contained in the Phillips Review. In response to the proposal to introduce caps on donations, the British Government submitted:
- ... the Government believes that any decision to cap the maximum level of donations to political parties alongside increased state funding must be subject to further and significant consideration. Central to this, of course, the question of what would be an appropriate level at which to set the cap. The £50 000 figure is higher than the level of a cap imposed by other countries and a significant sum in the eyes of most people. To this extent, it arguably falls short of the type of radical step needed to help reconnect people with the political process – which is the ultimate aim of the proposals contained in this White Paper. The Government therefore believes that further consideration of donation caps should extend to a significantly lower limit.
- While the White Paper advances the case for far-reaching reform, it recognises that differences of opinion endure on how such significant changes might best be achieved. The Government does not, therefore, intend to legislate in the short term to introduce Sir Hayden’s proposals on donation caps, state funding or a single all-encompassing

²³³ Section 54(2), *Political Parties, Elections and Referendums Act 2000* (UK)

²³⁴ Section 54(1), *Political Parties, Elections and Referendums Act 2000* (UK)

²³⁵ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, at http://www.dpc.nsw.gov.au/publications/news/stories/election_campaign_finance_reform (accessed 17 December 2009), pp. 14-15 and Gareth Griffith and Talina Drabsch, *Election Finance Law: Recent Developments and Proposals for Reform* (NSW Parliamentary Library Research Service, June 2007), p 27

²³⁶ Gareth Griffith and Talina Drabsch, *Election Finance Law: Recent Developments and Proposals for Reform* (NSW Parliamentary Library Research Service, June 2007), p 28. Subsequently the *Electoral Administration Act 2006* was amended to require all types of loans to be reported to the Electoral Commission.

²³⁷ UK, *The Review of Funding of Political Parties, Strengthening Democracy: Fair and Sustainable Funding of Political Parties*, March 2007 as cited in Gareth Griffith and Talina Drabsch, *Election Finance Law: Recent Developments and Proposals for Reform* (NSW Parliamentary Library Research Service, June 2007), p 29

²³⁸ Gareth Griffith and Talina Drabsch, *Election Finance Law: Recent Developments and Proposals for Reform* (NSW Parliamentary Library Research Service, June 2007), p 30

national spending limit, but will continue to advance the case for such fundamental reform within the context of further and wider discussions.²³⁹

- 5.49 In July 2009, the *Political Parties and Elections Act 2009* came into force. The Act seeks to fulfil the commitments the British Government made in its White Paper to 'bring forward immediate legislation to tighten controls on spending by political parties and candidates.'²⁴⁰ On the issue of donations, the Act requires that where a donation has passed through an intermediary, the original source of the donation be disclosed.

United States

- 5.50 Electoral funding laws in the United States place limits on contributions and prohibit contributions from certain sources. Under the *Federal Election Campaign Act*, individuals and groups are limited in the amounts they may contribute to candidates for federal office and to the political committees that support them. The limitations apply to any type of contribution including, but not limited to, contributions of money, goods or services and loans.²⁴¹
- 5.51 The following table produced by the Federal Electoral Commission details the current contribution limits for 2009-2010:

²³⁹ *Party finance and expenditure in the United Kingdom – The Government's proposals*, White Paper, June 2008, Cm 7329, p 8.

²⁴⁰ Explanatory Notes to *Political Parties and Elections Act 2009* (UK), p 1

²⁴¹ Federal Electoral Commission, Contributions brochure, updated January 2009

<http://www.fec.gov/pages/brochures/contrib.shtml#electionlimits> (accessed 23 February 2010)

Table 8: Contribution limits for 2009-10²⁴²

	To each candidate or candidate committee per election	To national party committee per calendar year	To state, district & local party committee per calendar year	To any other political committee per calendar year ¹	Special Limits
Individual may give	\$2,400*	\$30,400*	\$10,000 (combined limit)	\$5,000	\$115,500* overall biennial limit: • \$45,600* to all candidates • \$69,900* to all PACs and parties ²
National Party Committee may give	\$5,000	No limit	No limit	\$5,000	\$42,600* to Senate candidate per campaign ³
State, District & Local Party Committee may give	\$5,000 (combined limit)	No limit	No limit	\$5,000	No limit
PAC (multicandidate)⁴ may give	\$5,000	\$15,000	\$5,000 (combined limit)	\$5,000	No limit
PAC (not multicandidate) may give	\$2,400*	\$30,400*	\$10,000 (combined limit)	\$5,000	No limit
Authorized Campaign Committee may give	\$2,000 ⁵	No limit	No limit	\$5,000	No limit

* These contribution limits are indexed for inflation.

1. A contribution earmarked for a candidate through a political committee counts against the original contributor's limit for that candidate. In certain circumstances, the contribution may also count against the contributor's limit to the PAC. 11 CFR 110.6. See also 11 CFR 110.1(h).
2. No more than \$45,600 of this amount may be contributed to state and local party committees and PACs.
3. This limit is shared by the national committee and the national Senate campaign committee.
4. A multicandidate committee is a political committee with more than 50 contributors which has been registered for at least 6 months and, with the exception of state party committees, has made contributions to 5 or more candidates for federal office. 11 CFR 100.5(e)(3).
5. A federal candidate's authorized committee(s) may contribute no more than \$2,000 per election to another federal candidate's authorized committee(s). 11 CFR 102.12(c)(2).

5.52 The Federal Election Campaign Act also prohibits contributions from:²⁴³

- corporations, labour organisations and national banks. However, contributions may be made from political action committees established by corporations, labour organisations and national banks
- federal government contractors however it does not apply to employees, partners, shareholders or officers of businesses with government contracts

²⁴² <http://www.fec.gov/pages/brochures/contrib.shtml#electionlimits> (accessed 23 February 2010)

²⁴³ Federal Electoral Commission, *Brochure: Contributions*, http://www.fec.gov/pages/brochures/contrib.shtml#Prohibited_Contributions (accessed March 11 2010).

- foreign nationals who do not have permanent residence in the United States
- contributions which in aggregate exceeds \$100 from one person
- contributions made in the name of another
- Presidential candidates in the general election who have opted to accept public funding are prohibited from receiving contributions.²⁴⁴

New Zealand

5.53 There are no limits on donations an individual or an organisation based in New Zealand may make to a political party, candidate or both.²⁴⁵ The *Electoral Act 1993* does impose a limit of \$1000 on donations received from overseas donors and also a limit of \$1000 on donations received from anonymous donors.²⁴⁶ A large part of the rules that apply to donations in New Zealand are concerned with disclosure.²⁴⁷ Although New Zealand is currently undertaking a review of its election finance laws, the government has indicated that the provisions relating to donations will be retained, as it is considered that they 'strike a fair balance between transparency and the freedom to accept donations'.²⁴⁸

Inquiry participants' views

- 5.54 The Committee received submissions and heard evidence from a number of stakeholders regarding the capping or banning of particular donations. Two main options for reform emerged:
1. Ban all donations except small donations from individuals
 2. Allow donations from both individuals and entities, but capped at a relatively low level.
- 5.55 There was some discussion as to the inclusion of in-kind contributions in any cap on donations. There seemed to be general agreement amongst stakeholders that in-kind contributions, as currently defined under the *Election Funding and Disclosures Act 1981*, should be included in any cap, as long as the existing exclusion relating to genuine volunteer labour is maintained.²⁴⁹

²⁴⁴ Federal Electoral Commission, *Public Funding of Presidential Elections Brochure*, published August 1996 (updated January 2009), <http://www.fec.gov/pages/brochures/pubfund.shtml#anchor697350> (accessed 11 March 2010).

²⁴⁵ New Zealand Ministry of Justice, *Electoral Finance Reform, Proposal Document*, p. 21, <http://www.justice.govt.nz/policy-and-consultation/electoral/electoral-finance-reform/documents/Electoral%20Finance%20Reform%20Proposal%20Document.pdf> (accessed 5 March 2010)

²⁴⁶ Sections 207I & 207K, *Electoral Act 1992* (NZ). Where an anonymous donation exceeds \$1000, the candidate or party may keep \$1000 but must provide the excess amount to either the Electoral Commission or the Chief Electoral Office: s 207I(2).

²⁴⁷ Rules specifying disclosure requirements are contained throughout Subparts 3-6 of Part 6A of the *Electoral Act 1993* (NZ).

²⁴⁸ The Hon Simon Power, Minister of Justice, 'Second Reading Speech: Electoral Amendment Bill' 17 February 2009, p 1318 and New Zealand Ministry of Justice, *Electoral Finance Reform, Proposal Document*, pp. 21-22.

²⁴⁹ Section 96E(3)(a), *Election Funding Act 1981*. Mr Matthew Thistlethwaite, General Secretary, The Australian Labor Party (NSW Branch), *Transcript of Evidence*, 1 February 2010, p.17; NSW National Party, *Submission 18*, p.8; Mr Mark Neeham, State Director, Liberal Party of Australia (NSW Division), *Transcript of Evidence*, 1 February 2010, p.29; Christian Democratic Party, *Submission 28*, p.11; Electoral Commission NSW/Election Funding Authority *Submission 30*, Funding and Disclosure Model; Mr Greg Piper, Member for Lake Macquarie, *Transcript of Evidence*, 2 February 2010, p.38.

Evidence from political parties

5.56 The Liberal Party (NSW) advocated an annual cap at a low level (as in Canada) for donations from individuals, coupled with a ban on donations from corporations, trade unions and other organisations. Their support for this proposal was ‘contingent on the bans being comprehensive’.²⁵⁰ The Party indicated that they would not support banning donations from corporations unless donations from trade unions were also banned²⁵¹, arguing that:

Only those who have a right to vote in Australia should be able to contribute to elections with their financial support for campaigns. Unenrolled individuals, organisations, trade unions and corporations do not have votes so they should not be allowed to influence the democratic process through donations.²⁵²

5.57 The National Party also indicated that they supported ‘a ban on donations from any source other than individuals who are enrolled to vote at state elections in NSW’²⁵³, submitting that:

Only individual citizens, who have reached the age of majority are eligible to take an active role in selecting parliamentarians, which they do through their votes in Legislative Council and Legislative Assembly elections. No corporation, union or any other association is eligible to vote within our system of government, and there is no obvious reason why they should be able to indirectly take part in the selection of Members of Parliament (and therefore government) through the provision of donations to political parties.²⁵⁴

5.58 The National Party contended that ‘donations from enrolled individuals be capped at a relatively low amount (e.g. \$1000 - \$2,000, indexed to inflation) over the course of a financial year’²⁵⁵ and that this limit be ‘aggregated for any entity, Member of Parliament or candidate or political party together’.²⁵⁶ They argued that this aggregation is necessary as:

... we cannot have one political party having \$1,000 donations, for example, if that were the amount, for every candidate running in an election campaign because that would clearly make campaign finance reform meaningless.²⁵⁷

5.59 The Greens NSW also supported a low cap of around ‘\$1,000 per annum from individuals to any political party’²⁵⁸. Further, the Greens NSW expressed strong support for a prohibition on donations from corporations, even if capped at a very low level, as ‘corporate donations up to \$1,000 can still have influence, particularly when you take into account corporate structures, which allow for subsidiary donations and the like.’²⁵⁹ The Greens argued that:

Corporations do not have a vote, only the people who work for them, their employees and other people—members of unions and all those people—are empowered to vote, but the corporations themselves do not do that. I think the only way you can successfully limit the participation of corporations and their significant resources, and

²⁵⁰ Liberal Party of Australia (NSW Division), *Submission 17*, p.15.

²⁵¹ Liberal Party of Australia (NSW Division), *Submission 17*, p.15.

²⁵² Mr Mark Neeham, State Director, Liberal Party of Australia (NSW Division), *Transcript of Evidence*, 1 February 2010, p.27.

²⁵³ NSW National Party, *Submission 18*, p.4.

²⁵⁴ NSW National Party, *Submission 18*, p.4.

²⁵⁵ NSW National Party, *Submission 18*, p.6.

²⁵⁶ Mr Ben Franklin, State Director, NSW National Party, *Transcript of Evidence*, 1 February 2010, p.2.

²⁵⁷ Mr Ben Franklin, State Director, NSW National Party, *Transcript of Evidence*, 1 February 2010, p.2.

²⁵⁸ The Greens NSW, *Submission 19*, p.2.

²⁵⁹ Mr David Shoebridge, Convenor, The Greens NSW, *Transcript of Evidence*, 1 February 2010, p.22.

their potential to create the perception of corruption, is to ban all corporate participation in financial terms.²⁶⁰

5.60 The Christian Democratic Party (CDP) recommended that all donations be banned, except those of up to \$1,000 per year from individual persons. The CDP considered that this 'would be a major deterrent to the associated political pressure that is asserted when large donations are made by developers, casino operators, liquor suppliers, trade unions, etc'.²⁶¹

5.61 However, this position was not supported by The Shooters Party, which did not support any bans or caps on donations:

The cost of running campaigns and the difficulty of raising funds makes it very, very difficult for organisations such as ours... We are certainly not interested in seeing unions, business or other people not being able to donate whatever they think they need to be able to donate to a party to run an election campaign.²⁶²

Evidence from independent Members of Parliament

5.62 There was general support from a number of independent Members of Parliament for caps and bans on political donations. Mr Piper, the Member for Lake Macquarie, stated that only 'natural persons' should be able to make a political donation, as:

support for a candidate is something many people would wish to offer as a legitimate part of the democratic political process. This support may come from friends, family, people one may have campaigned with on various issues or from others who share or believe in one's principles. This type of support can only truly come from a 'natural person' and should therefore exclude donations from corporate entities, unions and other organizations.²⁶³

5.63 He also supported limiting donations to those from enrolled voters, so that 'no industry or group can exert influence beyond the democratic weight of its individual members through their rights as enrolled voters'.²⁶⁴ He considered donations made by any one person should be limited to around \$1000 per annum.²⁶⁵

5.64 Ms Moore, the Member for Sydney, submitted that 'all donors should be restricted to individuals who are enrolled to vote in NSW Parliamentary elections and all donations should be capped'.²⁶⁶ She contended that 'campaign donations from individuals are a valuable part of democracy, providing an opportunity for people to participate in the political process and express their support for particular candidates, policies or groups'.²⁶⁷ However, bans on campaign donations from corporations, other business entities and organisations such as trade unions are needed 'to address the growing community concern about large political donations from vested interests having undue influence on election outcomes and governments with serious consequences for skewed and damaging decisions'.²⁶⁸

²⁶⁰ Mr Christopher Maltby, Registered Officer, The Greens NSW, *Transcript of Evidence*, 1 February 2010, pp.21-22.

²⁶¹ Christian Democratic Party, *Submission 28*, p.3.

²⁶² Mr Robert Borsak, Chairman, The Shooter Party, *Transcript of Evidence*, 1 February 2010, p.64.

²⁶³ Mr Greg Piper, Member for Lake Macquarie, *Transcript of Evidence*, 2 February 2010, p.33.

²⁶⁴ Mr Greg Piper, Member for Lake Macquarie, *Submission 8*, p.1.

²⁶⁵ Mr Greg Piper, Member for Lake Macquarie, *Submission 8*, p.2.

²⁶⁶ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, p.2.

²⁶⁷ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, p.1.

²⁶⁸ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, p.2.

5.65 Ms Moore advocated a \$5,000 limit on donations from individuals. She explained the rationale behind this amount:

Setting the cap amount requires balance. If it is set too small, party and Independent candidates may not be able to raise sufficient funds to conduct effective campaigns. If the cap is set too high, there is a risk that donors could have undue influence. I believe a \$5,000 cap would achieve the right balance.

A cap of \$5,000 is sufficiently high to allow political parties and candidates to raise adequate funds, but sufficiently low to encourage broadening their funding base, which would dilute the influence of any individual donor.²⁶⁹

5.66 Mr Besseling, the Member for Port Macquarie, expressed support for the reform of political donations and stated that there needs to be a 'reasonable limit' to political donations.²⁷⁰

5.67 Mr Draper, the Member for Tamworth, advocated for a total ban on all political donations.²⁷¹ However, he felt that donations from individuals should still be possible, provided 'donors were kept anonymous and funds managed by an independent body to distribute'.²⁷² He considered that this would 'ensure that individuals wouldn't be seen to 'purchase' influence over any party or candidate'.²⁷³

Evidence from the Electoral Commissioner

5.68 Mr Colin Barry, Electoral Commissioner and Chairperson of the Election Funding Authority proposed the following caps and bans on donations:

Table 9: NSWEC funding and disclosure model²⁷⁴

DONATIONS

Participant	State general elections	State by elections
Registered Political Parties, Unendorsed Groups, Unendorsed Candidates and Independent MP's/Councillors/Mayors	<ul style="list-style-type: none"> Registered Political Parties, Unendorsed Groups, Unendorsed Candidates and Independent MP's are entitled to accept donations Donations from an individual cannot exceed \$1,000 in total in any financial year. Donations from an entity cannot exceed \$5,000 in total in any financial year. Limit for disclosure of details of donor to be \$100 for donations aggregating to more than \$100 in any financial year Donors must be: <ul style="list-style-type: none"> an individual on the NSW electoral roll, or a political party registered in NSW, or a company with an ABN which carries on business in NSW, or a trade union affiliated with Unions NSW, or an unincorporated association of two or more people which carries on the 	<ul style="list-style-type: none"> Registered Political Parties, Unendorsed Candidates and Independent MP's are entitled to accept donations Donations from an individual cannot exceed \$1,000 in total in any financial year. Donations from an entity cannot exceed \$5,000 in total in any financial year. Limit for disclosure of details of donor to be \$100 for donations aggregating to more than \$100 in any financial year Donors must be: <ul style="list-style-type: none"> an individual on the NSW electoral roll, or a political party registered in NSW, or a company with an ABN which carries on business in NSW, or a trade union affiliated with Unions NSW, or an unincorporated association of two or more people which carries on the

²⁶⁹ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, p.2.

²⁷⁰ Mr Peter Besseling, Member for Port Macquarie, *Transcript of Evidence*, 2 February 2010, p.19.

²⁷¹ Mr Peter Draper, Independent Member for Tamworth, *Submission 10*, p.1.

²⁷² Mr Peter Draper, Independent Member for Tamworth, *Submission 10*, p.2.

²⁷³ Mr Peter Draper, Independent Member for Tamworth, *Submission 10*, p.2.

²⁷⁴ Electoral Commission NSW/Election Funding Authority, *Submission 30*, Funding and Disclosure Model, p.

	<p>majority of its activities in NSW</p> <ul style="list-style-type: none"> • In kind donations are to be treated as donations • Membership fees of a RPP are to be limited to no more than \$1,000 in any one financial year but are not considered to be a donation. • Fees for RPP affiliation are considered to be a donation • Donations by candidates to their own campaign (election expenditure) permitted up to difference between expenditure entitlement and donations received from other sources • Donations accepted can be used for political expenditure on “general campaign expenditure” or “election expenditure” but only to meet any shortfall not met by public funding as outlined in this model and for operational (administrative) purposes • A person or entity cannot give money to another person or entity for the purposes of being used to make a donation 	<p>majority of its activities in NSW</p> <ul style="list-style-type: none"> • In kind donations are to be treated as donations • Membership fees of a RPP are to be limited to no more than \$1,000 in any one financial year but are not considered to be a donation. • Fees for RPP affiliation are considered to be a donation • Donations by candidates to their own campaign (election expenditure) permitted up to difference between expenditure entitlement and donations received from other sources • Donations accepted can be used for political expenditure on “general campaign expenditure” or “election expenditure” but only to meet any shortfall not met by public funding as outlined in this model and for operational (administrative) purposes. • A person or entity cannot give money to another person or entity for the purposes of being used to make a donation
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5.69 When questioned on the rationale for allowing corporations to make political donations under his proposed model, the Electoral Commissioner explained:

I cannot see what damage allowing corporate donations of modest amounts can do to the integrity of the system and consequently my general disposition is that if it is not going to be a problem, why do you need to rule it out? It comes back, to some extent, to a matter of judgement...²⁷⁵

5.70 When questioned as to why the cap for corporations was higher than that for individuals under his proposed model, he stated - ‘the corporation is a player in the business of the State and consequently, in my view, I think they can have a greater influence in the way things operate in the State in the business environment than what an individual can.’²⁷⁶ He qualified this statement with the following:

I do not mean influence in the sense of political influence but in terms of the contribution that they make to the State.²⁷⁷

5.71 The requirement that a donor be ‘a company with an ABN’ was introduced to the current Election Funding and Disclosures Act in 2008 to facilitate more transparent and accurate disclosure. The Electoral Commissioner gave the following evidence on the continuing difficulties with this aspect of the Act:

Whilst at the moment the Act deals with donations to entities by the use of ABNs and the like, that does cause difficulties with corporations and their subentities.²⁷⁸

²⁷⁵ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of in camera evidence*, 22 February 2010, p.23.

²⁷⁶ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of in camera evidence*, 22 February 2010, p.23.

²⁷⁷ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of in camera evidence*, 22 February 2010, p.23.

²⁷⁸ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of in camera evidence*, 22 February 2010.

- 5.72 In order to combat some of the problems associated with donations by related entities and sub-entities, the Mr DecCelis, Director, Funding and Disclosures, Electoral Commission NSW, recommended that 'an individual should be nominated [for each donation] by a particular entity'.²⁷⁹ Also, 'in one group of companies only one donation of \$5,000 would be acceptable'.²⁸⁰
- 5.73 As to the inclusion of 'trade unions affiliated with Unions NSW' on the list of eligible donors, Mr DeCelis explained:
- We did not profess to understand that relationship. What we were trying to advocate here was that they need to be credible, not people who just start as a union for the purposes of entering a State election. It was just a registered trade union, whatever that process is, just to keep them legitimate.²⁸¹
- 5.74 The Electoral Commission explained that the purpose of including an 'unincorporated association of two or more people which carries on the majority of its activities in NSW' is that it:
- ... essentially captures community groups. It might capture a local group, which is no more than a local club, a local group of people who come together.²⁸²

Evidence from constitutional and electoral law academics

- 5.75 The Committee received submissions from four academics specialising in constitutional and electoral law and held a roundtable discussion on 1 February 2010 with these academics to explore constitutional and practical issues surrounding reform. They put forward the following views on caps and bans on political donations.
- 5.76 Both Dr Orr and Dr Twomey considered that, while there would not be constitutional impediments to banning all donations except low amounts from individuals, there might be practical reasons to allow entities to continue to make donations.²⁸³
- 5.77 In her submission to the inquiry, Dr Twomey stated that, in order to reduce the need for a large increase in public funding and corresponding burden on the public purse, the Committee could consider the option of allowing 'non-voters, such as corporations and unions to make political donations, but to cap them at a higher level, such as \$20,000, so the donation from a large corporation or property developer is no more valuable to government than the donation of smaller corporations, associations or interest-groups'.²⁸⁴
- 5.78 Dr Twomey elaborated on this option during the roundtable discussion. When questioned on banning donations from corporations she stated:
- ...heading back to the position of the taxpayer, there is obviously going to be some reluctance to pay large amounts of public funding to political parties. It may well be more economically efficient to put a relatively low cap on corporations. For example, if you say \$10,000 as a cap for corporations, the donation of Westfield is going to have as

²⁷⁹ Mr Brian DeCelis, Director, Funding and Disclosures, Electoral Commission NSW, *Transcript of in camera evidence*, 22 February 2010, p. 19.

²⁸⁰ Mr Brian DeCelis, Director, Funding and Disclosures, Electoral Commission NSW, *Transcript of in camera evidence*, 22 February 2010, p.24.

²⁸¹ Mr Brian DeCelis, Director, Funding and Disclosures, Electoral Commission NSW, *Transcript of in camera evidence*, 22 February 2010, p. 19.

²⁸² Mr Brian DeCelis, Director, Funding and Disclosures, Electoral Commission NSW, *Transcript of in camera evidence*, 22 February 2010, p. 19.

²⁸³ Associate Professor Graeme Orr, *Transcript of Evidence*, 1 February 2010, p.49 and Associate Professor Anne Twomey, *Transcript of Evidence*, 1 February 2010, p.48.

²⁸⁴ Associate Professor Anne Twomey, *Submission 2*, p. 2.

much impact as the donation of the local fish and chip shop if they are both up to the maximum of \$10,000. So you are not able to buy your influence if you are a big corporation or a corporation that would otherwise be trying to influence Government; your influence is completely diluted by the fact that your \$10,000 is worth the same as anybody else's \$10,000.

- 5.79 When asked whether this same argument would apply if the Committee considered limiting corporate donations and individual donations to the same amount, she stated:

It could. Or you could make the corporate donations a bit higher, purely for the purposes of making sure that the amount of public funding was limiting the burden on the taxpayer. If the point of the exercise is to reduce both the risk and the perception of corruption, you can still do that in a way that minimises the public burden of the spending and maximises the private amount of the spending, so long as you do it in such a way that nobody's contribution is effectively more valuable than anybody else's.²⁸⁵

- 5.80 Dr Orr queried the need for a low cap on donations, such as \$1,500, and whether such a system would allow parties and candidates to raise adequate funds. As part of the roundtable discussion he asserted:

We are not in the American system; people do not give the way the Americans give, there is no kind of associational culture. I am not sure why we are talking in four figures rather than five figures for a cap that would pass the test of "sniff it and see" in the street, where most people would say "the figure of \$50,000 is too big a donation; it is the sort of thing that is going to buy excessive influence".²⁸⁶

- 5.81 He considered that a \$50,000 cap might be suitable in the case of 'unions and other organisations that agglomerate people's interests'²⁸⁷ and that an amount of \$10,000 was insufficient to buy undue influence (though it might be sufficient to buy access).²⁸⁸

- 5.82 Conversely, Dr Tham argued that there were compelling reasons to adopt low donation limits, as part of a comprehensive reform package. In the paper that he prepared for the NSW Electoral Commission on reform to the electoral and political finance regime in NSW, he stated:

There are compelling arguments for a limit on contributions as recommended by the NSW Select Committee. Such limits will act as a preventive measure in relation to graft. Moreover, as the amount of money contributed by an individual increases, the risk of undue influence heightens. Therefore, bans on large contributions can directly deter corruption through undue influence (and obviate the need for selective bans, e.g. the current ban on developer donations).

On a related point, such limits will promote fairness in politics as they prevent the wealthy from using their money to secure a disproportionate influence on the political process, thereby promoting the fair value of political freedoms (despite limiting the formal freedom to contribute). Further, by requiring parties to secure the support of a large base of small contributors, such limits are likely to enhance their participatory function.²⁸⁹

- 5.83 Dr Williams also advocated a ban on all donations from entities. He stated:

²⁸⁵ Associate Professor Anne Twomey, *Transcript of Evidence*, 1 February 2010, p.48.

²⁸⁶ Associate Professor Graeme Orr, *Transcript of Evidence*, 1 February 2010, p.49.

²⁸⁷ Associate Professor Graeme Orr, *Transcript of Evidence*, 1 February 2010, p.49.

²⁸⁸ Associate Professor Graeme Orr, *Transcript of Evidence*, 1 February 2010, p.50.

²⁸⁹ Dr Joo-Cheong Tham, 'Towards a More Democratic Political Funding Regime in New South Wales', February 2010, pp. 64-65.

I do have sympathy for the idea that those entitled to make contributions ought to be those entitled to vote on the basis that if you ask what the value is in a democracy of giving money it is a form of expression of someone who is entitled to participate in the democratic process. There is no particular value of corporations or legal entities being able to make contributions. It comes to again what functional role do they play within the system? Also from a constitutional point of view it is defensible that you limit it to natural persons because I do not think there is any strong political reason why corporate entities have any rights in this area.²⁹⁰

- 5.84 He also considered that there should be a cap on donations from individuals, of around \$1,000 to \$1,500. While this would be a restrictive scheme, he felt it would be necessary to ensure that parties or candidates with 'a few rich friends' are not advantaged. In addition, it would be closer to 'meeting some of the ideal forms of democratic participation'.²⁹¹ Professor Williams told the Committee that:

Voters should be able to donate up to \$1000 each year to a political party, candidate or organisation advocating an electoral outcome, with all contributions of more than \$100 being disclosed. Donations by corporations, unions and people who cannot vote should be banned. These restrictions should be matched by limits on how much can be spent on campaigning.²⁹²

- 5.85 During the roundtable discussion, Dr Williams disagreed with Dr Orr's view on the level at which a donation has the capacity to lead to undue influence, stating that:

... even \$10,000 is enough to at least have the perception of a real risk of corruption, particularly if it is \$10,000 from multiple family members or from a group of people'. I think the perception in the community would be that \$10,000 is a very, very significant donation. For me, that is why I would be focusing on \$1,000 or \$1,500, because I think that is closer to the mark, both as to where people might perceive the line exists as to where undue influence arises but also I think—and you of course would know better than me—you are starting to get to the point of genuine potential for undue influence when you get to five figures or higher. That is a very, very significant donation, particularly if you aggregate it with other people of a like mind who are seeking to achieve a like goal.²⁹³

- 5.86 Dr Williams also presented an alternative view to Dr Twomey and Dr Orr on whether a system of low-level caps places too heavy a burden on the public purse. He argued that reform of the system should lead to a change in the nature of political campaigning, which would alleviate the current high levels of political expenditure and hence would not require a large increase in public funding:

If we are talking about tens of millions of dollars, the taxpayer should not have to pay that amount. I think it is entirely reasonable to say that. But I would much prefer to have a system which says those sorts of campaigns will not occur, where the law is drafted in a way that will prevent that occurring. We are putting in place electronic and other forms of limitations such that the Committee can come up with a recommendation that this is what it will cost. We are trying to design a system that we believe will still enable people to make an informed choice, but we expect that costs will be reduced by a factor of 90 per cent, or whatever you are looking at, in a way that the Committee can then say we do not believe it is necessary to have corporate donations and we think it is possible to fund what will be a greater reliance upon public funding, but not exclusive, and that the Committee can come up with a balanced scheme of that kind. But I think that unless

²⁹⁰ Professor George Williams, *Transcript of Evidence*, 1 February 2010, p.47.

²⁹¹ Professor George Williams, *Transcript of Evidence*, 1 February 2010, p.47.

²⁹² Professor George Williams, 'Curbs on campaign ads should not be beyond us', *Sydney Morning Herald*, 11 August 2009.

²⁹³ Professor George Williams, *Transcript of Evidence*, 1 February 2010, p.50.

you deal with the expenditure side, you are trapped into a lot of undesirable outcomes.²⁹⁴

Evidence from other stakeholders

- 5.87 The Committee also heard from and received submissions from a number of other stakeholders regarding caps and bans on donations.
- 5.88 Action on Smoking and Health Australia supported a limit on single or cumulative donations of \$1,000 per year per donor (as in other jurisdictions), along with a ‘total ban on political donations from organisations, including private and publicly traded corporations and trade unions’ and a ‘total ban on donations from foreign or trans-national entities’.²⁹⁵
- 5.89 The Public Interest Advocacy Centre indicated a preference for ‘a model that prohibits donations/contributions from any entity and caps individual donations’.²⁹⁶ They supported a ban on anonymous donations, donations/contributions from individuals or entities that have contracts with government, and a ban on donations/contributions from foreign entities and individuals.²⁹⁷
- 5.90 The Public Interest Advocacy Centre argued that the level of any cap on individuals should be low in order to ‘facilitate greater grass roots democratic participation and reduce the likelihood of undue influence from large donors’.²⁹⁸
- 5.91 The Urban Taskforce advocated a ‘complete national blanket ban on political party donations from anyone — corporations or individuals, developers, lawyers, doctors, trade unions, miners, tobacco companies or environmentalists’. They considered that this should be accompanied by substantial additional public funding, to ‘ensure that the system is once and for all, free from any perception of financial influence’.²⁹⁹
- 5.92 This can be contrasted with the view of Unions NSW, which was that ‘...within a regime of full disclosure, organisations have a legitimate role in participating in the political process by making donations to political parties’.³⁰⁰

Fundraising for federal elections

- 5.93 As well as raising funds for NSW state elections, many political parties registered in New South Wales also raise funds, endorse candidates and fund expenditure for federal elections.³⁰¹ In advising the New South Wales government on the constitutionality of any scheme capping or banning donations, Dr Twomey stated:

Funds raised by State branches of political parties are often used to fund candidates for federal elections as well as State and local elections. Fund-raising for federal election campaigns often takes place within New South Wales. The consequence is that a State law that imposes limits on political donations made in New South Wales, or given to the

²⁹⁴ Professor George Williams, *Transcript of Evidence*, 1 February 2010, p.50.

²⁹⁵ Action on Smoking and Health Australia, *Submission 12*, p.3.

²⁹⁶ Public Interest Advocacy Centre, *Submission 26*, p.7.

²⁹⁷ Public Interest Advocacy Centre, *Submission 26*, p.7.

²⁹⁸ Public Interest Advocacy Centre, *Submission 26*, p.7.

²⁹⁹ Urban Taskforce Australia, *Submission 22*, p.1.

³⁰⁰ Unions NSW, *Submission 24*, p.2.

³⁰¹ Liberal Party of Australia (NSW Division), *Submission 17*, p.15.

NSW branch of a party, might be regarded as unconstitutional because it interferes with Commonwealth elections.³⁰²

- 5.94 The constitutional and jurisdictional issues which may prevent the NSW Parliament from legislating to cap donations received by NSW political parties for federal election campaigns are further discussed at paragraphs 4.53 – 4.62.
- 5.95 In their submission to the inquiry, the Liberal Party (NSW) proposed that there should be a requirement that ‘political parties registered to contest State elections ... quarantine various categories of income in separate accounts’. They outlined the following three separate accounts, which parties should be required to maintain:
1. *Federal Campaign Account* – for funds donated for the purpose of contesting federal general elections and by-elections. Commonwealth legislation on donations would apply to funds that can be deposited into that account(s).
 2. *State Campaign Account* - for funds donated for the purpose of contesting State general elections and by-elections. State legislation capping donations and banning corporations, trade unions and other organisations from donating would apply to funds that can be deposited into the State Campaign Account(s). Parties would only be able to pay for State electoral expenditure subject to expenditure limits from this hypothecated State Campaign Account(s).
 3. *Administration Account* - to fund the non-campaign needs of the Party.³⁰³
- 5.96 In order to ensure compliance with this scheme, the Liberal Party proposed that political parties be required to lodge fully audited financial statements annually as a condition of State registration.³⁰⁴
- 5.97 When questioned on the administrative burden of such a scheme, Mr Neeham, State Director of The Liberal Party (NSW) told the Committee:
- We currently have a similar system in operation. We keep separate bank accounts for Federal campaigns, State campaigns and the administration of head office, and for the party. So it would not be too much of an additional burden for us. The reason we have proposed such a model for legislation is that firstly we believe that a national approach is needed... But in the absence of things happening at a Federal level, we would propose that this is the best way moving forward. Taking into consideration that we and most of the other political parties that have been represented here today have to fight elections at both a State and Federal level, it would be easier to have three separate accounts, and that the State account and the administration account be controlled under State legislation and the Federal account be subject to Federal legislation.³⁰⁵
- 5.98 This proposal was put to other political party representatives during the inquiry. Mr Thistlethwaite, General Secretary of the Labor Party (NSW) indicated that such a system would not be an administrative burden, as much of the Labor Party (NSW) current accounting practices operate on separate accounts, ‘particularly for State-

³⁰² Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, at http://www.dpc.nsw.gov.au/publications/news/stories/election_campaign_finance_reform (accessed 17 December 2009), p.1.

³⁰³ Liberal Party of Australia (NSW Division), *Submission 17*, p.16.

³⁰⁴ Liberal Party of Australia (NSW Division), *Submission 17*, p.16.

³⁰⁵ Mr Mark Neeham, State Director, Liberal Party of Australia (NSW Division), *Transcript of Evidence*, 1 February 2010, p.28.

elected councils, Federal-elected councils, local government committees, and administration of the party.³⁰⁶

- 5.99 However, Mr Maltby, Registered Officer for The Greens NSW indicated that they might find it challenging to have separate Federal and State accounts, as the current practice of the party is for most federal campaigns to be conducted at state level, so it 'is the same pool of funds that generally campaign' for both election campaigns.³⁰⁷

Other sources of funding

- 5.100 Political parties receive funding from a number of sources other than donations. As recognised in the submission from the Public Interest Advocacy Group, 'it is important to catch other forms of private income in the scope of any law regulating political finance'.³⁰⁸ Otherwise, parties and candidates with significant other income may have an unfair advantage. This section of the report considers the regulation of sources of income other than donations.

Membership fees

- 5.101 Under the current system, membership fees are defined as a political donation and subject to relevant disclosure requirements. In advocating a ban on all but small donations from individuals, the Select Committee on Electoral and Political Party Funding recommended that party membership fees, up to a reasonable limit, be exempt from the ban on all but small individual donations.³⁰⁹ This position is reflected in a number of submissions received by the Committee during the current inquiry.
- 5.102 The Liberal Party (NSW) submitted that 'membership fees should be used to fund the administrative costs of the Party, over and above any public funding for party administration under a new regime.'³¹⁰ The Party considered that there should be a separate cap for membership fees, 'the same as, or below the cap on donations for enrolled individuals' and that members should be free to make a separate donation up to the allowed amount for the purposes of campaigning.³¹¹
- 5.103 The National Party (NSW) also submitted that membership fees (at a reasonable level) should be separate from the cap on donations, as:

To include membership fees of individuals within the cap on donations would effectively prevent members of political parties from contributing to a campaign to the same extent as other enrolled individuals are entitled to do. Their campaign donation would be limited to the difference between the donation cap and their membership fees, while non-members would be entitled to make a campaign donation up to the value of the cap. For this reason, membership fees of individuals should be exempted from the cap on donations.³¹²

- 5.104 The National Party (NSW) recommended that:

³⁰⁶ Mr Matthew Thistlethwaite, General Secretary, The Australian Labor Party (NSW Branch), *Transcript of Evidence*, 1 February 2010, p.13.

³⁰⁷ Mr Christopher Maltby, Registered Officer, The Greens NSW, *Transcript of Evidence*, 1 February 2010, p.21.

³⁰⁸ Public Interest Advocacy Centre, *Submission 26*, p.8.

³⁰⁹ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.113.

³¹⁰ Liberal Party of Australia (NSW Division), *Submission 17*, p.18.

³¹¹ Liberal Party of Australia (NSW Division), *Submission 17*, p.18.

³¹² NSW National Party, *Submission 18*, p.6.

Caps and Bans on Political Donations

That party membership fees from enrolled individuals be exempted from the cap on donations, but subject to a separate cap that is equal to or less than the cap on donations.³¹³

5.105 The Greens NSW indicated that, while there would be scope for excluding membership fees from the donations cap, the fee should be capped at \$100 per annum or a similar amount.³¹⁴ They indicated that a cap on membership fees that was similar to a cap on donations 'does not sound like a membership fee; [but rather] sounds like a funding fee'.³¹⁵

5.106 Dr Tham also argued for special consideration of membership fees:

A person or organisation taking out membership of a political party – and paying membership fees in the process – declares support for the party's policies, platform and constitution and also signals the intent to participate in the activities of the party as a party member in order to publicly advance the agenda of the party. These circumstances identify features of membership fees that generally distinguish it from other political contributions: they tend to signal a deeper form of political participation – as the NSW Select Committee correctly recognised, 'membership of political parties is an important means for individuals to participate in the political process' – *within* political parties. These features, together with the low rate of party members .., explain why there should be an exemption for membership fees. Whilst contribution limits permit membership fees below the limits, an exemption goes beyond such permissiveness by *encouraging* party membership.³¹⁶

5.107 The Electoral Commissioner also considered that membership fees should be treated separately from donations.³¹⁷

Affiliation fees

5.108 A more controversial aspect of how membership fees will be treated under any new regime relates to organisational members, in particular, trade union affiliates of the ALP.³¹⁸ Under the current system, affiliation fees are defined as a political donation and subject to relevant disclosure requirements.

5.109 Dr Tham has provided the following explanation of the way in which NSW political parties operate in terms of organisational members:

Some parties, such as the Liberal Party and the National Party for instance, may restrict themselves to individual memberships and are, in this way, *direct parties*. Others, like the ALP and the NSW Greens, allow both individual membership and membership by groups and are therefore *mixed parties*. The Constitution of the federal National Party also allows it to be a mixed party as organisations can become associations of the Party where there is no state branch. Some parties like the NSW Shooters Party fall

³¹³ NSW National Party, *Submission 18*, p.7.

³¹⁴ Mr David Shoebridge, Registered Officer, The Greens NSW, *Transcript of Evidence*, 1 February 2010, p.24.

³¹⁵ Mr David Shoebridge, Registered Officer, The Greens NSW, *Transcript of Evidence*, 1 February 2010, p.24.

³¹⁶ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, pp. 64-65, http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

³¹⁷ Electoral Commission NSW/Election Funding Authority, *Submission 30*, Funding and Disclosure Model.

³¹⁸ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 67

somewhere in the middle: membership is formally restricted to individuals while close links are maintained with various groups.³¹⁹

5.110 Mr Thistlethwaite, General Secretary of the Labor Party, provided the following information on union affiliation fees:

Under our rules trade unions can affiliate to the Labor Party. In doing so they pay an affiliation fee that currently is \$3.25 per member. Generally, those unions will do so on the will of their membership. Generally, there is a resolution at an annual conference or a committee of management for that particular union to make a decision to affiliate to the Labor Party. In that affiliation unions are accorded certain rights under the rules of the party, most notably, the right to send delegates to conferences of the Labor Party and to vote at those conferences.

...

Trade unions affiliate annually. There is a process that they have to follow. They have to prepare an audited average of their membership and that average is calculated over three years. They then send us their audited figures and they affiliate to the party.³²⁰

5.111 Mr Thistlethwaite indicated that there are currently 'about 18' affiliated unions.³²¹

5.112 The Liberal Party (NSW) submitted that there must be regulation of affiliation fees under any new system, stating that:

Labor's historical relationship with the trade union movement, which continues with affiliated trade unions exercising 50 percent of the vote at Annual Conference upon payment of affiliation fees for each trade unionist, presents some difficulty in working out the best approach. We advocate the banning of all trade union donations, along with corporations and other organisations. *To continue to allow affiliation fees without any constraint would simply invite trade unions to make their donations in the form of significantly increased affiliation fees.* [emphasis added]³²²

5.113 The Liberal Party (NSW) suggest the following approach in order to respect the structure and traditions of the Labor Party and its relationship with the trade union movement, whilst still regulating affiliation fees.

Under the approach we suggest, no donations or affiliation fees from trade unions would be able to be deposited in the hypothecated State Campaign account(s) [ie. The account used for state election campaigning]. However, while the constitutional linkage remains, our approach is to respect the different traditions of our parties, and allow affiliation fees to be retained for non-campaign purposes.³²³

5.114 They suggest 'that any trade union affiliation fees be deducted from [the] Labor's Party Administration Fund allocation [they propose that parties receive public funding for their on-going operational costs] where an affiliated trade union has not sought the written consent of each individual trade unionist for membership by affiliation of the Australian Labor Party'.³²⁴

³¹⁹ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 69.

³²⁰ Mr Matthew Thistlethwaite, General Secretary, The Australian Labor Party (NSW Branch), *Transcript of Evidence*, 1 February 2010, p.14.

³²¹ Mr Matthew Thistlethwaite, General Secretary, The Australian Labor Party (NSW Branch), *Transcript of Evidence*, 1 February 2010, p.15.

³²² Liberal Party of Australia (NSW Division), *Submission 17*, pp.16-17.

³²³ Liberal Party of Australia (NSW Division), *Submission 17*, p.17.

³²⁴ Liberal Party of Australia (NSW Division), *Submission 17*, pp.16-17.

5.115 The National Party (NSW) proposed the following method for dealing with affiliation fees:

... affiliation fees paid on behalf of an individual to a party by another organisation (such as a trade union) should not be exempted from the donation cap unless the individual in question has authorised the payment of said fee in writing. If written authorisation is not given, the affiliation fee should be counted as a donation from that organisation.³²⁵

5.116 The Electoral Commissioner also submitted that affiliation fees should be treated as donations.³²⁶

5.117 Dr Tham argued that while 'trade unions contributions in forms other than membership fees [should] be subject to the same ban as any other corporate entities', when these contributions are 'channelled through affiliation fees—trade unions as members of the Australian Labor Party—then there should be an exemption'.³²⁷ However, he felt that affiliation and other organisational membership fees should be subject to a 'reasonable limit or level to those sorts of fees'.³²⁸

5.118 He justified his view on a number of grounds, including that a ban on organisational membership would:

- Detract from the participatory function of parties. In the case of the ALP, there will be the loss of membership participation provided by trade union affiliates (however attenuated, such participation is still a form of participation); and
- Be an unjustified limitation of the freedom of political association, which rests on:
 - the individual's right to form political associations, act through such associations and to participate in the activities of these associations; and
 - the association's ability to determine its membership, the rules and manner of its governance and the methods it will use to promote its common objectives.³²⁹

5.119 During the roundtable discussion, Dr Tham defended the retention of organisational membership of political parties for the following reasons:

The first is that if you have a ban on membership fees, including organisational membership fees—this is the point recognised in the past report—you are banning a particular part of the party structure. You are basically saying to the ALP, "You cannot have the party structure that is based on what is called indirect membership." It is also a structure that the National Party had for quite a long time. That is quite a severe limitation on freedom of party association.

Secondly, one of the other principles is about supporting parties in discharging their functions. One of the functions identified was a participatory function. Trade union affiliation involves an indirect form of participation, but it is nevertheless a form of participation. But if we are going to ban those kinds of affiliation fees and the membership it carries with it, we are basically saying, "Don't participate in a political

³²⁵ NSW National Party, *Submission 18*, p.7.

³²⁶ Electoral Commission NSW/Election Funding Authority, *Submission 30*, Funding and Disclosure Model, p.6.

³²⁷ Dr Joo-Cheong Tham, *Transcript of Evidence*, 1 February 2010, p.48.

³²⁸ Dr Joo-Cheong Tham, *Transcript of Evidence*, 1 February 2010, p.48.

³²⁹ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 67,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

party or engage with them in campaigning." But that can only have the effect of weakening the party system.³³⁰

- 5.120 While Dr Orr agreed with Dr Tham in principle on this issue, he stated that he was not sure whether he could agree in practice, as he considered that creating an exception for organisation membership fees had the potential to create a large loophole in the regulatory regime. For example, it could encourage all parties to accept corporations as organisational members at inflated membership prices.³³¹
- 5.121 Dr Twomey expressed the view that 'people who are members of unions can themselves voluntarily become members of a political party'.³³² She argued that if union members or other members or organisations 'want to pay to be a member of a political party they always can, so that there is a level of freedom of choice there'.³³³

Intra-party transfers

- 5.122 Another source of income for political parties operating in New South Wales are 'intra-party transfers'. These include 'donations from a party's national head office to its state and territory branches, and donations from one state and territory branch to another'.³³⁴ The Select Committee on Electoral and Political Party funding recommended that:

The Premier, as part of the ban on all but small individual donations, ban intra-party transfers to cover State election costs. Consideration should be given to allowing intra-party transfers, up to a reasonable limit, to subsidise the costs of party administration.³³⁵

- 5.123 The Liberal Party proposed that it be unlawful to use intra-party transfers of funds from national party organisations, other state divisions or branches for election campaigning. Rather, intra-party transfers could be used to fund party administration costs, with the amount transferred deducted from public funding for party administration.³³⁶ They argued that this would ensure that parties are not discouraged from becoming more self-sufficient, while ensuring that there is no potential for undue influence.³³⁷
- 5.124 The Greens NSW submitted that:
- State Registered political parties and associated entities be prohibited from receiving more than a total of \$10,000 per annum in assistance from all branches and levels of the party including at the Commonwealth level and in any other state.³³⁸
- 5.125 Ms Moore, the Member for Sydney, also dealt with intra-party transfers in her submission, and argued for safeguards, as 'intra-party transfers from outside NSW can create loopholes and are inconsistent with the principle that all donations should be from NSW voters'.³³⁹

³³⁰ Dr Joo-Cheong Tham, *Transcript of Evidence*, 1 February 2010, p.48.

³³¹ Associate Professor Graeme Orr, *Transcript of Evidence*, 1 February 2010, p.48.

³³² Associate Professor Anne Twomey, *Transcript of Evidence*, 1 February 2010, p.48.

³³³ Associate Professor Anne Twomey, *Transcript of Evidence*, 1 February 2010, p.48.

³³⁴ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.108.

³³⁵ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.113.

³³⁶ Liberal Party of Australia (NSW Division), *Submission 17*, p.17.

³³⁷ Liberal Party of Australia (NSW Division), *Submission 17*, pp.17-18.

³³⁸ The Greens NSW, *Submission 19*, p.16.

³³⁹ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, p.5.

Held assets

5.126 The NSW National Party submitted that:

The principal motivation for the imposition of expenditure caps is to limit the ability of the parties to use preexisting assets and future income from these assets to outspend newer parties or independent candidates who are prevented from using preexisting assets to fund their campaigns by new supply-side regulation imposed as a result of this reform.³⁴⁰

5.127 The Liberal Party (NSW) submission argued that reform of the political funding system should include regulation of 'held assets'. 'Held assets' include 'funds or assets held in trust for a recognised party, including income earned on those funds or assets'.³⁴¹ They advised that provisions relating to held assets have recently been 'introduced in Nova Scotia, ensuring that funds or assets held in trust for a recognised party... cannot be used for electoral expenditure but can be used to fund their non-campaign operations.'³⁴²

5.128 The Liberal Party (NSW) recommended that:

Held assets provisions should be introduced in NSW which prohibit registered parties or their associated entities from depositing any income from held funds or assets in their State Campaign Account(s) and, thus, from funding their electoral expenditure.

5.129 They considered that, consistent with their recommendation on intra-party transfers:

An equivalent amount to any income deposited in the Administration Account(s) from the held assets of State-registered party should be deducted from their allocation from the Party Administration Fund...³⁴³

5.130 They argued that this would ensure that parties are not discouraged from becoming more self-sufficient, while ensuring that there is no potential for undue influence.³⁴⁴

Loans

5.131 The *Election Funding and Disclosures Act 1981* already creates requirements in relation to loans to candidates or parties of \$1,000 or more from one source in the same disclosure period³⁴⁵. With the exception of loans from a financial institution or a credit card transaction, details must be recorded with the Election Funding Authority.³⁴⁶

5.132 The National Party (NSW) submitted that 'any loans that are forgiven by the lender, in part or in full, should be treated as a donation, the value of which should be taken to be the amount by which the borrower's obligation to repay the loan has been reduced.' They argued that:

Failure to incorporate such a measure may result in the caps and bans on donations being readily avoided by the making of loans which are then forgiven. This potential loophole must be closed for a system of bans and caps to be effective.³⁴⁷

³⁴⁰ NSW National Party, *Submission 18*, p.17.

³⁴¹ Liberal Party of Australia (NSW Division), *Submission 17*, pp.17-18.

³⁴² Liberal Party of Australia (NSW Division), *Submission 17*, pp.17-18.

³⁴³ Liberal Party of Australia (NSW Division), *Submission 17*, pp.17-18.

³⁴⁴ Liberal Party of Australia (NSW Division), *Submission 17*, pp.17-18.

³⁴⁵ Election Funding Authority, http://www.efa.nsw.gov.au/nsw_parliament_candidates_and_groups#pd (accessed 20 February 2010).

³⁴⁶ Election Funding Authority, http://www.efa.nsw.gov.au/nsw_parliament_candidates_and_groups#pd (accessed 20 February 2010), see also section 96G, *Election Funding and Disclosures Act 1981*.

³⁴⁷ NSW National Party, *Submission 18*, p.9.

Self-funding

5.133 The Select Committee on Electoral and Political Party Funding recommended that ‘as part of the ban on all but small individual donations, [the Premier] treat donations by a candidate to his or her own campaign in the same way as other individual donations, and that they be capped at \$1,000’.³⁴⁸

5.134 Both the Liberal Party (NSW) and the National Party (NSW) submitted that any caps on donations should also apply to a candidate wishing to donate to their own campaign.³⁴⁹ The National Party (NSW) gave the following rationale for such a requirement:

Failure to incorporate such a measure opens two potential avenues for avoidance:

1. It would open the possibility that donors could circumvent the caps and bans by giving “personal” gifts to the candidate, who could then use these “personal” funds to cover campaign expenses.
2. It would open the possibility that a wealthy candidate would be able to self-fund a campaign to a significant extent, effectively avoiding the caps and bans on donations that would apply to everyone else. A system with significant restrictions on external donations whilst allowing personal contributions would be immensely favourable to wealthier candidates.³⁵⁰

5.135 However, the Committee received evidence from a number of independent Members of Parliament who argued that that treating self-funding as a donation would severely limit the ability of independent candidates to stand for election. As explained by Mr Besseling, the Member for Port Macquarie:

The difficulty there is that would preclude a lot of people from putting themselves forward. Political parties would definitely have an advantage there, simply given that being a political party they have a donation system in place. As an individual, it is difficult to go through a campaign, try and get yourself known throughout the area and at the same time try to raise funds. It is very difficult. So I think that would put a bit of a hand brake on a lot of individuals who may put themselves forward as independent candidates.³⁵¹

5.136 Mr Besseling indicated that he had contributed around \$50,000 to his own election campaign.³⁵² He stated ‘if that ability to put money forward was curtailed, I do not know how I would have gone about trying to raise the money’ and explained:

... a lot of decisions whether to run or not, particularly in by-election campaigns, are made close to the actual date of the election. Individuals do not have the ability like political parties to raise funds over a period of time and then say, okay, we are going to contest this by-election, here are some funds for it. If a by-election is called and there is six weeks until the by-election and someone thinks I am going to have a crack at this, I would not mind being the member for Port Macquarie or wherever it is, how do they go about raising funds to compete with a political party? Anyone who has had any experience in putting together a fund raiser realises how difficult it is. At the same time, as an individual, not only do you have to raise the funds, but you have to be out there

³⁴⁸ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, pp.105- 115.

³⁴⁹ Liberal Party of Australia (NSW Division), *Submission 17*, p.18; NSW National Party, *Submission 18*, p.9.

³⁵⁰ NSW National Party, *Submission 18*, p.9.

³⁵¹ Mr Peter Besseling, Member for Port Macquarie, *Transcript of Evidence*, 2 February 2010, p.20.

³⁵² Mr Peter Besseling, Member for Port Macquarie, *Transcript of Evidence*, 2 February 2010, p.21.

and about and working on policy and all sorts of other things. It would prove to be a huge impediment to individuals.³⁵³

5.137 Mr Greg Piper, Member for Lake Macquarie, contested the argument that self-funding advantages wealthy candidates, in that:

It could alternately be said that the willingness to expend personal savings or take on debt such as drawing on a mortgage, shows that the person has a genuine commitment to the decision to run for office. I support the continuance of the ability to self-fund as long as the total funds do not exceed the expenditure cap.³⁵⁴

5.138 The Electoral Commissioner's model included the ability for candidates to contribute to their own campaigns 'up to the difference between expenditure entitlement and donations received from other sources'.³⁵⁵

Levies on Members of Parliament

5.139 The Electoral Commission recommended that a contribution by a Member of Parliament to the political party to which they belong be treated as a donation.³⁵⁶

Disclosure

5.140 The Committee received submissions and heard evidence from a number of sources on the current disclosure system and the potential need for modification under a system in which donations are capped or banned.

Disclosure level

5.141 The Committee heard evidence that if donations are capped at or below the current disclosure level of \$1,000, the disclosure limit might need to be reduced.³⁵⁷

5.142 However, a number of stakeholders submitted that if donations were capped at above the existing level of disclosure, the current limit of \$1,000 should be retained.³⁵⁸ For example, the Liberal Party (NSW) submitted that:

... the question is what disclosure would still be required at a State level once a low-level cap on donations is adopted. We note that no Australian jurisdiction currently requires disclosure of donations of \$1 000 or less. We do not think it is necessary to vary this. Thus, if a donation cap is chosen that is higher than \$1 000, then donations of \$1 000 or more per annum would need to be disclosed.³⁵⁹

5.143 The National Party (NSW) considered that current disclosure levels are sufficient, stating that:

There is an obvious and appropriate public interest in transparency within our donation system, particularly in revealing the sources of large donations to candidates and political parties, but this must be weighed against the rights of individual donors to

³⁵³ Mr Peter Besseling, Member for Port Macquarie, *Transcript of Evidence*, 2 February 2010, p.22.

³⁵⁴ Mr Piper, Independent Member for Lake Macquarie, *Submission 8*, p.3.

³⁵⁵ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Submission 30*, 'Funding and disclosure model'.

³⁵⁶ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Submission 30*, 'Funding and disclosure model'.

³⁵⁷ Mr Matthew Thistlethwaite, General Secretary, The Australian Labor Party (NSW Branch), *Transcript of Evidence*, 1 February 2010, p.14; Mr Mark Neeham, State Director, Liberal Party of Australia (NSW Division), *Transcript of Evidence*, 1 February 2010, p.29.

³⁵⁸ NSW National Party, *Submission 18*; Liberal Party of Australia (NSW Division), *Submission 17*; and Mr Matthew Thistlethwaite, General Secretary, The Australian Labor Party (NSW Branch), *Transcript of Evidence*, 1 February 2010.

³⁵⁹ Liberal Party of Australia (NSW Division), *Submission 17*, p.18.

privacy. Reducing the disclosure threshold to a level below \$1,000 would deny individuals the right to express their modest support for a political party or candidate privately. The existing threshold of \$1,000 per financial year is therefore supported.³⁶⁰

5.144 The National Party (NSW) also recommended that for 'disclosure purposes, membership and/or affiliation fees be treated as donations.'³⁶¹

5.145 The Electoral Commissioner, however, called for a much lower disclosure limit of '\$100 for any single donation in the twelve monthly disclosure period'.³⁶²

Reporting

5.146 The Labor Party (NSW) emphasised the problems associated with the current disclosure system whereby 'the disclosure period is six monthly, whereas the threshold at which a donor's details must be disclosed is calculated annually'.³⁶³ They considered that the disclosure period and reporting period should be aligned at six months.³⁶⁴

5.147 The National Party submitted that although the current requirement for six monthly disclosures is 'burdensome to party administration', it is in the public interest.³⁶⁵

5.148 The Independent Commission Against Corruption (ICAC) recommended that:

... any political party, person or other entity that receives public funding for political purposes should be required to publish an annual statement containing relevant information about income and expenses.

The annual statement should contain:

- A record of all contributions from identified third parties, whether by money or other means, directly or indirectly received, in the year in question.³⁶⁶

5.149 ICAC also considered that these annual statements should be audited by an independent statutory authority.³⁶⁷

5.150 When questioned the recommendation to move from the current six monthly reporting period to an annual statement, Dr Waldersee, Executive Director of Corruption Prevention, Education and Research Division stated that this view was predicated on donations being capped at a low level:

For example, if it was limited to a \$1000 donation and if, as your earlier paper said, there would be safeguards against the American cap system where a corporation would violate that \$1000 limit by getting a thousand of its employees to give a \$1000 each, my understanding was the system was going to stop that by everyone declaring where that \$1000 had come from or whether there had been another source behind it. If all those things were in place, and being appropriately checked, then the addition of one more \$1000 from an individual from a corruption perspective is not - it is highly unlikely somebody is going to do something fundamentally wrong for a \$1000.³⁶⁸

³⁶⁰ NSW National Party, *Submission 18*, p.7.

³⁶¹ NSW National Party, *Submission 18*, p.8.

³⁶² Electoral Commission NSW/Election Funding Authority, *Submission 30*, 'Funding and disclosure model'.

³⁶³ Australia Labor Party (NSW Branch), *Submission 15*, p.4.

³⁶⁴ Australia Labor Party (NSW Branch), *Submission 15*, p.4.

³⁶⁵ Mr Ben Franklin, State Director, NSW National Party, *Submission 18*, p.7.

³⁶⁶ Independent Commission Against Corruption, *Submission 14*, p.4.

³⁶⁷ Independent Commission Against Corruption, *Submission 14*, p.4.

³⁶⁸ Dr Robert Waldersee, Executive Director of Corruption Prevention, Education and Research Division, Independent Commission Against Corruption, *Transcript of Evidence*, 2 February 2010, p.8.

- 5.151 When questioned on the rationale for auditing by an independent statutory authority, Dr Waldersee explained that :

Essentially, the confidence of the public is one of them. The suitably qualified auditor, again, we look at the sad side of humanity, which is our job, and we have seen some qualified auditors who are not really up to it. They still have their qualifications. If it was a statutory authority, then we have some reasonable confidence that there will be appropriate oversights and appropriate standards over and above what might be available in the private sector. If you want to work around it, there are auditors out there who will help you work around it.³⁶⁹

- 5.152 On the issue of an appropriate independent statutory authority to conduct audits, Dr Waldersee stated:

Throughout the public sector we have a number of audit bodies or people who conduct audits. The Auditor-General does, of course, a State-wide set of audits, but police have auditors internally in certain bodies that sit independently. Most of the major agencies have auditors set up internally. Whether the body exists now or whether somebody such as the Electoral Commission were to be funded to be an independent statutory auditing body, we do not have a position.³⁷⁰

- 5.153 The Electoral Commission also expressed support for a move to an annual reporting period if donations are capped at a relative low level:

... it [is] worthy of strong consideration to move to an annual disclosure period. In a regulated model like this with limited spending and a public funding regime, there are difficulties with the current regime of six months. We think an annual disclosure in the regulated model would work. It gives advantages to the parties. At least in the current model, parties have difficulty in trying to deal with the \$1,000 in aggregate in the financial year, over two disclosure periods. It causes some angst.

- 5.154 The Electoral Commission considered that a great benefit of an annual reporting period would be the ability to align federal reporting and disclosure requirements with NSW requirements:

... if the type of disclosure from parties was made to be similar to that which is currently required at the Federal level, which is full disclosure of all income and expenditure by a party, not just electoral income and expenditure, we could sit comfortably with the Commonwealth in processing and dealing with disclosures on an annual basis from parties, which is currently the case at the Federal level. Hopefully we would be able to work out some process, where, if we are both getting the same information, that would assist the parties immensely to move to an annual financial year as opposed to six monthly disclosures.³⁷¹

- 5.155 Both Mr Greg Piper, Member for Lake Macquarie, and Mr Peter Besseling, Member for Port Macquarie, advocated for full disclosure of both donations and expenditure one week prior to the election.³⁷² They argued that this would allow electors the opportunity to 'have all financial information available to them prior to the election' in contrast to the current system which is 'unfair on constituents who cast their votes

³⁶⁹ Dr Robert Waldersee, Executive Director of Corruption Prevention, Education and Research Division, Independent Commission Against Corruption, *Transcript of Evidence*, 2 February 2010, p.10.

³⁷⁰ Dr Robert Waldersee, Executive Director of Corruption Prevention, Education and Research Division, Independent Commission Against Corruption, *Transcript of Evidence*, 2 February 2010, pp.10-11.

³⁷¹ Mr Brian DeCelis, Director, Funding and Disclosures, Electoral Commission NSW, *Transcript of in camera evidence*, 22 February 2010 p. 29.

³⁷² Mr Greg Piper, Member for Lake Macquarie, *Submission 8*, p.2; Mr Peter Besseling, *Transcript of Evidence*, 2 February 2010, p.17.

and do so without prior knowledge of information that has the potential to change their voting decision.³⁷³

5.156 When questioned on the administrative burden this might place on political parties and candidates, Mr Besseling stated:

I am not suggesting for any moment that these reforms can be implemented quite easily, but I do believe that where there is a will there is a way and I do think it is important that as much information as possible is given to the voter prior to them going to the polls.³⁷⁴

5.157 In terms of whether there should be a requirement that returns be audited when submitted prior to the election, Mr Piper stated:

... at this stage no, I am not, however I think there should be a process of scrutiny with Elections NSW to do that. I would imagine that some costs might actually not even be able to be reconciled at that stage and therefore in my submission I have indicated, if you like, I am suggesting a declaration on oath or some such, because some may need to be reconciled post-election. I could not predict that everybody would be able to finalise their income and expenditure one week out, but I think everybody would have a fairly good idea of what they were doing. Certainly it would need some level of verification.³⁷⁵

Promoting transparency

5.158 ICAC pointed to the distinction between disclosure and transparency, in that increased disclosure, 'even with high compliance and public availability of the data will not achieve the goal of oversight by relevant oversight bodies, voters, public interest groups and the media'.³⁷⁶ This is because of the amount of data that is disclosed, for example, 'disclosure on just six financial and affiliation factors for the 5,000 candidates that typically stand in local government elections would create 30,000 pieces of data per election.'³⁷⁷

5.159 In order to provide for transparency, ICAC argued that disclosure data needs to be analysed into meaningful information:

Oversight requires that the information become usable knowledge for voters, the media and public interest groups. In the U.S. such analyses of data are carried out by numerous well-funded public interest groups such as Democracy Watch. Australia is economically smaller and traditionally less philanthropic, and therefore has fewer public interest groups able to perform the important analysis of the raw disclosure data.

5.160 Given the lack of a well-funded public interest group to analyse disclosure data in Australia, ICAC recommended that there 'there would be an advantage in such

³⁷³ Mr Peter Besseling, *Transcript of Evidence*, 2 February 2010, p.17. See also, Mr Greg Piper, Member for Lake Macquarie, *Transcript of Evidence*, 2 February 2010, p.34.

³⁷⁴ Mr Peter Besseling, Member for Port Macquarie, *Transcript of Evidence*, 2 February 2010, p.20.

³⁷⁵ Mr Greg Piper, Member for Lake Macquarie, *Transcript of Evidence*, 2 February 2010, p.39.

³⁷⁶ Independent Commission Against Corruption, *Submission 14*, p.2.

³⁷⁷ Independent Commission Against Corruption, *Submission 14*, p.2.

analyses being conducted via public funding of an independent authority such as the Electoral Funding Authority'.³⁷⁸

³⁷⁸ Independent Commission Against Corruption, *Submission 14*, p.2.

Chapter Six - Caps on expenditure

- 6.1 The terms of reference of this inquiry require the Committee to consider ‘whether any restrictions should be imposed on expenditure by political parties and candidates more generally and, if so, what restrictions should apply and how should expenditure be monitored’. Also, ‘whether there should be any regulation of expenditure by third parties on political advertising or communication.’
- 6.2 This Chapter considers the current regulatory regime for expenditure by political parties and candidates and the expenditure levels at the 2007 and 2003 state elections. It examines the arguments both for and against the imposition of expenditure caps for political parties and candidates and outlines options for reform. It also looks at the regulation of other types of potential political expenditure, specifically third party political advertising and communication, and government advertising.
- 6.3 The Committee’s recommendations relating to expenditure caps should not be considered in isolation, but must be considered as part of an integrated reform package.

Current regulation of electoral expenditure

- 6.4 Electoral expenditure in New South Wales is currently unregulated, except that political parties, groups and candidate are only able to access public funding for ‘electoral expenditure’ as defined under legislation, and are required to disclose electoral expenditure to the Election Funding Authority every six months (alongside disclosure of reportable donations).

Reimbursement for public funding

- 6.5 Campaign expenditure as presently defined in the public funding provisions of the *Electoral Funding and Disclosures Act 1981* encompasses the expenditure of goods and services for election campaign purposes and any expenditure in preparation for campaign purposes. It also includes expenditure incurred relating to the audit of the claim for payment of public funding under Part 5 of the Act and the declaration lodged in accordance with the disclosure requirements of Part 6 for the period ending on the polling day for the election (in each case the expenditure cannot exceed \$200 or such other amount as may be prescribed).
- 6.6 Section 55(1)(b) of the Act further specifies that election campaign expenditure does not include:
- (i) expenditure incurred substantially in respect of an election for a legislature other than the Parliament,
 - (ii) expenditure incurred substantially in respect of an election held before that in respect of which the relevant application for payment under this Part is made, or
 - (iii) expenditure of a prescribed class or description.
- 6.7 Relevant to the expenses recoverable under the existing public funding arrangements is the definition of ‘electoral material’ and ‘electoral matter’ found within s.151F of the *Parliamentary Electorates and Elections Act 1912*. This provision regulates the distribution of registered electoral material on polling day, for example,

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how to vote cards, and further defines the nature of material directly connected with an election campaign.³⁷⁹

6.8 Section 151F incorporates the definition of 'electoral matter' found at s.151B(6) of that Act, to clarify further that 'electoral material' for the purpose of the section includes:

...any matter which is intended or calculated or likely to affect or is capable of affecting the result of any election held or to be held under this Act or of any referendum of the electors held or to be held in accordance with the provisions of any Act or which is intended or calculated or likely to influence or is capable of influencing an elector in relation to the casting of his or her vote at any such election or referendum.

It also includes:

...the name of a candidate at any election, the name of the party of any such candidate, the name or address of the committee rooms of any such candidate or party, the photograph of any such candidate, and any drawing or printed matter which purports to depict any such candidate or to be a likeness or representation of any such candidate.

6.9 Specifically excluded from reimbursement as election campaign expenditure are any costs incurred in the use or acquisition of the following items listed in cl.5 of the Election Funding and Disclosures Regulation 2009:

- (a) a motor vehicle³⁸⁰,
- (b) motor vehicle accessories such as radios, sound reproducing equipment, air conditioning units, spare tyres or tools to be used with a motor vehicle ,
- (c) a vessel or aircraft used for the purpose of navigation,
- (d) televisions and radios,
- (e) television and radio broadcasting equipment,
- (f) electronic equipment for recording sounds or visual images,
- (g) photographic equipment,
- (h) computers and associated equipment and computer software,
- (i) office furniture and equipment such as desks, tables, chairs, filing cabinets, library shelving, typewriters, word processors, calculators, accounting machines, cash registers, photocopiers, printing machines, paper collating machines, water coolers, air conditioners, refrigerators, lockers or other items of a durable nature utilised in or ancillary to a work function.

³⁷⁹ Section 151F of the *Parliamentary Electorates and Elections Act 1912* defines election material as a "how to vote" card, handbill, pamphlet or notice containing:

- (a) electoral matter as defined in section 151B, or
- (b) without limiting paragraph (a), an express or implicit reference to or comment on:
 - (i) the election or referendum, or
 - (ii) the Government, the Opposition, a previous Government or a previous Opposition, of the State, or
 - (iii) the Government, the Opposition, a previous Government or a previous Opposition, of the Commonwealth or any other State or a Territory, or
 - (iv) a member or a former member of Parliament or the Parliament of the Commonwealth, any other State or a Territory, or
 - (v) a political party, a branch or division of a political party or a candidate in the election, or
 - (vi) an issue submitted to, or otherwise before, the electors in connection with the election or referendum.

³⁸⁰ Registration and insurance of the vehicle is also excluded according to Election Funding Authority, *Funding and Disclosures Guide – Candidates, Groups and Official Agents at State Elections*, October 2009, p. 11.

- 6.10 Such expenditure can be included if the use or acquisition occurs within a 10 week period around polling day, and it is terminated or disposed of within that period. In this case the expenditure for election campaign purposes includes only so much of the purchase price of the property as is not recovered in the disposal of the property.³⁸¹
- 6.11 Public funding for election campaign expenses is currently only available for state elections.

Current disclosure requirements

- 6.12 Under the disclosure provisions contained within Part 6 of the *Election Funding and Disclosures Act 1981* candidates, groups and parties running in both state and local government elections, as well as elected representatives, are required to lodge a disclosure every six months detailing donations received and 'electoral expenditure'. For state elections the payment of public funding to candidates, groups or parties, as reimbursement for expenses incurred in an election campaign, is partly contingent on the lodgement of these disclosures.³⁸²
- 6.13 For the purposes of the disclosure requirements, s.87 defines 'electoral expenditure' to be:
- (a) expenditure on advertisements in radio, television, the Internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and any other printed election material,
 - (b) expenditure on the holding of election rallies,
 - (c) expenditure on the distribution of election material,
 - (d) expenditure on travel and accommodation of a candidate for election,
 - (e) expenditure on research associated with election campaigns,
 - (f) expenditure incurred in raising funds for an election,
 - (g) expenditure on stationery, telephones, messages, postage and electronic transmissions,
 - (h) expenditure incurred in employing staff engaged in election campaigns,
 - (i) expenditure classified as electoral expenditure by the Authority,
 - (j) such other expenditure as may be prescribed by the regulations.³⁸³
- 6.14 However, factual advertising of party meetings for preselections, meetings for organising parties, branches, committees, conferences or other party bodies and any other advertising of matters mainly relating to party administration is excluded from the definition of electoral expenditure (s.87(2)).
- 6.15 Guidelines issued by the EFA indicate that 'electoral expenditure' does not include:
- Nomination deposits paid by a candidate or group
 - gifts purchased for office staff

³⁸¹ Clause 5, Election Funding and Disclosure Regulation 2009.

³⁸² Election Funding Authority, *Funding and Disclosures Guide – Candidates, Groups and Official Agents at State Elections*, October 2009, p. 52, and Election Funding Authority, *Funding and Disclosures Guide – Political Parties and Party Agents at State Elections*, October 2009, p. 35; see also s.78 of the EFD Act - Under Part 5 of the Act a party, group or candidate is ineligible for any payment of public funding in respect of a general election if the required disclosure of political donations and electoral expenditure has not been made

³⁸³ Section 87 (1), *Election Funding and Disclosures Act 1981*

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- parking fines incurred by candidates during the campaign
- annual subscriptions to newspapers or periodicals
- a candidate's loss of pay due to attendance at campaign events
- celebrations or social functions held after the close of polls
- expenditure relating to advertising which recommends the election to Parliament of a candidate in another electorate
- telephone accounts for a candidate's private telephone outside the election period
- fees paid by a candidate to scrutineers
- non-promotional clothing worn by a candidate in their campaign
- personal services (such as hairdressing)
- child care expenses
- costs of the candidate or their campaign director attending party functions
- any amount specified in a contract or agreement for which payment is conditional on the candidate receiving public funding
- any costs associated with advising the electorate how to vote in a referendum³⁸⁴

Expenditure levels at previous state elections

6.16 Table 10 shows total election spending for the 2007 and 2003 NSW State elections, including the amount spent per enrolled elector.

Table 10

	2007	2003
LA Candidate Expenditure	\$10,592,356	\$5,052,422
LC Party/Group Expenditure	\$25,734,511	\$18,320,546
Total Expenditure	\$36,326,867	\$23,372,968
Electors on the roll	4,374,029	4,272,104
\$ expenditure per voter	\$8.31	\$5.47

6.17 Between 2003 and 2007, campaign expenditure increased by \$12,953,899, or approximately 55%. The number of electors on the NSW electoral roll increased by 101,925, or approximately 2.3%.

6.18 The Select Committee on Electoral and Political Party Funding report provided the following Table 11 on election spending by each party in the four years leading up to the 2007 NSW State Election, based on returns to the Election Funding Authority.

³⁸⁴ Election Funding Authority, *Funding and Disclosures Guide – Candidates, Groups and Official Agents at State Elections*, October 2009, p. 38. This Guide provides advice on how to complete a disclosure and lists the areas requiring details of expenditure at p.20.

Table 11 Election spending by each party in the four years leading up to the 2007 NSW State Election³⁸⁵

Party name	Electoral expenditure \$				
	Advertising			Other expenditure	Total
	Newspapers & periodicals	Radio, TV & cinema	Other advertising		
Australian Democrats NSW	0	0	0	0	0
ALP NSW	226,724	11,679,496	1,704,356	3,208,540	16,819,116
Australians Against Further Immigration	0	0	0	0	0
Christian Democratic Party (Fred Nile Group)	217,423	43,070	175,701	0	436,194
Country Labor Party	0	0	0	0	0
Horse Riders Party	0	0	2,482	1,070	3,552
Liberal Party NSW	108,895	1,553,400	627,391	2,994,181	5,283,867
NSW National Party	10,564	1,003,511	313,455	392,368	1,719,898
Outdoor Recreation Party	0	0	5,541	1,568	7,109
Peter Breen – Human Rights Party	0	0	0	0	0
Restore The Workers Rights Party	0	0	12,661	0	12,661
Save Our Suburbs	0	4,191	5,360	0	9,551
The Fishing Party	1,370	0	0	3,909	5,279
The Greens NSW	56,613	110,179	121,166	179,204	467,162
The Shooters Party	186,479	346,978	132,158	17,345	682,960
Unity Party	16,101	27,500	46,310	198,878	288,789

Legislative Assembly candidate expenditure for the 2007 state election

6.19 The following tables are based on information published by the Electoral Commission after the 2007 state election detailing electoral expenditure incurred by each candidate in each Legislative Assembly district. The figures in the tables are those of the candidate with the highest reported expenditure in each electorate.

6.20 The following table shows the five districts with the highest expenditure by a candidate.

Table 12

District	Expenditure by an individual candidate
Manly	\$263,434 (Liberal)
Terrigal	\$201,403 (Liberal)
Newcastle	\$198,654 (Independent)

³⁸⁵ Election Funding Authority, Summary of Political Contributions Received and Electoral Expenditure Incurred by Parties, April 2008, www.efa.nsw.gov.au/_data/assets/pdf_file/0019/48115/Parties_Summary_Published_080409.pdf (accessed 20 May 2008) in NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, pp.121-122. The Committee noted the discrepancy that some parties have declared nil election expenditure, although they have been reimbursed public funding to cover their campaign costs.

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District	Expenditure by an individual candidate
Goulburn	\$197,609 (Liberal)
Tweed	\$186,353 (Nationals)

6.21 The following table shows the five districts with the lowest expenditure, based on the highest spending candidate in the district.

Table 13

District	Expenditure by an individual candidate
Liverpool	\$22,466 (Labor)
Albury	\$22,984 (Liberal)
Mount Druitt	\$24,869 (Labor)
Smithfield	\$24,910 (Labor)
Fairfield	\$24,940 (Labor)

6.22 The following table shows expenditure levels by the highest spending candidate in each district. Reported expenditure by candidates can be misleading. Totals for candidate expenditure do not include spending by registered political parties in each electoral district on behalf of their candidates.

Table 14

Expenditure	Number of districts
\$20,000 - \$40,000	23
\$40,000 - \$60,000	26
\$60,000 - \$80,000	18
\$80,000 - \$100,000	14
\$100,000 - \$120,000	3
\$120,000 - \$140,000	2
\$140,000 - \$160,000	2
\$160,000 - \$180,000	
\$180,000 - \$200,000	3
\$200,000 +	2

Rationale for reform

6.23 The Legislative Council Select Committee on Electoral and Political Party Funding examined the issue of limits for campaign expenditure. Spending caps were supported by a number of participants in order to:

- Alleviate concerns about the escalating costs of election spending.³⁸⁶
- Create a 'level playing field and increase the parity of the electoral contest.'³⁸⁷

³⁸⁶ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.122-123.

- Address the 'unequal fund-raising capacity of minor parties and new entrants compared to major parties'.³⁸⁸
 - Reduce the 'pressure to raise money'.³⁸⁹
- 6.24 There were two main arguments against spending caps in evidence presented to the Select Committee:
- Difficulties in addressing third party spending.
 - Difficulties in penalising those who breach the caps.³⁹⁰
- 6.25 Evidence to the current inquiry also generally supported a cap on election spending. The Labor Party (NSW) stated that:
- ...an 'arms race' has developed over electoral expenditure, with political parties spending record amounts at each election.
- For these reasons, fundamental reform of the existing funding and disclosure system is required to improve accountability and integrity and ensure that all parties and candidates have an opportunity to put a fair case for election.³⁹¹
- 6.26 The Liberal Party (NSW) argued that:
- protection of a system of representative government requires political equality of opportunity. There must be a 'level playing field' for the principal players. Elections should be a battle of ideas, policies and principles, not a battle of war-chests... The Liberal Party of Australia (NSW Division) supports expenditure limits for candidates, parties, Legislative Council Groups and third parties at appropriate levels.³⁹²
- 6.27 The National Party (NSW) also supported expenditure caps as 'to restrict the ability of political players to raise money in future campaigns [ie. To place a cap on donations] without restricting expenditure in those campaigns confers a significant advantage on major political parties who may have an existing asset base'.³⁹³
- 6.28 The Greens NSW submitted that 'reasonable electoral expenditure caps would enhance democracy, not hinder it' for the following reasons:
- If reform only deals with the supply of funds (ie. caps and bans on donations), 'but leaves unregulated ongoing demand for influential donations to support excessive electoral expenditure, this conflict will produce powerful institutional pressures to circumvent the funding restrictions'.
 - There is 'strong community support for less wasteful and less oppressive electoral advertising and campaign expenditure in the lead up to elections in New South Wales'. Genuine political debate can be engendered and real community information campaigns undertaken, without resort to blanket media broadcasting and saturation electronic and paper advertising campaigns.

³⁸⁷ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.124.

³⁸⁸ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.124.

³⁸⁹ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.125.

³⁹⁰ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.126.

³⁹¹ Australia Labor Party (NSW Branch), *Submission 15*, p.3.

³⁹² Liberal Party of Australia (NSW Division), *Submission 17*, pp.12-13.

³⁹³ NSW National Party, *Submission 18*, p.3.

Caps on expenditure

- Equality and fairness, in that ‘it is not acceptable for any party or candidate to be in apposition to effectively "buy" an election by vastly outspending their opponents’.³⁹⁴

6.29 Conversely the Shooters Party maintained that ‘no limits be placed on expenditure by political parties or candidates in an election campaign’, as:

Such limits would be impractical to police in real time in the run up to an election. If a party was later found to have exceeded such a limit when all the expenses are collated and submitted to the Electoral Commission following the election, it would be too late to impose any relevant and meaningful penalty.³⁹⁵

6.30 Dr Tham provided the following reasons for the imposition of spending limits in NSW:

- *To promote fairness* – ‘this rationale was implicit in the justification that Senator O’Connor gave more than a century ago for candidate expenditure limits enacted by the original *Commonwealth Electoral Act* (which included caps on expenditure):

[i]f we wish to secure a true reflex of the opinions of the electors, we must have ... a system which will not allow the choice of the electors to be handicapped for no other reason than the inability of a candidate to find the enormous amount of money required to enable him [sic] to compete with other candidates.³⁹⁶

If ‘properly designed, they [spending limits] will facilitate open access to electoral contests by reducing the costs of meaningful campaigns, thereby increasing the competitiveness of these contests.’³⁹⁷

- *To reduce corruption and undue influence* – there is a ‘tight relationship between the demand for funds and the supply of funds’ and ‘election spending limits can perform a *prophylactic* function by *containing* increases in campaign expenditure and therefore, the need for parties to seek larger donations – especially donations which carry the risk of graft and undue influence’.³⁹⁸
- *To enhance other regulatory measures* – for example ‘Increased public funding of political parties and candidates raises a serious risk of inflating campaign expenditure, a risk which can be dealt with by properly designed election spending limits’.³⁹⁹
- *To enhance the operation of contribution limits* - while regulation of other sources of income ‘will significantly reduce the private income of the major parties’,

³⁹⁴ The Greens NSW, *Submission 19*, pp.11-12.

³⁹⁵ The Shooters Party, *Submission 25*, p.3.

³⁹⁶ Commonwealth, *Parliamentary Debates*, Senate, 30 January 1902 (Senator O’Connor: 2nd Reading Speech to Commonwealth Electoral Bill 1902) 9542 in Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p.52, http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

³⁹⁷ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p.52, http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

³⁹⁸ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p.54.

³⁹⁹ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p.54.

spending limits ‘can, however, go some way to ameliorating this impact’.⁴⁰⁰

Further:

...the public arena is a finite and ‘limited space’ – hence, what matters in terms of political deliberation is the *relative* capacity of citizens and their groups to engage in political expression. This is especially true in relation to electoral *contests*. For instance, what matters more is whether the Coalition can match the level of ALP spending rather than the objective levels of its spending (e.g. how many millions are being spent?). It is here that election spending limits can make a distinct contribution. By capping the maximum amount that any party can spend, it does, at the very least, contain the costs of an ‘adequate’ campaign for the major parties...⁴⁰¹

- 6.31 Dr Orr considered that regulation of the electoral and political finance regime should focus attention on expenditure limits, as this ‘has the benefit of relative transparency and enforceability, since most political expenditures are inherently public’.⁴⁰² Also, ‘rival parties will to a significant extent monitor and police each other’.⁴⁰³
- 6.32 The Public Interest Advocacy Centre supported ‘introducing limits on expenditure of public and private funding as one of several measures that address concerns about the spiraling costs of campaigns and political activity, and the unequal fund-raising capacity of minor parties and new entrants compared to the major parties’.⁴⁰⁴

Expenditure limits in other jurisdictions

- 6.33 The regulatory regimes in other jurisdictions may be useful in determining appropriate expenditure caps for New South Wales. However, care must be taken in transplanting any aspects of electoral and political finance regimes that operate elsewhere, given that the various aspects of any scheme must be viewed as a whole. As well, it is important to recognise the different constitutional issues and political culture and structures in New South Wales.

Australia

- 6.34 Some Australian jurisdictions have a long history of expenditure caps. Expenditure limits ‘applied to candidates at Commonwealth elections from 1902 to 1980 when they were repealed’.⁴⁰⁵ Dr Twomey has pointed to a number of issues associated with this expenditure limits scheme:
- the limits were focused on expenditure by candidates in their electorates and did not deal with expenditure by political parties generally.
 - the limits remained too low and were only raised once in 1946
 - the fact that the limits did not relate to the reality of political expenditure and were not enforced, meant that they were largely ignored.⁴⁰⁶

⁴⁰⁰ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p.54.

⁴⁰¹ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, pp.54-55.

⁴⁰² Associate Professor Graeme Orr, *Submission 23*, p.2.

⁴⁰³ Associate Professor Graeme Orr, *Submission 23*, p.2.

⁴⁰⁴ Public Interest Advocacy Centre, *Submission 26*, p.4.

⁴⁰⁵ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, at http://www.dpc.nsw.gov.au/publications/news/stories/election_campaign_finance_reform (accessed 17 December 2009), p.25.

⁴⁰⁶ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, pp.25-26.

Caps on expenditure

6.35 The expenditure limits at the Commonwealth level 'were repealed in 1980, partly because they were regarded as 'unworkable' and were mostly honoured in the breach, but primarily because of concern that breaches would give rise to challenges to the election of candidates after such a challenge was successful with respect to a Tasmanian State election.'⁴⁰⁷

6.36 Expenditure limits have also been in place in Western Australia and Victoria, but were abolished in 1979 and 2002 respectively.⁴⁰⁸ Only Tasmania continues to apply expenditure limits, 'with respect to elections for the Legislative Council'.⁴⁰⁹ They operate as follows:

Only a candidate or his or her agent may incur expenditure with a view to promoting the election of the candidate to the Legislative Council. A political party may not incur expenditure to promote the election of candidates to the Legislative Council, nor may third parties. The expenditure limit for candidates was set at \$10,000 in 2005, to which an additional \$500 is added every subsequent year. Breach of the expenditure limit is an offence punishable by a fine, and if it is breached by more than \$1000 and the candidate was elected to the Legislative Council, the court must declare the candidate's election void, unless satisfied that there are special circumstances that make it undesirable or inappropriate to make such a declaration.⁴¹⁰

United Kingdom

6.37 In the United Kingdom under the *Political Parties Elections and Referendum Act 2000* (PPERA Act) and the *Representation of the People Act 1983* (RPA Act) political parties, candidates and third parties are subject to expenditure limits.⁴¹¹

6.38 With regard to *political parties*, the PERPA Act limits political parties expenditure (referred to as campaign expenditure) for a year before election day.⁴¹² According to the UK Electoral Commission 'any items purchased before the regulated period but used during the regulated period are included in the spending limit.'⁴¹³ The Commission further advises that 'where some items may be used partly during the regulated period and partly outside it, a reasonable estimate of the proportion of the expenditure used during the regulated period should be made.'⁴¹⁴

6.39 Campaign expenditure is defined by the PERPA Act as spending by a party on items for:

promoting the party or its candidates at a relevant election or in promoting the standing of the party or its candidates in connection with future relevant elections.⁴¹⁵

6.40 Items which must be treated as campaign expenditure are:

⁴⁰⁷ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, pp.25-26.

⁴⁰⁸ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, pp.25-26.

⁴⁰⁹ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, pp.25-26.

⁴¹⁰ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, pp.25-26.

⁴¹¹ Expenditure limits apply to the following: a parliamentary general election; a European Parliamentary general election; a Scottish Parliamentary general election; an ordinary election to the National Assembly for Wales; and a general election to the Northern Ireland Assembly: see Section 79 and Schedule 9 of the *Political Parties Elections and Referendum Act 2000*.

⁴¹² Section 79 and Schedule 9, *Political Parties Elections and Referendum Act 2000*.

⁴¹³ The Electoral Commission, *Campaign Expenditure – Guidance for party treasurers and campaign officers*, January 2010, <http://www.electoralcommission.org.uk/guidance/resources-for-those-we-regulate/parties> (accessed 12 March 2010).

⁴¹⁴ The Electoral Commission, *Campaign Expenditure – Guidance for party treasurers and campaign officers*, January 2010, p 15.

⁴¹⁵ Section 72(4) *Political Parties Elections and Referendum Act 2000* as cited in The Electoral Commission, *Campaign Expenditure – Guidance for party treasurers and campaign officers*, January 2010, p 5.

- party political broadcasts
- advertising
- unsolicited material addressed to electors
- manifesto and policy documents
- market research or canvassing
- media
- transport with a view to obtaining publicity for the election
- rallies and other events.⁴¹⁶

6.41 During the year prior to a general election, political parties can spend the greater of:

- £810 000 in England
- £120 000 in Scotland
- £60 000 in Wales

OR

- £30 000 multiplied by the number of seats the party is contesting.⁴¹⁷

6.42 With regard to *candidates*, the *Representation of the People Act 1983* (RPA Act) limits candidate's expenditure (referred to as election expenditure). There are two separate periods during which limits apply.⁴¹⁸ The UK Electoral Commission describes these two separate periods as:

- The long campaign – which begins after a Parliament has been sitting for 55 months and ends on the date that Parliament is dissolved.
- The short campaign – which starts when the person has formally become a candidate⁴¹⁹ and ends on election day.⁴²⁰

6.43 Having two regulatory periods applicable to candidates is a recent change to UK electoral finance laws, introduced by the passing of the *Political Parties and Elections Act 2009*. Previously the regulatory period for candidates only applied during the period from the dissolution of Parliament up to election day. As noted in an Impact Assessment document produced by the Ministry of Justice, 'the unforeseen consequence of this has been a dramatic increase in unregulated spending by candidates before dissolution.'⁴²¹

⁴¹⁶ Section 72(2) and part 1 of schedule 8 *Political Parties Elections and Referendum Act 2000*

⁴¹⁷ Section 79 and schedule 9 *Political Parties Elections and Referendum Act 2000* as cited in The Electoral Commission, *Campaign Expenditure – Guidance for party treasurers and campaign officers*, January 2010, p 19.

⁴¹⁸ Restrictions on candidates' expenses are imposed under the *Representation of the People Act 1983*.

⁴¹⁹ Section 118A of the *Representation of the People Act 1983* sets out when an individual is considered a candidate.

⁴²⁰ UK Electoral Commission, *Guidance for candidates and agents – the 2010 UK Parliamentary general elections in Great Britain*.

⁴²¹ Ministry of Justice, *Impact Assessment of Political Parties and Elections Act – Controls on pre-candidacy spending for certain general elections*, July 2009, p 1, <http://www.justice.gov.uk/publications/political-parties-elections-bill.htm> (accessed 5 March 2010).

Caps on expenditure

- 6.44 To address these concerns ‘an additional ‘pre-candidacy’ spending limit for those occasions where a Parliament runs for over 55 months only’ was introduced.⁴²² The result being that, on the occasions where a Parliament runs its full term of five years, there will be a period of approximately 6 months before a general election where a candidate’s expenditure will be regulated. The present UK Parliament is currently operating within the long campaign spending limit period.⁴²³
- 6.45 Items which must be treated as election expenditure for candidates are:
- advertising
 - unsolicited materials sent to electors
 - some types of transport
 - public meetings
 - staff costs
 - accommodation
 - administrative costs, such as telephone and stationery costs.⁴²⁴
- 6.46 The maximum amount a candidate can spend during the long campaign period is a percentage⁴²⁵ of £25 000, plus 5p per elector in a borough constituency or 7p per elector in a county constituency.
- 6.47 The spending limit applicable to the short campaign is £7 150 plus 5p per Parliamentary elector in a borough constituency or 7p per Parliamentary elector in a county constituency.

New Zealand

- 6.48 In New Zealand expenditure limits apply to political parties and candidates in the three months prior to the date of the election. The *Electoral Act 1993* provides that, where an election activity occurs before the three month period and continues during the regulated period, a fair apportionment of the expenses must be attributed as an election expense. Elections New Zealand provides the following example:
- ...if one third of a pamphlet print run had been distributed before the election year began then two thirds of the cost would be included in the return. However, if the party produced billboards six months before election year and erected them in the month before polling day then the total production costs must be included in the return. A party cannot avoid declaring an election expense simply by ensuring the work is done or invoiced before or after the regulated period.⁴²⁶

⁴²² Ministry of Justice, *Impact Assessment of Political Parties and Elections Act – Controls on pre-candidacy spending for certain general elections*, July 2009, p 1, <http://www.justice.gov.uk/publications/political-parties-elections-bill.htm> (accessed 5 March 2010).

⁴²³ The current long campaign period spending limit commenced on 1 January 2010. The present UK Parliament reached 55 months in office on 11 December 2009. The *Political Parties and Elections Act 2009* received Royal Assent on July 2009. Section 20(2)(a) of the *Political Parties and Elections Act 2009* specifies that the provisions do not apply to any expenses incurred before 1 January 2010.

⁴²⁴ Schedule 4A *Representation of the People Act 1983* as cited and summarised in UK Electoral Commission, *Guidance for candidates and agents – the 2010 UK Parliamentary general elections in Great Britain*, December 2009, p 70.

⁴²⁵ The percentage is determined by which month of its term a Parliament is dissolved in.

⁴²⁶ Party Election Guide 2008, <http://www.elections.org.nz/rules/parties/partysub/e5-party-return-expenses.html> (accessed 8 March 2010).

- 6.49 The *Electoral Act 1993* currently imposes the following limits:⁴²⁷
- total expenses of a candidate must not exceed \$20 000
 - total expenses of a political party must not exceed \$1 million plus \$20 000 for each constituency contested by a candidate for that party.⁴²⁸
- 6.50 For both *political parties* and *candidates* spending limits apply to expenses incurred in respect of election activity, including:
- advertising of any kind
 - radio or television broadcasting
 - publishing, issuing, distributing, or displaying addresses, notices, posters, pamphlets, handbills, billboards, and cards.⁴²⁹
- 6.51 The above activities can be for the purposes of campaigning for the return of the candidate or party and/or encouraging or persuading voters to not vote for an alternative candidate or party.
- 6.52 Expenses for *candidates* and *political parties* that are exempt under the spending limits include:
- travel
 - the conduct of any survey or public opinion poll
 - volunteer labour
 - the replacement of any materials that were destroyed beyond the control of the candidate.⁴³⁰
- 6.53 The following additional exemptions also apply for *political parties*:
- the labour of any person that is provided to the party free of charge by that person
 - the election expenses of any one of the party's candidates
 - allocations of time and money made to the party under the *Broadcasting Act 1989*.⁴³¹
- 6.54 As mentioned previously in Chapter 5, the New Zealand government is currently conducting a review of electoral finance laws. After publishing an Issues Paper and Proposal Document seeking public consultation, the New Zealand Government announced proposals for reform on 16 February 2010. On the issue of expenditure limits, the government indicated its intention to, 'increase the amount of money that parties and candidates can spend on election campaigning at the rate of inflation for each general election.'⁴³² The Minutes documenting the Cabinet's decisions on the electoral finance reform package state that:

⁴²⁷ The following limits do not include the amounts allocated to candidates and parties under the *Broadcasting Act 1989 (NZ)*.

⁴²⁸ Sections 205B(1) & 206B(1) *Electoral Act 1993 (NZ)*.

⁴²⁹ Sections 205 & 206 *Electoral Act 1993 (NZ)*.

⁴³⁰ Sections 205A(c) & 206A(c) *Electoral Act 1993 (NZ)*.

⁴³¹ Section 206A(c) *Electoral Act 1993 (NZ)*.

⁴³² <http://www.beehive.govt.nz/release/electoral+finance+reform+package+announced> (accessed 25 February 2010).

Caps on expenditure

Submissions from most parliamentary parties supported indexing expenditure limits to inflation...However, there was no consensus among the parliamentary parties about broader increases to expenditure limits.⁴³³

- 6.55 The government also undertook public consultation on the length and timing of the regulated campaign period in relation to expenditure limits. In the Proposal Document the government noted that as New Zealand does not have a fixed election date or a specific date on which campaigning officially begins:

...where the Prime Minister announces that a general election will be held in less than three months time (e.g. an early or snap election is called). The regulated period operates retrospectively – that is, it commences before the announcement is made.

This means that constituency candidates and political parties can unwittingly exceed expenditure limits if they have spent money on election advertising before the Prime minister's announcement.⁴³⁴

- 6.56 As stated in the Cabinet Minutes, while many submissions supported a fixed date for the start of the regulated campaign period, after consultation with the electoral authorities it was considered that a fixed start dated would be technically unworkable. Therefore, the government decided that the 'regulated campaign period will continue to be three months before polling day, which is the status quo.'⁴³⁵

Canada

- 6.57 In Canada expenditure limits are imposed on both candidates and parties under the *Canada Elections Act 2000*.⁴³⁶ Spending limits apply for the election campaign period, which begins with the issue of the writs and ends on election day.⁴³⁷ Elections Canada advises that pre-writ expenses, that is, any expenses incurred for items consumed before the election period begins, are not election expenses. Elections Canada provide the following two examples:

For example, the cost of a flyer distributed before the issue of the writ is not an election expense.

The cost of promotional material sent by mail before the issue of the writs and distributed during the election period, but over which the candidate has no possible control when the election is called, would not be an election expense. The important consideration in these cases is the control of the candidate or official agent over the distribution after the issue of the writ.⁴³⁸

- 6.58 An election campaign expense is one that is reasonably incurred as an incidence of the election. It will be an expense that directly promotes or opposes a candidate

⁴³³ Cabinet Minutes, Electoral Finance Reform Package, CAB Min (09) 45/10, 17 December 2009, p 8, <http://www.justice.govt.nz/policy-and-consultation/electoral/electoral-finance-reform/what-stage-is-the-review-at-now> (accessed 25 February 2010).

⁴³⁴ Cabinet Minutes, *Electoral Finance Reform Package*, CAB Min (09) 45/10, 17 December 2009, <http://www.justice.govt.nz/policy-and-consultation/electoral/electoral-finance-reform/what-stage-is-the-review-at-now> (accessed 25 February 2010).

⁴³⁵ Cabinet Minutes, *Electoral Finance Reform Package*, CAB Min (09) 45/10, 17 December 2009, p 15

⁴³⁶ The Canada Elections Act is federal legislation.

⁴³⁷ Section 407(2), *Canada Elections Act 2000*. Subject to earlier dissolution a general election in Canada must be held on the third Monday in October in the fourth calendar year following the previous general election.

⁴³⁸ Elections Canada, *Election Handbook for Candidates, Their Official Agents and Auditors*, Chapter 5.3, <http://www.elections.ca/content.asp?section=pol&document=elec&dir=can/EC20190&lang=e&anchor=a5&textonly=false#a5> (accessed 8 March 2010).

during an election.⁴³⁹ An election expense includes a cost incurred or a non-monetary contribution in relation to:

- the production of advertising or promotional material and its distribution, broadcast or publication in any media or by any other means
- the payment of remuneration and expenses to or on behalf of a person for their services as an official agent, registered agent or in any other capacity
- securing a meeting space or the supply of light refreshments at meetings
- any product or service provided by a government, a Crown corporation or any other public agency
- the conduct of election surveys or other surveys or research during an election period.⁴⁴⁰

6.59 Candidates' personal expenses incurred as an incidence of the election are also considered an election expense. These are defined to include:

- travel and living expenses
- childcare expenses
- expenses relating to the provision of care for a person with a physical or mental incapacity for whom the candidate normally provides such care
- in the case of a candidate who has a disability, additional personal expenses that are related to the disability.⁴⁴¹

6.60 Expenditure limits for *candidates* are calculated by the following four steps.

- **Step 1** – spending limits are based on the number of names on the list of electors. They are calculated by the following limits:
 - \$2.07 for each of the first 15,000 electors
 - \$1.04 for each of the next 10,000 electors
 - \$0.52 for each elector over 25,000⁴⁴²
- **Step 2** – adjustments are then made for those candidates running in electorates with fewer electors than the national average.⁴⁴³
- **Step 3** – adjustments are then made for geographically large electoral districts.⁴⁴⁴
- **Step 4** – after a limit has been calculated following steps 1-3, the amount is then adjusted by the inflation adjustment factor in effect on the day of the issue of the writ.⁴⁴⁵

6.61 Expenditure limits for *registered parties* are calculated as follows:

- **Step 1** – multiply \$0.70 by the number of names on the list of electors for the electoral districts in which the party has endorsed a candidate.

⁴³⁹ Section 407(1), *Canada Elections Act 2000*.

⁴⁴⁰ Section 407(3) *Canada Elections Act 2000*

⁴⁴¹ Section 406(b) *Canada Elections Act 2000*

⁴⁴² Sections 441(3) and (7) *Canada Elections Act 2000* as cited in Elections Canada, *Election Handbook for Candidates, Their Official Agents and Auditors*, p 28,

<http://www.elections.ca/content.asp?section=pol&document=index&dir=can/ec20190&lang=e&textonly=false> (accessed 26 February 2010).

⁴⁴³ Section 441(4) and (8) *Canada Elections Act 2000*

⁴⁴⁴ Section 441 (6) and (10) *Canada Elections Act 2000*

⁴⁴⁵ Sections 441(6) and 440 *Canada Elections Act 2000*

Caps on expenditure

- **Step 2** – multiply the amount from step 1 by the inflation adjustment factor in effect on the day of the issue of the writ.⁴⁴⁶

United States

- 6.62 In the United States expenditure limits apply to those Presidential candidates that accept public funding. As discussed in paragraphs 7.49-7.51 public funding is available to eligible Presidential candidates on a voluntary basis. Presidential candidates who do decide not to participate in the public funding program are not required to observe the expenditure limits.
- 6.63 For the 2008 *primary elections*, Presidential candidates who accepted public funding were limited to an overall total of US\$42.05 million⁴⁴⁷ for campaign expenditure. Within this overall total there are spending limits applicable to each state. A Presidential candidate is also limited to spending US\$50,000 from personal funds. Not included in the expenditure limits are any legal and accounting expenses incurred to ensure the campaign complies with the law.⁴⁴⁸
- 6.64 For the 2008 *general election*, Presidential candidates from each major party who accepted public funding were limited to US\$84.1 million⁴⁴⁹ for campaign expenditure. Candidates are also not permitted to accept private donations. Candidates may spend up to US\$50,000 of their own personal funds which are not included in the expenditure limit. Legal and accounting expenses incurred to ensure the campaign complies with the law are also exempt.
- 6.65 The following table prepared by the United States Federal Electoral Commission provides an overview of the expenditure limits applicable for publicly funded Presidential candidates.

Table 15 US Expenditure Limits for Publicly Funded Candidates*⁴⁵⁰

	Primary candidates	General election	
		Major party nominees	Minor/new party nominees
National Spending Limit	\$10 mil. + COLA**	\$20 mil. + COLA	\$20 mil. + COLA
State Spending Limit	The greater of \$200,000 + COLA or \$0.16 x state VAP***	None	None
Exempt Fundraising Limit	20% of national limit	Not applicable	20% of national limit
Maximum Public Funds Candidate May Receive	50% of national limit	Same as national limit	Percentage of national limit based on candidate's popular vote.

⁴⁴⁶ Sections 414 and 422 *Canada Elections Act 2000*

⁴⁴⁷ This figure is adjusted to take into account the Cost of Living Adjustment (COLA). Federal Electoral Commission, *Presidential Spending Limits for 2008*, http://www.fec.gov/pages/brochures/pubfund_limits_2008.shtml (accessed 1 March 2010).

⁴⁴⁸ Federal Electoral Commission, *Public Funding of Presidential Elections Brochure*, published August 1996 (updated January 2009), http://www.fec.gov/pages/brochures/pubfund.shtml#Expenditure_Limits (accessed 1 March 2010).

⁴⁴⁹ This figure is adjusted to take into account the Cost of Living Adjustment (COLA). Federal Electoral Commission, *Presidential Spending Limits for 2008*, http://www.fec.gov/pages/brochures/pubfund_limits_2008.shtml (accessed 1 March 2010).

⁴⁵⁰ Federal Electoral Commission, *Public Funding of Presidential Elections Brochure*, published August 1996 (updated January 2009), http://www.fec.gov/pages/brochures/pubfund.shtml#Expenditure_Limits (accessed 1 March 2010).

	Primary candidates	General election	
		Major party nominees	Minor/new party nominees
National Party Spending Limit for Candidate****	Not applicable	\$0.02 x VAP of U.S. + COLA	\$0.02 x VAP of U.S. + COLA
Limit on Spending from Candidate's Personal Funds	\$50,000	\$50,000	\$50,000

* Legal and accounting expenses incurred solely to ensure the campaign's compliance with the law are exempt from all expenditure limits.

** Spending limits are increased by the cost-of-living adjustment (COLA), which the Department of Labor calculates annually using 1974 as the base year.

*** VAP is the Voting Age Population, which the Department of Commerce calculates annually.

**** The national committee of a political party may make special, limited expenditures, called coordinated party expenditures or 441a(d) expenditures, on behalf of its Presidential nominee, even if the nominee does not accept public funds. Coordinated party expenditures are not considered contributions and do not count against a publicly funded campaign's candidate expenditure limit.

Definition of electoral expenditure

- 6.66 The definition of electoral expenditure is crucial in determining appropriate levels for expenditure caps. If a wide definition is adopted, expenditure caps will need to be higher than for a narrow definition, which might require lower caps. Definitional issues around campaign expenditure also arise in relation to government advertising and expenditure by third parties. The case of government advertising and third parties is dealt with below.
- 6.67 The Electoral Commissioner gave evidence that the definition of 'electoral expenditure' at s.87 of the *Public Funding and Disclosures Act* is couched widely and it is questionable as to whether all of the expenditure captured in this section directly relates to an election campaign. Section 87 includes some items that may be regarded more as administrative or operational costs.
- 6.68 For instance, the Commissioner expressed some doubt as to whether s.87(d)-(e), and (g) should be defined as campaign expenditure subject to reimbursement in a public funding model. He identified the issue of an appropriate definition of campaign expenditure as one warranting further consideration 'particularly because under the NSWEC public funding model the public purse would now be funding the ongoing running of a party'.⁴⁵¹ In this circumstance, 'what then is electoral expenditure...needs to be much more focused, in that it really should deal with the campaign' as distinct from administration.⁴⁵²
- 6.69 The Commissioner elaborated on his position in subsequent correspondence with the Committee.

As indicated in earlier comment, Section 96 (1) of the current Act requires that particular types of electoral expenditure included in the disclosure are required to be supported by appropriate documentation such as invoices or receipts. This includes:

- (a) expenditure incurred on election campaign advertising on radio, television or the Internet, or in cinemas, newspapers or periodicals; and
- (b) expenditure incurred on other printed election campaign material.

⁴⁵¹ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of in camera evidence*, 22 February 2010, p.13.

⁴⁵² Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of in camera evidence*, 22 February 2010, p.13.

Caps on expenditure

This approach is consistent with the observation that, in the current public funding scheme, the significant expenditure by election participants is in respect to electoral advertising and almost entirely substantiates their entitlement for claims for reimbursement. Other aspects of campaign expenditure, such as accommodation, staff, office costs and the like, are not regularly relied upon to satisfy entitlement to the full amount of public funding.

The expenditure caps proposed in the Authority's model are, in the main, only sufficiently adequate to meet the advertising cost of a modest campaign. Extraneous costs such as accommodation and staff would not comfortably fit into the proposed cap but could be met from funding provided through the proposed operational funding.

The proposed limited definition of electoral expenditure sits comfortably with the definition in other overseas jurisdictions although, in some jurisdictions, there are other minor inclusions.

If the definition of electoral expenditure is extended to items such as accommodation and staffing so as to be included in the expenditure cap or if there is a substantial increase in the expenditure cap as proposed in the Authority's model, then it is necessary to consider the effect this would have on other aspects of the Authority's model. This would include consideration of the extent of public funding, the eligibility limits for public funding and the capacity for minor parties and independents to risk committing campaigns to the increased expenditure caps where eligibility for reimbursement is unlikely to be achieved. There is a risk of introducing a noticeable disparity between the major political parties and minor parties and candidates. I would need to consider whether any such outcome would weaken any of the four principles for a strong public funding and disclosure scheme that I outlined in my submission in December 2009.

In order for me to consider the overall effect on our proposed model of any changes to the definition of electoral expenditure and/or the expenditure caps, then more clarity of what is proposed would be necessary.⁴⁵³

6.70 In her submission to the inquiry, Dr Twomey raised a number of practical considerations about the type of expenditure that should be included in any cap, including:

- Should it include the costs of party administration and operation, or should it be confined to election expenditure only?
- Should expenditure caps include the market price of goods and services that have been given for free or at a discount?
- Should it cover capital expenditure or the wages of staff during election campaigns?
- Should it include the market cost of wages for people who volunteer?
- Should it include interest on loans or expenditure on income generating activities?⁴⁵⁴

6.71 The Liberal Party (NSW) submitted that expenditure limits should be applied under a definition of 'campaign expenditure' similar to those applying in New Zealand and Britain.⁴⁵⁵

⁴⁵³ Correspondence from Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, 10 March 2010.

⁴⁵⁴ Associate Professor Anne Twomey, *Submission 2*, p. 6.

⁴⁵⁵ Liberal Party of Australia (NSW Division), *Submission 17*, p.22.

- 6.72 The National Party NSW suggested that the definition of ‘campaign expenditure’ ‘cover as much campaign spending as is practically enforceable’ and that ‘electoral expenditure extends far beyond spending on “electoral matter”, as defined under s151B(6) of the Parliamentary Electorates and Elections Act (NSW)’.⁴⁵⁶ Otherwise, they reasoned:
- Any glaring omissions from the caps (such as telecommunications) will provide those entities possessing the means and motive to do so with a sterling opportunity to circumvent the regulation and unfairly distort the political process.⁴⁵⁷
- 6.73 Dr Tham considered that the definition of campaign expenditure in the UK is a good template as it not only has the virtue of ensuring that the spending is related to the electoral success of a candidate and/or party but also, by specifying categories of expenditure, allows for greater ease of compliance.⁴⁵⁸ He also considered that the existing definition of ‘electoral expenditure’ in the *Election Funding and Disclosures Act 1981* (NSW) was a ‘good starting point’⁴⁵⁹. He made the following recommendation:
- In principle, election spending limits should cover ‘electoral expenditure’ as defined by the *Election Funding and Disclosures Act 1981* (NSW) and/or ‘campaign expenditure’ as defined by the UK Political Parties, Elections and Referendum Act 1998.⁴⁶⁰
- 6.74 During the roundtable discussion, he commented that election spending limits should not include party costs as a whole:
- given the imperative of proper enforcement and that you are trying to basically focus on election spending limits on more public activity, you have to concede that election spending limits cannot contain the party costs as a whole. In my view, that perhaps should not be its aim. Its aim should be to try to contain where there is expenditure is seeking to influence the elections.⁴⁶¹
- 6.75 Associate Professor Twomey also considered that expenditure caps should not apply to general party activity, as:
- It would also be problematic if you extended your expenditure caps to general party activity because party activity would more likely cross the line between Commonwealth and State sorts of things. You need to confine yourself to State expenditure for State candidates in a State election. Once you start getting into the area of general party expenditure, you are going to end up with crossing problems with the Commonwealth.⁴⁶²
- 6.76 Associate Professor Orr put forward that a ‘working model’ would be one where regulated ‘political expenditure’ focussed on expenditures that are public. This was

⁴⁵⁶ NSW National Party, *Submission 18*, p.18.

⁴⁵⁷ NSW National Party, *Submission 18*, p.18.

⁴⁵⁸ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, pp. 61-62, http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

⁴⁵⁹ Dr Joo-Cheong Tham, *Transcript of Evidence*, 1 February 2010, p.51.

⁴⁶⁰ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, pp. 61-62, http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

⁴⁶¹ Dr Joo-Cheong Tham, *Transcript of Evidence*, 1 February 2010, p.52.

⁴⁶² Associate Professor Anne Twomey, *Transcript of Evidence*, 1 February 2010, p.53.

because public expenditure 'are the ones that are seen as having influence and they are the ones on which parties can vet each other'.⁴⁶³ He stated:

The litmus test for me would be what would you do about, say, market research expenditure, which is not something that necessarily is going to be done publicly, which political parties increasingly do, and which has a lot of value in informing their campaigns and so on. I would want to include that because I think it is close enough to what I call political election expenditure.

...

I am saying that within reason you would want to include some of the borderline tests, which would be market research and those kinds of secondary expenditures that support the campaign, but then there are more difficult questions of auditing and vetting those.⁴⁶⁴

Timing of expenditure limits

6.77 The timing of expenditure caps affects the extent to which regulation impacts on the freedom of political communication. It is also important in determining appropriate levels for expenditure caps, in that if expenditure caps are to operate for the whole of the election cycle a slightly higher amount may be needed.

Timing of elections in NSW

6.78 As New South Wales has fixed term elections, a number of the problems that have emerged in other jurisdictions relating to the timing of expenditure caps [see paragraphs 6.34-6.65] are not relevant.

6.79 Under section 24 of the *Constitution Act*, the Legislative Assembly expires on the Friday before the first Saturday in March four years after the previous general election for the Legislative Assembly. Under section 24A of the Act general elections for the Legislative Assembly are to take place on the fourth Saturday in March. Section 24B of the *Constitution Act* provides for the dissolution of the Assembly by the Governor by proclamation under certain circumstances, such as if a motion of no confidence in the Government is passed by the Legislative Assembly or it rejects a Bill which appropriates revenue or moneys for the ordinary annual services of the Government.⁴⁶⁵

6.80 Table 16 outlines the key election dates:

Table 16 Key Events/Dates for General Elections

Event	Occurs when...
Expiry of Parliament	Friday before the first Saturday in March four years after the previous Assembly elected. (Midnight Friday 4 March 2011).
Issue of the Writs	Within four clear days after above date. (Last day - Tuesday 8 March 2011).
Polling Day	Assembly expired - fourth Saturday in March next following the expiry. Assembly dissolved - not later than the 40th day from the date of the issue of the writs (Election to be Saturday 26 March 2011).

⁴⁶³ Associate Professor Graeme Orr, *Transcript of Evidence*, 1 February 2010, p.51.

⁴⁶⁴ Associate Professor Graeme Orr, *Transcript of Evidence*, 1 February 2010, p.51.

⁴⁶⁵ Parliament of NSW, *Fact Sheet No.7*,

<http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/key/FactSheetNo07>, (accessed 6 March 2010).

Inquiry participants' views

- 6.81 At the Committee's initial hearing with the Electoral Commissioner, he outlined two possible periods for the operation of expenditure caps. Firstly, he stated that expenditure could be regulated from 1 July of the financial year in which the election is held. When considering this option, the Commissioner warned about the need to consider the impact on election campaigning activities in the unregulated period. For instance:
- Effectively, if the regulated period was 1 July 2010, does that mean in June 2010 you would see the party starting to spend millions and millions of dollars that is not covered by the cap?⁴⁶⁶
- 6.82 Secondly, he put forward that expenditure could be regulated from election to election – for the whole four-year election period.⁴⁶⁷ This option would have the advantage of preventing a 'spending blitz' by candidates, political parties and third parties in the lead up to the period of the expenditure cap. This is the position advocated by the Commissioner in his final submission to the Committee. He explained:
- Our reasoning for that was that if you have an unregulated period it is a free-for-all; whatever goes on in that period is a free-for-all. We also wanted to ensure that the campaign is not just shifted to another period. I have seen one month, two months, six months, 12 months before the actual State election, as to where the regulated period would kick in. I took the view that all you are going to do is shift the campaign to some other point in time, and it would be unregulated... We will be having parties raising large sums of money, because the arms race will continue in the unregulated period.⁴⁶⁸
- 6.83 The Liberal Party (NSW) submitted that 'the regulated period should be the beginning of the financial year in which the general election is held.'⁴⁶⁹ They opposed a longer period due to concerns that third party regulation should not be too onerous.⁴⁷⁰
- 6.84 The National Party (NSW) contended that the timing of the expenditure cap is crucial, and the 'closer the date of the imposition of the cap is to the election, the more likely parties and candidates are to splurge on election advertising in the lead up to that date, negating the purpose of the caps entirely.'⁴⁷¹ However, even though they considered that 'a strong argument can be made for continuous expenditure caps over the life of a parliament', they contended that 'the administrative burden that would accompany such a system would be too onerous.'⁴⁷² They claimed that since 'expenditure caps impose limits on a wide spectrum of political communication, it is desirable that they be as short as possible whilst achieving the purpose for which they were designed'⁴⁷³ They recommended that the 'expenditure cap should apply (assuming a fixed election date in March) from the 1st of July the previous year' as

⁴⁶⁶ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 13.

⁴⁶⁷ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 13.

⁴⁶⁸ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of in camera evidence*, p. 13.

⁴⁶⁹ Liberal Party of Australia (NSW Division), *Submission 17*, pp.21-22.

⁴⁷⁰ Liberal Party of Australia (NSW Division), *Submission 17*, p.22.

⁴⁷¹ NSW National Party, *Submission 18*, p.17.

⁴⁷² NSW National Party, *Submission 18*, p.17.

⁴⁷³ NSW National Party, *Submission 18*, p.17.

Caps on expenditure

this is 'long enough to achieve the desired end without imposing an inappropriate burden on political communication in non-election periods'.⁴⁷⁴

6.85 Mr Thistlethwaite, representing the Labor Party (NSW) felt that a figure of six or nine months might be reasonable.⁴⁷⁵

6.86 The Greens NSW indicated that a period of three months before the election would be an appropriate period for any expenditure caps to be in place.⁴⁷⁶

6.87 Mr Besseling, the Member for Port Macquarie, considered that a period of 6 months prior to an election would be appropriate for expenditure caps, and that the same time limit should apply for by-elections.⁴⁷⁷

6.88 Associate Professor Orr maintained that since New South Wales has fixed term elections, the 'simplest system would be set a cap for each of the first three years of a parliamentary term, with a higher cap for the final, election year'.⁴⁷⁸ However, as part of the roundtable discussions he stated that:

... at least in the first round of regulation, to go beyond that six-month window where you are focusing on electioneering and gearing up for electioneering because of the problem I spoke about before—for example, WorkChoices and government advertising and issues that happened during the parliamentary cycle, when I do not think we are in a position to restrain or restrict those within a workable constitutional system.⁴⁷⁹

6.89 Dr Tham recommended that:

Election spending limits should apply at least for a period of six months prior to the elections with consideration given to having the limits apply for the entire duration of the electoral cycle.⁴⁸⁰

6.90 In her submission to the Committee, Associate Professor Twomey expressed similar concerns to the Electoral Commissioner:

Should limits on expenditure apply only to the formal campaign, from the issue of the election writs to polling day, or for a longer period of, say, one year before polling day? The problem is that if the period during which the limits apply is relatively short, there will be massive spending in marginal electorates before the period starts to avoid the expenditure limits. The effect would be simply to move the timing of expenditure rather than reducing it. If, however, expenditure limits apply to parties all the time, the administrative and compliance burden may be excessive.⁴⁸¹

6.91 The Public Interest Advocacy Centre put forward that 'consideration be given to creating a system that applies over each year of the whole term' as this 'would avoid excessive expenditure just before the campaign period commences and would address the current climate of 'continuous campaigning''.⁴⁸²

⁴⁷⁴ NSW National Party, *Submission 18*, pp.17-18.

⁴⁷⁵ Mr Matthew Thistlethwaite, General Secretary, The Australian Labor Party (NSW Branch), *Transcript of Evidence*, 1 February 2010, p.14.

⁴⁷⁶ The Greens NSW, *Submission 19*, p.13.

⁴⁷⁷ Mr Besseling, Independent Member for Port Macquarie, *Submission 29*, p.2.

⁴⁷⁸ Associate Professor Graeme Orr, *Submission 23*, p.2.

⁴⁷⁹ Associate Professor Graeme Orr, *Transcript of Evidence*, 1 February 2010, p.51.

⁴⁸⁰ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 61,

http://www.efa.nsw.gov.au/data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

⁴⁸¹ Associate Professor Anne Twomey, *Submission 2*, p. 6.

⁴⁸² Public Interest Advocacy Centre, *Submission 26*, p.5.

- 6.92 During the roundtable discussion with constitutional academics, the issue arose of expenditure during the regulated period by those who have not yet nominated as candidates, but may do so at a later date. It was queried whether there would be a need to close nominations at the beginning of the regulated period. Professor Williams commented that this might not be necessary:
- You would need a lot of public education but you might say that you are eligible to nominate if you have complied. That is one possibility. You might ensure that the Electoral Commission is putting out notices in the newspapers and elsewhere that if you intend, or have any idea of nominating, be aware that these limits are in place and that you are subject to the law, and that you will be breaking the law if you nominate having spent in excess of that amount. Of course if you do nominate and you do spend in excess, whether before or afterwards, well you suffer the consequences.⁴⁸³
- 6.93 He also considered that spending by candidates that have yet to nominate might not be a problem if the Committee recommended expenditure caps for third parties as ‘individuals, presumably, would fit within the third party expenditure caps anyway, so they could not spend more than a certain amount. Presumably that would be less than what a candidate could spend.’⁴⁸⁴

Level of expenditure caps

- 6.94 The Select Committee on Electoral and Political Party Funding recommended that expenditure caps be implemented, but felt that it did not have the expertise to recommend the appropriate level of the caps. The Committee identified the following issues to be considered in the setting of any caps:
- ... spending caps must be set high enough to allow candidates and parties to conduct a reasonable election campaign, but not so high as to impose an excessive demand on the public purse. Another issue is whether there should be one spending cap for everyone, or whether the cap should be adjusted to take into account the needs of independent candidates, candidates in rural areas and new candidates. Another complexity is that spending caps should not be determined by past election spending, because part of the rationale for caps is to rein in election spending.⁴⁸⁵
- 6.95 This recommendation was not implemented, with the government stating that it raised ‘complex constitutional, jurisdiction and practical issues’ that needed to be addressed in order that the statutory regime ‘survive constitutional challenge and be workable’.⁴⁸⁶ The constitutional issues arising from the Committee’s proposed reform package are outlined in Chapter 4 of this report.

Evidence from political parties

- 6.96 Mr Thistlethwaite, General Secretary of the Labor Party (NSW) indicated that it is most practical for expenditure caps to be placed on ‘electronic and print advertisements’, as caps on expenditure in other areas ‘are simply too hard to administer and police’.⁴⁸⁷

⁴⁸³ Professor George Williams, *Transcript of Evidence*, 1 February 2010, p.52.

⁴⁸⁴ Professor George Williams, *Transcript of Evidence*, 1 February 2010, pp.52-3.

⁴⁸⁵ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.130.

⁴⁸⁶ New South Wales Government, Response to the Report of the Select Committee on Electoral and Political Party Funding, p.11.

⁴⁸⁷ Mr Matthew Thistlethwaite, General Secretary, The Australian Labor Party (NSW Branch), *Transcript of Evidence*, 1 February 2010, p.17.

Caps on expenditure

- 6.97 The Liberal Party (NSW) submitted that ‘there should be a uniform spending limit for each registered party and any independent candidates in each electoral district’.⁴⁸⁸ As well there should be ‘an overall cap on how much a registered party can spend on their entire state wide election campaign based on the number of Legislative Assembly seats it contests’.⁴⁸⁹ The National Party (NSW) contended that:

Depending upon the level chosen for the electoral district limit, it may be necessary to make provision for an additional amount for central campaigning costs such as television, radio, cinema, internet and newspaper advertising. The reality is that most parties will only spend to the local limit where they have a higher level of discomfort about the likely result (i.e. the marginal seats). If the local limit chosen is high, then parties may well then have a sufficient number of seats where they under-spend to fund their central campaigning costs. This would not be the case if a lower local limit is chosen.

For example, if a local spending limit of \$100,000 was adopted for each seat, then the overall spending limit for a party contesting all 93 seats in the Legislative Assembly would be \$9.3 million. The local limit would in fact represent a considerable reduction in the average campaign spend in a typical marginal seat. But it would be considerably more than the amount spent by a major party in a so-called safe seat at a general election. This would ensure a party would also have enough to fund central campaigning costs.⁴⁹⁰

- 6.98 In relation to parties only contesting the Legislative Council election, the Liberal Party (NSW) proposed that the ‘expenditure limit should be the same as the individual limit in each electoral district, multiplied by twenty-one (which is the number of seats to be elected at each periodic Legislative Council election)’.⁴⁹¹ They illustrated this proposal with the following example: ‘if the local limit were \$100,000, then the spending limit would be \$2.1 million for a registered party only contesting Legislative Council seats’.⁴⁹²

- 6.99 They considered that a different approach would be needed for Legislative Council Groups who are not registered parties, as:

We need to ensure that third parties (ie non-registered players seeking to influence the election result) do not try and flout any third party expenditure limits by nominating candidates for the Legislative Council. For this reason, the Committee should examine whether it would be more appropriate for Legislative Council Groups (other than registered political parties) to have the same expenditure limits as third parties.⁴⁹³

- 6.100 As to the exact level of expenditure caps, the Liberal Party (NSW) submitted that ‘an independent arbiter should set the actual campaign limits within the framework adopted in the legislation’.⁴⁹⁴

- 6.101 The National Party (NSW) made the following recommendation regarding expenditure limits:

That a flat-cap system be applied to electoral expenditure based on the following model:

Parties

⁴⁸⁸ Liberal Party of Australia (NSW Division), *Submission 17*, p.20.

⁴⁸⁹ Liberal Party of Australia (NSW Division), *Submission 17*, p.20.

⁴⁹⁰ Liberal Party of Australia (NSW Division), *Submission 17*, pp.20-21.

⁴⁹¹ Liberal Party of Australia (NSW Division), *Submission 17*, p.21.

⁴⁹² Liberal Party of Australia (NSW Division), *Submission 17*, p.21.

⁴⁹³ Liberal Party of Australia (NSW Division), *Submission 17*, p.21.

⁴⁹⁴ Liberal Party of Australia (NSW Division), *Submission 17*, p.20.

Electoral spending for political parties would be restricted to the following:

- For parties contesting Legislative Assembly elections - a set amount (for example \$2.00) per elector in Legislative Assembly districts contested by the party.
- For parties only contesting Legislative Council elections – a set amount per elector (for example \$0.66) eligible to vote in that Legislative Council election.

For parties engaged in a joint Legislative Council ticket, the spending cap in respect of their Legislative Council expenditure should be divided by agreement between the parties concerned.

Parties only contesting Legislative Council elections, but doing so in a joint ticket arrangement with parties contesting Legislative Assembly elections, should not be able to incur electoral expenditure under the Legislative Council cap.

Independent Candidates (Legislative Assembly)

Electoral spending for each candidate would be restricted to an amount per elector in the district contested by the candidate (equal to the amount determined for party candidates).

Non-party Legislative Council Groups

Electoral spending for non-party Legislative Council Groups would be restricted to 1/10th of the amount per elector available for a Legislative Council ticket, minimising the incentive for third parties to register LC groups in order to circumvent restriction on third party expenditure.

Ungrouped Legislative Council Candidates

Electoral spending for ungrouped candidates in the Legislative Council would be restricted to 1/15th of the amount per elector available for a Legislative Council ticket (based on the requirement for a group being 15 candidates).⁴⁹⁵

6.102 The Greens NSW submitted that:

Election expenditure for individual lower house candidates be capped at \$30,000 and the expenditure for a political party running a state wide campaign be capped at \$1 million (not including the expenditure of its lower house candidates).⁴⁹⁶

6.103 They also submitted that in order to 'ensure the level of expenditure remain[s] reasonable, all amounts must be automatically indexed to any annual increase in the Consumer Price Index'.⁴⁹⁷

6.104 When questioned on whether political parties should be able to transfer unspent amounts in one electorate to another, Mr Shoebridge, Convenor for The Greens NSW commented that this:

would subvert the central principle that you do not allow any particular organisation to buy the result in any given seat. If there is to be a cap then it ought to be set in place uniformly. If you think about the administrative complexities of that, you need to have real-time communication between seats to work out the underfunding in this seat so as you can overfund in that seat. All legislative reform should, wherever possible, aim to put in clear, cogent, readily understandable restraints. A uniform cap is effectively like

⁴⁹⁵ NSW National Party, *Submission 18*, p.19.

⁴⁹⁶ The Greens NSW, *Submission 19*, p.13.

⁴⁹⁷ The Greens NSW, *Submission 19*, p.13.

Caps on expenditure

the ability to trade poker machine licences. You could trade your electoral expenditure. That would seem to fall foul of those essential principles.⁴⁹⁸

6.105 When questioned on how such a system would work considering that the central office of political parties often produces campaigning material on general campaign issues or party policies, which are then distributed to candidates across the state, Mr Maltby, Registered Officer for The Greens NSW stated:

If there is room within the statewide cap to fund that activity that would be okay. If the individual campaigns wanted to purchase that material from the head office that would work, I would think. So I do not see that being a particular problem either way.⁴⁹⁹

6.106 In such a situation, Mr Shoebridge emphasised the importance of a 'single accounting for the resource' as:

There may well be seats that depend upon some funding from the central office to get those types of materials out. There may be other seats that are in a position to buy them from the Federal office, but a single accounting.⁵⁰⁰

6.107 The Christian Democratic Party indicated that 'a scheme to limit electronic advertising could be developed'⁵⁰¹ but that 'having laws and regulations to limit expenditure is not going to stop problems occurring.'⁵⁰²

Evidence from Independent Members of Parliament

6.108 Mr Greg Piper, Member for Lake Macquarie, considered that there should be a cap on expenditure per candidate of between '\$60,000 to \$80,000 range indexed annually'.⁵⁰³ He did not advocate a separate amount for political parties, but felt that they could 'benefit from the accumulation of these funds for utilisation on their state-wide campaign'.⁵⁰⁴ He felt that while this might create inequality between independent and endorsed candidates, 'the inequity would be far less than the status quo'.⁵⁰⁵

6.109 Mr Peter Draper, Member for Tamworth, suggested a cap of '\$20,000 be placed on the expenditure of any individual candidate during an election campaign'.⁵⁰⁶

6.110 Ms Clover Moore, Member for Sydney, indicated that she does 'not support capping election expenditure', which she believed would be 'reduced by adopting the capped individual donor model'.⁵⁰⁷

6.111 Mr Peter Besseling, Member for Port Macquarie, supported a cap per electorate coupled with an overarching cap for political parties. He indicated that he had spent about \$80,000 on his campaign and that this might be around the level 'that most individuals should be able to get their name out and about'.⁵⁰⁸

⁴⁹⁸ Mr David Shoebridge, Convenor, The Greens NSW, *Transcript of Evidence*, 1 February 2010, pp.24-25.

⁴⁹⁹ Mr Christopher Maltby, Registered Officer, The Greens NSW, *Transcript of Evidence*, 1 February 2010, p.25.

⁵⁰⁰ Mr David Shoebridge, Convenor, The Greens NSW, *Transcript of Evidence*, 1 February 2010, p.25.

⁵⁰¹ Christian Democratic Party, *Submission 28*, p.3.

⁵⁰² Christian Democratic Party, *Submission 28*, p.10.

⁵⁰³ Mr Greg Piper, Member for Lake Macquarie, *Submission 8*, p.2.

⁵⁰⁴ Mr Greg Piper, Member for Lake Macquarie, *Submission 8*, p.2.

⁵⁰⁵ Mr Greg Piper, Member for Lake Macquarie, *Submission 8*, p.2.

⁵⁰⁶ Mr Draper, Member for Tamworth, *Submission 10*, p.1.

⁵⁰⁷ Ms Clover Moore, Member for Sydney, *Submission 27*, p.3.

⁵⁰⁸ Mr Peter Besseling, Member for Port Macquarie, *Transcript of Evidence*, 2 February 2010, p.20.

Evidence from the Electoral Commission

6.112 The Electoral Commissioner indicated that the fundamental question in setting expenditure caps is - 'what level of expenditure is necessary in order to allow parties and candidates to communicate adequately with voters?'⁵⁰⁹

6.113 In his submission to the Committee, the Electoral Commissioner recommended the following method for calculating expenditure limits (Table 17) and applied these limits to the results of the 2007 NSW state election to give an indication of maximum expenditure limits under his model (Table 18):

Table 17: NSWEC funding and disclosure model⁵¹⁰

ELECTORAL EXPENDITURE

Participant	State general elections	State by-elections
Registered Political Parties	<ul style="list-style-type: none"> • General campaign spending cap of \$0.50 per elector for whichever is the greater of: <ul style="list-style-type: none"> o the total number of electors in Legislative Assembly district(s) where RPP has endorsed candidate; OR o the total number of electors in NSW when RPP has endorsed group/candidate at Legislative Council election • An RPP is limited to a maximum spend in any one District of \$0.50 for each elector on that District roll • General campaign spending able to be undertaken anytime during the four year period between general elections • RPPs to submit audited disclosures as presently provided in EF&D Act to support that they have not exceeded the general campaign spending limit. • If an RPP exceeds the general campaign spending limit they will be liable for a penalty 3 times the amount by which they exceeded the spending limit. 	<ul style="list-style-type: none"> • General campaign spending cap of \$0.50 for each elector in Legislative Assembly district for any RPP endorsing one or more candidates at the election • General campaign spending limited to three months prior to (but including) election day. • RPPs to submit audited disclosures as presently provided in EF&D Act to support that they have not exceeded the general campaign spending limit. • If an RPP exceeds the general campaign spending limit they will be liable for a penalty 3 times the amount by which they exceeded the spending limit.
Candidates (Endorsed/Independent)	<ul style="list-style-type: none"> • Election campaign spending cap of \$1.00 for endorsed candidate and \$2.00 for each unendorsed candidate for each elector on District electoral roll. The monies must be spent by the RPP (in the case of endorsed candidates) or by the candidate (in the case of not endorsed candidates). (Additional spend by unendorsed candidate is to compensate for RPP entitlement to spend from general campaign spend during this period) • If RPP endorses more than one candidate for a District, total election campaign spending cap by the RPP is still limited to \$1.00 for each elector on District electoral roll • RPP cannot donate (in money or in kind) to an unendorsed candidate. Unendorsed candidate cannot receive donation (in money or in kind) from an RPP. • Election campaign spending able to be undertaken anytime during the four year period between elections 	<ul style="list-style-type: none"> • Election campaign spending cap of \$1.00 for endorsed candidate and \$2.00 for each unendorsed candidate for each elector on District electoral roll. The monies must be spent by the RPP (in the case of endorsed candidates) or by the candidate (in the case of not endorsed candidates). (Additional spend by unendorsed candidate is to compensate for RPP entitlement to spend from general campaign spend during this period) • If RPP endorses more than one candidate for a District, total election campaign spending cap by the RPP is still limited to \$1.00 for each elector on District electoral roll • RPP cannot donate (in money or in kind) to an unendorsed candidate. Unendorsed candidate cannot receive donation (in money or in kind) from an RPP. • Election campaign spending limited to

⁵⁰⁹ Associate Professor Anne Twomey, *Submission 2*, p. 6.

⁵¹⁰ Electoral Commission NSW/Election Funding Authority, *Submission 30*, Funding and Disclosure Model, pp. 1-2.

Caps on expenditure

Participant	State general elections	State by-elections
	<ul style="list-style-type: none"> • Audited disclosures to be lodged as presently provided in EF&D Act to support that they have not exceeded the election campaign spending limit. • If RPP/candidate exceeds the election campaign spending limit they will be liable for a penalty 3 times the amount by which they exceeded the spending limit. 	<p>three months prior to (but including) election day</p> <ul style="list-style-type: none"> • Audited disclosures to be lodged as presently provided in EF&D Act to support that they have not exceeded the election campaign spending limit. • If RPP/candidate exceeds the election campaign spending limit they will be liable for a penalty 3 times the amount by which they exceeded the spending limit.
<p>Groups and Ungrouped Candidates</p>	<ul style="list-style-type: none"> • Election campaign spending cap of \$1.00 for each elector on NSW electoral roll. The monies must be spent by RPP (in the case of an endorsed group or endorsed ungrouped candidate) or by the group (in the case of a not endorsed group) or by the candidate (in the case of a not endorsed ungrouped candidate). • Election campaign spending able to be undertaken anytime during the four year period between elections • If RPP endorses more than one group, total election campaign spending cap by the RPP is still limited to \$1.00 for each elector on NSW electoral roll • RPP cannot donate (in money or in kind) to an unendorsed group. Unendorsed group cannot receive donation (in money or in kind) from an RPP. • Audited disclosures to be lodged as presently provided in EF&D Act to support that they have not exceeded the election campaign spending limit. • If RPP, group or ungrouped candidate exceeds the election campaign spending limit they will be liable for a penalty 3 times the amount by which they exceeded the spending limit. • Election campaign expenditure in respect to an individual candidate in a group is to be considered as expenditure of the group. 	
<p>Third parties</p>	<ul style="list-style-type: none"> • Third parties can incur electoral expenditure up to \$200k. • A maximum of \$0.50 for each elector on the District electoral roll can be spent in respect to any one District • All third parties must be registered • Only individuals on the NSW electoral roll are eligible to be registered. Entities seeking to register as a third party must nominate an individual on the NSW electoral roll as its nominee. • Third parties must be: <ul style="list-style-type: none"> • an individual on the NSW electoral roll, or • a political party registered in NSW, or • a company with an ABN which carries on business in NSW, or • a trade union affiliated with Unions NSW, or • an unincorporated association of two or more people which carries on the majority of its activities in NSW 	<ul style="list-style-type: none"> • Third parties can incur electoral expenditure up to a maximum of \$0.50 for each elector on the District electoral roll • All third parties must be registered • Only individuals on the NSW electoral roll are eligible to be registered. Entities seeking to register as a third party must nominate an individual on the NSW electoral roll as its nominee. • Third parties must be: <ul style="list-style-type: none"> • an individual on the NSW electoral roll, or • a political party registered in NSW, or • a company with an ABN which carries on business in NSW, or • a trade union affiliated with Unions NSW, or • an unincorporated association of two or more people which carries on the majority of its activities in NSW • Registered third parties must renew their

Participant	State general elections	State by-elections
	<ul style="list-style-type: none"> Registered third parties must renew their registration at the commencement of each financial year (similar to continued registration of political parties) Election campaign spending able to be undertaken anytime during the four year period between elections Third party to lodge disclosures each six months (similar to donors - as presently provided in EF&D Act). A person or entity cannot give money to another person or entity for the purposes of being used as a donation or to incur electoral expenditure If a third party/entity exceeds the expenditure limit they will be liable for a penalty 3 times the amount by which they exceeded the spending limit. 	<ul style="list-style-type: none"> registration at the commencement of each financial year (similar to continued registration of political parties) General campaign spending limited to three months prior to (but including) election day. Third party to lodge disclosures each six months (similar to donors - as presently provided in EF&D Act). A person or entity cannot give money to another person or entity for the purposes of being used as a donation or to incur electoral expenditure If a third party/entity exceeds the expenditure limit they will be liable for a penalty 3 times the amount by which they exceeded the spending limit.

Table 18: NSWEC funding and disclosure model⁵¹¹

Public funding maximum expenditure

Name	Expenditure			
	Electoral Expenditure (Max. Entitlement)			
	LA	LC	General	TOTAL
ALP	4,374,029	4,374,029	2,187,015	10,935,073
Liberal/Nationals	4,374,029	4,374,029	2,187,015	10,935,073
Greens	4,374,029	4,374,029	2,187,015	10,935,073
Christian Democrats	2,680,856	4,374,029	2,187,015	9,241,900
AAFI	2,633,824	4,374,029	2,187,015	9,194,867
Unity	1,410,977	4,374,029	2,187,015	7,972,021
Democrats	1,222,847	4,374,029	2,187,015	7,783,890
Fishing	141,098	4,374,029	2,187,015	6,702,141
Outdoor Recreation/Horse Riders	141,098	4,374,029	2,187,015	6,702,141
SOS	141,098	4,374,029	2,187,015	6,702,141
Socialist Alliance	94,065	4,374,029	2,187,015	6,655,109
Restore The Worker's Rights		4,374,029	2,187,015	6,561,044
Shooters		4,374,029	2,187,015	6,561,044
Human Rights		4,374,029	2,187,015	6,561,044
Independent Candidates	3,668,540			3,668,540
TOTAL				117,111,099

6.114 The Electoral Commission gave the following explanation of the types of expenditure that would be allowed under the three separate expenditure caps:

- General campaign expenditure:

⁵¹¹ Electoral Commission NSW/Election Funding Authority, *Submission 30*, Funding and Disclosure Model, p. 15.

Caps on expenditure

A registered political party does play a particular role in politics so we took the view that parties should have what I have called here a general campaign spend. It is an amount of money able to be expended by a party essentially just to put out to the public forum the views and directions of the party and its platform for the election. It is just a general spend. It was not intended for it to focus in on a particular election, being the district or the upper House; it was more just to deal with the party's platform at a very high level for the election. That was the basis for the first part, which I do refer to there as just a general campaign spend.⁵¹²

- Legislative Council (groups and ungrouped candidates) expenditure:

In the Legislative Council we would be looking for the material to mention the actual group, to direct people how to vote for the group, to deal with the candidates in the group. It was specific to the particular group; it did not deal at a very high level with party issues and party matters. We would be looking for it to be specific to the election.⁵¹³

- Legislative Assembly expenditure:

As per Legislative Council expenditure, Legislative Assembly expenditure would encompass material mentioning the candidate and directing people how to vote for the candidate. It would not deal with high-level party issues and would be specific to the local election campaign.⁵¹⁴

6.115 When questioned on whether political parties could focus their 'general campaign spending' in particular areas, the Electoral Commission indicated that this was envisaged as part of the proposed model, but within the requirement that a party can spend no more than \$0.50 general expenditure per elector in each district.⁵¹⁵

6.116 The Electoral Commission indicated that any money spent on the campaign of an endorsed candidate should 'be managed by the registered political parties [RPPs]' and the 'party agent must be the agent for an endorsed candidate'.⁵¹⁶ This is to guard against situations where 'the candidate could be committing or expending funds and the party... or the party agent is also expending funds'. The Commission considered that this could create confusion and lead to inadvertent breaches of the cap.⁵¹⁷

6.117 The Electoral Commission recommended 'that a party should not be able to make a donation to an unendorsed candidate'. They explained that this was in order to 'overcome the problem... where a party might choose to run an unendorsed candidate... which gives them an opportunity to spend more money in that particular district behind the curtain of an unendorsed candidate'.⁵¹⁸

⁵¹² Mr Brian DeCelis, Director, Funding and Disclosures, NSW Electoral Commission, *Transcript of in camera evidence*, 22 February 2010, p.2.

⁵¹³ Mr Brian DeCelis, Director, Funding and Disclosures, NSW Electoral Commission, *Transcript of in camera evidence*, 22 February 2010, p.4.

⁵¹⁴ Mr Brian DeCelis, Director, Funding and Disclosures, NSW Electoral Commission, *Transcript of in camera evidence*, 22 February 2010, p.2.

⁵¹⁵ Mr Brian DeCelis, Director, Funding and Disclosures, NSW Electoral Commission, *Transcript of in camera evidence*, 22 February 2010, p.2.

⁵¹⁶ Mr Brian DeCelis, Director, Funding and Disclosures, NSW Electoral Commission, *Transcript of in camera evidence*, 22 February 2010, p.2.

⁵¹⁷ Mr Brian DeCelis, Director, Funding and Disclosures, NSW Electoral Commission, *Transcript of in camera evidence*, 22 February 2010, p.2.

⁵¹⁸ Mr Brian DeCelis, Director, Funding and Disclosures, NSW Electoral Commission, *Transcript of in camera evidence*, 22 February 2010, p.2.

6.118 Also, they recommended limiting expenditure entitlements where a registered party chooses to endorse more than one candidate in a district so as to overcome 'the problem of a party running two, three or four' candidates in order to increase their allowed expenditure in a particular district.⁵¹⁹

6.119 In response to a question on whether it is appropriate that the caps for Legislative Assembly expenditure and Legislative Council expenditure are equal (given the primacy of the Legislative Assembly election in determining government), the Electoral Commission stated:

We had two thinkings there. One was, when you are dealing with the Legislative Council we all appreciate you are dealing statewide and the audience is far greater to reach statewide than it would be at a district level...[O]ne of the benchmarks we always use is also how much to send a letter to all of these people... We took the view that the benchmark to write a letter to 4.3 million people was somewhere at least in excess of 50¢— that is no more than two mail outs. You are dealing with 4.3 million people so what we had in mind was what is necessary to be expended to reach the target audience, but when you come back to the district level it is a very defined and much smaller area and the advertising is much more focused and again our view is it would not make as much sense to be putting an ad in the *Sydney Morning Herald* to reach the voters in Ballina, that would not be in our view the best use of money because there is much more access to local resources and advertising and campaigning than to be using statewide.

The other reason was because we again had the view that the whole concept was to level the playing field. In levelling the playing field the model brings in caps on expenditure... What we had in mind was, that outside the major parties what could we reasonably expect is the legitimate amount that those people...could raise, and participate in the election and be on a level playing field?...⁵²⁰

Evidence from the academics

6.120 Dr Tham proposed that the level of the 2003 NSW Election is not an unreasonable starting point for determining appropriate expenditure caps as 'there is at least a perception that the current level of spending is too high'.⁵²¹ He supported imposing expenditure limits 'at both the state and constituency level'.⁵²² He considered that the Canadian approach to setting limits is appealing and made the following recommendations:

The level of election spending limits should be further investigated with serious consideration given to setting it according to the level of spending in the 2003 NSW Elections.

Election spending limits should be imposed at both state and constituency levels.

⁵¹⁹ Mr Brian DeCelis, Director, Funding and Disclosures, NSW Electoral Commission, *Transcript of in camera evidence*, 22 February 2010, p.2.

⁵²⁰ Mr Brian DeCelis, Director, Funding and Disclosures, NSW Electoral Commission, *Transcript of in camera evidence*, 22 February 2010, p.4.

⁵²¹ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 62,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

⁵²² Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 62,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

Caps on expenditure

In designing election spending limits, serious consideration should be given to the Canadian system of election spending limits.⁵²³

6.121 Professor Williams advocated for a particular ban on electronic advertising expenditure, as 'any cap on donations or expenditure is unlikely to be effective unless the demand for funds by political parties and candidates is also reduced'.⁵²⁴

6.122 Associate Professor Twomey also considered that:

Given that advertising on television and radio is by far the most expensive aspect of running an election campaign, and given that the current level of saturation advertising is far from necessary in order for parties to get their message across, it is probably time for some limits to be placed upon political advertising in election campaigns through the electronic media, as long as they are reasonable, meet the proportionality test and are not used as a means of favouring incumbents or particular political parties.⁵²⁵

Differential expenditure caps

6.123 Some submissions and evidence to the inquiry called for differential expenditure caps for some Legislative Assembly candidates, taking account of differences in electorates or the status of the candidate.

Regional considerations

6.124 A number of inquiry participants mentioned the need for special consideration of the costs of campaigning in rural and regional areas.

6.125 As outlined by Associated Professor Twomey:

Where expenditure caps apply to candidates, issues will arise as to whether the different cost of campaigning in urban and rural areas are adequately accommodated by those caps. For example, the cost of advertising in newspapers and on radio may be higher in urban areas than rural areas, but the costs of petrol for transport in rural areas will be greater and the larger size of electorates in rural areas may mean that advertising has to take place through a greater number of media outlets to cover the electorate, increasing overall costs. Expenditure caps for candidates may therefore need to take into account the nature of the electorate and the relative costs of waging a reasonable campaign in different electorates.⁵²⁶

6.126 Mr Peter Besseling, the Member for Port Macquarie, put forward that there 'should be consideration for the differences between metropolitan and rural areas'.⁵²⁷ Also, that consideration be given to the opportunities for fundraising in particular areas, in that it might be 'easier to fund raise in metropolitan areas than it is in rural areas'.⁵²⁸

6.127 Mr Maltby, the Registered Officer of the The Greens NSW stated that expenditure limits 'may need to be considered in the light of the complexity of campaigning in

⁵²³ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, pp. 62-63,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

⁵²⁴ Professor George Williams, *Submission 1*, attachment 1.

⁵²⁵ Associate Professor Anne Twomey, *Submission 2*, p. 5.

⁵²⁶ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008, http://www.dpc.nsw.gov.au/publications/news/stories/election_campaign_finance_reform (accessed 17 December 2009), p.40.

⁵²⁷ Mr Peter Besseling, Member for Port Macquarie, *Transcript of Evidence*, 2 February 2010, p.24.

⁵²⁸ Mr Peter Besseling, Member for Port Macquarie, *Transcript of Evidence*, 2 February 2010, p.24.

particular seats given their geographical size, number of booths'.⁵²⁹ Mr Shoebridge, the Convenor of The Greens NSW argued that the Canadian model, which 'takes into account the geographic spread and the difficulties of electioneering' might be appropriate.⁵³⁰

6.128 However, the Electoral Commissioner warned:

If you are a going to balance it up you have to say: for Murray-Darling you have to have a pilot's licence. How much is that? That is another \$20,000. [Some electorates have] 150 different languages. How much is that going to cost? These are things you are going to have to determine. How do you deal with it within a simple model? It seems to me that where this is all going to come unstuck is if you start saying: We are going to have different arrangements for Lakemba compared with Murray-Darling and so on.⁵³¹

Independent candidates

6.129 A number of inquiry participants mentioned the possible need for special consideration of the costs of campaigning for independent candidates. While candidates for political parties are able to draw on centralised funds and administration services, independent candidates do not have the benefit of party support and structures.

6.130 The Electoral Commissioner's model for Legislative Assembly expenditure allows \$1.00 per elector for an endorsed candidate and \$2.00 per elector for an unendorsed candidate, the rationale being to level the playing field as much as possible 'because the political party still has this general spend that it has available to it'.⁵³²

6.131 Mr Shoebridge, The Convenor of the The Greens NSW commented that:

There might be room to consider saying if you are a candidate of a registered party who already has elected members in the Parliament then you are going to benefit from economies of scale in the course of your electoral campaign and therefore the cap for those candidates might be considered to be marginally lesser than an independent candidate. There might be scope for that. I think that is an area for legitimate public debate because there are economies of scale—we all know that. There are economies of scale in running a statewide campaign and that is an area for legitimate concern.⁵³³

6.132 Mr Maltby, the Registered Officer for The Greens NSW, presented the other side of the argument:

...I am not sure that you would make it worse, and in fact you may well make it better by doing this [ie. Introducing expenditure caps per electorate]. Certainly the local media and other things have been a place for candidates, but I think the threshold per seat needs to be struck at such a level where it is possible to run a reasonable campaign as an individual candidate, and whether that would be more or less if you were independent or part of a statewide campaign I think is a matter for debate, but my feeling is that an equivalent amount is probably right...⁵³⁴

⁵²⁹ Mr Christopher Maltby, Registered Officer, The Greens NSW, *Transcript of Evidence*, 1 February 2010, p.25.

⁵³⁰ Mr David Shoebridge, Convenor, The Greens NSW, *Transcript of Evidence*, 1 February 2010, p.25.

⁵³¹ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of in camera evidence*, 22 February 2010, p. 11.

⁵³² Mr Brian DeCelis, Director, Funding and Disclosures, NSW Electoral Commission, *Transcript of in camera evidence*, 22 February 2010, p.3.

⁵³³ Mr David Shoebridge, Convenor, The Greens NSW, *Transcript of Evidence*, 1 February 2010, p.23.

⁵³⁴ Mr Christopher Maltby, Registered Officer, The Greens NSW, *Transcript of Evidence*, 1 February 2010, p.23.

Caps on expenditure

6.133 Professor Williams considered that in a system where there are separate caps for candidates and parties, a 'way of dealing with independents is that, given they will not have a party, is give them the benefit of the party proportion, so they would have a higher local cap'.⁵³⁵

6.134 In evidence to the Committee, Mr Besseling, the Member for Port Macquarie, suggested that expenditure caps should try to achieve a fair contest between candidates, stating that:

I do not think there would be an independent sitting today who has not been outspent by one of the major political parties in a campaign, not just outspent slightly but significantly outspent, four to one often or three to one.⁵³⁶

Expenditure caps for third parties

6.135 The terms of reference to this inquiry require the Committee to consider whether there should be any regulation of expenditure by third parties on political advertising or communication. In this context, third parties are 'individuals or organizations that are not candidates, groups or parties or associated entities such as, lobby groups and individual, corporate or institutional supporters'.⁵³⁷

Rationale for reform

6.136 The Legislative Council Select Committee on Electoral and Political Party Funding recommended a spending cap for candidates, parties, groups and third parties due to 'the potential for limits on campaign spending to be circumvented by third party spending'.⁵³⁸ The government did not implement this recommendation, stating that it raised 'complex constitutional, jurisdiction and practical issues' that needed to be dealt with in order that the statutory regime 'survive constitutional challenge and be workable'.⁵³⁹ The constitutional implications of reform are outlined at Chapter 4 of this Report.

6.137 A number of submissions to this inquiry also indicated that if political parties, candidates and groups were to be subject to expenditure caps, the expenditure of third parties should also be capped.

6.138 Dr Tham outlined the following reasons for applying expenditure limits to third parties:

- 'preserving the integrity of the limits applied on parties and candidates' in that 'without third party limits, political parties and candidates may be able to use front groups to engage in spending otherwise prohibited if they had done so directly'.⁵⁴⁰
- 'fairness to those who are standing for office' in that 'limits on candidate and party spending without corresponding limits on third parties mean that parties are at a disadvantage in relation to third parties in election contests'.⁵⁴¹

⁵³⁵ Professor George Williams, *Transcript of Evidence*, 1 February 2010, p.52.

⁵³⁶ Mr Peter Besseling, Member for Port Macquarie, *Transcript of Evidence*, 2 February 2010, p.20.

⁵³⁷ Callinan, R, *Election Finance Law: Public Funding, Donations and Expenditure*, New South Wales Parliamentary Library Research Service Briefing Paper 15/2001, p.13.

⁵³⁸ NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p.133.

⁵³⁹ New South Wales Government, Response to the Report of the Select Committee on Electoral and Political Party Funding, p.11.

⁵⁴⁰ Dr Joo-Cheong Tham, 'Towards a More Democratic Political Funding Regime in New South Wales', February 2010, p. 63.

⁵⁴¹ Dr Joo-Cheong Tham, 'Towards a More Democratic Political Funding Regime in New South Wales', February 2010, p. 63.

6.139 He argued that ‘parties and candidates should have a privileged role in election contests’ and to not placing limits on third parties while capping the amount that parties and candidates can spend ‘clearly has the effect of undermining the party system’.⁵⁴²

6.140 Dr Twomey also made similar comments:

If limitations are imposed upon donations to political parties or the expenditure of political parties during election campaigns, including expenditure on advertising, then it is essential that some kind of limitation be imposed upon political expenditure of third parties, such as unions, business groups and other lobby groups. If not, third parties would be able to swamp the advertising of political parties, so that campaigns end up being focused on well-funded single issues, as often occurs in the United States. Moreover, there is a significant risk that political parties will become beholden to third parties to run campaigns for them as unregulated surrogates.⁵⁴³

6.141 The Electoral Commissioner stated that third parties ‘need to be subject to some rules’, arguing that ‘it would be not in the interests of the health of our system for a scheme where there were caps on what political parties could spend at an election, but there were no such caps on third parties’.⁵⁴⁴

6.142 The Liberal Party submitted that

Non-party competitors in the election context need to be regulated as well, to ensure that, at a minimum, there is no attempt to escape the regulatory net through the use of third parties.⁵⁴⁵

6.143 This view was also reflected in the National Party (NSW) submission, which stated that ‘unless the electoral activities of third parties are regulated in a commensurate manner to those of parties and candidates, fundraising and expenditure will continue by proxy through campaigns that are not officially linked with political players’.⁵⁴⁶ The National Party (NSW) drew on the following overseas examples to support its position:

Third parties have proven to be the bane of campaign finance reform worldwide. In the US, “527 groups” which do not specifically campaign for or against a candidate, have played significant roles in election campaigns without being subject to federal campaign finance laws. In the 2005 New Zealand elections the Exclusive Brethren, operating outside of any party spending limits, campaigned heavily against the Labour and Green Parties, prompting the government to pass laws in 2007 (since repealed) that regulated election spending by third parties.⁵⁴⁷

6.144 However, the Committee heard a contrary view from Unions NSW, one of the few third party organisations that made a submission to the inquiry. Unions NSW considered that third party expenditure should not be regulated for a number of reasons:

- *Regulation is unnecessary* – they questioned whether third party campaigns ‘whether coinciding with an election period or not, and whether they are run by community groups, business groups, unions or other advocacy groups, are a “problem” that requires a regime of monitoring, policing, enforcement and

⁵⁴² Dr Joo-Cheong Tham, ‘Towards a More Democratic Political Funding Regime in New South Wales’, February 2010, p. 63.

⁵⁴³ Associate Professor Anne Twomey, *Submission 2*, p.5.

⁵⁴⁴ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, pp. 6-7.

⁵⁴⁵ Liberal Party of Australia (NSW Division), *Submission 17*, p.12.

⁵⁴⁶ NSW National Party, *Submission 18*, p.3.

⁵⁴⁷ NSW National Party, *Submission 18*, p.20.

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sanction by the state'.⁵⁴⁸ Rather, they argued that 'different views being expressed publicly and with the comparable prominence as those run by candidates or parties seeking office are a positive contribution to pluralist political discourse.'⁵⁴⁹

- *Protecting free speech and enhancing public debate* – they argued that 'all citizens and groups ... should have the right to have a public say on any issue, and this should not be the sole domain of political parties'.⁵⁵⁰ For instance:
 - A group of residents should be able, without having to familiarise themselves with complex declaration requirements, to provide via advertising and other means its views on an local issue which may include republishing the views of candidates on this issue, giving voters a better opportunity to make an informed decision if it is an issue of importance to them.⁵⁵¹
- *Impracticability of effective regulation* – in that 'it is impossible to define third party election advertising or campaigning as distinct from general campaigning on bread and butter issues for advocacy groups, unions, or the business lobby'.⁵⁵² They pointed to difficulties with current federal reporting requirements relating to 'political expenditure', which is 'defined as amongst other items in a lengthy list [as] the public expression of views on an issue in an election by any means.'

6.145 In relation to the current Federal Government regulation of third parties, Unions NSW pointed to the submission by the Australian Council of Trade Unions to the Federal Government's Electoral Reform Green Paper, which outlined the following issues in determining the line between expenditure incurred as a legitimate part of an organisation's everyday functions and political expenditure:

- When precisely does a subject become 'an issue in an election'? During the last election period, one of our affiliates produced material promoting increased public funding of public schools. Was the level of public funding for schools an issue in the last election? At the time, media commentators were widely observing that education was *not* an election issue. So does this mean that this expenditure need not be reported?
- What if the purpose of expenditure is not to express views 'on an issue in an election' but a nonpartisan attempt to generate public interest and attention around a particular issue of concern: that is, expenditure seeking to make a particular issue an issue in an election? Does this type of expenditure need to be reported?
- What precisely does the phrase 'in an election' mean? Is this just expenditure incurred after an election has been called?⁵⁵³

Third party expenditure limits in other jurisdictions

Australia

6.146 Under the *Commonwealth Electoral Act 1918* any person that incurred political expenditure of more than \$10,900⁵⁵⁴ must provide an annual return setting out the details of the expenditure.⁵⁵⁵ The provisions do not apply to a person who is:

⁵⁴⁸ Unions NSW, *Submission 24*, p.4.

⁵⁴⁹ Unions NSW, *Submission 24*, p.4.

⁵⁵⁰ Unions NSW, *Submission 24*, pp.4.

⁵⁵¹ Unions NSW, *Submission 24*, pp.4-5.

⁵⁵² Unions NSW, *Submission 24*, p.5.

⁵⁵³ Unions NSW, *Submission 24*, p.6.

⁵⁵⁴ This amount is indexed each year. See Australian Electoral Commission, *Funding and Disclosure Guide: Third Parties incurring political expenditure*, Version 1, July 2009, p 2.

⁵⁵⁵ Section 314AEB *Commonwealth Electoral Act 1918 (Cth)*.

- a registered political party; or
- a State branch of a registered political party; or
- the Commonwealth (including a Department of the Commonwealth, an Executive Agency or a Statutory Agency (within the meaning of the *Public Service Act 1999*)); or
- a member of the House of Representatives or the Senate; or
- a candidate in an election; or
- a member of a group.⁵⁵⁶

6.147 The types of expenditure captured by the Act include:

- the public expression of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate by any means;
- the public expression of views on an issue in an election by any means;
- the printing, production, publication or distribution of any material (not being material referred to in subparagraph (i) or (ii)) that is required under section 328 or 328A to include a name, address or place of business;
- the broadcast of political matter in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the Broadcasting Services Act 1992;
- the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors⁵⁵⁷

6.148 There is currently a Bill before the Federal parliament that seeks to introduce new measures that would implement commitments made during the 2007 federal election campaign, in addition to recommendations made in the Joint Standing Committee on Electoral Matters Advisory Report on the Commonwealth Electoral Amendments (Political Donations and Other Measures Bill) 2008. The measures contained within the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009 that impact upon third parties include:

- reducing the threshold amount from \$10,900 to \$1,000
- prohibiting third parties from receiving a gift of foreign property in some situations
- new provisions relating to anonymous donations in excess of \$50 per person.

6.149 There has been some criticism of the current legislative provisions and the new provisions in the Bill. Some suggest the provisions go beyond what is required and do not adequately define who needs to make disclosures or what they need to disclose, placing more people at risk of prosecution.⁵⁵⁸

United Kingdom

6.150 With regard to third parties, the *Political Parties, Elections and Referendums Act 2000* operates to limit non-party campaigners' expenditure (referred to as controlled expenditure) for a year before election day.⁵⁵⁹ Non-party campaigners who want to spend over £10,000 in England or £5,000 in Scotland, Wales or Northern Ireland

⁵⁵⁶ Section 314AEB(1)(c) *Commonwealth Electoral Act 1918 (Cth)*.

⁵⁵⁷ Section 314AEB(1)(a), *Commonwealth Electoral Act 1918 (Cth)*.

⁵⁵⁸ Norton A, Centre for Independent Studies, *Diminishing Democracy: The Threat Posed by Political Expenditure Laws*, Issue Analysis, No. 114, July 2009, p 1.

⁵⁵⁹ Section 94 and schedule 10, *Political Parties, Elections and Referendums Act 2000 (UK)*.

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must register with the UK Electoral Commission.⁵⁶⁰ Controlled expenditure is defined as expenses incurred in connection with the production or publication of election material.⁵⁶¹ Election material is defined as material that can reasonably be regarded as intending to:

- (a) promote or procure electoral success at any relevant election for—
 - (i) one or more particular registered parties,
 - (ii) one or more registered parties who advocate (or do not advocate) particular policies or who otherwise fall within a particular category of such parties, or
 - (iii) candidates who hold (or do not hold) particular opinions or who advocate (or do not advocate) particular policies or who otherwise fall within a particular category of candidates, or
- (b) otherwise enhance the standing—
 - (i) of any such party or parties, or
 - (ii) of any such candidates,

with the electorate in connection with future relevant elections (whether imminent or otherwise);

and any such material is election material even though it can reasonably be regarded as intended to achieve any other purpose as well.⁵⁶²

6.151 The spending limits on non-party campaigners for the current UK Parliament are:⁵⁶³

Table 19:

Area	Spending limit (£)
England	953,250
Scotland	126,00
Wales	71,259
Northern Ireland	33,750
UK total	1,184,259

6.152 The *Representation of the People Act 1983* also imposes a £500 limit on third party campaigning in relation to a specific candidate.⁵⁶⁴

6.153 In the United Kingdom there is also a prohibition on political advertising on television other than the free broadcast time provided to eligible major parties.⁵⁶⁵

⁵⁶⁰ Section 94(5), *Political Parties, Elections and Referendums Act 2000 (UK)*.

⁵⁶¹ Section 85(2), *Political Parties, Elections and Referendums Act 2000 (UK)*.

⁵⁶² Section 85(3), *Political Parties, Elections and Referendums Act 2000 (UK)*.

⁵⁶³ UK Electoral Commission, *Non-party campaigners: Guidance on expenditure and donations for elections in 2010*, January 2010, p.4, <https://extranet.electoralcommission.org.uk/guidance/resources-for-those-we-regulate/non-party-campaigners> (accessed 25 February 2010).

⁵⁶⁴ UK Electoral Commission, *Non-party campaigners: Guidance on expenditure and donations for elections in 2010*, January 2010, Appendix 1 p.20, <https://extranet.electoralcommission.org.uk/guidance/resources-for-those-we-regulate/non-party-campaigners> (accessed 25 February 2010).

⁵⁶⁵ *Party finance and expenditure in the United Kingdom – The Government's proposals*, White Paper, June 2008, Cm 7329, p 48.

New Zealand

- 6.154 In New Zealand, there are no separate expenditure limits imposed on third parties, however there are rules associated with third party advertising. The present rules governing third parties are:
- they may spend any amount on advertising that does not support a constituency candidate or political party (negative advertising); and
 - they must be identified on election advertisements (for both positive and negative advertising).⁵⁶⁶
- 6.155 In addition, any third party who wishes to engage in positive advertising must get written permission from the candidate or the party itself. The cost of the advertisement is then included in the total campaign expenditure of either the candidate or the party.⁵⁶⁷
- 6.156 In the Proposal Document produced as part of the electoral reform package, the government sought submissions on greater regulation of third parties, including the introduction of expenditure caps on third parties.⁵⁶⁸ However, as stated in the Cabinet Minutes, the government decided not to impose overall spending limits:
- ... submissions received from both the public and parliamentary parties were polarised on whether campaign expenditure caps should be imposed. In many respects, the arguments made in submission reflect the views expressed at the time of the passage of the Electoral Finance Act 2007, with little consensus on the way forward.
- The area where there was consensus across submissions was for the need for openness and transparency concerning the identity of parallel campaigners. This aspect of the law was considered across almost all submissions to be an essential component of any regulatory system for parallel campaigners.
- I therefore propose to implement a system where parallel campaigners must register with the Electoral Commissioner where they spend, or anticipate spending, over \$20,000 on election advertising during the regulated campaign period.
- ...
- There will not, however, be overall expenditure limits imposed on parallel campaigners, or any obligation to submit returns of expenditure or political donations in the absence of any clear consensus on this topic.⁵⁶⁹
- 6.157 Under Part 6 of the *Broadcasting Act 1989*, third parties are prohibited from advertising either for or against a candidate or party on radio and television.⁵⁷⁰

Canada

- 6.158 Third party expenditure is regulated under the *Canada Elections Act 2000*. If a third party intends on spending more than \$500 on election advertising, it must register with the Chief Electoral Officer.⁵⁷¹ Third parties are not permitted to incur election advertising expenses of more than \$187,650, and no more than \$3,753 can be incurred in an individual electorate.⁵⁷² Election advertising under the Act is defined as

⁵⁶⁶ New Zealand Ministry of Justice, Electoral Finance Reform, Proposal Document, p 32.

⁵⁶⁷ New Zealand Ministry of Justice, Electoral Finance Reform, Proposal Document, p 32.

⁵⁶⁸ New Zealand Ministry of Justice, Electoral Finance Reform, Proposal Document, p 33.

⁵⁶⁹ Cabinet Minutes, Electoral Finance Reform Package, CAB Min (09) 45/10, 17 December 2009, p 2.

⁵⁷⁰ New Zealand Ministry of Justice, Electoral Finance Reform, Proposal Document, p 36.

⁵⁷¹ Section 353(1) *Canada Elections Act 2000*.

⁵⁷² Section 350(1) and (2) *Canada Elections Act 2000*. The quotes limits are indexed annually based on the inflation adjustment factor. See:

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an advertising message that promotes or opposes a registered party or candidate, including one that takes a position on an issue with which a party or candidate is associated.⁵⁷³ The legislation provides details on what is *not* considered election advertising:

- An editorial, a debate, a speech, an interview, a column, a letter, a commentary or news.
- The distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public, regardless of whether there was to be an election.
- A document transmitted directly by a person or a group to their members, employees or shareholders.
- The transmission by an individual, on a non-commercial basis on what is commonly known as the Internet, of his or her personal political views.⁵⁷⁴

6.159 The provisions in the *Canada Elections Act 2000* containing third party expenditure limits have been challenged on the grounds of being unconstitutional but were upheld by the Supreme Court of Canada in the case of *Harper v Canada (Attorney General)*.⁵⁷⁵

United States

6.160 In the United States, expenditure limits on third party advertisements that advocate the election or defeat of candidates were ruled unconstitutional by the Supreme Court in the case of *Buckley v Valeo*.⁵⁷⁶ In the recent decision of *Citizens United v Federal Electoral Commission*⁵⁷⁷ (*Citizens United*), the US Supreme Court also ruled that prohibiting corporations from making electioneering communications and independent expenditures was unconstitutional.

6.161 Prior to the *Citizens United* decision, sections within the *Bipartisan Campaign Reform Act 2002* (which amended the *Federal Election Campaign Act of 1971*) prohibited, in part, corporations and labour organisations from making electioneering communications and from making independent expenditures.⁵⁷⁸ Electioneering communications are defined in the Federal Election Campaign Act as:

(i)...any broadcast, cable, or satellite communication which—

(I) refers to a clearly identified candidate for Federal office;

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate;

http://www.elections.ca/content.asp?section=fin&document=limit_tp&dir=lim&lang=e&textonly=false (accessed 26 February 2010).

⁵⁷³ Section 319 *Canada Elections Act 2000*.

⁵⁷⁴ Section 319 *Canada Elections Act 2000*

⁵⁷⁵ [2004] 1 S.C.R. 827, 2004 SCC 33

⁵⁷⁶ 424 US 1 (1976) 55.

⁵⁷⁷ 558 U.S. __ (2010).

⁵⁷⁸ Federal Election Commission (US), News Release – *FEC Statement on the Supreme Court's decision in Citizen's United v. FEC*, 5 February 2010, <http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml> (accessed 2 March 2010).

and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.⁵⁷⁹

6.162 The Act specifies that ‘electioneering communications’ does not include communication:

- appearing in a news story, commentary or editorial
- constituting an expenditure or independent expenditure
- constituting a candidate debate or forum.⁵⁸⁰

6.163 An independent expenditure is defined by the Act as:

(17)...The term ‘independent expenditure’ means an expenditure by a person—

(A) expressly advocating the election or defeat of a clearly identified candidate; and

(B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.⁵⁸¹

6.164 In *Citizens United*, a 5-4 majority of judges overturned an earlier Supreme Court decision, *Austin v Michigan Chamber of Commerce*⁵⁸², which had decided that a state law in Michigan prohibiting independent expenditures by corporations was constitutional.⁵⁸³ *Citizens United* also overturned parts of the Supreme Court decision *McConnell v Federal Election Commission*.⁵⁸⁴ In which the Court had upheld sections of the Bipartisan Campaign Reform Act that placed restrictions on the use of corporate or union treasury funds to finance electioneering communications.⁵⁸⁵

6.165 Kennedy J who delivered the majority judgment stated:

... political speech must prevail against laws that would suppress it by design or inadvertence. Laws burdening such speech are subject to strict scrutiny, which requires the Government to prove that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.” *WRTL*, 551 U. S., at 464.⁵⁸⁶

6.166 He went on to state:

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.⁵⁸⁷

⁵⁷⁹ 2 U.S.C. s 434(f)(3)(A)(i)

⁵⁸⁰ 2 U.S.C. s 434(f)(3)(B)

⁵⁸¹ 2 U.S.C. s 431(17).

⁵⁸² 494 U.S. 652 (1990).

⁵⁸³ Federal Electoral Commission (US), Litigation, Court Case Abstract: *Austin v Michigan Chamber of Commerce*, accessed at http://www.fec.gov/law/litigation_CCA_A.shtml#austin (accessed on 2 March 2010).

⁵⁸⁴ 540 U.S. 93 (2003)

⁵⁸⁵ Federal Electoral Commission (US), Litigation, Court Case Abstracts: *McConnell v Federal Electoral Commission*, accessed at http://www.fec.gov/law/litigation_CCA_M.shtml#mcconnell (accessed 3 March 2010).

⁵⁸⁶ *Citizens United v Federal Electoral Commission* 558 U.S. _ (2010) at p 22

⁵⁸⁷ *Citizens United v Federal Electoral Commission* 558 U.S. _ (2010) at p 40

Inquiry participants' views

6.167 The general view of inquiry participants was that third parties play a legitimate role in our democracy, and should only be regulated to the extent necessary to ensure that they do not drown out the voices of candidates and political parties and cannot be used to circumvent expenditure caps on political parties. For instance, the Nationals (NSW) submitted:

... it would not be appropriate to prevent third parties from producing electoral matter altogether. Many organisations that participate in electoral campaigning represent legitimate interests distinct from any party affiliation, and deserve to be able to communicate these views effectively to the public.⁵⁸⁸

6.168 Dr Twomey stated:

Banning third parties from advertising or campaigning during election campaigns is not appropriate and would probably be unconstitutional, as it would be an unreasonable burden on the implied freedom of political communication. The best that could be done is to impose some kind of expenditure limit on third parties which balances their right to put their view across against the need to maintain integrity in the political process.⁵⁸⁹

6.169 The need to balance the regulation of third party expenditure with the legitimate role third parties play in the democratic process was also advocated by the Public Interest Advocacy Centre (PIAC):

Issue-advocacy organisations play an important role in a democracy as they can often raise issues that mainstream political parties may choose not to raise. Regulations must ensure as much as possible that election spending limits are not undermined by the activities of third parties but equally that third parties are not prevented from genuine issue advocacy.⁵⁹⁰

Evidence from political parties

6.170 The Liberal Party (NSW) advocated for the Canadian approach to expenditure limits for third parties, which imposes three limits on their expenditure:

- a limit that can be spent promoting or opposing an individual candidate;
- an overall limit that can be spent promoting or opposing a registered political party, including issues advertising; and
- a limit appropriate for promoting or opposing multiple candidates in multiple seats but capped at the same overall limit multiplied by the number of seats affected but capped at the overall limit.⁵⁹¹

6.171 In relation to the monetary level of the caps, the Liberal Party argued that this should be dependent 'on those imposed on political parties' and that there should be independent oversight of the caps.⁵⁹²

6.172 They advocated for the 'Canadian approach' to registration of third parties, 'which requires third parties intending to spend more than \$5,000, to register, disclose their source of funds and their actual expenditure'.⁵⁹³

⁵⁸⁸ NSW National Party, *Submission 18*, p.20.

⁵⁸⁹ Associate Professor Anne Twomey, *Submission 2*, p. 4.

⁵⁹⁰ Public Interest Advocacy Centre, *Submission 26*, p.10.

⁵⁹¹ Liberal Party of Australia (NSW Division), *Submission 17*, p.29.

⁵⁹² Liberal Party of Australia (NSW Division), *Submission 17*, p.29.

⁵⁹³ Liberal Party of Australia (NSW Division), *Submission 17*, p.29.

- 6.173 In terms of the timing of expenditure caps for third parties, the Liberal Party (NSW) submitted that 'third parties should only be subject to the same regulated period as expenditure limits' (ie. the beginning of the financial year in which the election is held) in order to limit the impact on freedom of political communication.⁵⁹⁴
- 6.174 The National Party (NSW) made the following recommendations for third party expenditure caps:
- That all third parties intending to produce electoral material be required to register with the electoral commission before incurring election spending or accepting donations.
 - ...
 - That donations to registered third parties be regulated in an identical manner to that employed for political parties.
 - ...
 - That expenditure by third parties during an election period be limited to 5% of the maximum expenditure for a party running candidates only in the Legislative Council at that election.
 - That expenditure by third parties during an election period in any one Legislative Assembly district be limited to 5% of the maximum expenditure for a party or a candidate in that district.
 - That accounts of registered third parties be audited and made available for inspection by officials of the Electoral Funding Authority.⁵⁹⁵
- 6.175 The Greens NSW submitted that, in order to ensure that expenditure restrictions are effective, 'they must also apply to associated entities of political parties as well as third parties' and that 'expenditure by associated entities of political parties must for these purposes be treated as expenditure by the political party itself'.⁵⁹⁶
- 6.176 They considered that expenditure by 'genuine' third parties should be 'encouraged in any pluralist democracy'.⁵⁹⁷ However, 'if electoral expenditure caps are to be placed on political parties then some form of reasonable expenditure caps must also be placed on third parties to ensure no one voice dominates a campaign'.⁵⁹⁸ They considered that international models, such as those in Canada and New Zealand 'provide positive and workable international models for New South Wales'.⁵⁹⁹ They recommended that:
- Third party expenditure to be capped at \$100,000 for state-wide elections and a reasonable cap put in place for by-elections based on the number of registered voters.⁶⁰⁰
- 6.177 When questioned on whether the caps for third parties should be lower than for political parties, Mr Shoebridge, Convenor for The Greens NSW stated that:
- One way of looking at it is saying the parties and the candidates must be the primary voice. That is probably not the way I think would be appropriate to look at it. The best way to look at it would be to say "No single issue in a campaign or no single issue group can dominate" so there needs to be restrictions so you do not get these single

⁵⁹⁴ Liberal Party of Australia (NSW Division), *Submission 17*, pp.29-30.

⁵⁹⁵ NSW National Party, *Submission 18*, pp.20-21.

⁵⁹⁶ The Greens NSW, *Submission 19*, pp.12-13.

⁵⁹⁷ The Greens NSW, *Submission 19*, pp.12-13.

⁵⁹⁸ The Greens NSW, *Submission 19*, pp.12-13.

⁵⁹⁹ The Greens NSW, *Submission 19*, pp.12-13.

⁶⁰⁰ The Greens NSW, *Submission 19*, p.14.

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issue campaigns dominating a campaign: it can only be part of a campaign. That is probably, I think, a more rigorous way to look at it.⁶⁰¹

- 6.178 The Christian Democratic Party agreed that ‘there should be a cap on the third party expenditure and that it should actually be part of the disclosure reporting at the end of the election and it should come under some cap, as determined by the Committee’.⁶⁰²

Evidence from Independent Members of Parliament

- 6.179 Ms Clover Moore, Member for Sydney, considered that third parties ‘play a vital role in our democracy by representing the interests of their members, informing the public about important issues and contributing to public debate and policy development’.⁶⁰³ However, she also recognised the importance of preventing third parties from ‘skew[ing] the electoral process or be[ing] used to circumvent restrictions on campaign donations’.⁶⁰⁴ She outlined the following method for regulating third party expenditure:

Any organisation that directly or indirectly advocates support or opposition for a particular party or candidate should first be required by law to obtain the consent of its membership. Any organisation that commits resources to supporting or opposing a particular party or candidate (eg paid advertising, using its database for mail outs) should be subject to the same rules and regulations as parties and candidates. This would include being required to make declarations to the Election Funding Authority and being subject to any restrictions on donations.⁶⁰⁵

- 6.180 Mr Peter Besseling, Member for Port Macquarie submitted that the effectiveness of limits imposed on political parties and candidates would be undermined if no limits were placed on third parties.⁶⁰⁶

Evidence from the Electoral Commissioner

- 6.181 The Electoral Commissioner advocated for a policy outcome where ‘at a State level they cannot drown out the voice of the main parties and at a local or district level, they cannot drown out the voice of the candidates’.⁶⁰⁷

- 6.182 He proposed the following regulation of expenditure by third parties (Table 20).

- 6.183 When questioned about whether may be considered ‘draconian’ to impose expenditure caps on third parties for the whole of the political cycle, the Electoral Commissioner responded:

No, I would not say that third parties could not spend; they would just need to be regulated. For example, if political parties could not spend any more than \$4.6 million in the four-year period, then third parties would equally have to be regulated but it would not be up to the \$4.6 million—there would be some other threshold.⁶⁰⁸

⁶⁰¹ Mr David Shoebridge, Convenor, The Greens NSW, *Transcript of Evidence*, 1 February 2010, p.19-20.

⁶⁰² Mr Ian Smith, Acting Party Agent, Christian Democratic Party, *Transcript of Evidence*, 2 February 2010, p.29.

⁶⁰³ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, p.4.

⁶⁰⁴ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, p.4.

⁶⁰⁵ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, p.4.

⁶⁰⁶ Mr Peter Besseling, Independent Member for Port Macquarie, *Submission 29*, p.2.

⁶⁰⁷ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 7.

⁶⁰⁸ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, pp. 13-14.

6.184 At the preliminary hearing, the Electoral Commissioner cautioned against over-regulation of third parties, which might ‘stifle political debate and stifling people from having a say’.⁶⁰⁹ He contended that a way around this might be to:

... provide that an organisation can spend X amount of dollars without having to register itself. It still has to disclose, but it does not have to register. Once it wants to spend large sums of money, then it has to register with a funding authority, whoever that might be, and then they start to get involved. They become more formal players in the whole scheme.⁶¹⁰

6.185 However, in his final submission to the Committee, the Commissioner recommended that all third parties must registered, regardless of their level of expenditure.

6.186 In subsequent correspondence to the Committee, the Electoral Commissioner proposed the following additional points:

In addition to the points made in my submission regarding third parties I propose the following:

- Registered third parties must seek the prior approval of the EFA to their proposed schedule of electoral expenditure to ensure that they will not exceed the cap for third parties in any one particular district or overall.
- Third parties will be permitted to receive donations but will be subject to the same rules as those applying to RPPs [Registered Political Parties].
- Third parties will be required to disclose and be subject to audit following the election.

I note that I have revised my previous view that third parties should not be permitted to receive donations. Having had time to reflect on possible outcomes of this approach, especially on local communities which may wish to raise issues at an election, I consider on balance that third parties should be capable of raising funds to support their cause. However, to minimise the risk of RPPs, candidates or groups of candidates establishing third parties I recommend that they be prohibited from donating to or in any way supporting or colluding with third parties.⁶¹¹

Table 20: NSWEC funding and disclosure model⁶¹²

Third parties	<ul style="list-style-type: none"> • Third parties can incur electoral expenditure up to \$200k. • A maximum of \$0.50 for each elector on the District electoral roll can be spent in respect to any one District • All third parties must be registered • Only individuals on the NSW electoral roll are eligible to be registered. Entities seeking to register as a third party must nominate an individual on the NSW electoral roll as its nominee. • Third parties must be: <ul style="list-style-type: none"> • an individual on the NSW electoral roll, or 	<ul style="list-style-type: none"> • Third parties can incur electoral expenditure up to a maximum of \$0.50 for each elector on the District electoral roll • All third parties must be registered • Only individuals on the NSW electoral roll are eligible to be registered. Entities seeking to register as a third party must nominate an individual on the NSW electoral roll as its nominee. • Third parties must be: <ul style="list-style-type: none"> • an individual on the NSW electoral roll, or • a political party registered in NSW, or
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⁶⁰⁹ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 7.

⁶¹⁰ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 7.

⁶¹¹ Correspondence from Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, 10 March 2010.

⁶¹² Electoral Commission NSW/Election Funding Authority, *Submission 30*, ‘Funding and Disclosure Model’.

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	<ul style="list-style-type: none"> • a political party registered in NSW, or • a company with an ABN which carries on business in NSW, or • a trade union affiliated with Unions NSW, or • an unincorporated association of two or more people which carries on the majority of its activities in NSW • Registered third parties must renew their registration at the commencement of each financial year (similar to continued registration of political parties) • Election campaign spending able to be undertaken anytime during the four year period between elections • Third party to lodge disclosures each six months (similar to donors - as presently provided in EF&D Act). • A person or entity cannot give money to another person or entity for the purposes of being used as a donation or to incur electoral expenditure • If a third party/entity exceeds the expenditure limit they will be liable for a penalty 3 times the amount by which they exceeded the spending limit. 	<ul style="list-style-type: none"> • a company with an ABN which carries on business in NSW, or • a trade union affiliated with Unions NSW, or • an unincorporated association of two or more people which carries on the majority of its activities in NSW • Registered third parties must renew their registration at the commencement of each financial year (similar to continued registration of political parties) • General campaign spending limited to three months prior to (but including) election day. • Third party to lodge disclosures each six months (similar to donors - as presently provided in EF&D Act). • A person or entity cannot give money to another person or entity for the purposes of being used as a donation or to incur electoral expenditure • If a third party/entity exceeds the expenditure limit they will be liable for a penalty 3 times the amount by which they exceeded the spending limit.
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Evidence from academics

6.187 Dr Twomey put forward that ‘any limitation upon the political expenditure of third parties must be carefully tailored to ensure that they are not unreasonably restricted in conveying their message to voters and can run a modest national campaign.’⁶¹³ She explained that in ‘some jurisdictions this has been achieved by setting a cap on political expenditure of third parties during election periods, but permitting a higher cap if third parties register with the Electoral Commission and agree to higher levels of disclosure and scrutiny’.⁶¹⁴

6.188 She warned that, in limiting expenditure, it is necessary to ‘be aware of the constitutional rules’:

You have to be aware that third parties do have a legitimate right in a democracy to express their views, be they business groups, unions, environmental groups, whoever, they are entitled to express their views and they should, therefore, be entitled to run what I think one court described as a modest campaign on the issue to be able to let people know their views. That does not mean being able to expend money in a completely unlimited way and swamp the airwaves. You can express your view clearly without doing that.

I think it is likely that the High Court would uphold limits on third party expenditure so long as it is done in a careful, reasonable, fair manner and those limits were set below the limits imposed upon the main political parties but not so low as to impede third parties from being able to clearly contribute to the political debate and express their views.⁶¹⁵

6.189 Dr Twomey suggested that regard be had to the need to prevent ‘swamping’ by third parties as occurs in the United States ‘where you have single issue third party campaigns that completely dominate the election and the actual issues that arise in terms of government just get completely swamped and wiped out of the system’.⁶¹⁶

⁶¹³ Associate Professor Anne Twomey, *Submission 2*, pp. 5-6.

⁶¹⁴ Associate Professor Anne Twomey, *Submission 2*, pp. 5-6.

⁶¹⁵ Associate Professor Anne Twomey, *Transcript of Evidence*, 1 February 2010, p.41.

⁶¹⁶ Associate Professor Anne Twomey, *Transcript of Evidence*, 1 February 2010, p.44.

She did not consider that such a system would be ‘a good thing from the point of view of democracy’.⁶¹⁷

- 6.190 She also stated that it might be most practical to have a ‘two-layer version of restrictions on third party expenditure, so if it is only a small level of expenditure by third parties it is not regulated, but if you want to expend more significant amounts you have to register with the Electoral Commission and then you have to meet certain disclosure requirements and the like’. She considered this might be preferable, as ‘there will be circumstances in which small business buy raffle tickets or whatever, or are involved in very low-level expenditure, and you do not want to tie up everybody in red tape ...’⁶¹⁸
- 6.191 Dr Twomey suggested that third party expenditure caps might be set with reference to the cost of ‘running a modest campaign’. She indicated that there is international case law ‘where they [the Courts] have actually said that the amount that was allocated to the third parties only allowed advertising for one quarter of one page in one small newspaper, and that was it, and so they looked at what that money would buy you in terms of the extent to which you could make your view known’.⁶¹⁹
- 6.192 Dr Orr considered that ‘depending on the cap set on parties and their collective candidates, lower caps should be set for the same expenditures by ‘third party’ lobby groups’.⁶²⁰
- 6.193 He considered that the main impediment to third parties conducting ‘swift Boat Veterans’ type campaigns (ie. ‘an excess of negative advertising’) is cultural. He submitted that:

Such advertising is of course open in Australia at present (witness some of the Brethren advertising). That we have not imported it holus bolus from America yet is not a factor of our legal arrangements, but of a more statist cultural tradition, that accepts advertising by well established groups like the ACTU and industry bodies but is less open to a cacophony of third-party advertising.⁶²¹

- 6.194 Dr Orr elaborated on this point during the roundtable discussion, stating that, at least initially, it is unlikely that third party campaigns will ‘swamp’ political party and candidate campaigns due to the ‘nature and political culture in campaigning’ in NSW. He suggested that ‘it has been reasonably stable over time apart from the rise in government advertising’, noting that:

There is not a huge amount of third party expenditure except by groups that are relatively well-known and generally respected business groups. Generally we are talking about trade unions, large lobby groups and established groups. That may change if we legislate. It might create a waterbed effect where we will get Swift Boat Veterans for Truth, but I suspect not, certainly not in the first decade or so because the Australian political culture is different from American political culture.⁶²²

- 6.195 When questioned about the level of expenditure caps for third parties, Dr Orr commented:

... you have to be concerned that you do not limit third party activities to the extent that they are unable to meaningfully engage in whatever types of advertising are either

⁶¹⁷ Associate Professor Anne Twomey, *Transcript of Evidence*, 1 February 2010, p.44.

⁶¹⁸ Associate Professor Anne Twomey, *Transcript of Evidence*, 1 February 2010, p.42.

⁶¹⁹ Associate Professor Anne Twomey, *Transcript of Evidence*, 1 February 2010, p.44.

⁶²⁰ Associate Professor Graeme Orr, *Submission 23*, p.2.

⁶²¹ Associate Professor Graeme Orr, *Submission 23*, p.2.

⁶²² Associate Professor Graeme Orr, *Transcript of Evidence*, 1 February 2010, p.44.

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commonplace or still allowed, and in particular I am talking about broadcast advertising. So you have to set those caps at a reasonable level. Who knows what is a reasonable level is in terms of how long is a piece of string, but I think that is essentially a political matter rather than one that the courts are going to micromanage.⁶²³

6.196 He also warned of the need to prevent co-ordination of expenditures between parties/candidates and non-associated entities.⁶²⁴

6.197 Professor Williams indicated that he believed it possible to regulate third parties 'seeking to advertise or influence voting in State elections', even though 'there are some tricky constitutional issues'.⁶²⁵ However, he pointed to jurisdictional and constitutional issues, in that 'great care needs to be taken to regulate any form of direct electioneering relating to Federal elections lest you encroach upon areas of Commonwealth expertise'.⁶²⁶

6.198 He warned against expenditure caps for third parties that are too generous, as:
... the problem with third parties is their potential to multiply and, of course, when you define third parties it is very hard to deal with the problem of just a new corporate entity being created or a third party splitting, and sometimes you might try to deal with that through associated entity provisions and the like but, if you are too generous with third parties, you do run the risk of just being swamped by the creation of multiple entities.⁶²⁷

6.199 Dr Tham argued that third party expenditure caps should recognise the 'privileged position of candidates and parties, simply by virtue of the fact they are contestants, they are the ones competing for public office'.⁶²⁸ He also argued for a lower cap for third parties on the grounds of accountability, in that:

If people do not like a candidate or party, what can they do? They do not vote for the candidate or party. That same mechanism of accountability does not apply to third party campaigning. That is a crucial aspect to bear in mind.⁶²⁹

6.200 He argued for a political system that provided 'more integrated and comprehensive politics rather than issue politics', stating that:

Third parties tend to run on single, discrete issues whereas my preference would be if a party wants to run for political office in this State that it has policies for the whole State and not just policies about abortion or particular issues. They should have a role, that is correct, but they should not be allowed to dominate the election campaign.⁶³⁰

6.201 Dr Tham also spoke of the need to ensure that third parties are not able to act as 'front groups' for political parties – 'this is where third parties... have coordinated campaigns with political parties and candidates...'.⁶³¹

Evidence from other stakeholders

6.202 In their submission to the inquiry, ICAC noted that 'the regulation and enforcement of third party expenditure caps is fraught'.⁶³² Consequently, they advocated 'increased disclosure as a key corruption prevention tool in this area'.⁶³³

⁶²³ Associate Professor Graeme Orr, *Transcript of Evidence*, 1 February 2010, p.40.

⁶²⁴ Associate Professor Graeme Orr, *Submission 23*, p.2.

⁶²⁵ Professor George Williams, *Transcript of Evidence*, 1 February 2010, p.40.

⁶²⁶ Professor George Williams, *Transcript of Evidence*, 1 February 2010, p.40.

⁶²⁷ Professor George Williams, *Transcript of Evidence*, 1 February 2010, p.43.

⁶²⁸ Dr Joo-Cheong Tham, *Transcript of Evidence*, 1 February 2010, p.41.

⁶²⁹ Dr Joo-Cheong Tham, *Transcript of Evidence*, 1 February 2010, p.45.

⁶³⁰ Dr Joo-Cheong Tham, *Transcript of Evidence*, 1 February 2010, p.45.

⁶³¹ Dr Joo-Cheong Tham, *Transcript of Evidence*, 1 February 2010, p.41.

⁶³² Independent Commission Against Corruption, *Submission 14*, p.5.

6.203 Unions NSW also considered that transparency is the key to regulating third parties:

Advocates of a new regulatory regime for third party campaigns may cite the example of the the United States, where quite separately from the issue of the huge funds (and corresponding large donations) required by the major parties to run their campaigns, is the influence wielded by the corporate sector through their funding of campaigns where it is not clear who is providing the funding, often under the banner of a bogus, made-up advocacy group. For this reason, advertisements must make the source of funding clear. This is not a reason to restrict the ability of organisations to put their view forward in the public arena.⁶³⁴

6.204 However, where the sources of funding and people behind third parties are clear, Unions NSW did not consider that regulation is required, illustrating this point with the following example:

While the union movement conducted the *Your Rights at Work* campaign, a coalition of business groups presented an alternative view on industrial relations reform prior to the 2007 election. As the source of funding and on whose behalf the advertisements were run were clear in both examples, there should be no restriction or requirement to declare. This protects free speech around elections, as implied in the Australian Constitution, while protecting the public from being misled.⁶³⁵

Electoral Mailout Account

6.205 Members of the Legislative Assembly are entitled to an Electorate Mailout Account. The Account is to be used for preparing and distributing letters/newsletters to each constituent in an electorate. Members are provided with an annual amount, which is based on the cost of issuing two newsletters/letters per enrolled voter annually. Members may also issue additional newsletters/letters, subject to available funds in their Electorate Mailout Account and the Legislative Assembly's administrative guidelines.⁶³⁶

6.206 The guidelines that apply to additional entitlements such as the Mailout Account state that they may be used for parliamentary duties, including activities 'undertaken in representing the interests of constituents, but excluding activities of a direct electioneering or political campaigning nature.'⁶³⁷

6.207 The 2009 Parliamentary Remuneration Tribunal Determination outlines specific conditions relating to the Mailout Account, which include that: Members are to fund the cost of preparing, printing and distributing letters/newsletters to constituents and for no other purpose; communication with constituents is to be limited to matters

⁶³³ Independent Commission Against Corruption, *Submission 14*, p.5.

⁶³⁴ Unions NSW, *Submission 24*, p.4.

⁶³⁵ Unions NSW, *Submission 24*, p.5.

⁶³⁶ In addition, upon the gazettal of new electoral districts following a redistribution, members may use their Electorate Mailout Account to communicate with prospective constituents from neighbouring electorates who, at the time of the next election following the gazettal of the new electoral districts, will become constituents of the member's electorate: Parliamentary Remuneration Tribunal, *Annual Report and Determination of Additional Entitlements for Members of the Parliament of New South Wales*, 29 May 2009, p. 34, http://www.remtribunals.nsw.gov.au/_data/assets/pdf_file/0020/50609/2009_Parliamentary_Annual_Report_and_Determination.pdf (accessed 3 March 2010).

⁶³⁷ Parliamentary Remuneration Tribunal, *Annual Report and Determination of Additional Entitlements for Members of the Parliament of New South Wales*, 29 May 2009, p. 14, http://www.remtribunals.nsw.gov.au/_data/assets/pdf_file/0020/50609/2009_Parliamentary_Annual_Report_and_Determination.pdf (accessed 3 March 2010).

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affecting the Member's electorate; and unused allocations are to be forfeited at the end of each financial year.⁶³⁸

6.208 The 2009 Determination also sets the annual entitlement for each electoral district, based on the number of electors. The entitlement ranged from approximately \$57,000 to \$69,000 per electorate. The total estimated cost for 2009 of the Electorate Mailout Account entitlement was \$5,898,463.⁶³⁹

6.209 The Auditor-General's 2009 audit of Members' additional entitlements noted that Members' use of the Electorate Mailout Account (EMA) tended to increase towards the end of a financial year and that there had been an increase in use of the allocation prior to the last state election:

While we recognise that it is a matter for a Member to determine when the allowance is used, ... Members spent their EMA allowance more in the last quarter of the financial year (46 per cent was spent in June). This may be partly due to members communicating with their constituents the details of the budget announced in late May or early June each year. The increase in March 2007 coincided with the date of the last election. The increase in June 2008 may reflect the fact that unspent entitlements cannot be carried from one financial year to another. An inference can be drawn that current expenditure pattern could give the impression of lack of forward planning into the timing of EMA expenditure.⁶⁴⁰

6.210 The Auditor-General recommended that 'members should ensure their EMA entitlement spending is better planned and not concentrated at the end of each financial year.'⁶⁴¹

6.211 The National Party (NSW) submitted that:

With the imposition of expenditure caps on all candidates, the use of the Electorate Mail-out Account becomes a powerful advantage for incumbents, who whilst unable to use the EMA for campaign purposes are able to take advantage of the account to communicate with constituents about electorate matters.

The Nationals believe that although the EMA is essential to the performance of a parliamentarian's duties and should thus be exempted from the expenditure cap, steps should be taken to ensure that the provision of this account to members of parliament does not unduly inflate the benefits of incumbency in the context of a campaign expenditure cap.

6.212 The National Party (NSW) recommended:

⁶³⁸ Parliamentary Remuneration Tribunal, *Annual Report and Determination of Additional Entitlements for Members of the Parliament of New South Wales*, 29 May 2009, pp. 34-5, http://www.remtribunals.nsw.gov.au/_data/assets/pdf_file/0020/50609/2009_Parliamentary_Annual_Report_and_Determination.pdf (accessed 3 March 2010).

⁶³⁹ Parliamentary Remuneration Tribunal, *Annual Report and Determination of Additional Entitlements for Members of the Parliament of New South Wales*, 29 May 2009, Schedule 4, pp. 48-51, http://www.remtribunals.nsw.gov.au/_data/assets/pdf_file/0020/50609/2009_Parliamentary_Annual_Report_and_Determination.pdf (accessed 3 March 2010).

⁶⁴⁰ Auditor-General, *Auditor-General's Report to Parliament, Financial Audits Volume Two 2009*, May 2009, Section 2, p. 12, http://www.audit.nsw.gov.au/publications/reports/financial/2009/vol2/pdf/08_0276_the_legislature_members_additional_entitlements.pdf (accessed 4 March 2010).

⁶⁴¹ Auditor-General, *Auditor-General's Report to Parliament, Financial Audits Volume Two 2009*, May 2009, Section 2, p. 12, http://www.audit.nsw.gov.au/publications/reports/financial/2009/vol2/pdf/08_0276_the_legislature_members_additional_entitlements.pdf (accessed 4 March 2010).

Recommendation 3.2. During the period where spending is capped, the Electorate Mail-out Account for Members of Parliament should be significantly reduced. The allowance should still be sufficient to permit the MP to carry out basic correspondence on an individual level.⁶⁴²

Government advertising

- 6.213 The terms of reference require the Committee, in inquiring into a public funding model, to consider the need for 'additional regulation to ensure that government public information advertising is not used for party political purposes'. Several participants in the inquiry made the point that government advertising should be factored into a public funding model. In the section below the Committee discusses current processes and guidelines relating to government advertising, along with practices in other jurisdictions and options for reform.
- 6.214 It is relevant to note that the Committee is examining government advertising as part of a public funding model, that is, as a possible loophole to expenditure caps and not in general terms. The Committee is, therefore, not making recommendations with the aim of regulating all government advertising, instead focussing on ways to prevent it from being used for party political purposes in the context of election campaigns.

Background

Government advertising guidelines

- 6.215 The NSW government publishes advertising guidelines, incorporating all relevant advertising policies and requirements, for government agencies to follow in their planning and implementation of advertising campaigns.⁶⁴³ In addition to outlining the review and approval processes for various types of advertising, the guidelines specify the principles to be observed in the development of government advertising, and provide details on appropriate and inappropriate use of advertising.
- 6.216 The principles for agencies include that 'A reasonable person should **not interpret the message as serving party political interests**. NSW Government advertisements are to be clearly distinguishable from party-political messages and include authorisation tags ... in accordance with the *Broadcast Services Act 1992*. (original emphasis)⁶⁴⁴
- 6.217 The following examples of inappropriate use of publicly funded advertising are given in the guidelines:
- The message could be reasonably understood as being on behalf of a political party
 - The party in government is named, or the government is linked to the Premier's name.
 - Party-political slogans or images are used.
 - Political party websites, publications or other materials are referred to.

⁶⁴² NSW National Party, *Submission 18*, p.18.

⁶⁴³ NSW Government, *NSW Government Advertising Guidelines*, version 1.3, December 2009, p. 2, <http://www.services.nsw.gov.au/advertising/pdf/NSWGovernmentAdvertisingGuidelines.pdf> (accessed 22 February 2010).

⁶⁴⁴ NSW Government, *NSW Government Advertising Guidelines*, version 1.3, December 2009, p. 2, <http://www.services.nsw.gov.au/advertising/pdf/NSWGovernmentAdvertisingGuidelines.pdf> (accessed 22 February 2010).

Caps on expenditure

- A political party or other group is disparaged or ridiculed.⁶⁴⁵

6.218 The guidelines state that, for advertising with a budget of \$50,000 or more, an independent peer review of advertising occurs at “concept stage” prior to the advertising being submitted for approval to BCC [Cabinet Standing Committee on the Budget].⁶⁴⁶ According to the guidelines, peer review is ‘conducted by a team of experienced advertising and communications practitioners drawn from across the NSW public sector’, with the aim of providing feedback on the proposed advertisement, and assessing it against each of the following criteria:

- need for the campaign
- strategy chosen
- management approach.⁶⁴⁷

6.219 Following the peer review, a report is prepared and submitted to the relevant department for information and response, with a report summary included in the submission prepared for the Cabinet Standing Committee on the Budget.⁶⁴⁸

6.220 In terms of the use of government advertising prior to state elections, the guidelines state that agencies should stop major advertising activity two months prior to an election.⁶⁴⁹

Auditor-General's reviews of government advertising

6.221 The Audit Office of New South Wales has conducted three reviews of government advertising since 1995. The performance audit reports tabled by the Auditor-General made several recommendations relating to the guidance provided to agencies and the approval process for advertising. The government guidelines have been revised to reflect some of the Auditor-General's recommendations.⁶⁵⁰ As part of the Auditor-General's most recent advertising audit, several recommendations were made for amendments to the guidelines, including a recommendation that the peer review panel considering whole of government awareness campaigns include a member

⁶⁴⁵ NSW Government, *NSW Government Advertising Guidelines*, version 1.3, December 2009, p. 3, <http://www.services.nsw.gov.au/advertising/pdf/NSWGovernmentAdvertisingGuidelines.pdf> (accessed 22 February 2010).

⁶⁴⁶ NSW Government, *NSW Government Advertising Guidelines*, version 1.3, December 2009, p. 7, <http://www.services.nsw.gov.au/advertising/pdf/NSWGovernmentAdvertisingGuidelines.pdf> (accessed 22 February 2010).

⁶⁴⁷ NSW Government, *NSW Government Advertising Guidelines*, version 1.3, December 2009, p. 8, <http://www.services.nsw.gov.au/advertising/pdf/NSWGovernmentAdvertisingGuidelines.pdf> (accessed 22 February 2010).

⁶⁴⁸ The Director of Strategic Communications and Government Advertising may exempt advertising from peer review under certain circumstances: see NSW Government, *NSW Government Advertising Guidelines*, version 1.3, December 2009, p. 8.

<http://www.services.nsw.gov.au/advertising/pdf/NSWGovernmentAdvertisingGuidelines.pdf> (accessed 22 February 2010).

⁶⁴⁹ The quarantine period does not apply to some advertisements, for example, those relating to community health and safety issues, see NSW Government, *NSW Government Advertising Guidelines*, version 1.3, December 2009, p. 6,

<http://www.services.nsw.gov.au/advertising/pdf/NSWGovernmentAdvertisingGuidelines.pdf> (accessed 22 February 2010).

⁶⁵⁰ Audit Office of New South Wales, *Government advertising: Department of Premier and Cabinet; Department of Services, Technology and Administration; NSW Treasury*, Performance audit report, December 2009, p. 1,

http://www.audit.nsw.gov.au/publications/reports/performance/2009/govt_ad/government_advertising.pdf (accessed 22 February 2010).

who is independent of government, and that the panel should ‘specifically attest that the campaign would not be seen as party political and is not excessive.’⁶⁵¹

6.222 The audit report also considered the issue of breaches of the government guidelines, stating that:

Government guidelines set out standards of performance and processes to be followed. Guidelines are generally not binding and therefore would not appear to attract penalties for breaches, unlike many laws and regulations.

However, there is a link between the Guidelines and the *Public Finance and Audit Act 1983* when publicly funded advertising is used inappropriately. This misuse of funds could lead to a penalty being issued under that Act.⁶⁵²

Legislative Council Select Committee on Electoral and Political Party Funding

6.223 The Legislative Council Select Committee inquiry heard from participants who expressed concern at government advertising being used for political purposes. Some participants in the inquiry suggested that greater regulation of spending on government advertising was required, with the Liberal Party stating that ‘without putting in place measures to stop the misuse of government advertising for political gain, other reforms, in particular caps on campaign expenditure, would be meaningless.’⁶⁵³ The Liberal Party submitted in support of the approval process in place in Ontario, Canada, whereby the Ontario Auditor-General reviews and approves all government advertising. Several participants in the inquiry recommended that the NSW Auditor-General be authorised to review government advertisements prior to publication or broadcast, while one participant expressed reservations about statutory officers being involved in ‘what are essentially political arguments during a highly partisan period.’ The St James Ethics Centre called for pre-election restriction of non-critical advertising.⁶⁵⁴

6.224 The Select Committee concluded that there should be greater regulation and oversight of government advertising to prevent it from ‘becoming an ersatz form of election funding’, while also noting that government advertising would need to be restricted if spending caps were introduced, with bans on advertising during a specified pre-election period.⁶⁵⁵

⁶⁵¹ Audit Office of New South Wales, *Government advertising: Department of Premier and Cabinet; Department of Services, Technology and Administration; NSW Treasury*, Performance audit report, December 2009, p. 4,

http://www.audit.nsw.gov.au/publications/reports/performance/2009/govt_ad/government_advertising.pdf (accessed 22 February 2010).

⁶⁵² Audit Office of New South Wales, *Government advertising: Department of Premier and Cabinet; Department of Services, Technology and Administration; NSW Treasury*, Performance audit report, December 2009, pp. 17-8,

http://www.audit.nsw.gov.au/publications/reports/performance/2009/govt_ad/government_advertising.pdf (accessed 22 February 2010).

⁶⁵³ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, p. 73.

⁶⁵⁴ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, pp. 73-4.

⁶⁵⁵ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, p. 74.

Caps on expenditure

- 6.225 The Select Committee recommended that ‘the Premier entrust the Auditor General with oversight responsibility for government advertising, with the Auditor General’s powers to be modelled on those of the Auditor General in Ontario, Canada.’⁶⁵⁶
- 6.226 In dissenting statements to the report, the Hon Amanda Fazio MLC and the Hon Mick Veitch MLC stated that they did not support the Select Committee’s recommendation for the Auditor-General to undertake the review and approval of government advertising while retaining his oversight role, arguing that it would be inconsistent with usual auditing practice:
- The Auditor General cannot accept responsibility for oversight for government advertising without impugning his role. It is against all accepted audit practices for an auditor to oversight expenditure that they then are responsible for auditing.⁶⁵⁷
- 6.227 The government’s response to the Select Committee’s recommendation noted that the government advertising guidelines had been reviewed and updated in light of the Auditor-General’s 2007 performance audit. It stated that ‘the guidelines establish a clear set of principles and procedures to be observed by NSW Government agencies when undertaking advertising activities.’⁶⁵⁸

Inquiry participants’ views

- 6.228 Many participants in the current inquiry highlighted the importance of including government advertising in a public funding model. The Electoral Commissioner, Mr Colin Barry, told the Committee that government advertising must be considered as part of integrated political funding reform:
- It is essential that any reforms are an integrated package, including comprehensive dealing with all areas of political funding such as private donations, public funding, spending by parties, candidates and third parties, and government advertising.
- ... It is important that all these key areas are considered in an holistic manner as they are each connected. To disregard any one, or to set it aside for consideration, will expose the scheme to possible abuse.⁶⁵⁹
- 6.229 Mr Barry told the Committee that, if advertising were not addressed as part of funding reform, ‘it clearly would leave any government of the day the opportunity to basically use public money for political propaganda, badged under information.’⁶⁶⁰
- 6.230 The NSWEC submission made the following points in regard to government advertising, while noting that the proposals only apply to advertising occurring within the parameters of the *Election Funding and Disclosures Act 1981*:⁶⁶¹

⁶⁵⁶ The Auditor-General’s role would include determining whether advertisements would be permitted in the proposed pre-election quarantine period, with the ban not applying in emergency situations: see Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, pp. 74-5.

⁶⁵⁷ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, p. 258.

⁶⁵⁸ NSW Government, *Response to the report of the Select Committee on Electoral and Political Party Funding*, pp. 9-10,

[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/\\$FILE/081219%20Government%20Response.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/$FILE/081219%20Government%20Response.pdf) (accessed 12 January 2010).

⁶⁵⁹ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, pp. 4-5.

⁶⁶⁰ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 11.

⁶⁶¹ Section 84 of the *Election Funding and Disclosures Act 1981* provides that, for the purposes of disclosure of electoral expenditure and other requirements relevant to Part 6 of the Act, electoral expenditure includes

- The Electoral Commission has not been asked by agencies to give advice or information in relation to the 'electoral' content of any government advertising. This may be because any material serving party political interests that is published in accordance with the guidelines would fall outside the statutory period covered by electoral legislation.
- To ensure that publicly funded advertising does not serve party political interests, 'it is necessary that Government not be treated differently in any advertising that, whether intentional or not, constitutes "political expenditure" as defined in the *Election Funding and Disclosures Act 1981* and that it not escape such scrutiny simply by moving it to a period outside the regulated election period.'
- The government, or all government agencies, should be classed as third parties in order that their advertising would be captured as expenditure under the recommended statutory requirements contained in the Commission's proposed funding model and dealt with accordingly. The relevant legislation would need to provide for ongoing compliance that is not restricted to an election period.
- If no other body were to be given the role of overseeing compliance with the guidelines, the EFA could be empowered to give advice to agencies on advertising, as well as issuing guidelines and enforcing any statutory requirements.⁶⁶²

6.231 The Liberal Party submitted that expenditure caps 'would be meaningless without complementary legislation to stop the misuse of Government Advertising budgets.'⁶⁶³

6.232 The Christian Democratic Party argued that additional regulation of government advertising may be necessary to prevent misuse of funds for partisan purposes, stating that 'the abuse of government advertising to promote their political party should be referred to the NSW Ombudsman to investigate and report.'⁶⁶⁴ Ms Clover Moore MP submitted that government advertising during an election period should be restricted to essential, factual information about services and programs.⁶⁶⁵

6.233 The Public Interest Advocacy Centre focussed on transparency, suggesting that the government publish annual reports 'outlining expenditure on advertising, public relations and public opinion research.'⁶⁶⁶

Pre-election advertising limits

6.234 Dr Anne Twomey told the Committee that pre-election bans or restrictions on government advertising were needed as part of a comprehensive reform, arguing that the reforms may otherwise be undermined:

If there are to be limits placed upon political advertising during election campaigns, or a longer period of, say, 6 months before an election, then there must also be restrictions placed upon government advertising to prevent incumbents gaining a significant advantage by both avoiding expenditure caps and relying on taxpayers' funds, rather than capped political donations, to pay for the advertising.

'expenditure on advertisements in radio, television, the Internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and any other printed election material'.

⁶⁶² Electoral Commission NSW/Election Funding Authority, *Submission 30*, p. 4.

⁶⁶³ Mr Mark Neeham, State Director, Liberal Party of Australia (NSW Division), *Transcript of evidence*, 1 February 2010, p. 31.

⁶⁶⁴ Christian Democratic Party, *Submission 28*, pp. 11-2.

⁶⁶⁵ Ms Clover Moore MP, Independent Member for Sydney, *Submission 27*, p. 5.

⁶⁶⁶ Public Interest Advocacy Centre, *Submission 26*, p. 13.

Caps on expenditure

... As part of a comprehensive reform to political donations and campaign expenditure, government advertising in the electronic media should simply be banned either for the election campaign or preferably for a longer period leading up to the election. ... Once exceptions start creeping in and someone is anointed to determine whether or not government advertising is 'political' in nature, then avoidance again becomes rampant, undermining the reforms.⁶⁶⁷

6.235 Associate Professor Graeme Orr agreed that government advertising should be limited or banned during pre-election periods, citing the ACT *Government Agencies (Campaign Advertising) Act 2009* which 'legislates a ban, but only during the 37 days of their election campaign and then subject to Ministerial override in cases of emergency.'⁶⁶⁸ Associate Professor Orr suggested that, as an extension of the caretaker convention, government advertising could be subject to opposition approval:

... why not legislate to extend and enforce the current convention that campaign advertising is subject to the caretaker convention? For example, legislate that any campaign advertising run in the 6 months prior to the fixed election date be subject to approval by the Opposition Leader. This ought to ensure that ads in that time are limited to public health/welfare messages with bipartisan support.⁶⁶⁹

6.236 However, Professor George Williams did not support caps or time limits applying to the approval of government advertising during a pre-election period:

... I do not think you can predict the need for government advertising. It may be bushfires, medical emergency or the like and I do not think it is realistic, particularly over a recess, to expect Parliament to be recalled to look again at increasing the amount.⁶⁷⁰

Independent oversight and regulation

6.237 Participants in the current inquiry emphasised the importance of independent review of government advertising, due to the potential for it to be used for political purposes. Action on Smoking and Health stated that an independent body should be responsible for monitoring government advertising and ensuring public funds are spent 'for a reasonable purpose'.⁶⁷¹

6.238 Unions NSW supported increased restrictions on government use of partisan political advertising, stating that legislation prohibiting inappropriate political advertising, while continuing to permit community service information, is required. Mr Mark Lennon, Secretary of Unions NSW told the Committee that he supported independent oversight, in addition to pre-election government advertising bans.⁶⁷²

6.239 In a report on political funding commissioned by the NSWEC, Dr Joo-Cheong Tham made several recommendations to enhance the accountability of government advertising. Dr Tham noted that 'suspicions of party political advertising are aroused when there is an increase in government advertising in the lead up to elections, as was the case with the 2007 NSW state election.'⁶⁷³

⁶⁶⁷ Associate Professor Anne Twomey, *Submission 2*, p. 5.

⁶⁶⁸ Associate Professor Graeme Orr, *Submission 23*, pp. 2-3.

⁶⁶⁹ Associate Professor Graeme Orr, *Submission 23*, pp. 2-3.

⁶⁷⁰ Professor George Williams, *Transcript of evidence*, 1 February 2010, p. 61.

⁶⁷¹ Action on Smoking and Health Australia, *Submission 12*, p.3.

⁶⁷² Mr Mark Lennon, Secretary, Unions NSW, *Transcript of evidence*, 2 February 2010, p. 51.

⁶⁷³ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 77,

6.240 Dr Tham observed that the issue of whether government advertising is party-political or not is contextual and depends on several factors. He emphasised the need for a strong regulatory framework to discourage party political advertising:

Whether such advertising is party-political will depend on various factors including whether it can be justified by reference to specific informational needs; its content and timing; the amount spent; and the broader political context of such advertising. The complexity attending such judgments does not mean regulation is unworkable in practice. What it implies is an emphasis on requiring governments to justify the need for the advertising they engage in with a specific onus on explaining why such advertising is not party-political.

... a robust accountability framework is essential to prevent party-political government advertising. For instance, requiring governments to justify advertising campaigns based on specific informational needs will be one way to filter out party-political advertisements because such advertising is often not directed towards a specified information need.⁶⁷⁴

6.241 Dr Tham noted that there are three aspects to the government advertising accountability framework: disclosure of information relating to advertising; parliamentary mechanisms; and executive mechanisms. In terms of improving the disclosure of information on government advertising, Dr Tham referred to the recommendations of the Senate Finance and Public Administration Committee for more detailed disclosure of government expenditure, with figures on advertising expenditure to be included in agency annual reports and in a separate report published by the Department of Prime Minister and Cabinet. Dr Tham concluded that the current NSW government guidelines were inadequate in this respect and recommended that the Senate Committee's recommended reporting requirements be implemented by the NSW government.⁶⁷⁵

6.242 Parliamentary accountability should also be increased, in Dr Tham's view, with annual inquiries into government advertising to be conducted by an appropriate parliamentary committee.⁶⁷⁶

6.243 In terms of executive accountability mechanisms, Dr Tham supported the current prohibitions relating to party political advertising contained in the government advertising guidelines, while also recommending some amendments to improve the guidelines' effectiveness:

- That, consistent with the federal guidelines, fact should be distinguished from opinion.

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 4 March 2010).

⁶⁷⁴ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, pp. 78-9,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 4 March 2010).

⁶⁷⁵ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, pp. 79-82,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 4 March 2010).

⁶⁷⁶ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, pp. 82-3,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 4 March 2010).

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- The length of the quarantine period applying in the lead up to state elections be increased, with consideration given to specifying a quarantine period of six months in the lead up to elections.
- The exception granted during the pre-election quarantine period to advertisements that contain 'appropriate public information' be removed.⁶⁷⁷

6.244 Finally, Dr Tham argued that the Auditor-General's government advertising performance audits were not undertaken with sufficient regularity and recommended that measures be taken to provide for regular independent scrutiny of the implementation of the government advertising guidelines. He also recommended that consideration be given to providing regular independent oversight of the advertising guidelines, through the NSW Auditor-General and/or strengthening the peer review system.⁶⁷⁸

Suggested models for the review and approval of government advertising

6.245 In terms of a model for independent review of government advertising, Professor George Williams told the Committee that the Commonwealth model may be an effective system for independent scrutiny:

I would certainly agree that I would be looking to the Commonwealth system for this. ... So I think the key here is to actually go to a system where you do have independent scrutiny; if it is not the Auditor-General then another group of people who have the confidence of not only the Government but also other parties within the Parliament, even the Independents. That to me seems to be the only workable system but it does seem to be working well at the Commonwealth level so far.⁶⁷⁹

6.246 The Liberal Party submitted that the Auditor-General should have a role in scrutinising government advertising that may be used for partisan political purposes. The Liberal Party reiterated its support for the Select Committee's recommendation in relation to review and approval of government advertising by the Auditor-General, consistent with the Ontario framework for granting advertising approval.⁶⁸⁰

6.247 The Greens stated that 'government advertising, especially in the months leading up to an election campaign, must not be allowed to advance the governing party's partisan political agenda', suggesting that stringent statutory criteria should be put in place in relation to government advertising. The Greens submitted that the Auditor-General could be empowered to assess and approve government advertising against certain criteria during pre-election periods:

In the three months prior to and including a general election the NSW Auditor General to be given the power to determine if government advertisements should be publicly

⁶⁷⁷ The federal guidelines state that information presented in campaigns should 'enable the recipients of the information to reasonably and easily distinguish between facts ... and comment, opinion and analysis'. Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, pp. 87-9,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 4 March 2010).

⁶⁷⁸ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 90,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 4 March 2010).

⁶⁷⁹ Professor George Williams, *Transcript of evidence*, 1 February 2010, p. 61.

⁶⁸⁰ Mr Mark Neeham, State Director, Liberal Party of Australia (NSW Division), *Transcript of evidence*, 1 February 2010, p. 31.

released, basing such decision on the public education value and general importance of the advertisements.⁶⁸¹

6.248 In evidence to the Committee, Mr David Shoebridge, Convenor of the Greens expressed the view that an independent statutory officer should consider government advertising, noting that the Election Funding Authority's role and powers could be extended to include such a function:

If not the Auditor-General, an independent statutory officer needs to be put in place to consider government advertising, particularly if you are restricting the capacity of Oppositions and other parties and other voices to be heard because otherwise the danger will be that incumbency with the power to advertise at will without a restraint will become even more powerful than it is in the current system. ... the Electoral Funding Authority needs to be given both additional funds and some form of independent statutory commissioner, with independence similar to that of the Director of Public Prosecutions and to have oversight of the electoral funding reform agenda and would be entirely appropriate for that independent commissioner to also take on board that function that we have suggested might happen with the Auditor-General.⁶⁸²

6.249 The Auditor-General, Mr Peter Achterstraat, informed the Committee of the recommendations resulting from his recent performance audit of government advertising, before providing the following outline of the two primary models for the regulation and oversight of government advertising:

- The assurance or attestation model, with two variants in operation in Ontario and the Commonwealth. The Ontario system provides for the Auditor-General to review government advertising prior to its placement against certain criteria, including whether it could be perceived to be party political, and to veto particular advertising. Under the Commonwealth model, the Auditor-General reviews departmental processes for the preparation of government advertisements as well as conducting limited assurance audits. Larger advertisements are required to be reviewed, but the Auditor-General does not have a veto power over government advertising and Ministers are able to approve advertising even if the Auditor-General has determined that relevant criteria were not met.
- The committee model also has two variants, with one providing for a committee, including the Auditor-General, to review advertisements in terms of their efficacy, business case, cost benefit analysis and size. The second variant, similar to the current New South Wales system, involves a peer review committee consisting of experts who can determine the appropriateness of advertisements against criteria, including whether it could be perceived as party political. The committee should include an independent member, not the Auditor-General, 'not necessarily an expert in advertising, a person not associated with Parliament or Government of the day, an independent person.'⁶⁸³

6.250 In answers to questions on notice, the Auditor-General outlined the current peer review committee process. The Department of Services, Technology and Administration draws on a register of NSW public sector marketing practitioners who have nominated to be on peer review panels. The panels are made up of two to three of the registered reviewers, who are independent of the relevant agency, and are

⁶⁸¹ The Greens NSW, *Submission 19*, p. 15.

⁶⁸² Mr David Shoebridge, Convenor, the Greens (NSW), *Transcript of evidence*, 1 February 2010, p. 20.

⁶⁸³ Mr Peter Achterstraat, Auditor-General, Audit Office of NSW, *Transcript of evidence*, 2 February 2010, p. 3. Under the Commonwealth guidelines, the Auditor-General reports on compliance with the guidelines for proposed government campaign advertising with expenditure in excess of \$250,000.

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chosen based on their availability and the timing of the reviews and the Cabinet approval process.⁶⁸⁴

6.251 Mr Achterstraat told the Committee that his preference was for the peer review committee model with an independent member, noting that 'the peer review process has improved the processes considerably since it has been there, but I am suggesting it could go further by having this independent person on it.'⁶⁸⁵ He referred to his recent recommendation that an independent member be appointed to the current peer review committee, telling the Committee that he believed 'there was implicit agreement to this recommendation' and that the Department of Premier and Cabinet was expected to respond to his recommendations by March 2010.⁶⁸⁶

6.252 Mr Achterstraat also outlined his concerns in relation to the Ontario attestation model, referring to the corporate governance principle that management and audit roles should not be undertaken by the same entity:

This fundamental principle of corporate governance is enshrined in the professional standards, particularly by virtue of the Accounting, Professional and Ethics Standards Board's Standard APES 110, which refers to the notion of self review. It makes it quite clear that if you have been giving advice or involved in management you have to be very circumspect about the audit of the same entity. In relation to that, I am of the view that the Audit Office is the only body that can undertake audits of New South Wales government entities. So we need to be very careful about getting involved in any management decisions, such as setting the parameters for payments or setting the size of payments ...⁶⁸⁷

6.253 The Auditor-General made the point that 'there are a large number of people who can give advice in relation to whether the government advertising could be seen as party political, but there is only one person who can do an audit.'⁶⁸⁸ Mr Achterstraat told the Committee that his ability to perform his audit role in relation to government advertising may be compromised by an involvement in management or policy decisions associated with government advertising:

I am of the firm view that the Auditor-General should not be involved in setting the limits, that is clearly a management decision, almost a policy decision, and the Auditor-General should not be involved in setting policy. ... maybe a remuneration tribunal or something like that should be more involved with setting those limits ...

... Once the Auditor-General starts getting involved in making those sorts of decisions, people later on down the track say he has got no right to do an audit on that.⁶⁸⁹

6.254 Dr Anne Twomey had similar concerns about the Auditor-General being involved in what may potentially be political decisions, and questioned the integrity and effectiveness of this model:

I have some concerns about this. I have to say I have got a bit of a different view. I recollect, and I cannot remember the detail now, looking at the new Commonwealth system with the Auditor-General checking, and looking at the conditions and rules, but, quite frankly, you could drive a truck through those rules in terms of getting up politically

⁶⁸⁴ Audit Office of New South Wales, Answers to questions taken on notice at 2 February 2010 hearing, p. 1.

⁶⁸⁵ Mr Peter Achterstraat, Auditor-General, Audit Office of NSW, *Transcript of evidence*, 2 February 2010, p. 4.

⁶⁸⁶ Mr Peter Achterstraat, Auditor-General, Audit Office of NSW, *Transcript of evidence*, 2 February 2010, p. 7 and Audit Office of New South Wales, Answers to questions taken on notice at 2 February hearing, p. 2.

⁶⁸⁷ Mr Peter Achterstraat, Auditor-General, Audit Office of NSW, *Transcript of evidence*, 2 February 2010, p. 2.

⁶⁸⁸ Mr Peter Achterstraat, Auditor-General, Audit Office of NSW, *Transcript of evidence*, 2 February 2010, p. 5.

⁶⁸⁹ Mr Peter Achterstraat, Auditor-General, Audit Office of NSW, *Transcript of evidence*, 2 February 2010, pp. 5-6.

favourable advertising. I was not impressed by them at all. I think it is inherently problematic. If you ever get any independent officer and require them to assess what is political and what is not, if you are the Auditor-General or the Electoral Commissioner or anybody else you are, first, not going to want to do it because, second, it undermines your role when you start getting into fights about what is and what is not political with Government.⁶⁹⁰

6.255 In his report on political funding, Dr Tham noted the Auditor-General's concerns about the Ontario model and stated that the relative benefits of both models required further examination.⁶⁹¹

Other jurisdictions

6.256 As noted above, some inquiry participants submitted that the Committee should recommend that the public funding model encompass aspects of government advertising regulation applying in other jurisdictions, such as Canada. The Committee outlines key features of the models applying in the ACT, Commonwealth and Ontario in the following table.

Table 21: Key features of government advertising regulatory regimes in other jurisdictions

Jurisdiction and relevant legislation/ guidelines	Application and terms of legislation/ guidelines	Relevant definitions or criteria	Regulated period
ACT (commencing 1 July 2010) <i>Government Agencies (Campaign Advertising) Act 2009</i> ⁶⁹² <i>Electoral Act 1992</i>	Object of Act is to prevent use of public funds for advertising for party political purposes Appointment of campaign advertising reviewer ⁶⁹³ to review proposed government campaigns for compliance with the Act and to report on results of review ⁶⁹⁴ Proposed government campaigns that are likely to exceed \$40,000 must be reviewed Such campaigns may only be conducted if they are certified as complying with the Act, and, if exceeding \$40,000, they have been reviewed for compliance A statement of total advertising campaign cost must be prepared Minister may exempt campaigns, only if satisfied of emergency; or extreme urgency; or other extraordinary circumstances ⁶⁹⁵	government campaign: dissemination of information to the public about government programs, policies or matters affecting their entitlements, rights or obligations, excludes public health/safety information, job and tender advertisements or routine advertising relating to agencies' operational activities party political: designed to promote policies, past performance, achievements or intentions of a program or the government to advance or enhance a political parties' reputation, rather than informing public pre-election period: the period of 37 days ending on the end of polling day	Government agencies must not conduct campaigns in pre-election period (excepting the electoral commissioner)

⁶⁹⁰ Associate Professor Anne Twomey, *Transcript of evidence*, 1 February 2010, p. 61.

⁶⁹¹ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 91,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010).

⁶⁹² *Government Agencies (Campaign Advertising) Act 2009* (ACT)

⁶⁹³ The reviewer must not be a public servant and must have experience in one of the following areas: media and advertising; legal; or government administration: *Government Agencies (Campaign Advertising) Act 2009* (ACT) s.12.

⁶⁹⁴ The reviewer reports to a 'responsible person' who may be the relevant Minister, CEO or statutory office holder, as well as reporting to the Legislative Assembly: *Government Agencies (Campaign Advertising) Act 2009* (ACT) ss.8 and 13.

⁶⁹⁵ The Minister must tell the Legislative Assembly in writing about an exemption and the reasons for the exemption: *Government Agencies (Campaign Advertising) Act 2009* (ACT) s.23.

⁶⁹⁶ *Electoral Act 1992* (ACT), s.3 and Dictionary.

Caps on expenditure

Jurisdiction and relevant legislation/ guidelines	Application and terms of legislation/ guidelines	Relevant definitions or criteria	Regulated period
	Minister must make guidelines consistent with the principles and object of the Act.	for an election. ⁶⁹⁶	
<p>Cth <i>Guidelines on Campaign Advertising by Australian Government Departments and Agencies</i>, June 2008⁶⁹⁷</p> <p><i>Commonwealth Electoral Act 1918</i></p> <p><i>Broadcasting Services Act 1992</i></p>	<p>Campaign approval occurs when the relevant Chief Executive certifies that the campaign complies with the guidelines, and, for campaigns exceeding \$250,000, the Auditor-General reviews and reports on compliance with the guidelines</p> <p>Cabinet Secretary may exempt campaigns from compliance, on basis of national emergency, extreme urgency or other extraordinary reasons⁶⁹⁸</p> <p>Material should:</p> <ul style="list-style-type: none"> • be relevant to government responsibilities • be presented in an objective, fair and accessible manner • not be directed at promoting party political interests • be produced and distributed in an efficient, effective and relevant manner, with due regard to accountability <p>Advertising must comply with legal requirements, including electoral laws</p>	<p>government campaigns do not include advertisements for specific jobs, tender advertising, or other similar routine advertising carried out by agencies in relation to their operational activities</p> <p>Information may be perceived as party-political because of factors including:</p> <ul style="list-style-type: none"> • the content of the material • the source of the campaign • the reason for the campaign • the purpose of the campaign • the choice of media • the timing, geographic and demographic targeting of the campaign • the environment in which it is communicated • the effect it is designed to have 	<p>No provision in guidelines for a pre-election quarantine period.⁶⁹⁹</p> <p>The Broadcasting Services Act provides for an electronic advertising blackout from midnight on the Wednesday prior to polling day to the end of polling on Saturday.⁷⁰⁰</p>
<p>Ontario, Canada</p> <p><i>Government Advertising Act 2004</i></p> <p><i>Election Finances Act</i></p>	<p>Advertisements are to be reviewed by Auditor-General as meeting required standards:</p> <ul style="list-style-type: none"> • Reasonable means of achieving one of more of: informing public of current or proposed government policies, programs or services; informing public of their legal rights and responsibilities; encouraging or discouraging specific social behaviour in public interest; promoting Ontario as place to live, work, invest, study or visit or promoting economic activity or sector • Includes statement that the item has been paid for by the government • Does not include name, voice or image of member of Executive Council or Assembly • Is not partisan • Must not have primary objective of 	<p>partisan advertising: primary objective is to promote the partisan political interests of the governing party</p> <p>reviewable advertisement does not include notices required by law, urgent matters affecting public health and safety, job advertisements, or advertisements relating to the provision of goods and services to a government office</p> <p>blackout period means polling day and the day before polling day in any election⁷⁰¹</p> <p>political advertising means advertising in any broadcast, print, electronic or other medium with the purpose of promoting or opposing any registered party or the election of a registered candidate.</p>	<p>No registered party, constituency association, third party or candidate, and no person, corporation or trade union is to arrange political advertising that appears during a blackout period.</p>

⁶⁹⁷ Australian Government, Department of Finance and Deregulation, *Guidelines on Campaign Advertising by Australian Government Departments and Agencies*, June 2008, pp. 4-7, <http://www.finance.gov.au/advertising/guidelines-on-campaign-advertising.html> (accessed 1 March 2010).

⁶⁹⁸ If an exemption is approved, the Auditor-General will be informed and the reasons formally recorded and reported to Parliament: Australian Government, Department of Finance and Deregulation, *Guidelines on Campaign Advertising by Australian Government Departments and Agencies*, June 2008, p. 3, <http://www.finance.gov.au/advertising/guidelines-on-campaign-advertising.html> (accessed 1 March 2010).

⁶⁹⁹ In terms of advertising during an election period, although the Commonwealth Electoral Act provides for electors to be informed about the source of political advertisements, there is no regulation of their content: see Australian Electoral Commission, *Electoral Advertising*, Electoral Backgrounder no 15, August 2007.

⁷⁰⁰ Australian Electoral Commission, *Electoral Advertising*, Electoral Backgrounder no 15, August 2007, pp. 8-9.

⁷⁰¹ Excepting a by-election and general election that is not held under s.9(2) of the Election Act, in which case the blackout period begins when the writ of election is issued and ends on the 22nd day before polling day: *Election Finances Act*, Ontario, s.37(1)

Jurisdiction and relevant legislation/ guidelines	Application and terms of legislation/ guidelines	Relevant definitions or criteria	Regulated period
	fostering positive image of governing party or negative image of person or entity who is critical of government <ul style="list-style-type: none"> • Meets any additional prescribed standards If agency head is not given notification of results of review within prescribed period of 7 working days, item is deemed to have met standards required under the Act Prohibition on publishing or broadcasting advertisement if Auditor-General deems it not to meet standards required under the Act Revised versions of advertisements are required to be submitted for further review.		

Recent developments

- 6.257 The Commonwealth Auditor-General's 2009 review of campaign advertising noted that the Commonwealth advertising guidelines could be refined, with more information and clarification provided on matters such as the use of research to inform communication strategies, cost benefit analysis requirements, which activities come under the definition of campaign advertising, and agencies publishing campaign documentation on their websites. According to the report, the Australian National Audit Office wrote to the Special Minister of State and the Chair of the Joint Committee of Public Accounts and Audit to inform them of areas where the guidelines could be revised.⁷⁰² The Joint Committee is currently conducting an inquiry into the role of the Auditor-General in scrutinising government advertising.
- 6.258 In March 2009, the Ontario government introduced a Bill that included proposed amendments to the *Government Advertising Act 2004*. According to the Ontario Auditor General's 2009 annual report, the amendments provided for a marginal widening of the scope of advertising covered by the Act to include cinema advertisements, in addition to eliminating some of the standards for government advertising and revoking the Auditor General's discretionary powers to consider additional factors in determining whether an advertisement is partisan. The proposed amendments also included a narrower definition of what could be considered partisan.⁷⁰³ The Auditor General expressed concern that the amendments would impact on his ability to exercise discretion or use professional judgement on the issue

⁷⁰² The Auditor-General, *Campaign Advertising Review 2008–09: Assurance Report*, Report No 2, 2009–10, pp. 10-1, http://www.anao.gov.au/uploads/documents/07092009-10_Audit_Report_2.pdf (accessed 1 March 2010).

⁷⁰³ Office of the Auditor General of Ontario, *2009 Annual Report of the Office of the Auditor General of Ontario*, p. 448, http://www.auditor.on.ca/en/reports_2009_en.htm (accessed 1 March 2010).

Caps on expenditure

of partisanship. The annual report noted that the amendments were withdrawn during committee debate on the Bill.⁷⁰⁴

⁷⁰⁴ Office of the Auditor General of Ontario, *2009 Annual Report of the Office of the Auditor General of Ontario*, p. 448, http://www.auditor.on.ca/en/reports_2009_en.htm (accessed 1 March 2010).

Chapter Seven - Public funding

- 7.1 The inquiry's terms of reference require the Committee to inquire into a public funding model, considering the following:
- the criteria and threshold for public funding
 - the manner in which public funding is calculated and allocated
 - any caps that should apply, such as the overall cap on public funding and/or caps on public funding to individual parties and members
 - the persons to whom public funding should be paid
 - mechanisms for paying public funding
 - any restrictions on expenditure of public funding.
- 7.2 In this chapter, the Committee outlines the current public funding scheme and funding levels, before examining public funding regimes in other jurisdictions. The Committee then examines evidence received during the inquiry on the points outlined above, in relation to specific points and proposals for the public funding of NSW parties and candidates under a reformed election funding scheme.

Current political funding scheme

- 7.3 Public funding is currently available to eligible candidates in state elections to cover election campaign expenditure, as defined in s.55 of the *Election Funding and Disclosures Act 1981*.
- 7.4 The funding is distributed from two separate pools of money, the Central Fund and the Constituency Fund, which are administered by the Election Funding Authority. Funding is only available for state elections; no public funding is available for candidates in local government elections.⁷⁰⁵
- 7.5 The EFA establishes the Central Fund and the Constituency Fund for each state general election. A Constituency Fund is established for each state by-election. The Authority determines the amount to be credited to the two funds for a general election after the issuing of the writs, using a formula which is based on the number of people enrolled to vote at the issue of writs for the general election, the length of the parliamentary term and a monetary figure set out in the Act and indexed to CPI for the Sydney region.⁷⁰⁶
- 7.6 The Central Fund provides funding for candidates, groups or parties who stood in the Legislative Council election, while the Constituency Fund provides funding for candidates who stood for a Legislative Assembly seat (in either a state general election or by-election).
- 7.7 The total amount is distributed between the two funds, with two thirds credited to the Central Fund and one third credited to the Constituency Fund. In a state election the total amount in the Constituency Fund is distributed evenly among each electorate in which two or more candidates stand for election.⁷⁰⁷

⁷⁰⁵ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, p. 38.

⁷⁰⁶ Election Funding Authority, *NSW EFA - Public Funding of Election Campaigns*, http://elections.clients.squiz.net/public_funding_of_election_campaigns (accessed 23 February 2010).

⁷⁰⁷ *Election Funding and Disclosures Act 1981*, s.66

Public funding

7.8 All funding is provided retrospectively to candidates, groups or parties.⁷⁰⁸ The Act provides for an entitlement to advance payments, for expenditure incurred for campaign purposes, to parties who were eligible for public funding from the Central Fund at the previous election. Eligible parties are able to receive an advance payment of 10% of their total entitlement for the previous election, in each of the three years following an election.⁷⁰⁹

Funding for Legislative Council candidates, groups and parties

7.9 The Central Fund is distributed to eligible candidates, groups and parties who ran for election to the Legislative Council.

7.10 To be eligible for funding from the Central Fund, candidates, groups or parties must have been registered for the election with the relevant body (the EFA for candidates and groups, and the NSWEC for parties) and either the individual candidate or a candidate from a group or party must have been elected to the Council, or the candidate, group or party must have polled at least 4% of the total number of first preference votes cast in the election.⁷¹⁰

7.11 To receive public funding, the candidate or group's official agent, or the party agent, must lodge a claim for payment form, along with the relevant political donation and electoral expenditure disclosures. Claims for payment must be audited by a registered company auditor prior to lodgement.⁷¹¹ All payments are made to the party agent or official agent by way of the campaign account.⁷¹²

7.12 The Central Fund is distributed to eligible candidates, groups and parties based on the proportion of the total primary votes they received. No candidate, group or party can receive more than half the available funds and they cannot claim for an amount greater than their verified electoral expenditure.⁷¹³

Funding for Legislative Assembly candidates

7.13 The Constituency Fund is distributed to eligible candidates who ran for election to the Legislative Assembly.

7.14 To be eligible for funding from the Constituency Fund, candidates must have been registered with the EFA on the register of candidates for the Assembly election and must either have been elected, or polled at least 4% of the total number of first preference votes cast in that election.⁷¹⁴

7.15 To receive public funding, the candidate's official agent, or the party agent if they are endorsed by a party, must lodge a claim for payment form, along with the relevant political donation and electoral expenditure disclosures. Claims for payment must be

⁷⁰⁸ *Election Funding and Disclosures Act 1981*, Part 5

⁷⁰⁹ *Election Funding and Disclosures Act 1981*, s.69

⁷¹⁰ Election Funding Authority, *NSW EFA - Public Funding of Election Campaigns* http://elections.clients.squiz.net/public_funding_of_election_campaigns (accessed 23 February 2010).

⁷¹¹ Election Funding Authority, *NSW EFA - Public Funding of Election Campaigns* http://elections.clients.squiz.net/public_funding_of_election_campaigns (accessed 23 February 2010).

⁷¹² Election Funding Authority, *Funding and Disclosure Guide – Political Parties and Party Agents*, October 2009, p. 36 and Election Funding Authority, *Funding and Disclosure Guide – Candidates, Groups and Official Agents at State Elections*, October 2009, p. 53.

⁷¹³ *Election Funding and Disclosures Act 1981*, ss.63(1)(a), 74

⁷¹⁴ Election Funding Authority, *NSW EFA - Public Funding of Election Campaigns* http://elections.clients.squiz.net/public_funding_of_election_campaigns (accessed 23 February 2010).

audited by a registered company auditor prior to lodgement.⁷¹⁵ All payments are made to the party agent or official agent by way of the candidate's campaign account.⁷¹⁶ A candidate who has been endorsed by a political party may, under s.76A of the *Election Funding and Disclosures Act 1981*, direct that the EFA make the payment of their public funding to the party rather than to their individual campaign account.⁷¹⁷

- 7.16 The Central Fund is distributed to eligible candidates, groups and parties based on the proportion of the total primary votes they received. No candidate, group or party can receive more than half the available funds and they cannot claim for an amount greater than their verified electoral expenditure.⁷¹⁸

Political Education Fund

- 7.17 The Political Education Fund provides annual payments for carrying out political education of voters to registered political parties, eligible for public funding as outlined above, that stood candidates for election in the Legislative Assembly.⁷¹⁹
- 7.18 The amount available to each eligible party is determined by the cost of an ordinary postage stamp, multiplied by the total number of first preference votes recorded for candidates endorsed by the party for election to the Legislative Assembly.⁷²⁰
- 7.19 Funds distributed from the Political Education Fund may be spent on:
- Costs relating to the preparation and dissemination of material in a printed form or otherwise setting out:
 - Information on the history and/or structure of the party.
 - Policies of the party, including contrasts with other parties.
 - Achievements of the party.
 - Statewide newsletters for party members (but not internal circulars).
 - Seminars for party members/members of the public.
 - Salaries for staff time spent working directly on political education activities.
 - Direct equipment and maintenance costs.⁷²¹

⁷¹⁵ Election Funding Authority, *NSW EFA - Public Funding of Election Campaigns*.

http://elections.clients.squiz.net/public_funding_of_election_campaigns (accessed 23 February 2010).

⁷¹⁶ Election Funding Authority, *Funding and Disclosure Guide – Political Parties and Party Agents*, October 2009, p. 36 and Election Funding Authority, *Funding and Disclosure Guide – Candidates, Groups and Official Agents at State Elections*, October 2009, p. 53.

⁷¹⁷ *Election Funding and Disclosures Act 1981*, s.76A. Candidates can either have individual campaign accounts or use a campaign account established for multiple candidates from the party (section 96B(3) allows for a single campaign account to be used for multiple candidates so long as the transactions are identifiable by candidate, as such parties can operate a single campaign account for all candidates in a State General Election.)

⁷¹⁸ *Election Funding and Disclosures Act 1981*, ss.68(1)(a), 74

⁷¹⁹ Election Funding Authority, *NSW EFA - Political Education Fund*

http://www.efa.nsw.gov.au/registered_political_parties/political_education_fund (accessed 24 February 2010).

⁷²⁰ *Election Funding and Disclosures Act 1981*, s.97E

⁷²¹ Election Funding Authority, *Political Education Fund Determinations*

http://www.efa.nsw.gov.au/data/assets/pdf_file/0016/66040/PEF_Determination.pdf (accessed 24 February 2010).

Current levels of public funding

Public funding

7.20 The total amount of public funding paid to eligible candidates, groups and parties following the 2007 state election was approximately \$11 million, with parties receiving \$7.5 million and candidates receiving \$3.5 million.⁷²² The following table details the public funding payments for Legislative Council groups based on the 2007 state election (Table 22).

7.21 Public funding for Legislative Assembly candidates was on the basis of \$42,222 per electoral district. Tables 23-32 are a selection of the distribution of funds in 10 of the 93 electorates.

Table 22: 2007 State Government Election Legislative Council Entitlements⁷²³

Party	Percentage of Primary Votes	Entitlement \$	Amount Paid \$
Australian Democrats (NSW Division)	1.78	-	-
Australian Labor Party (NSW Branch)	39.14	3,426,979	3,426,979.00
Australians Against Further Immigration	1.64	-	-
Christian Democratic Party (Fred Nile Group)	4.42	387,204	387,204.00
Horse Riders Party	0.57	-	-
Outdoor Recreation Party			
Liberal Party of Australia New South Wales Division	34.22	2,996,107	1,997,404.67
National Party of Australia - NSW			998,702.33
Peter Breen - Human Rights Party	0.44	-	-
Restore the Workers Rights Party	0.92	-	-
Save Our Suburbs	0.31	-	-
Socialist Alliance	0.40	-	-
The Fishing Party	1.53	-	-
The Greens	9.12	798,434	463,939.32
The Shooters Party	2.79	244,696	244,696.00
Unity Party	1.21	-	-
Independent Group			
A	0.68	-	-
D	0.01	-	-
F	0.50	-	-
H	0.08	-	-
M	0.09	-	-
Ungrouped Candidate			
BODLAY, Jordie	0.00	-	-
CARBURY, Richard	0.00	-	-
FRASER, Dawn	0.12	-	-

⁷²² Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, p. 49. See also Election Funding Authority, Funding and entitlement reports

http://www.efa.nsw.gov.au/public_funding_of_election_campaigns/funding_and_entitlement_reports (accessed 4 March 2010)

⁷²³ Election Funding Authority, http://www.efa.nsw.gov.au/public_funding_of_election_campaigns/funding_and_entitlement_reports/entitlements_for_the_legislative_council_election (accessed 4 March 2010).

Party	Percentage of Primary Votes	Entitlement \$	Amount Paid \$
LOVETT, Ryan	0.00	-	-
MACDONALD, Alasdair	0.00	-	-
NUNEZ, Jose	0.00	-	-
ROFE, David	0.01	-	-
Undistributed Funds \$		2	

Table 23: Albury

Candidate	Party	Result (%)	Expenditure (\$)	2007 Public funding (\$)	
				Entitlement	Amount paid
Gregory Aplin	Liberal	65.34	22,984	21,111	20,624.37
Christopher Ryan	Country Labor	27.39	15,315	11,565	11,565
Christina Sobey	The Greens	7.27	0	3,070	0
				Undistributed funds	6,476

Table 24: Ballina

Candidate	Party	Result (%)	Expenditure (\$)	Public funding (\$)	
				Entitlement	Amount paid
John Bailey	The Greens	19.44	9,164	8,472	8,472
Flora Boyd	Australians Against Further Immigration	1.36	0		
Melanie Doreian	Labor	23.07	17,804	10,055	10,055
Don Page	Nationals	54.36	47,000	21,111	21,111
Benjamin Smith	Australian Democrats	1.77	0		
				Undistributed funds	2,584

Table 25: Camden

Candidate	Party	Result (%)	Expenditure (\$)	Public funding (\$)	
				Entitlement	Amount paid
Leon Belgrave		1.21	0		
Ross Bowen	Australians Against Further Immigration	2.95	1,512		
Christopher Buchtmann		0.83	0		
Geoff Corrigan	Labor	44.78	41,535	21,111	21,111
Judith Morris	Christian Democratic Party	3.79	0		
Christopher Patterson	Liberal	38.57	56,829	18,399	18,399
Allen Powell	The Greens	5.16	2,438	2,461	2,438
Katryna Thirup		2.71	3,942		
				Undistributed	251

Public funding

Candidate	Party	Result (%)	Expenditure (\$)	Public funding (\$)	
				Entitlement	Amount paid
				funds	

Table 26: Gosford

Candidate	Party	Result (%)	Expenditure (\$)	Public funding (\$)	
				Entitlement	Amount paid
Marie Andrews	Labor	42.66	28,901	19,311	19,311
Bryan Ellis	Save our Suburbs	1.21	443		
George Grant	Christian Democratic Party	2.87	2,004		
Chris Holstein	Liberal	34.82	89,768	15,761	15,761
Hillary Morris	The Greens	6.88	6,374	3,116	3,116
Robert Moulds	Australians Against Further Immigration	2.64	1,744		
Debra Wales		8.91	20,295	4,032	4,032
				Undistributed funds	2

Table 27: Maitland

Candidate	Party	Result (%)	Expenditure (\$)	Public funding (\$)	
				Entitlement	Amount paid
Peter Blackmore		26.58	118	11,220	11,220
Jan Davis	The Greens	5.03	3	2,125	2,125
Robert Geoghegan	Liberal	20.51	150	8,661	8,661
Frank Terenzini	Labor	39.66	27	16,746	16,746
Kellie Tranter		8.22	4	3,468	3,468
				Undistributed funds	2

Table 28: Marrickville

Candidate	Party	Result (%)	Expenditure (\$)	Public funding (\$)	
				Entitlement	Amount paid
Fiona Byrne	The Greens	32.55	23,974	14,976	14,976
Grace Chen	Unity Party	1.32	0		
Robin Eve-Macleod	Australian Democrats	1.63	0		
Philippa Hinman	Socialist Alliance	1.58	0		
Ramzy Mansour	Liberal	12.57	13,209	5,784	5,784
Patrick O'Connor		0.51	0		
Carmel Tebbutt	Labor	46.64	86,551	21,111	21,111
Joseph Tuiletufug	Christian Democratic Party	1.50	0		
Angus Wood		1.70	0		
				Undistributed funds	351

Table 29: Menai

Candidate	Party	Result (%)	Expenditure (\$)	Public funding (\$)	
				Entitlement	Amount paid
Neerav Bhatt	The Greens	4.51	1,253	2,057	1,253
Mark Clyburn	Australian Democrats	1.77	0		
Mark Collins	Australians Against Further Immigration	3.09	1,512		
Christopher McLachlan		2.60	0		
Alison Megarrity	Labor	45.40	33,186	20,713	20,713
Stephen Simpson	Liberal	42.63	27,224	19,450	19,450
				Undistributed funds	2

Table 30: Murray-Darling

Candidate	Party	Result (%)	Expenditure (\$)	Public funding (\$)	
				Entitlement	Amount paid
Peter Black	Country Labor	37.02	20,687	16,712	16,712
Thomas Kennedy		2.64	2,691		
Ronald Page		1.41	1,163		
Judith Renner	The Greens	2.42	0		
John Williams	Nationals	56.51	78,675	21,111	21,111
				Undistributed funds	4,399

Table 31: Northern Tablelands

Candidate	Party	Result (%)	Expenditure (\$)	Public funding (\$)	
				Entitlement	Amount paid
Vanessa Bible	The Greens	3.16	0		
Phillip Kelly	Nationals	17.73	26,380	7,896	7,896
Isabel Strutt	Christian Democratic Party	2.02	6,367		
Richard Torbay		72.74	73,523	21,111	21,111
Phillip Usher	Country Labor	4.34	4,000	1,933	1,933
				Undistributed funds	11,282

Table 32 Smithfield

Candidate	Party	Result (%)	Expenditure (\$)	Public funding (\$)	
				Entitlement	Amount paid
Ninos Khoshaba	Labor	52.38	24,910	21,111	21,111
Liam Pender	Christian Democratic Party	5.42	779	2,447	779
Minh Phu	Unity Party	3.04	0		
Sandro Pini	Australians Against Further Immigration	3.43	0		
Andrew Rohan	Liberal	27.54	22,819	12,432	12,432
Vlaudin Vega	The Greens	8.20	0	3,699	0
				Undistributed funds	2,533

Political Education Fund

7.22 In the three years prior to the 2007 state election, eligible parties received annual payments totalling approximately \$1.66 million through the Political Education Fund, with the ALP receiving \$688,618 and the Liberal Party receiving \$472,444 annually. The total of payments made through the Political Education Fund for 2004-2007 was approximately \$6.65 million.⁷²⁴

Table 33: Political Education Fund payments 2004-2007⁷²⁵

Party name	2004 \$	2005 \$	2006 \$	2007 \$	Total \$
ALP NSW	688,618	688,618	688,618	688,618	2,754,472
Christian Democratic Party (Fred Nile Group)	32,986	32,986	32,986	32,986	131,944
Country Labor Party	126,891	126,891	126,891	126,891	507,564
Liberal Party NSW	472,444	472,444	472,444	472,444	1,889,776
National Party NSW	184,002	184,002	184,002	184,002	736,008
The Greens NSW	157,685	157,685	157,685	157,685	630,740
Total	1,662,626	1,662,626	1,662,626	1,662,626	6,650,504

Rationale for reform

7.23 The Committee heard that the existing public funding system is in need of reform. Inquiry participants told the Committee that factors including an increasing reliance on private donations to fund campaigns, perceptions of corruption and undue influence and the rising costs of modern campaigning mean that reform to the current system is required. Many participants who supported a restriction of private sources of funding argued that such a measure would necessitate an increase in public funding. The Committee discusses caps on donations in Chapter 5 of this report.

7.24 The Labor Party (NSW) submitted that ‘fundamental reform of the existing funding and disclosure system is required to improve accountability and integrity and ensure that all parties and candidates have an opportunity to put a fair case for election.’⁷²⁶

⁷²⁴ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, p. 63.

⁷²⁵ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, p. 63.

7.25 Noting that partial public funding was initially introduced to limit reliance on private funding of parties, the Labor Party (NSW) argued that this objective is no longer being met by the legislation, with private funding having dramatically increased since the enactment of the (then) Election Funding Act. According to the Party, reform is needed to reduce private sources of funding, through an expansion of the current public funding regime:

In order to improve and maintain public confidence in the integrity of political decision-making, political parties' reliance on private donations should be reduced.

The first step towards reducing reliance on private donations is expanding the existing public funding scheme.⁷²⁷

7.26 The Liberal Party (NSW) submitted in support of reform to restrict donations and introduce public funding for parties' administrative costs through a reimbursement system. The Party noted that increased public funding would need to be a part of any reform, as parties would no longer be viable if private funding sources were limited without a corresponding increase in public funding:

The ability of political parties to perform their current function and compete in election campaigns is beyond the capacity of their membership bases to finance. At present, the most cost-effective way for parties to finance their activities is soliciting substantial donations from trade unions and corporations. Under our approach, this practice would be at an end. For parties to continue to perform their current role and remain viable, increased public funding is essential. The need will be even greater in the short-term as the parties undertake a costly enhancement of their capacity to fundraise from a mass base of small donors. We support a system of funding the ongoing administrative costs of political parties similar to the Canadian model and the continuation of the reimbursement of election expenses.⁷²⁸

7.27 The National Party (NSW) submitted that they were 'strongly supportive of the need to engage in meaningful reform of the current system of donations and election campaign funding', in order to reduce opportunities and instances of corruption and the perception of corruption due to large political donations.⁷²⁹ The Nationals noted that the restriction of donations would affect parties' ability to fund both their administration and election campaigning, and reflected that parties would need to be compensated so that political communication is not inappropriately impeded by a significant reduction in parties' funding:

... current public funding of elections must be reviewed to consider whether it is adequate to support the role that candidates and political parties play in our democratic system.⁷³⁰

7.28 The National Party (NSW) supported public funding reform that would enable parties and candidates to reduce their reliance on private donations while also funding them to communicate their policy platforms to the voting public:

... Within a system of meaningful caps and bans on donations, public funding would not only lead to reduced reliance on private funding in a practical sense, it would be essential to providing candidates and political parties with the means to communicate

⁷²⁶ Australian Labor Party (NSW Branch), *Submission 15*, p. 4.

⁷²⁷ Australian Labor Party (NSW Branch), *Submission 15*, p. 3.

⁷²⁸ Liberal Party of Australia (NSW Division), *Submission 17*, p. 13.

⁷²⁹ NSW National Party, *Submission 18*, p. 1.

⁷³⁰ NSW National Party, *Submission 18*, p. 11.

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their policies and positions to the electorate. Campaigns would become to a large degree reliant on public funding.⁷³¹

7.29 The Greens NSW also expressed support for funding reform, stating that they 'strongly support increased public funding as the only viable method of reducing the influence of private and powerful corporations and individuals in the politics of this State.'⁷³² Unions NSW agreed that an increase in public funding would address perceptions of donor influence, by bringing public funding closer to meeting the costs of modern election campaigns.⁷³³

7.30 The Shooters Party expressed the view that public funding should be reviewed to provide a system with greater equity that also reduces perceptions of influence:

One reason in favour of providing public funding for political parties and election campaigns is to reduce the reliance of parties on contributions from what could be seen as a potentially inappropriate source from donations. Funding programs should therefore, be designed to create a more equitable environment for all political parties, big and small, as well as independent candidates wishing to contest elections.⁷³⁴

Public funding in other jurisdictions

7.31 Various forms of public funding are available in other jurisdictions. While these schemes are useful in considering reform to public funding in NSW, the level and types of funding should be viewed in the context of other aspects of the political finance schemes in these jurisdictions. For example, there are relatively low levels of public funding in New Zealand. However, in New Zealand there are no caps on donation levels and parties are unable to communicate via broadcast media outside a publicly funded 'broadcast allocation' during the regulated period.

New Zealand

7.32 In New Zealand public funding is provided in the form of a broadcasting allocation. Under the *Broadcasting Act 1989* political parties can apply to the Electoral Commission for funding to broadcast election programmes on radio and television and for free time to broadcast their opening and closing addresses.⁷³⁵ The funding is for broadcasts during the election period - from writ day to the day before polling day⁷³⁶ - and is only available to political parties. Candidates may use their own money to purchase advertising on radio and television within their campaign expenditure limit.⁷³⁷

7.33 At the 2008 New Zealand general election a total of \$3,211,875 was available for allocation.⁷³⁸

7.34 Under the Act only election programmes that have been paid for by the allocated broadcasting funds and those that have been paid for by a candidate's own funds are

⁷³¹ NSW National Party, *Submission 18*, p. 11.

⁷³² The Greens NSW, *Submission 19*, p. 7.

⁷³³ Unions NSW, *Submission 24*, p. 2.

⁷³⁴ The Shooters Party, *Submission 25*, pp. 1-2.

⁷³⁵ *Broadcasting Act 1989* (NZ), ss.70A, 73, 74A

⁷³⁶ *Broadcasting Act 1989* (NZ), s.69(1)

⁷³⁷ *Broadcasting Act 1989* (NZ), s.70(1)

⁷³⁸ Section 74 of the *Broadcasting Act 1989* (NZ) provides that the Minister of Justice shall notify the Electoral Commission, in respect of each election period, of the amount of money appropriated by Parliament for the purpose of enabling political parties to meet all or part of the costs of broadcasting election programmes.

permitted to be broadcast within and outside the election period.⁷³⁹ The Act therefore prohibits the broadcast of election programmes by individuals or groups other than eligible political parties that have been given a broadcasting allocation.

- 7.35 Election programmes are defined under the Act as a programme that:
- (a) encourages or persuades or appears to encourage or persuade voters to vote for a political party or the election of any person at an election; or
 - (b) encourages or persuades or appears to encourage or persuade voters not to vote for a political party or the election of any person at an election; or
 - (c) advocates support for a candidate or for a political party; or
 - (d) opposes a candidate or a political party; or
 - (e) notifies meetings held or to be held in connection with an election⁷⁴⁰
- 7.36 The Electoral Commission is responsible for allocating the funds and the free time for the opening and closing addresses to each of the eligible political parties.⁷⁴¹ Eligible political parties are those that are registered at the time of the dissolution of Parliament and have provided the Electoral Commission with notice that they consider they qualify for an allocation of time and money. The criteria to which the Electoral Commission shall have regard in making its determinations include:
- the number of persons who voted for that party and for the candidates of that party at the most recent general election
 - the number of persons who voted for any candidate belonging to that party at any by-election held since the most recent general election
 - the number of Members of Parliament of that party immediately before the dissolution or expiration of Parliament
 - any relationships that exist between parties
 - any indications of public support for that political party such as the results of opinion polls and the number of persons who are members of that party
 - the need to provide a fair opportunity for each party to convey its policies to the public.⁷⁴²
- 7.37 Political parties are prohibited from purchasing additional broadcasting time even if they have funds available within their overall campaign expenditure limit.⁷⁴³
- 7.38 During recent discussions on the reform of the New Zealand electoral finance regime, a number of proposals concerning the introduction of increased public funding and the broadcasting allocation were presented by the government for public comment and consultation. The proposals put forward for comment included:
- **Retain the current regime:** as stated above only political parties using allocated funds and candidates using their own funds may broadcast election programmes on radio and television during the election period. Third parties are prohibited from broadcasting election programmes.

⁷³⁹ *Broadcasting Act 1989* (NZ), s.70(1)

⁷⁴⁰ *Broadcasting Act 1989* (NZ), s.69(1)

⁷⁴¹ *Broadcasting Act 1989* (NZ), ss.71A and 74A

⁷⁴² *Broadcasting Act 1989* (NZ), s.75(2)

⁷⁴³ *Broadcasting Act 1989* (NZ), s.70

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- **Moderate reform:** would allow broadcast of election advertising on other forms of media, not just radio and television. Also, political parties would be able to spend more on election advertising than what was allocated to them, provided they stay within their campaign expenditure limit. Arguments in favour of this option included that the current broadcasting allocation is outdated and should keep pace with changes in modern communication methods and that it may give political parties greater flexibility to choose how they want to spend allocated funds.
- **Significant reform:** would allow parties to spend funds for any purpose not just election advertising and there would also be no limit on the amount of advertising a political party could purchase. Arguments in favour of this option included that it would provide greater equality between the parties and greater freedom in running campaigns.⁷⁴⁴

7.39 The government was also interested in seeking views on whether the prohibition on members of the public, including third parties, from broadcasting election programmes should be retained.

7.40 After receiving submissions on the proposals, the government decided that, due to a lack of consensus among political parties, no reform of the broadcasting allocation would be undertaken. The Cabinet Minutes note that the Green Party and the Labour Party supported retaining the status quo, with the Labour Party submitting that the current system, 'keeps our elections low-cost; reduces the demand on political parties to fund huge advertising programmes; keeps the excesses of negative advertising to a minimum; and limits the potential for those with wealth to exercise excessive influence on election outcomes, as is seen in other countries.'⁷⁴⁵ Both the National Party and the ACT Party supported the moderate reform option and also supported allowing third parties to broadcast election programmes.

7.41 In deciding not to propose any changes to the current system, the government noted that any proposed reform also raised the issue of freedom of expression:

... any significant reform of the broadcast allocation will require substantial amendment of Part 6 of the Broadcasting Act 1989, and possibly its entire repeal and replacement with new bespoke provisions in the Electoral Act 1993. This would raise questions about whether the existing prohibition on campaign advertising by the general public on radio and television is a justifiable limit of the right to freedom of expression under the New Zealand Bill of Rights Act 1990.⁷⁴⁶

United Kingdom

7.42 Public funding in the United Kingdom is provided in a number of forms for different activities. Under the *Political Parties, Elections and Referendum Act 2000* policy development grants are available to represented registered parties to assist them 'with the development of policies for inclusion in any manifesto.'⁷⁴⁷ Under the Act, a represented registered party is one that has two Members of the House of Commons.⁷⁴⁸ The scheme is administered by the Electoral Commission, with a total of £2 million available each financial year to be divided up among eligible parties.

⁷⁴⁴ See New Zealand Ministry of Justice, Electoral Finance Reform, Proposal Document, pp. 15-6 and Cabinet Minutes, Electoral Finance Reform Package, CAB Min (09) 45/10, 17 December 2009, p. 6.

⁷⁴⁵ Cabinet Minutes, Electoral Finance Reform Package, CAB Min (09) 45/10, 17 December 2009, p. 7.

⁷⁴⁶ Cabinet Minutes, Electoral Finance Reform Package, CAB Min (09) 45/10, 17 December 2009, p. 13.

⁷⁴⁷ *Political Parties, Elections and Referendum Act 2000* (UK), s.12(1)(a)

⁷⁴⁸ *Political Parties, Elections and Referendum Act 2000* (UK), s.12(1)(b)

7.43 The following table, produced by the United Kingdom Electoral Commission, details how the amount was divided up between the parties from 2006 to 2009.

Table 34: Policy development grant allocations made under the scheme⁷⁴⁹

Party	2006-7	2007-8	2008-9
Conservative and Unionist Party	£457,997	£458,736	£457,387
Democratic Unionist Party	£155,786	£154,754	£155,203
Labour Party	£457,997	£458,736	£457,387
Liberal Democrats	£457,997	£458,736	£457,387
Plaid Cymru	£151,894	£151,845	£152,247
Scottish National Party	£162,542	£162,438	£165,187
Social Democratic and Labour Party	£155,786	£154,754	£155,203
Ulster Unionist Party*	£0	£0	£0
Total	£2,000,000	£2,000,000	£2,000,001

* The Ulster Unionist Party was removed from the Scheme for 2006-7 because it no longer satisfied the eligibility requirement (of having two Members of Parliament who had taken the oath).

7.44 Other sources of public funding include what are commonly referred to as 'Short Money' and 'Cranbourne Money'. Short money is funded by the House of Commons and is provided to support opposition parties to perform their parliamentary business, assist with travel expenses and fund the running costs of the Leader of the Opposition's office.⁷⁵⁰ It is available to opposition parties who have either two seats or one seat and received at least 150,000 votes at the previous general election. Short money allocations for 2009-2010 are shown in the table below.

Table 35: Short money allocations, 2009/10 (£)⁷⁵¹

	General	Travel	Leader of the Opposition	Total
Conservative Party	4,004,543.00	100,427.12	652,936.00	4,757,906.12
Liberal Democrats	1,706,587.00	42,798.30		1,749,385.30
Scottish National Party	141,777.00	3,555.53		145,332.53
Plaid Cymru	66,508.00	1,667.91		68,175.91
Democratic Unionist Party	159,975.00	4,011.90		163,986.90
Social Democratic and Labour Party	59,623.00	1,495.24		61,118.24

7.45 Cranbourne Money is a similar scheme to Short Money, applying to the House of Lords. In 2009/10 the Conservative Party was allocated £474,927, the Liberal Democrats were allocated £237,136 and the Convenor of the Crossbench Peers £61,003.⁷⁵²

⁷⁴⁹ http://www.electoralcommission.org.uk/_data/assets/excel_doc/0010/67915/PDGs---website.xls, (accessed 5 March 2010).

⁷⁵⁰ UK Ministry of Justice, 'Party finance and expenditure in the United Kingdom – The Government's proposals', White Paper, June 2008, p. 51.

⁷⁵¹ House of Commons Library, *Short Money*, SN/PC/1663 (11 June 2009) p. 3, <http://www.parliament.uk/commons/lib/research/briefings/snpc-01663.pdf> (accessed 5 March 2010).

⁷⁵² House of Commons Library, *Short Money*, SN/PC/1663 (11 June 2009) p. 9, <http://www.parliament.uk/commons/lib/research/briefings/snpc-01663.pdf> (accessed 5 March 2010).

Public funding

7.46 Another form of public funding available in the United Kingdom is free party political broadcasts and free election postage. According to the Ministry of Justice, free party political broadcasting and election broadcasts 'equates to around £121 million in a general election year.'⁷⁵³

Canada

7.47 In Canada, eligible political parties and candidates are reimbursed a percentage of their election expenses. Political parties are eligible to be reimbursed 50% of their election expenses if they receive at least 2% of the valid votes cast at the election or 5% of the votes cast in the electoral districts where the party endorsed a candidate.⁷⁵⁴ Candidates are eligible to be reimbursed 60% of their combined election and personal expenses if they are elected or receive at least 10% of the valid votes cast.⁷⁵⁵

7.48 Eligible parties also receive quarterly allowance payments. Parties are eligible if they receive at least 2% of the total number of valid votes, or 5% of the valid votes in electoral districts where they endorsed candidates. The payment is \$0.4375 multiplied by the number of votes.⁷⁵⁶

United States

7.49 The United States has a public funding program available to eligible presidential candidates for both the primary and general elections. The program also provides funds to finance the major parties' national nominating conventions.⁷⁵⁷ To be eligible for public funding, candidates and parties must agree to abide by certain rules, including to:

- only spend the funds on campaign or party convention purposes
- limit spending to specified amounts
- maintain records and cooperate with an audit
- repay public funds if necessary.⁷⁵⁸

7.50 In addition, to be eligible for public funding during the primary elections, a candidate must show that they have public support by raising US\$5,000 in at least 20 states.

7.51 The amounts of public funding available are as follows:

- **For primary elections:** candidates receive matching payments. The public funding program will match contributions from individuals up to US\$250 per individual. The total of public funds cannot exceed half the national spending limit

⁷⁵³ UK Ministry of Justice, 'Party finance and expenditure in the United Kingdom – The Government's proposals', White Paper, June 2008, p. 51.

⁷⁵⁴ *Canada Elections Act 2000*, s.435(1)

⁷⁵⁵ *Canada Elections Act 2000*, ss.464 and 465

⁷⁵⁶ *Canada Elections Act 2000*, ss.435.01 and 435.02(2), as cited in Elections Canada, Registered Party Handbook, Chapter 4.7,

<http://www.elections.ca/content.asp?section=pol&document=page4index&dir=pol/ec20229&lang=e&textonly=false>, (accessed 10 March 2010).

⁷⁵⁷ Federal Electoral Commission, *Public Funding of Presidential Elections Brochure*, published August 1996 (updated January 2009), http://www.fec.gov/pages/brochures/pubfund.shtml#Expenditure_Limits, (accessed 9 March 2010).

⁷⁵⁸ Federal Electoral Commission, *Public Funding of Presidential Elections Brochure*, published August 1996 (updated January 2009), http://www.fec.gov/pages/brochures/pubfund.shtml#Expenditure_Limits (accessed 9 March 2010).

for the primary campaign (the overall primary election spending limit for the 2008 election was US\$42.05 million).

- **For general elections:** the Presidential nominee of each major party is entitled to a public grant for campaigning purposes.⁷⁵⁹ The amount of the public grant at the recent 2008 election was US\$84.1 million. Candidates must limit their spending to the amount of the grant and are entitled to spend US\$50,000 of their personal funds, which is not included in the spending limit.
- **For party nominating conventions:** each major party is entitled to funding to finance its Presidential nominating convention. For the 2008 election each major party received US\$16.3 million in public funds.⁷⁶⁰

Inquiry participants' views

Full public funding

- 7.52 The Committee heard various views on the level of public funding that should be provided to parties and candidates as part of a reformed funding system. Many participants argued against full public funding, with the Liberal Party stating that 'we are opposed to 100 percent of campaign costs being funded by the taxpayer. We do not believe that any registered party whether a major player or a frivolous new entrant, is entitled to a full taxpayer subsidy for their campaign spending.'⁷⁶¹ The Liberal Party expressed the view that grass-roots participation and support, party responsiveness and local autonomy may be undermined by the full public funding of campaigns.⁷⁶²
- 7.53 Ms Clover Moore MP, the Independent Member for Sydney, argued that private funding should continue to be allowed as part of a campaign funding model, noting that instead of being completely reliant on public funding, parties should be encouraged to broaden their support base in the community. Ms Moore also expressed the view that the public would not support a significant increase in public funding: 'I do not believe there is community support for open-ended taxpayer funding or the diversion of funds from much needed services or infrastructure to support accelerating election costs'.⁷⁶³
- 7.54 Unions NSW similarly argued that, although public funding should be increased, 'within a regime of full disclosure, organisations have a legitimate role in participating in the political process by making donations to political parties'.⁷⁶⁴

⁷⁵⁹ This figure is adjusted to take into account the Cost of Living Adjustment (COLA). Federal Electoral Commission, Presidential Spending Limits for 2008, http://www.fec.gov/pages/brochures/pubfund_limits_2008.shtml, accessed 10 March 2010. Candidates from minor parties and new parties may become eligible for partial public funding. A minor party can receive a proportion of public funding based on a percentage of their popular vote at the preceding election. A new party can apply for public funding after the election if they receive 5% of the vote. Candidates of minor and new parties may accept private donations but they are still bound by the same spending limits. See: Federal Electoral Commission, *Public Funding of Presidential Elections Brochure*, published August 1996 (updated January 2009), http://www.fec.gov/pages/brochures/pubfund.shtml#Expenditure_Limits, (accessed 10 March 2010).

⁷⁶⁰ Federal Electoral Commission, Presidential Spending Limits for 2008, http://www.fec.gov/pages/brochures/pubfund_limits_2008.shtml, (accessed 10 March 2010). A minor party may also be eligible for public funding based on its percentage of the popular vote at the preceding election.

⁷⁶¹ Liberal Party of Australia (NSW Division), *Submission 17*, p. 27.

⁷⁶² Liberal Party of Australia (NSW Division), *Submission 17*, pp. 13-4.

⁷⁶³ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, p. 3.

⁷⁶⁴ Unions NSW, *Submission 24*, p. 2.

Public funding

- 7.55 However, Mr Peter Draper MP, the Independent Member for Tamworth, submitted that only full public funding would address concerns about the equity of the current system:

What is required is an equitable and transparent system of public electoral funding. Our current system of partial public funding is an improvement on previous methods, however, only a system of full public funding will ease concerns that political donations undermine the political process.⁷⁶⁵

- 7.56 The Urban Taskforce also submitted that there should be a total ban on donations, with full public funding to meet the costs of election campaigns:

... we advocate a complete national blanket ban on political party donations from anyone — corporations or individuals ... However, this kind of change must be accompanied by substantial additional public funding. Taxpayers should meet all of the costs of election campaigns.

... Only a radical measure like this will ensure that the system is once and for all, free from any perception of financial influence.⁷⁶⁶

- 7.57 Mr Mike Cottee agreed that elections should be fully publicly funded, with all donations being banned to address public perceptions of undue influence:

I would like to submit that elections be funded entirely from the public purse, eliminating donations in all their guises (donations through third parties, fund-raising auctions, dinners with politicians etc.)

Such a move, introduced with a funding formula which was fair to both political incumbents and their challengers, ... would go a long way towards restoring faith in our political system. ...⁷⁶⁷

- 7.58 Dr Joo-Cheong Tham told the Committee that he was not in favour of a system that provides for full public funding, arguing that there is a legitimate role for private contributions. He also expressed the view that public funding may have the effect of inflating campaign expenditure:

... I am against a system where political parties are completely reliant on public funding ...

The other thing I will say is it is important for us not to cast this debate—linking to an earlier set of comments—as private funding bad, public funding good. Public funding also gives rise to a number of risks or dangers. One is that it risks ... inflating campaign expenditure. Rather than reducing the reliance of parties on private money it is an add-on that basically bumps up campaign expenditure. That is why if we are going to see increased public funding of elections, spending limits have to be part of the package.⁷⁶⁸

- 7.59 Associate Professor Anne Twomey also expressed reservations about full public funding, arguing that the democratic process is enhanced by parties being required to seek grass roots support:

There is an important issue about ensuring that parliamentary parties are obliged to connect to grassroots voters. If parliamentary parties were totally funded by public funding and then had no need to go out and connect with grassroots supporters and tailor their campaign to meet the interests of supporters and the like, except to the extent that they need them to vote for them in the end, it would detract from the system.

⁷⁶⁵ Mr Peter Draper, Independent Member for Tamworth, *Submission 10*, p. 2.

⁷⁶⁶ Urban Taskforce, *Submission 22*, p. 1.

⁷⁶⁷ Mr Mike Cottee, *Submission 5*, p. 1.

⁷⁶⁸ Dr Joo-Cheong Tham, *Transcript of evidence*, 1 February 2010, p. 46.

So there is some interest in placing an incentive on parliamentary parties to interact with voters and to get voters to put their money where their mouths are and support political parties.⁷⁶⁹

- 7.60 Associate Professor Twomey reflected that it may be preferable to achieve ‘a balance between, on the one hand, substantial public funding but also an incentive for parties to be able to raise some of their own funding by interacting with and gaining the support of people.’⁷⁷⁰
- 7.61 The public funding model proposed by the Electoral Commission provides for full public funding (reimbursement) of candidates’ and parties’ campaign expenses, if the following eligibility criteria are met:
- registered political parties - the average of the total number of first preference votes received by all endorsed candidates in the Legislative Assembly, or the total number of first preference votes received in aggregate by an endorsed group and candidates in that group (or an endorsed candidate not in a group) in the Legislative Council, is at least 8%; or an endorsed candidate is elected to the Legislative Assembly or Legislative Council.
 - endorsed/independent candidates - receiving 8% of the first preference vote.
 - groups and ungrouped candidates - groups and candidates in the group, or ungrouped candidates, receive 8% of the first preference vote (for groups a total of 8%) or are elected, or a group member is elected.⁷⁷¹

Eligibility threshold for public funding

- 7.62 There was broad support for the retention of the current 4% (or member elected) threshold for eligibility for public funding. The Electoral Commission’s proposed funding model provides for eligibility for entitlements to be based on a minimum threshold of 4% of first preference votes. The Commission notes that this is consistent with current legislation and with the experience in many international jurisdictions.⁷⁷²
- 7.63 The National Party (NSW Branch) submitted that the threshold should be retained ‘to prevent the proliferation of candidates nominating for election who have no realistic chance of winning a seat in Parliament.’⁷⁷³ The Shooters Party expressed the view that the current threshold was fair.⁷⁷⁴
- 7.64 The Greens NSW suggested that the threshold could be decreased for Legislative Council candidates and parties, to enable them to gain some level of public funding in the absence of parliamentary representation:
- In order to ensure new parties are able to successfully establish themselves in the absence of large private donations some consideration needs to be given to public funding of newly registered political parties that have not succeeded in obtaining parliamentary representation or a substantial state-wide vote.

⁷⁶⁹ Associate Professor Anne Twomey, *Transcript of evidence*, 1 February 2010, pp. 45-6.

⁷⁷⁰ Associate Professor Anne Twomey, *Transcript of evidence*, 1 February 2010, p. 46.

⁷⁷¹ Electoral Commission NSW/Election Funding Authority, *Submission 30*, Funding and Disclosure Model, pp. 3-4.

⁷⁷² Electoral Commission NSW/Election Funding Authority, *Submission 30*, p. 1.

⁷⁷³ NSW National Party, *Submission 18*, p. 12.

⁷⁷⁴ Mr Robert Borsak, Chairman, The Shooters Party, *Transcript of evidence*, 1 February 2010, p. 65.

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In this regard the Greens support reducing the threshold for electoral funding for parties or candidates contesting the upper house to 2% of the vote and retaining the current level for candidates in the lower house, namely at 4% of the vote.⁷⁷⁵

7.65 However, the Christian Democratic Party (CDP) called for the abolition of the 4% threshold for both Houses, stating that 'that this would promote more fairness in politics and support political parties to perform their function.'⁷⁷⁶

7.66 Independent Members generally supported the retention of the threshold. Ms Clover Moore MP noted that the current threshold does not appear to disadvantage independent and first time candidates:

Any revised threshold should not unduly disadvantage Independent candidates, including first time Independents. Of the 70 Independent candidates who contested the 2007 Legislative Assembly electorates, 32 received four per cent or more of the primary vote, and were thus entitled to receive public funding. Most of these were first time candidates. This suggests that the four percent threshold does not present a disincentive or barrier to Independent or first time candidates.⁷⁷⁷

7.67 The Independent Member for Port Macquarie, Mr Peter Besseling MP, agreed stating that the threshold 'certainly encourages not only active participation but also competition for candidates to give their best efforts.'⁷⁷⁸ Mr Peter Draper MP argued that the threshold safeguards against nuisance candidates and serves to control costs:

... Public funds should not be there to simply fund any campaign regardless of merit to the electorate. The need to gain 5% of first preference votes would help ensure that many nuisance candidates would be eliminated. Such a cap would also stop the huge cost blowouts seen at recent elections. It would also help level the playing field and return the focus to policy rather than media and advertising hype.⁷⁷⁹

7.68 The Public Interest Advocacy Centre stated that the current threshold was inequitable and proposed that funding include non-monetary support, which could be based on other indicators of popularity such as opinion polls, in order that new candidates and parties not be disadvantaged:

Allocation of a flat payment per vote to parties that receive 4 percent of the vote is inequitable because it favours established parties. It is also inequitable because the retrospective nature of the payment disadvantages new entrants.

PIAC sees merit in the NZ model where measures of public support beyond votes such as opinion polls leading up to an election, and the number of members in the party, are used to calculate the entitlement to nonmonetary support, such as through free broadcasting time.⁷⁸⁰

7.69 FamilyVoice Australia submitted that, if private funding were to be restricted, 'it would be fairer to have a lower threshold for public funding to create more opportunity for emerging parties and independent candidates to engage in an election campaign', and recommended that a threshold of 2% of formal votes cast apply for candidates to be eligible for public funding.⁷⁸¹

⁷⁷⁵ The Greens, *Submission 19*, p. 8.

⁷⁷⁶ Mr Graham Freemantle, Acting State Manager, Christian Democratic Party, *Transcript of evidence*, 2 February 2010, p. 27.

⁷⁷⁷ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, pp. 3-4.

⁷⁷⁸ Mr Peter Besseling, Independent Member for Port Macquarie, *Submission 29*, p. 3.

⁷⁷⁹ Mr Peter Draper, Independent Member for Tamworth, *Submission 10*, p. 2.

⁷⁸⁰ Public Interest Advocacy Centre, *Submission 26*, p. 3.

⁷⁸¹ FamilyVoice Australia, *Submission 4*, p. 3.

Level of public funding

- 7.70 The Legislative Council Select Committee on Electoral and Political Party Funding considered that its proposed electoral funding scheme (advocating caps and bans on donations and the introduction of expenditure limits) would require an increase in public funding, and recommended that the Premier consult to determine a reasonable increase in electoral and political party funding.⁷⁸²
- 7.71 Some participants in the current inquiry stated that an increase in public funding should be modest, with the Greens NSW arguing that a 'modest degree of public funding is a fair public investment to ... affirm that public, not private, interests direct governments in this State.'⁷⁸³
- 7.72 The Greens NSW also supported automatic indexing of funding levels in line with the consumer price index in order to ensure that the scheme remains viable.⁷⁸⁴ The Shooters Party submitted that taxpayers should be 'fully informed of the costs associated with a publicly funded election campaign.'⁷⁸⁵
- 7.73 Other participants, including the National Party (NSW Branch), submitted that public funding would have to increase if private funding was curbed, in order that parties' and candidates' ability to communicate with voters not be inappropriately limited:
- The rate of public funding will obviously need to be increased to take account of reductions in the availability of private funding to political parties and candidates. Otherwise the introduction of donation limits could be inappropriately impact upon freedom of political communication.⁷⁸⁶
- 7.74 It was noted by participants that the cost of public funding would inevitably increase over time with population increases and inflation. The National Party (NSW Branch) argued that such increases were appropriate, as they reflected actual increases in campaign costs:
- The current system of allocating monies for campaign funding is based primarily on the number of enrolled electors in the state, and adjusted for inflation. This is entirely appropriate, and takes into account the fact that the real cost of election campaigning will rise with population growth.⁷⁸⁷
- 7.75 The Liberal Party (NSW) argued in favour of a substantial increase in public funding to cover the majority of campaign costs: 'the overall pool of public funding will need to be significantly increased to ensure that the existing parties represented in the Parliament and their viable competitors should be able to have a significant proportion of their campaign costs reimbursed through public funding.'⁷⁸⁸
- 7.76 On the other hand, Ms Clover Moore MP expressed the view that the current cost of campaigns is too high and that funding should not be substantially increased to fill a gap left by restricted or banned private donations. Ms Moore reflected that the public would not support such an increase and that parties should be encouraged to broaden their funding base rather than being supported to run campaigns that are substantially publicly funded:

⁷⁸² Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, pp. 75-9.

⁷⁸³ The Greens NSW, *Submission 19*, p. 1.

⁷⁸⁴ The Greens NSW, *Submission 19*, p. 9.

⁷⁸⁵ The Shooters Party, *Submission 25*, p. 1.

⁷⁸⁶ NSW National Party, *Submission 18*, p. 14.

⁷⁸⁷ NSW National Party, *Submission 18*, p. 13.

⁷⁸⁸ Liberal Party of Australia (NSW Division), *Submission 17*, p. 27.

Public funding

Current campaign expenditures are excessive, fuelled by corporate donations, but public funding should not be substantially increased to compensate for a loss of corporate donations. I do not believe there is community support for open-ended taxpayer funding ...⁷⁸⁹

7.77 Ms Moore submitted that public funding could be increased in line with inflation and through incorporating the Public Education Fund, which in her view should be abolished: 'public funding should be marginally increased supplemented by absorption of the Educational Fund and adjusted over time for inflation.'⁷⁹⁰

7.78 Professor George Williams argued that funding levels may not need to increase if expenditure and donations were restricted as part of a public funding scheme:

Reforms should be founded on the principle of the maximum possible transparency and disclosure and should include caps on donations and expenditure. Combined with restrictions on the use of funds for purposes like electronic advertising, this might mean that the current level of public funding will be sufficient, or near to sufficient.⁷⁹¹

7.79 As previously noted, the Urban Taskforce advocated for a significant increase in public funding to meet all campaign costs.⁷⁹²

7.80 FamilyVoice Australia observed that restricting donations 'will either require drastic reductions in expenditure on election campaigns or a massive increase in public funding', and stated that a large amount of public expenditure would therefore be required:

The [donations] ban could result in the loss of about \$50 million in election campaign funding from private sources. If this were to be made up from the public purse it would, allowing for the current level of public funding, require a total expenditure of over \$60 million.⁷⁹³

Formula to calculate and allocate public funding

7.81 The Committee heard various proposals for the way public funding could be allocated, with some participants suggesting that primary votes gained could continue to be used to determine public funding entitlements. However, others argued that eligibility for funding would have to be calculated by reference to other measures of public support, for example, party membership numbers. It was suggested by a number of inquiry participants that the maximum amount of public funding allocated to each party or candidate should continue to be limited to no more than half of the funding pool.

Evidence from political parties

7.82 The Liberal Party (NSW) submitted that the current 4% threshold should be retained, with funding being linked to the number of seats contested and the percentage of first preference votes gained.⁷⁹⁴ Although the Party supported the current system whereby the funding pool is divided into two funds, it argued that the Legislative Assembly's proportion of the allocation should be significantly increased to two-thirds

⁷⁸⁹ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, p. 3.

⁷⁹⁰ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, p. 4.

⁷⁹¹ Professor George Williams, *Submission 1*, Attachment 1, p. 1.

⁷⁹² Urban Taskforce, *Submission 22*, p. 1.

⁷⁹³ FamilyVoice Australia, *Submission 4*, p. 2.

⁷⁹⁴ Liberal Party of Australia (NSW Division), *Submission 17*, pp. 26-7.

of the fund, 'reflecting the role the Legislative Assembly plays in forming the government'.⁷⁹⁵

We do not think it necessary to further subdivide the Legislative Assembly Fund into funds for individual electoral districts. The fund would simply be allocated according to each party's share of the first preference votes. The method of calculation can be the same for Independent candidates. Likewise, the Legislative Council Fund could also be allocated to registered parties according to their share of the vote.⁷⁹⁶

- 7.83 In terms of the overall funding pool, the Liberal Party proposed that it be determined based on a dollar amount that is multiplied by the number of voters enrolled at the beginning of the regulated period.⁷⁹⁷
- 7.84 However, the National Party (NSW Branch) argued for retention of the current funding split between the Central Fund and the Constituency Fund, submitting that a change would 'adversely affect small parties or independents that do not run candidates for both the Legislative Council and Assembly'.⁷⁹⁸
- 7.85 Mr Ben Franklin, State Director of the NSW Branch of the National Party of Australia, told the Committee that while the Constituency Fund is for the funding of campaigns in individual electorates, the Central Fund 'was always intended for more than just funding a Legislative Council campaign' and the objectives for its establishment remain valid. Mr Franklin also pointed to the possible consequences of varying the fixed proportions that are currently allocated to the Funds, with independents or minor parties being disadvantaged:
- If, for example, you swap the ratio from two to one to the Legislative Council to two to one to the Legislative Assembly, it would mean that The Shooters Party, who only run in the Legislative Council, would lose a significant proportion of funds. On the other hand, if you increase the Legislative Council funding at the expense of the Constituency Fund, then Independents who only run in Legislative Assembly seats would obviously be proportionately disadvantaged. For all those reasons we contend that keeping the status quo is the most appropriate solution. ... our submission has tried to keep to the status quo in as many areas as possible to ensure that the significant changes that will have to be made are as understandable, acceptable and easily digestible by the community as possible.⁷⁹⁹
- 7.86 The National Party (NSW Branch) also expressed reservations about tying funding to primary votes, noting that it could result in independents and small parties being financially disadvantaged:
- Public funding of elections is currently tied to a party's primary vote. The main problem with this system, and one which must be addressed if public funding is to become such a major part of campaign finance, is that parties suffering a particularly adverse result at the polls are placed at a financial disadvantage for future elections. This entrenches incumbents and provides uncertainty for small parties and independents, whose political fortunes may fluctuate more dramatically than those of the major parties.⁸⁰⁰
- 7.87 Although the National Party (NSW Branch) proposed that the primary vote be retained as the basis for determining funding allocations, the Party recommended that the committee explore 'ways of making allowance for singular adverse electoral

⁷⁹⁵ Liberal Party of Australia (NSW Division), *Submission 17*, p. 27.

⁷⁹⁶ Liberal Party of Australia (NSW Division), *Submission 17*, p. 27.

⁷⁹⁷ Liberal Party of Australia (NSW Division), *Submission 17*, p. 27.

⁷⁹⁸ NSW National Party, *Submission 18*, p. 12.

⁷⁹⁹ Mr Ben Franklin, State Director, NSW National Party, *Transcript of Evidence*, 1 February 2010, pp. 6-7.

⁸⁰⁰ NSW National Party, *Submission 18*, p. 13.

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events.⁸⁰¹ In terms of the rationale for retaining current eligibility criteria, Mr Ben Franklin, State Director of the NSW Branch of the National Party, told the Committee that:

... public funding of election campaigns, ... is determined in our model and in most models that are proposed by some sort of assessment of the primary vote of that candidate or individual or party and giving them an equivalent amount of public funding depending on the figure that is struck. Clearly that is not going to be a problem for new parties or candidates or independents. If they can prove their support in the electoral marketplace then they will receive the appropriate funding, so I do not see that that is an issue.⁸⁰²

7.88 The National Party argued that incumbent parties or candidates should not be unfairly advantaged by receiving the bulk of available public funding:

It would arguably run contrary to the purpose of this reform if the system imposed were to unfairly benefit incumbents. The current stipulations that no party receive more than 50% of the Central Fund or of the Constituency Fund in any one district ensure that an adverse election result does not significantly shift the balance of funding to the government or to the incumbent candidate in a district.⁸⁰³

7.89 The Greens NSW agreed, stating that, in order to encourage pluralism, 'no party or candidate should be entitled to receive more than 50% of the total pool of public funding available at either a state or electoral district level.'⁸⁰⁴

7.90 The Greens NSW submitted that public funding should be based on primary votes received, stating that 'There are clear precedents for this form of public funding including at both a Commonwealth level and internationally with the Canadian electoral funding system.'⁸⁰⁵ Publicly funded election advertising during the campaign period was also suggested by the Greens.⁸⁰⁶

7.91 In terms of the allocation of funding, the CDP recommended that the 4% threshold be removed, with all candidates paying a higher nomination fee (to discourage frivolous nominations) and receiving public funding based on the number of primary votes they receive. According to the CDP proposal, the public funding allocated to candidates would gradually drop as the number of primary votes gained increases, with the aim of providing 'some degree of equity to all candidates, both Party-affiliated and independents.'⁸⁰⁷

7.92 The CDP argued that party membership may not be an appropriate way to determine funding allocations:

We submit that any funding model based on the number of Party members is open to manipulation unless the membership fees charged and the duration of membership are realistic. For example, it is possible for a party to offer free membership and/or sign-up members just before the Election Commission's closing date for Party Registration.⁸⁰⁸

⁸⁰¹ NSW National Party, *Submission 18*, p. 13.

⁸⁰² Mr Ben Franklin, State Director, NSW National Party, *Transcript of Evidence*, 1 February 2010, p. 4.

⁸⁰³ NSW National Party, *Submission 18*, p. 14.

⁸⁰⁴ The Greens NSW, *Submission 19*, p. 8.

⁸⁰⁵ The Greens NSW, *Submission 19*, p. 7.

⁸⁰⁶ The Greens NSW, *Submission 19*, p. 9.

⁸⁰⁷ Christian Democratic Party, *Submission 28*, p. 3.

⁸⁰⁸ Christian Democratic Party, *Submission 28*, p. 8.

7.93 Mr Robert Borsak, Chairman of the Shooters Party, told the Committee that a formula to allocate public funding should be formulated in a way that is equitable for smaller parties that do not receive as many votes as the major parties:

... Smaller parties obviously get less votes, so if there is some sort of formula-based arrangement, if it is going to be a level playing field once we get to the election, then we are going to need more dollars per vote than the larger parties get per vote. That is the way we would look at it. I think it is pretty important for us to be in a position when we approach an election—and it depends on what other restrictions come around in that process, and what the balance is—to be able to grow our appeal by growing the dollars that we get.⁸⁰⁹

Evidence from independent Members of Parliament

7.94 Ms Clover Moore MP supported retention of the current primary vote based model for the allocation of funding, while stating that ‘the proportions of political party funding and electoral funding should be reviewed with electoral funding marginally increased to \$5,000 per 10 per cent of the primary vote’.⁸¹⁰ Ms Moore also submitted that the amounts allocated to the Central and Constituency Funds should be adjusted so that 60% of the total fund is allocated to the Central Fund and 40% to the Constituency Fund in order to recognise the ‘increasing importance of locally based campaigns.’⁸¹¹

7.95 Mr Peter Draper MP emphasised the importance of equity and transparency, stating that public funding ‘should be dependent on a candidate receiving a minimum 5% of the first preference vote’.⁸¹²

7.96 Mr Greg Piper MP proposed that expenditure be capped, with public funding only being available for half of the allowable expenditure:

Limit the amount that candidates need to raise by providing partial public funding. I believe that this should be 50% of the capped allowable expenditure. Certain electorates may need some indexation of the cap based on geographic area and the associated additional costs of engaging a widely dispersed community.⁸¹³

Evidence from the Electoral Commissioner

7.97 At the Committee’s initial hearing with the Electoral Commissioner on 9 December 2009, the Commissioner told the Committee that it is important that public funding not be allocated solely on the basis of the number of votes a party receives at each election, in order to ensure that parties remain viable in the long-term:

One of the other things that is very important in this concept of funding political parties is it sort of spins around this idea of winner takes all. There are always the risks, as we know with Federal and State elections, that there tends to be the tide—the tide comes in and the tide goes out. You have to ensure that at elections political parties that are on the ebb do not become so depleted of funding that they cannot be an effective political party while they are in that state of having gone out of office. So it is important that there is some equalisation scheme so that parties are not just funded on the basis of a very simple approach of how many votes they got at the last election, because that could mean that a party could be very depleted, and that would not be in the democratic interest. ...⁸¹⁴

⁸⁰⁹ Mr Robert Borsak, Chairman, Shooters Party, *Transcript of evidence*, 1 February 2010, p. 65.

⁸¹⁰ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, pp. 2-3.

⁸¹¹ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, p. 4.

⁸¹² Mr Peter Draper, Independent Member for Tamworth, *Submission 10*, p. 1.

⁸¹³ Mr Greg Piper, Independent Member for Lake Macquarie, *Submission 8*, p. 2.

⁸¹⁴ Mr Colin Barry, NSW Electoral Commissioner and Chair of the NSW Election Funding Authority, *Transcript of evidence*, 9 December 2009, pp. 9-10.

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7.98 According to the Electoral Commission, public funding should encourage participation in democracy by not limiting funding to parties and candidates that are likely to achieve a certain level of support:

A public funding model should recognize that eligibility should not be limited to only those certain of determined levels of voter support but, instead, should encourage and support legitimate democratic competition. To this end, election participants should be entitled to enter into a scheme where reasonable support will not leave them totally out of-pocket but, rather, with there being opportunity to recover partial cost.⁸¹⁵

7.99 The public funding model submitted by the Electoral Commission, including criteria and eligibility thresholds for entitlements, is reproduced at Table 36. The Commission made the following points about the model:

- The model engages the principle that participants should have genuine political ambition, based on a platform which has (or is likely to have) reasonable electoral support in the relevant district or New South Wales as a whole.
- The model satisfies the objective of full public funding of the cost of a campaign, subject to satisfying eligibility criteria. Not all participants will meet eligibility for the full entitlement.
- Any model where full public funding of an election campaign is available should be in harmony with restrictions on the amount that a participant is entitled to spend, otherwise it would be liable to excessive spending.
- An underlying principle for the model is that the period during which “electoral expenditure” is incurred be ongoing, across the whole four year electoral cycle.
- Eligibility for many entitlements is based on a minimum threshold of 4%, consistent with the terms of the present legislation and with what has been found to be the experience in many international jurisdictions.
- Public funding should be on the basis of a reimbursement (not entitlement) scheme, although provision does exist for advance payments.⁸¹⁶

⁸¹⁵ Electoral Commission NSW/Election Funding Authority, *Submission 30*, p. 2.

⁸¹⁶ Electoral Commission NSW/Election Funding Authority, *Submission 30*, pp. 1-2.

Table 36: NSWEC funding and disclosure model⁸¹⁷**PUBLIC FUNDING**

Participant	State general elections	State by-elections
Registered political parties (RRPs)	<ul style="list-style-type: none"> • RPP will be entitled to public funding for general campaign spending if they obtain: <ul style="list-style-type: none"> o at least an average of 4% of total first preference votes received for all endorsed candidates in the Legislative Assembly, or an endorsed candidate is elected; OR o at least 4% of first preference votes received in aggregate by an endorsed group and candidates in that group (for an endorsed group), or, for an endorsed candidate (when not in a group) in the Legislative Council, or a candidate is elected • The RPP will be entitled to public funding of 50% of all general campaign spending where: <ul style="list-style-type: none"> o the average of the total number of first preference votes received by all endorsed candidates in the Legislative Assembly is at least 4%, or o the total number of first preference votes received in aggregate by an endorsed group and candidates in that group is at least 4%, or o the total number of first preference votes received by an endorsed candidate not in a group in the Legislative Council is at least 4%, • The RPP will be entitled to public funding of 100% of all general campaign spending where: <ul style="list-style-type: none"> o the average of the total number of first preference votes received by all endorsed candidates in the Legislative Assembly is at least 8%, or o the total number of first preference votes received in aggregate by an endorsed group and candidates in that group in the Legislative Council is at least 8%, or o the total number of first preference votes received by an endorsed candidate not in a group in the Legislative Council is at least 8%, or, o an endorsed candidate is elected in either the Legislative Assembly or Legislative Council 	<ul style="list-style-type: none"> • RPP will be entitled to public funding for general campaign spending if they obtain: <ul style="list-style-type: none"> o at least 4% of total first preference votes for an endorsed candidate, or an endorsed candidate is elected • The RPP will be entitled to public funding of 50% of all general campaign spending where: <ul style="list-style-type: none"> o the first preference votes received for an endorsed candidate is at least 4% • The RPP will be entitled to public funding of 100% of all general campaign spending where: <ul style="list-style-type: none"> o the first preference votes received for an endorsed candidate is at least 8%, or o an endorsed candidate is elected
Legislative Assembly Candidates (endorsed / independent)	<ul style="list-style-type: none"> • When an endorsed candidate receives 4% of the first preference vote, the RPP will be entitled to reimbursement of 50% of the candidate election campaign spending • When an independent candidate receives 4% of the first preference vote, the candidate will be entitled to reimbursement of 50% of the candidate election campaign spending • When an endorsed candidate receives 8% of the first preference vote, the RPP will be entitled to reimbursement of 100% of the candidate election campaign spending • When an independent candidate receives 8% of the first preference vote, the candidate will be entitled to reimbursement of 100% of the candidate election campaign spending 	<ul style="list-style-type: none"> • When an endorsed candidate receives 4% of the first preference vote, the RPP will be entitled to reimbursement of 50% of the candidate election campaign spending • When an independent candidate receives 4% of the first preference vote, the candidate will be entitled to reimbursement of 50% of the candidate election campaign spending • When an endorsed candidate receives 8% of the first preference vote, the RPP will be entitled to reimbursement of 100% of the candidate election campaign spending • When an independent candidate receives 8% of the first preference vote, the candidate will be entitled to reimbursement of 100% of the candidate election campaign spending

⁸¹⁷ Electoral Commission NSW/Election Funding Authority, *Submission 30, Funding and Disclosure Model*, pp. 3-6.

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Participant	State general elections	State by-elections
Legislative Council Groups and Ungrouped candidates	<p><u>Groups</u></p> <ul style="list-style-type: none"> • A group will be entitled to public funding on the following basis: <ul style="list-style-type: none"> o where a group and the candidates in the group receive a total of 4% of the first preference votes they will be entitled to reimbursement of 50% of their electoral expenditure 	
	<ul style="list-style-type: none"> o where a group and the candidates in the group receive a total of 8% of the first preference votes or gets one of its members elected they will be entitled to reimbursement of 100% of their electoral expenditure <p><u>Ungrouped Candidates</u></p> <ul style="list-style-type: none"> • A candidate will be entitled to public funding on the following basis: <ul style="list-style-type: none"> o where a candidate receives 4% of the first preference vote they will be entitled to reimbursement of 50% of their electoral expenditure o where a candidate receives 8% of the first preference vote or is elected they will be entitled to reimbursement of 100% of their electoral expenditure 	

Evidence from academics

7.100 Dr Tham told the Committee that an equitable public funding scheme should be based on the level of popular support for a party or candidate, determined through an assessment of factors such as the number of votes gained and party membership levels, in addition to matching private donations:

... As to the components of what seems to be a fair public funding scheme that not just supports the parties but also opens up the political process, there are two questions. One set of questions is firstly about eligibility. What do you need to do to be eligible for public funding? ... It seems to me that eligibility has to depend on popular support. How many votes you receive is a good way to determine that. I take the point about branch stacking and corruption, but serious thought should be given to a public funding system that also bases eligibility on the number of party members.

You can have a certain amount of funds calculated according to the votes you have received and a certain amount of funds calculated according to the number of party members you have. Also another component could be matching funds. What I mean by matching funds is where public funding is given to match small contributions. So if a person gives maybe \$500 the public matches to some extent, maybe 20 per cent or 30 per cent. That is an important way of encouraging the kind of political contributions you want to see to invigorate the political system.⁸¹⁸

7.101 In a report on political funding commissioned by the Electoral Commission, Dr Tham considered how public funding should be allocated. He recommended that the current funding system be replaced by a Party and Candidate Support Fund, which would provide for:

- election funding payments – parties (or a group of candidates) being eligible if they secure at least 2% of first preference votes cast for Legislative Assembly and Legislative Council elections, and candidates being eligible if they secure at least 4% of first preference votes cast in a particular constituency. Payments would be ‘subject to a tapered scheme with the payment rate per vote decreasing according to the number of first preference votes received’.

⁸¹⁸ Dr Joo-Cheong Tham, *Transcript of evidence*, 1 February 2010, pp. 46-7.

- annual allowances – parties eligible for funding payments and those with membership exceeding a certain level (for example, 500) should be eligible for these allowances, which would be distributed according to a formula based on votes received in the previous election and current membership figures.
- policy development grants – eligibility consistent with that for annual allowances, with the funds being used for activities ‘strictly aimed at policy development and not electioneering’.⁸¹⁹

7.102 Dr Tham argued that the proposed Support Fund would ensure that parties are adequately funded, if private donation sources were restricted. He reasoned that it would fund parties in an equitable way, while also encouraging policy development and grass roots membership support:

... a Party Support Fund scheme funds parties in a way that promotes fairness, especially by financially assisting parties with significant electoral and/or membership support through a tapered scheme. This is akin to a progressive income tax system, with less resourced parties helped to a greater degree. Also, the payment of public funds is explicitly tied to the promotion of party functions. The policy development grants should encourage parties to devote more time and energy to generating new ideas and policies. Linking annual allowances to membership figures may result in the parties recruiting more members and thereby, invigorating themselves. Both may result in a richer democratic deliberation.⁸²⁰

7.103 Associate Professor Anne Twomey agreed that a combination of criteria, including votes gained and party membership, may be the most effective way of assessing support as a basis for equitable allocation of funding:

... Again you probably need some kind of a mixed process where you look back not only the support the party received at the previous election but how many members does the party have now, what level of capped donations are they receiving from members and perhaps get some level of matching funding for that. ... There are ways of mixing up the various interests to try to get a more fair and representative apportionment of what public funding should go to which parties and which candidates.⁸²¹

7.104 Associate Professor Graeme Orr outlined the difficulties with tying funding to party membership, suggesting that funding should instead be linked to certain campaigning methods, such as the distribution of policy statements:

In theory, public funding can be tailored to encourage greater connection by parties with their grass roots. Matching payments for party memberships or small scale donations are options that are often been touted. However such proposals present three practical difficulties: (1) auditing against fraud, (2) privacy of donors/members and (3) perverse incentives (eg to branch-stacking).

It would be simpler to tie some public funding to specific, desirable forms of campaigning. For instance, tie some payments to the distribution by parties of formal

⁸¹⁹ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, pp. 73-5, http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010)

⁸²⁰ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 75, http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010)

⁸²¹ Associate Professor Anne Twomey, *Transcript of evidence*, 1 February 2010, p. 46.

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policy statements, and allocate some monies to the production and airing of televised debates.⁸²²

Evidence from other participants

7.105 FamilyVoice Australia submitted that, to prevent public funding from being 'used entirely as a replacement for efforts to raise funds privately', public funding could be based on votes received, with additional public funds also being allocated to match private donations raised by the party or candidate.⁸²³

7.106 The Independent Commission Against Corruption recommended that, in order to minimise corruption, 'no weight be placed on party membership subscriptions and individual donations as a determinant of entitlement to public funding'.⁸²⁴ The ICAC argued that using party membership numbers to determine public funding:

... could create an incentive for membership numbers to be corruptly misrepresented. It would also be expensive and time-consuming for a body such as the Election Funding Authority or the Commission to investigate any alleged misrepresentations.⁸²⁵

7.107 The ICAC also submitted that providing for a system of 'matching funds', whereby public funding is allocated according to the amount of private donations a party or candidate receives, would 'create an incentive to maximise such funding by splitting donations, or otherwise working around the donation limit to come within the designated threshold'.⁸²⁶

7.108 PIAC submitted that 'measures of public support beyond votes should be utilised to calculate entitlement to public electoral funding in the lead up to an election'.⁸²⁷ PIAC advocated an emphasis on community involvement and consultation by linking funding to social objectives:

PIAC supports the tying of at least a portion of any public electoral funding to particular social objectives, such as occurs in other countries. This could support a refocusing on grass-roots democracy and deliberative democracy including community consultation and campaigns, policy development, and party building; countering the current tendency in Australia for political parties to spend the majority of their funds on election advertising in the election period. PIAC submits that accountability and representative and deliberative democracy would be enhanced if parties were required to earn at least a proportion of their public electoral funding through such activities.⁸²⁸

7.109 According to PIAC, public funding is 'inherently inequitable' if it is allocated in a way that advantages major parties. PIAC proposed that payments be allocated on a progressively decreasing sliding scale, depending on the number of primary votes gained:

If the rationale for public funding is to assist political parties and candidates to participate in the democratic system then there is no justification for disparity in funding.

A solution to this disparity in funding would be to create a sliding scale of payment per primary vote, with a higher payment for the first bracket of votes won and then progressively decreasing. Such a measure would contribute to financial equivalency between parties and candidates.

⁸²² Associate Professor Graeme Orr, *Submission 23*, p. 4.

⁸²³ FamilyVoice Australia, *Submission 4*, p. 3.

⁸²⁴ Independent Commission Against Corruption, *Submission 14*, p. 3.

⁸²⁵ Independent Commission Against Corruption, *Submission 14*, p. 3.

⁸²⁶ Independent Commission Against Corruption, *Submission 14*, p. 3.

⁸²⁷ Public Interest Advocacy Centre, *Submission 26*, p. 4.

⁸²⁸ Public Interest Advocacy Centre, *Submission 26*, p. 5.

PIAC does not accept the argument that the funding is relative to support and therefore parties have earned it. The current predominance and therefore larger earning capacity of the larger parties is as much the result of previous partisan decisions about electoral law as it is about community support.⁸²⁹

Timing

- 7.110 In terms of the timing of payments, the Nationals submitted that election funding should be paid after the declaration of the poll, with full payment to recipients within 21 days of electoral returns being lodged.⁸³⁰ The CDP proposed that payment occur 'as soon as administratively practical after the final results of the election are known.'⁸³¹
- 7.111 The Committee notes that the Electoral Commission's funding model provides that 'mechanisms and timing for payment remain as presently provided for in the *Election Funding and Disclosures Act 1981*.'⁸³²

Recipient and method of payment

- 7.112 Most participants favoured the retention of a model that provides for the public funding of campaign expenses through reimbursement, rather than funding being allocated on an entitlement basis, as is the case federally. The funding model proposed by the Electoral Commission provides for a scheme that continues to be based on the reimbursement of eligible electoral expenditure, to certain levels of entitlement.⁸³³
- 7.113 The Liberal Party expressed support for the current reimbursement system for actual expenses. In terms of the recipient of the payment, the Party submitted that the registered party agent, not candidates or local units, should receive the funding allocation.⁸³⁴
- 7.114 The CDP agreed, stating that funding 'should only be used to reimburse genuine election expenditure with receipts.'⁸³⁵ According to the CDP, payment could occur through funds being electronically transferred into the party's or independent candidate's nominated bank account, with the recipient being either the party or the candidate:
- Where a candidate stands for election on behalf of political party, then the public funding should be paid to that Party. However, when candidates are truly independent and are responsible for meeting all the costs associated with promoting themselves, then they are reasonably and realistically entitled to receive the public funding entitlement as a personal payment, which of course becomes assessable for income tax purposes. ...⁸³⁶
- 7.115 The National Party (NSW Branch) recommended that funding be paid to the party's or candidate's registered agent 'as they are responsible for the finances and returns to the EFA.'⁸³⁷ The reimbursement system was favoured by the National Party

⁸²⁹ Public Interest Advocacy Centre, *Submission 26*, p. 3.

⁸³⁰ NSW National Party, *Submission 18*, p. 15.

⁸³¹ Christian Democratic Party, *Submission 28*, p. 10.

⁸³² Electoral Commission NSW/Election Funding Authority, *Submission 30*, p. 2.

⁸³³ Electoral Commission NSW/Election Funding Authority, *Submission 30*, pp. 2-3.

⁸³⁴ Liberal Party of Australia (NSW Division), *Submission 17*, p. 26.

⁸³⁵ Christian Democratic Party, *Submission 28*, p. 3.

⁸³⁶ Christian Democratic Party, *Submission 28*, pp. 9-10.

⁸³⁷ NSW National Party, *Submission 18*, p. 15.

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(NSW), who argued that it would be inappropriate for funding to be granted for anything other than campaign expenses:

The purpose of public campaign funding is to enable parties and candidates to communicate their policies with the electorate. It would seem inappropriate therefore to allocate monies for any purpose other than to reimburse parties and candidates for such expenses.⁸³⁸

7.116 The Greens NSW submitted that registered political parties should be the recipients of public funding payments, while eligible independents should receive direct payments.⁸³⁹

7.117 PIAC reflected that, although a reimbursement scheme can act to enhance accountability and transparency, it should not be so restrictive that it disadvantages independent candidates and new parties:

... if such a scheme is limited to a short campaign period, and is too restrictive in terms of what types of expenditure may be reimbursed, the viability of new or small parties and independent participants may be at risk. This is particularly the case if restrictions on expenditure and donations are in place.⁸⁴⁰

7.118 Ms Clover Moore MP reflected that, although the reimbursement system can be a burden on individual candidates, it is appropriate as it only provides for the reimbursement of campaign expenses and ensures that 'candidates cannot profit from the system', while also not posing an obstacle to independent candidates:

The reimbursement system has not proved to be a significant obstacle preventing independent candidates, first time candidates or new political groups from contesting elections.⁸⁴¹

7.119 Ms Moore also noted that recent reforms - preventing candidates from using personal campaign accounts and requiring the appointment of official agents for the management of independents' campaign accounts - have proved to be difficult for independent candidates. Ms Moore submitted that many independent candidates have found it difficult to appoint a person who is qualified and willing to take on the responsibilities of an official agent, and that independents should be permitted to manage their own campaign accounts:

While it is vital that campaign accounts are kept separate from personal or business accounts, candidates should have the option to either appoint an official agent to manage that account or manage the campaign account themselves, provided they meet all reporting and other responsibilities imposed by the *Election Funding and Disclosures Act*.⁸⁴²

7.120 Associate Professor Anne Twomey expressed the view that a system that does not link public funding with the amount spent by parties on campaigning could result in candidates and parties profiting from public funding. Associate Professor Twomey told the Committee that:

... There are some risks in using public funding to fund parties generally rather than as compensation for actual expenditure. I think that is a factor that needs to be considered. From my point of view, I think I would prefer the public funding to be directed at compensation for actual election campaigning costs and other methods of raising

⁸³⁸ NSW National Party, *Submission 18*, p. 14.

⁸³⁹ The Greens NSW, *Submission 19*, p. 8.

⁸⁴⁰ Public Interest Advocacy Centre, *Submission 26*, p. 3.

⁸⁴¹ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, p. 4.

⁸⁴² Ms Clover Moore, Independent Member for Sydney, *Submission 27*, p. 4.

money be used, such as from private individuals or potentially corporations, that are capped, for the purposes of funding parties.⁸⁴³

Restrictions on the use of public funding

7.121 The Greens NSW argued that expending public funding on personal expenses should be prohibited under a reformed scheme.⁸⁴⁴ On the other hand, FamilyVoice Australia submitted that restrictions placed on parties' spending of public funding should not impede their ability to communicate with voters:

Any shift to greater use of public funding of election campaigns should not be used as an excuse to interfere in the freedom of political parties and candidates to choose their preferred means of political communication with the voters. There is no warrant for such interference in a free democracy.

The existing requirements for establishing that funds have been expended on an election campaign before public funding is received are sufficient.⁸⁴⁵

7.122 FamilyVoice Australia expressed the view that a public funding scheme should not involve restrictions on how funding is spent, stating that there is no 'no persuasive case for any general restrictions on election expenditure.'⁸⁴⁶

Annual audited accounts

7.123 The Committee heard that annual audited accounts should be a requirement of a public funding model, with the Liberal Party submitting that the annual lodgement of full, audited financial statements should be a condition of registration for political parties, to ensure compliance.⁸⁴⁷ The Greens NSW agreed that annual auditing of parties or candidates who receive public funding should be compulsory for compliance purposes.⁸⁴⁸

7.124 Associate Professor Graeme Orr also expressed support for a system that provides for party accounts to be annually audited and published in order to improve accountability and transparency around public funding, stating that:

The fact is that for 20-odd years parties have been receiving large amounts of public funding after elections that they can use prospectively to pay off debt or for party administration. ... we really should have a similar model to what corporations and trade unions already have. That will provide some further accountability for party members as well as for onlookers, the media and so on.⁸⁴⁹

7.125 Professor George Williams agreed that parties receiving public funding should be subject to additional compliance mechanisms to ensure accountability: 'I would say if the public is really going to be forking out the money in any more significant way, then political parties need to bear far higher responsibilities that go with that.'⁸⁵⁰

7.126 The ICAC submitted that 'any political party, person or other entity that receives public funding for political purposes should be required to publish an annual statement containing relevant information about income and expenses.'⁸⁵¹ The

⁸⁴³ Associate Professor Anne Twomey, *Transcript of evidence*, 1 February 2010, p. 57.

⁸⁴⁴ The Greens NSW, *Submission 19*, p. 8.

⁸⁴⁵ FamilyVoice Australia, *Submission 4*, p. 3.

⁸⁴⁶ FamilyVoice Australia, *Submission 4*, p. 3.

⁸⁴⁷ Liberal Party of Australia (NSW Division), *Submission 17*, p. 16.

⁸⁴⁸ The Greens NSW, *Submission 19*, p. 6.

⁸⁴⁹ Associate Professor Graeme Orr, *Transcript of evidence*, 1 February 2010, p. 58.

⁸⁵⁰ Professor George Williams, *Transcript of evidence*, 1 February 2010, pp. 57-8.

⁸⁵¹ Independent Commission Against Corruption, *Submission 14*, p. 4.

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Commission proposed that the statements, which should be audited by an independent statutory authority, should contain:

- A record of all contributions from identified third parties, whether by money or other means, directly or indirectly received, in the year in question.
- Full details of all expenses for political purposes of whatever kind, incurred in the year in question out of public funding.
- Full and detailed explanations of any difference between the party's current assets as reflected in its previous annual statement and contributions and other monies received, on the one hand, and expenditure on the other. Any change in the amounts reflected for current assets and all use of monies received in the period in question must be reconciled with expenditure.⁸⁵²

7.127 The Electoral Commission's funding model proposed that registered political parties should be required to submit annual audited financial returns, in order to be eligible for operational funding for the following financial year.⁸⁵³

Administration and operational funding

7.128 The Legislative Council Select Committee noted the lack of monitoring occurring in relation to the use of Political Education Fund payments and recommended the Fund be abolished and replaced with two new funds. The Select Committee recommended that the Premier:

- Establish a Party Administration Fund, which would be open to all parties that have candidates elected to either the Legislative Council or Legislative Assembly, and would provide annual payments to subsidise party administration costs.
- Review the funding provided through the Party Administration Fund to ensure that parties are adequately funded and assess whether it is appropriate to calculate each party's entitlement based on the cost of a postage stamp.
- Establish a new Political Education Fund, to be administered by the NSW Electoral Commission, and allocate monies equal to the value of the current Political Education Fund. The Fund should have clear objectives and assessment criteria against which to monitor the effectiveness of projects.⁸⁵⁴

7.129 Most participants in the current inquiry agreed that a reformed scheme would need to provide for public funding of parties' administration costs, with some arguing that administration funding would have to be increased if private donations were restricted. The Committee heard various suggestions for determining eligibility for administration funding, including proposals to publicly fund administration costs in an equitable way that does not disadvantage emerging parties.

7.130 Associate Professor Orr noted that parties already receive 'a fair amount of support within parliamentary resources', while also observing that parties are primarily volunteer organisations, and should not require funding for work performed on a volunteer basis. He told the Committee that such funding may serve to increase campaign expenditure, and argued that parties should receive public funding if they meet certain conditions:

⁸⁵² Independent Commission Against Corruption, *Submission 14*, p. 4.

⁸⁵³ Electoral Commission NSW/Election Funding Authority, *Submission 30*, Funding and Disclosure Model, p. 5.

⁸⁵⁴ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, pp. 67-79.

We are still historically running on the model of volunteer organisations. I am not sure why you would necessarily be funding political parties for their general administration expenses when that remains something that should be done on an essentially voluntary basis. The real issue is the ratcheting-up of expenditure on election campaigns or political advertising communication ... Maybe you might want to think about ways of public funding ... and whether you want to encourage that kind of electioneering by providing that some funding can be used only for the provision of party manifestos to put under doors, or through some other mechanism.⁸⁵⁵

- 7.131 As noted in paragraphs 7.101 –7.102, Dr Tham proposed the replacement of the current Administration and Education Funds with a Party and Candidate Support Fund, consisting of election funding payments, annual allowances and policy development grants.⁸⁵⁶
- 7.132 The Liberal Party submitted that a Party Administration Fund should be established to fund registered parties' ongoing costs through annual allocations to be paid on a quarterly basis. The allocated amount would be based on performance at the previous election, with allowance for 'some modifications to take account of the vicissitudes of the electoral cycle'.⁸⁵⁷ The Party proposed that eligibility for allocations should be determined according to a four tier system, based on members elected to both Houses:
- Tier One Parties with 25 Members of Parliament or more
 - Tier Two Parties with 10 - 24 Members of Parliament
 - Tier Three Parties with 5 - 9 Members of Parliament
 - Tier Four Parties with 1 - 4 Members of Parliament.⁸⁵⁸
- 7.133 According to the Liberal Party, the funding tiers should be structured to achieve the following aims:
- Enabling the governing party and the largest opposition party (in Tier One) to have stable, ongoing support for their administrative and other needs, at a level that would be sufficient to replace funding from corporations, trade unions and other organisations.
 - Continuing to ensure that the two principal parties remain viable during periods of electoral downturn, while not being too high a threshold to preclude new entrants winning eligibility at this level.⁸⁵⁹
- 7.134 Under the Liberal Party's proposal, funding would be annually indexed, commencing at an initial level to be provided for in the legislation establishing the funding scheme. The following figures were suggested as appropriate initial amounts:
- Tier One \$2,000,000
 - Tier Two \$750,000
 - Tier Three \$500,000

⁸⁵⁵ Associate Professor Graeme Orr, *Transcript of evidence*, 1 February 2010, pp. 57-8.

⁸⁵⁶ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, pp. 73-5,

http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010)

⁸⁵⁷ Liberal Party of Australia (NSW Division), *Submission 17*, p. 24.

⁸⁵⁸ Liberal Party of Australia (NSW Division), *Submission 17*, p. 24.

⁸⁵⁹ Liberal Party of Australia (NSW Division), *Submission 17*, p. 24.

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Tier Four \$250,000⁸⁶⁰

7.135 In countering potential claims that its proposed funding allocation model would favour the Coalition parties over the Labor Party, the Liberal Party observed that, although the Liberal and National parties are in a coalition for campaign purposes, they are administratively separate organisations and should therefore receive separate administrative allocations. The Party also noted that the potential incentive for parties to split for funding purposes should be addressed in the legislation:

... This is a classic example of the need to respect different traditions. While in Coalition for the purposes of campaigns, in Parliament and having previously formed Government together, in fact the Liberal and National Parties are two separate organisations. Inevitably, there is duplication of administrative functions, with entirely separate offices, staff, party forums and party units. Therefore, each must receive a separate allocation from the Party Administration Fund. ... A safeguard would need to be built into the legislation to remove any perverse incentive for parties to artificially split to secure higher funding.⁸⁶¹

7.136 In terms of equity for new and emerging parties, Party Administration funding could be made available 'for newly registered political parties with a viable level of support in the lead-up to an election', with support to be determined in the following way:

After the deadline for registration of parties 12 months prior to the general election, the Election Funding Authority could conduct opinion poll research to determine whether any of the parties without existing parliamentary representation is attracting, say, 5 percent of those polled. If such a party was identified, they could be eligible for pro rata Tier Four funding during the regulated period. ...⁸⁶²

7.137 The Liberal Party estimated that its proposed Fund would entail an initial allocation to registered parties of \$5,500,000 per annum, based on current parliamentary representation. In making this estimate, the Liberal Party noted that parties are currently allocated \$2,026,063 annually through the Political Education Fund.⁸⁶³

7.138 The National Party (NSW Branch) submitted that, if revenue from donations were to be restricted under a public funding model, parties should be provided with public support to fund party administration and policy development, in addition to meeting their campaign expenses:

Widespread decline in membership of political parties has meant that administration costs, once covered by party membership dues, are increasingly paid for by corporate and union donations. With the reduction in these funding sources under a reformed system, the parties will need a new source of funding in order to meet administration costs between elections.⁸⁶⁴

7.139 The National Party (NSW Branch) proposed that a party administration fund should be established, consistent with the recommendation of the Select Committee:

Monies from this fund should be paid to parties quarterly, and based on a linearly weighted moving average of primary vote share in the Legislative Assembly in the previous three elections. A separate allowance should be provided for parties with representation in the Legislative Council who do not contest seats in the Legislative Assembly to receive some funding.

⁸⁶⁰ Liberal Party of Australia (NSW Division), *Submission 17*, pp. 24-5.

⁸⁶¹ Liberal Party of Australia (NSW Division), *Submission 17*, pp. 24-5.

⁸⁶² Liberal Party of Australia (NSW Division), *Submission 17*, p. 24.

⁸⁶³ Liberal Party of Australia (NSW Division), *Submission 17*, p. 26.

⁸⁶⁴ NSW National Party, *Submission 18*, pp. 3, 16.

The rate of funding per vote should be indexed to inflation.⁸⁶⁵

7.140 Under the National Party proposal, eligibility for funding from the administration fund would be restricted to parties with elected representatives:

The second issue is ... the suggested party administration fund. I think that there does need to be some consideration of new players in that process, but at the end of the day The Nationals believe that until a party has an elected representative in parliament they should not be entitled to claim funding under the party administration fund. I think we have to draw the line somewhere, otherwise there will be all sorts of new parties being established every week that have no serious intention of winning elections or running for parliament ...⁸⁶⁶

7.141 The Greens NSW submitted that reasonable administrative costs, incurred during an electoral cycle by registered parties and elected independent Members, could be met by expanding and increasing the Political Education Fund to include funding for administration through annual payments based on the party's vote at the previous election. The Greens NSW also recommended that parties should have the discretion 'to determine whether periodic public funding is spent on election campaigns or party administration costs.'⁸⁶⁷

7.142 PIAC noted that a funding scheme based on reimbursement of expenditure should also take into account 'ongoing reasonable expenses of political participants.'⁸⁶⁸

7.143 The Electoral Commissioner recommended that an 'Operational Fund' be established to fund the on-going costs of both parties and candidates that received over 4% of primary votes over the past two state elections.

Table 37: Electoral Commissioner's proposal for Operational Funding⁸⁶⁹

Participant	State general elections	State by-elections
Registered political parties	<ul style="list-style-type: none"> • The RPP qualifies for an entitlement for operational support where either: <ul style="list-style-type: none"> o the total first preference votes obtained by all endorsed candidates of the party for all districts contested in the Legislative Assembly at the last two State General Elections is at least 4% of the total first preference votes; or o the first preference votes obtained by endorsed groups/candidates for the Legislative Council election at the last two State General Elections is at least 4% of the total first preference votes; or o a candidate is elected. • RPP required to submit annual audited financial returns to be eligible for next twelve months funding (based on a financial year). • The RPP to satisfy the annual continued registration requirements to be eligible for the payment of the operational funding allowance. • RPP would receive \$1 each financial year for the average of the total first preference vote received for the LA or the LC (whichever is the greater) at the last two State General Elections. • This funding applies to RPP's registered for State purposes and would replace the existing Political Education Fund. 	
Independent MPs	Independent MPs would receive \$1 each financial year for each first preference vote received at the last General Election.	<ul style="list-style-type: none"> • Independent MPs would receive \$1 each financial year for each first preference vote received at the by election.

⁸⁶⁵ NSW National Party, *Submission 18*, p. 16.

⁸⁶⁶ Mr Ben Franklin, State Director, NSW National Party, *Transcript of Evidence*, 1 February 2010, p. 4.

⁸⁶⁷ The Greens NSW, *Submission 19*, pp. 8-9.

⁸⁶⁸ Public Interest Advocacy Centre, *Submission 26*, p. 4.

⁸⁶⁹ Electoral Commission NSW/Election Funding Authority, *Submission 30*, Funding and Disclosure Model, p.

Political Education Fund

7.144 Some inquiry participants submitted that the Political Education Fund should be abolished. The Shooters Party called for the abolition of the Fund, arguing that it was inequitable, particularly for parties that only stand candidates in the Legislative Council. The Party noted that parties may not be eligible for funding, even if they succeeded in having candidates elected to the Legislative Council.⁸⁷⁰ Mr Robert Borsak, Chairman of the Shooters Party, told the Committee that:

... Since 1993, again because we do not run in the lower House, we have not got a zack out of the process. ... I think it is important that The Shooters Party amendments be made and recommendations be found that a party like The Shooters Party, or an Independent who may be represented only in the upper House, gets some equitable cut of that education pie. In the 2007 campaign The Shooters Party spent \$164,000 on the education process. We have not had a penny of that back.⁸⁷¹

7.145 Ms Clover Moore MP agreed, submitting that the Political Education Fund 'is a political rort on taxpayers: there is no evidence that funds are used for or have any effect on the education of voters.'⁸⁷² Ms Moore argued that the Fund should be abolished and reallocated to the general campaign fund.⁸⁷³

7.146 The Liberal Party stated that, consistent with the Select Committee's recommendation, the Political Education Fund could be retained and administered by the Electoral Commission:

... we have no objection to the suggestion made by the Select Committee that the fund be retained but be administered by the NSW Electoral Commission for the purposes of political education, to which the registered political parties should be able to apply for funding.⁸⁷⁴

7.147 The National Party (NSW Branch) submitted that the Education Fund would need to be supplemented as it is 'inadequate to meet party policy formulation and education costs under a system of restricted donations.'⁸⁷⁵

Emerging parties and independent candidates

7.148 One of the main issues raised by inquiry participants was how a reformed public funding model could ensure that independents and emerging parties were not disadvantaged, with many expressing concern that independents may be hindered by funding eligibility criteria. Ms Clover Moore MP emphasised the continuing contribution made by independent candidates to NSW politics:

Since 1901, 57 members of the NSW Legislative Assembly have been elected as Independents. Independents have been elected to every Parliament since 1956 and two or more persons elected as Independents have simultaneously been Members of Parliament since 1981. Since 1988, the number of Independents has never been less than three, and since 1999 the number has never been less than five. There are currently six Independent members.

In 2007, 70 Independent candidates contested 53 Legislative Assembly electorates, receiving 8.89 per cent of the total vote. In 17 electorates, the two-candidate preferred

⁸⁷⁰ The Shooters Party, *Submission 25*, pp. 3-4.

⁸⁷¹ Mr Robert Borsak, Chairman, Shooters Party, *Transcript of evidence*, 1 February 2010, p. 68.

⁸⁷² Ms Clover Moore, Independent Member for Sydney, *Submission 27*, p. 3.

⁸⁷³ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, pp. 4-5.

⁸⁷⁴ Liberal Party of Australia (NSW Division), *Submission 17*, p. 26.

⁸⁷⁵ NSW National Party, *Submission 18*, p. 16.

count was between Independents and major party candidates. Six Independents were elected.⁸⁷⁶

7.149 Ms Moore stated that a public funding model involving a total ban on political donations would significantly disadvantage independents, arguing that 'it is important that any changes do not undermine the Independents' role in the democratic process.'⁸⁷⁷ Ms Moore also submitted that eligibility thresholds for public funding should not disadvantage independent candidates.

7.150 The Electoral Commissioner reflected that consideration would need to be given to how a funding model would fund independent candidates' and emerging parties' participation in the electoral process in a fair way, noting that this presented a challenge:

One of the things this Committee needs to address in how you will deal with emerging parties, not just the existing players. This is one of the challenges. At the moment we can focus our attention on the existing players and how any sorts of schemes might impact upon them, but it is the emerging parties and that is why I have suggested that in terms of fairness, in terms of access to the public notice board, in terms of getting agenda setting and in terms of debate and information, emerging parties have to be considered as part of the scheme and how they will be funded.⁸⁷⁸

7.151 The Commissioner told the Committee that other forms of funding, such as policy development grants, could be considered to provide support to emerging parties:

... I think the Committee needs to consider some more sophisticated ways of public funding to political parties, such as by way of grants and donations ...

If we are going to have ... some sort of funding for genuine communication with membership, I would much prefer to see some sort of grants so that the overseeing body can have some satisfaction and evidence that that is how the money was used. To give you another example, if emerging political parties, in particular, were given access to grants for developing policy, one of the things I would expect to see is that the policy that is developed is on a website somewhere—not just handing money into a black hole into a political party, for the political party to use the money for whatever purpose they consider to be appropriate.⁸⁷⁹

7.152 The National Party (NSW) proposed that there be public funding of candidates' and parties' campaign costs, along with a Party Administration Fund. Campaign funding would be based on an assessment of a candidate's primary vote triggering eligibility for 'an equivalent amount of public funding depending on the figure that is struck'. Mr Ben Franklin, State Director of the NSW Branch of the National Party, argued that this would not disadvantage independent candidates:

Clearly that is not going to be a problem for new parties or candidates or independents. If they can prove their support in the electoral marketplace then they will receive the appropriate funding, so I do not see that that is an issue.⁸⁸⁰

7.153 As previously noted, the Nationals expressed the view that, although independents and new parties would be disadvantaged by being ineligible for the administration

⁸⁷⁶ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, p. 6.

⁸⁷⁷ Ms Clover Moore, Independent Member for Sydney, *Submission 27*, p. 6.

⁸⁷⁸ Mr Colin Barry, NSW Electoral Commissioner and Chair of the NSW Election Funding Authority, *Transcript of evidence*, 9 December 2009, pp. 10-1.

⁸⁷⁹ Mr Colin Barry, NSW Electoral Commissioner and Chair of the NSW Election Funding Authority, *Transcript of evidence*, 9 December 2009, pp. 10-1.

⁸⁸⁰ Mr Ben Franklin, State Director, NSW National Party, *Transcript of Evidence*, 1 February 2010, p. 4.

Public funding

fund, only parties with elected members should be eligible for this type of public funding.⁸⁸¹

7.154 On the other hand, the Greens NSW proposed that newly established parties that are ineligible for public funding could be compensated by being granted annual base funding, capped at a modest level of around \$10,000 annually, for the first eight years after a party is established, with the base funding to cease if the party received sufficient support to gain eligibility for public funding.⁸⁸²

7.155 Mr David Shoebridge, Convenor of the NSW Greens, also suggested that expenditure caps could be set at a lower rate for an established party's candidate than for independent candidates, in recognition of the advantage gained by established parties from economies of scale:

There might be room to consider saying if you are a candidate of a registered party who already has elected members in the Parliament then you are going to benefit from economies of scale in the course of your electoral campaign and therefore the cap for those candidates might be considered to be marginally lesser than an independent candidate. ... I think that is an area for legitimate public debate because there are economies of scale—we all know that. ...⁸⁸³

7.156 The Greens NSW also observed that it was challenging for independents to gain publicity to communicate their policies, submitting that the threshold for funding should be set at a rate to allow all candidates to conduct a reasonable campaign:

... those candidates presently face enormous difficulties in getting their message out. If you are an independent candidate in an individual seat, the media attention on the election is primarily focused on leadership and the statewide issues, so cutting through that is going to be very difficult for you as an independent anyway. ... I think the threshold per seat needs to be struck at such a level where it is possible to run a reasonable campaign as an individual candidate, and whether that would be more or less if you were independent or part of a statewide campaign I think is a matter for debate, but my feeling is that an equivalent amount is probably right for the reasons I went through before.⁸⁸⁴

7.157 The Shooters Party also stated that the increasing cost of elections has particularly affected minor parties and independents' ability to be heard by voters:

If minor parties and independent candidates are unable to effectively communicate their policies at election time because the major parties dominate communications media, then we could argue that the state effectively becomes a plutocracy, rather than a democracy.⁸⁸⁵

7.158 However, Associate Professor Orr told the Committee that a funding model that includes expenditure caps may go some way to balancing out any disadvantage experienced by independent candidates: 'bringing in expenditure limits on the whole you should be somewhat levelling the playing field potentially towards Independents.'⁸⁸⁶

7.159 Dr Tham also emphasised the importance of expenditure caps, and noted that eligibility criteria for public funding may serve to advantage major parties:

⁸⁸¹ Mr Ben Franklin, State Director, NSW National Party, *Transcript of Evidence*, 1 February 2010, p. 4.

⁸⁸² The Greens NSW, *Submission 19*, p. 8.

⁸⁸³ Mr David Shoebridge, Convenor, The Greens (NSW), *Transcript of evidence*, 1 February 2010, p. 23.

⁸⁸⁴ Mr Chris Maltby, Registered Officer, The Greens (NSW), *Transcript of evidence*, 1 February 2010, p. 23.

⁸⁸⁵ The Shooters Party, *Submission 25*, p. 1.

⁸⁸⁶ Associate Professor Graeme Orr, *Transcript of evidence*, 1 February 2010, p. 49.

... if we are going to see increased public funding of elections, spending limits have to be part of the package. The second danger is public funding being unfairly biased towards the major parties. I take the point about frivolous or vexatious parties, but the point to be made is that it should not be evaluated from the views of the major parties as to what is respectable political opinion.⁸⁸⁷

7.160 Mr Peter Besseling MP cautioned that the funding of nuisance independent candidates could erode public support for public funding, stating that:

We had 11 candidates in the by election campaign. I think the public would be quite cynical if they thought that they were paying for 32 candidates in a by election campaign, not only in terms of the public money that is going towards it, but also when they go to the ballot box and they get a tablecloth again that they have to sort through. I think that is a difficulty that would arise there, how to sort out people who are serious and people who want to make a political statement or just thought it would be fun to have a go.⁸⁸⁸

⁸⁸⁷ Dr Joo-Cheong Tham, *Transcript of evidence*, 1 February 2010, p. 46.

⁸⁸⁸ Mr Peter Besseling, Independent Member for Port Macquarie, *Transcript of evidence*, 2 February 2010, p. 23.

Chapter Eight - Legislative and administrative reform

- 8.1 This chapter discusses the implementation of electoral and political finance reforms, particularly the need for new electoral funding legislation, which would implement the Committee's recommended reforms and resolve issues with the current legislation. The Committee also examines the timing of reform in the lead up to the 2011 state election and looks at ways to ensure that legislative reform is undertaken in a timely way while also allowing for adequate stakeholder consultation.
- 8.2 The Committee also considers the current arrangements for the administration of political finance regulation, including the composition of the Election Funding Authority. It contemplates ways in which the current structures and resources of the Election Funding Authority may need to be modified in order to accommodate the recommendations and findings proposed by the Committee in Chapter 1. It also examines the Auditor-General's role in the political finance system.

Legislative reform

- 8.3 The Legislative Council Select Committee on Electoral and Political Party Funding considered the *Election Funding Act 1981* in detail and called for a 'review of all aspects of the Act'.⁸⁸⁹ The Select Committee found that the lack of a clear purpose and objectives made it very difficult to 'evaluate the effectiveness of the election funding scheme, and whether it is doing what it was designed to do'.⁸⁹⁰ In light of evidence given by the EFA, the Select Committee considered that the treatment of GST and the role of registered officers should be considered as part of a review of the Act, recommending:

That the Premier review the *Election Funding Act 1981* to clarify:

- the purpose and objectives of the Act
- the role and structure of the Election Funding Authority
- how GST amounts are to be treated.

Consideration should be given to whether registered officers should be assigned the role of party agents.⁸⁹¹

- 8.4 The government's response did not directly address this recommendation, referring instead to Dr Anne Twomey's paper on political funding reform and stating that the federal green paper process was 'the best forum to pursue issues relevant to the remainder of the Committee's recommendations'.⁸⁹²

⁸⁸⁹ NSW Parliament, Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, p. 193.

⁸⁹⁰ NSW Parliament, Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, p. 193.

⁸⁹¹ NSW Parliament, Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, p. 193.

⁸⁹² NSW Government, *Response to the report of the Select Committee on Electoral and Political Party Funding*, pp. 11-12, <[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/\\$FILE/081219%20Government%20Response.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/$FILE/081219%20Government%20Response.pdf)> accessed 12 January 2010.

8.5 In evidence to the current inquiry, the Electoral Commissioner advocated for a completely new Act to implement any new public funding model, rather than amending the existing legislation. He pointed to the problems associated with recent major amendments to the Act, particularly ‘in giving effect to the anticipated policy outcomes.’⁸⁹³ The Commissioner told the Committee that comprehensive rather than piecemeal statutory reform is required to prevent problems arising with implementation of reform:

... If you do not treat this as a holistic exercise, in my view you run the risk of one of a number of things: one is bolting something onto a piece of legislation that has already been bolted onto—unsuccessfully, in my view; in fact, with two bolts on. We have just had another bolt onto it last week with the amended legislation for developers. We are yet to see how all of that is going to work. My caution is that while I can see the enthusiasm for wanting to get something up for the State election, and while I share enthusiasm to do that, I come back to what I said at the beginning: this will require a completely new piece of legislation. That needs to be kept in mind.⁸⁹⁴

8.6 The Commissioner emphasised that it was important that a new Act be drafted in order to successfully implement the Committee’s recommendations and address weaknesses in the current Act:

... some of the difficulties associated with implementation of the 2008 amendments arise from the amendments not fitting well into the existing scheme. I would strongly submit that, considering the wide terms of reference, any recommendations that the Committee makes in connection with the 16 specific matters under consideration, the most significant is that you recommend that a completely new Act is now required to fix the weaknesses in the present Act and to give effect to any recommendations arising out of this inquiry.⁸⁹⁵

8.7 He outlined the difficulties the Election Funding Authority faces with prosecuting offences under the Act, noting that further amendments may serve to compound the problems with the current Act. These difficulties are discussed in detail in Chapter 9 of this report.

8.8 Associate Professor Anne Twomey expressed support for the Commissioner’s view, stating that a new Act was required as ‘bolting things onto existing Acts will only cause more problems.’⁸⁹⁶

Objectives of the Act

8.9 The objectives and purpose of a new election funding Act should be based on the principles of a democratic political finance scheme, as discussed in detail in Chapter 4 of this report. The Committee has recommended that these principles, outlined by the Electoral Commissioner, be incorporated into an object clause for New South Wales election finance legislation. The principles include protecting the integrity of representative government, promoting fairness in politics, supporting parties to perform their functions and respecting political freedoms.

⁸⁹³ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 2.

⁸⁹⁴ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 8.

⁸⁹⁵ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 2.

⁸⁹⁶ Associate Professor Anne Twomey, *Transcript of evidence*, 1 February 2010, p. 56.

Timing of new Act

- 8.10 In announcing the terms of reference to this inquiry, the then Premier stated that he expected draft legislation to be completed in time for it to be implemented by the 2011 state election:

That is why I have announced that – one way or another – the next State election will be conducted under a public funding model in conjunction with bans and caps on private donations...⁸⁹⁷

I expect draft legislation very soon after that and a public funding model in place by around the middle of next year.⁸⁹⁸

- 8.11 When asked about the timing of any reform the Electoral Commissioner indicated that, given the broadness of the policy changes being considered by the Committee, it would be very challenging to legislate and implement public funding reform by the next state election:

When we talk about a public funding model, I take it you are referring to a public funding model that embodies the complete funding of political parties. I think here are other challenges. This inquiry is very broad. It is wide ranging and, as I said, it has to come up with holistic recommendations. It has to be a composite package of policy outcomes if nothing else. Given the fact that the Committee is required to report by 12 March, which I think in itself is extremely challenging, it would require a fundamental new piece of legislation in order to give effect to a complete public funding model for the next State election.

... I have some concerns about meeting a timeline that would give effect to all of that by the State election.⁸⁹⁹

- 8.12 The Commissioner also noted that, as part of the implementation process there would be a need for transitional arrangements given the timing of the disclosure periods in the lead up to the next state election.

... there have to be drafting instructions prepared for Parliamentary Counsel, and Parliamentary Counsel has to draft the bill. My humble suggestion is that the bill should have some exposure and there should be proper time to consider it. We are talking about March; I think you are going to be in very challenging territory. Bearing in mind that the current law requires that we start the disclosure period from 1 July 2010 to 31 December 2010, we are already into a current disclosure period. So there has to be a transitional arrangement and we have the election in March 2011. ...⁹⁰⁰

- 8.13 Mr Mark Neeham, State Director of the Liberal Party's NSW Division expressed concern at possible delays in reform, and noted that draft legislation would need to be drafted and released for public consultation with less than a year remaining until writs are issued for the state election:

There are real concerns that this Inquiry will only serve to further delay reform. The reporting date is less than twelve months before the issue of the writs. With the time necessary to draft legislation, including the need for an exposure draft as the Electoral Commissioner suggests, there is a grave risk that comprehensive reform will not be in

⁸⁹⁷ Mr Nathan Rees, Legislative Assembly Hansard, Agreement in principle speech, Election Funding and Disclosures Amendment (Property Developers Prohibition) Bill 2009, 25 November 2009, p. 52.

⁸⁹⁸ Jacqueline Maley, 'Rees plans to end election funding taint', *The Australian Financial Review*, 18 November 2009, p. 6.

⁸⁹⁹ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, pp. 5-6.

⁹⁰⁰ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 12.

place by a date where it can effectively regulate and fund the coming State election campaign.⁹⁰¹

- 8.14 Mr Neeham agreed with the Electoral Commissioner's support for a new Act, on the basis that it is implemented prior to the 2011 election:

If a new Act can be ready to ensure the timely implementation of comprehensive reforms before the 2011 State general election, then we would have no objection to that course of action.⁹⁰²

- 8.15 Associate Professor Anne Twomey suggested that, in order for legislation to be implemented by the next election, phased implementation could be considered:

... I think you could do it on a phased basis. Part of it could be implemented immediately and part of it could be an exposure draft that is set out for the community in which you say, "This is what we intend to do."⁹⁰³

Draft Exposure Bill

- 8.16 The Electoral Commissioner reflected on the importance of community and bipartisan support for political funding reform, suggesting that an exposure draft of the bill be released for community consultation and comment:

... One of the important things is that it has bipartisan support, that it has the support of Parliament and, more importantly, there is an opportunity for the community to digest what is being contemplated. I think that would require some exposure bill, a bill to be drafted and given exposure, so there will be an opportunity for comment. ...⁹⁰⁴

- 8.17 Dr Joo-Cheong Tham stressed the importance of 'a reform package based on democratic deliberation', telling the Committee that a consultation process was not only valuable in principle but also in terms of the constitutional validity of any legislation that is enacted:

... It is important from a constitutional point of view Clearly, it is also important as a matter of principle. In my report I will be recommending that once the Committee has handed out its report and the Government decides to proceed ...there should be an exposure draft that is subject to a separate inquiry and open to public submissions before the final bill is tabled in the Parliament. I think that in principle that would enhance the process but it would also be important from the point of view of constitutional validity.⁹⁰⁵

- 8.18 Associate Professor Graeme Orr agreed that consent and multi-partisan support are important factors in terms of constitutional validity, stating that:

... the extent to which the Committee can be in relatively multi-partisan agreement about the problems it is trying to address and the general shape of the regime that it wants to put in place, not necessarily all the details. In judicial Realpolitik that will assist to make it constitutionally fireproof.

... Consent is important for a number of reasons. However, a conservative High Court is much less likely to hoe in and extend something that it has not extended in the electoral

⁹⁰¹ Mr Mark Neeham, State Director, Liberal Party of Australia (NSW Division), *Submission 17*, p.5.

⁹⁰² Mr Mark Neeham, State Director, Liberal Party of Australia (NSW Division), *Submission 17*, p.14.

⁹⁰³ Associate Professor Anne Twomey, *Transcript of evidence*, 1 February 2010, p. 56.

⁹⁰⁴ Mr Colin Barry, Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, pp. 5-6.

⁹⁰⁵ Dr Joo-Cheong Tham, *Transcript of evidence*, 1 February 2010, p. 55.

sphere since 1992 if it feels that would overturn an apple cart that had multi-partisan support.⁹⁰⁶

- 8.19 The General Secretary of the NSW Branch of the Labor Party, Mr Mark Thistlethwaite, stressed the value of public consultation and bipartisanship in developing a public funding system that the public supports:

... these reforms need to be approached on a multiparty consultative basis. All parties must support the reform process. There is no point in political parties arguing over the details of such a scheme because it simply will not work, and it will not be a system in which the public will have confidence. Can I say that the Labor Party in New South Wales is happy to work with other political parties to ensure that we come up with a system in which all parties, all candidates and ultimately all members of the public have confidence.⁹⁰⁷

- 8.20 In terms of concern about a consultation process resulting in delays, Professor Williams stated that it was possible to undertake consultation in a way that would allow for shorter timeframes and timely implementation. He pointed to the process undertaken as part of the development of the Victorian Bill of Rights, noting that a shorter consultation period could be used in order to ensure prompt implementation of public funding reform:

... I have worked extensively on other complex legal reforms including, for example, the Victorian Bill of Rights, which was a much larger reform. That got done in about five months. It always comes down to one thing—political will. I do not have any doubt that there is the capacity to put out an exposure draft and to get all this done in a three-month to four-month period if there is the desire to do it.

For an exposure draft you might go for a shorter period: it might be only four weeks or something like that, but that would be acceptable. From the point of view of the public, people would be horrified to think that a year is not long enough to legislate in this area, given that the debate has been running for several years ... I can accept staggered implementation if there were good policy reasons for that. That might mean that we focus, in particular, on the expenditure and other issues here and there. That is acceptable for public policy reasons. However, I would not accept that there is not enough time to do this properly. ...⁹⁰⁸

- 8.21 Associate Professor Anne Twomey suggested that the commencement provisions of the legislation could allow for the immediate commencement of the expenditure provisions, while providing for delayed commencement of the remaining provisions, pending consultation:

... Potentially you could pass a new law immediately with a view to bringing into effect the provisions concerning expenditure but with a commencement clause that states that the other provisions in the Act do not commence until some period well after the election. During that period, if community concerns are raised about particular provisions, you could go back and amend them before the other parts of the Act came into force. At least you could then go back to the community and say, "We have enacted something; it is law and it is on the books; but we accept that it may need further consultation. It will come into force automatically on a certain date after the election unless it is amended before then by the new Parliament that is elected at this

⁹⁰⁶ Associate Professor Graeme Orr and Professor George Williams, *Transcript of evidence*, 1 February 2010, p. 5.

⁹⁰⁷ Mr Mark Thistlethwaite, General Secretary (NSW Branch), Australian Labor Party, *Transcript of evidence*, 1 February 2010, p. 12.

⁹⁰⁸ Professor George Williams, *Transcript of evidence*, 1 February 2010, pp. 56-7.

next election." It is something that is there and it is something that is tangible rather than being a mere promise. ...⁹⁰⁹

Role and composition of the Election Funding Authority

8.22 The Election Funding Authority (the EFA) was established under the *Election Funding and Disclosures Act 1981* (the Act), and has two main purposes:

- To prescribe a scheme of public funding of State election campaigns.
- To provide for the public disclosure of the source of funds used (contributions) and expenditure incurred in State and Local Government election campaigns.⁹¹⁰

8.23 The functions of the EFA include dealing with:

- Applications for registration of candidates and parties.
- Applications for registration of party agents and official agents.
- Processing claims for payments of electoral expenditure by parties, groups and candidates.
- Processing disclosures of political donations and electoral expenditure by parties, members, groups and candidates (including elected members of councils).⁹¹¹

Composition

8.24 The NSW Electoral Commission (NSWEC) is the administrative unit through which the EFA exercises its statutory responsibilities, however the EFA itself is a body corporate consisting of three members.⁹¹² The Act provides that the Electoral Commissioner is its chairperson, with the two other members being appointed by the Governor on the nomination of the Premier and the Leader of the Opposition in the Legislative Assembly.⁹¹³ The rationale for this membership was described in the second reading speech to the Election Funding Bill as:

... The authority, independence and expertise of the Electoral Commissioner will be brought to the authority by him being constituted chairman. The method of nomination of the other two members recognises implicitly the importance of Parliament in our democratic system and will ensure a balanced representation on the authority.⁹¹⁴

8.25 The Legislative Council Select Committee on Electoral and Political Party Funding considered the composition of the Authority, referring to a number of submissions that were critical of the requirement to make partisan political appointments to the EFA. Although the Select Committee did not make any recommendations regarding the composition of the Authority, it observed that partisan appointments may create the perception of bias:

The Committee is of the view that partisan appointments to the EFA should cease, to remove any perception of bias in the operation of the EFA. The Committee underscores that there is no evidence of impropriety on the part of the EFA, but that partisan appointments give rise to this perception.⁹¹⁵

⁹⁰⁹ Associate Professor Anne Twomey, *Transcript of evidence*, 1 February 2010, p. 56.

⁹¹⁰ Election Funding Authority Charter, http://www.efa.nsw.gov.au/about_us (accessed on 16 December 2009)

⁹¹¹ *Election Funding and Disclosures Act 1981* ss.22 and 23

⁹¹² Election Funding Authority Charter, http://www.efa.nsw.gov.au/about_us (accessed on 16 December 2009)

⁹¹³ *Election Funding and Disclosures Act 1981*, ss.6-7.

⁹¹⁴ NSW Parliamentary Debates (Legislative Assembly), 15 April 1981, pp. 5939-40.

⁹¹⁵ NSW Parliament, Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, p. 213.

8.26 During the current inquiry, the Electoral Commissioner gave evidence on the need to review the role and functions of the EFA and, in particular, its composition. He stated that, although he did not have any concerns with the way the two current members have performed their duties, the current composition of the EFA does not meet the standards of a 'healthy funding and disclosure regime':

It is important that the authority has the confidence of all key stakeholders and the appearance of impartiality is reflected in that composition. A body that is at arm's length from the political debate should administer the functions of any new political funding and disclosure regime. As well as being competent to undertake the responsibilities, the body should be independent and, more importantly, be seen to be independent of the political parties. I would encourage the Committee to consider this important matter in its recommendations.⁹¹⁶

8.27 The Commissioner suggested that the EFA's independence would be enhanced by a change in composition, to a body consisting of a retired Supreme Court judge as chairperson, the Electoral Commissioner and either a statutory office holder such as the Auditor-General, the Information Commissioner, or a person from the St James Ethics Centre.⁹¹⁷

8.28 The Australian Electoral Commission consists of a Chairperson who is either a judge or a retired Federal Court judge, the Electoral Commissioner, and a non-judicial member, who is usually the Australian Statistician.⁹¹⁸

8.29 When questioned during the current inquiry on whether the model of the composition of the Australian Electoral Commission has anything in particular to recommend it, the Electoral Commissioner stated:

There is something to recommend that model but again that would require an amendment to the Parliamentary Electorates and Elections Act and bringing all of the new election funding and disclosure Act under that Act. But that is an option.⁹¹⁹

8.30 The Liberal Party (NSW) noted that perceived problems with the composition of the EFA had not affected its performance. The State Director of the Liberal Party (NSW), Mr Mark Neeham, expressed qualified support for the Electoral Commissioner's proposal, suggesting that the membership of the EFA could be increased with the addition of two independent members:

In relation to the Authority, we take the view that while many have objected to its structure as a matter of principle, none have articulated an actual grievance with the Authority's performance. We think it is important that a regulator should have the confidence of the regulated and we support the retention of nominees of the Premier and the Leader of the Opposition. A compromise might be the addition of a currently serving or retired Supreme Court Justice as the Chair of the Authority, with the Auditor General also serving as a Member. The Electoral Commissioner might appropriately be designated as the Chief Executive Officer of the Authority, making a total of five Members.⁹²⁰

⁹¹⁶ Mr Colin Barry, NSW Electoral Commissioner and Chair of the NSW Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 5.

⁹¹⁷ Electoral Commission NSW/Election Funding Authority, *Submission 30*, p. 6.

⁹¹⁸ AEC, Organisational structure, http://www.aec.gov.au/About_AEC/index.htm (accessed 14 January 2010)

⁹¹⁹ Mr Colin Barry, NSW Electoral Commissioner and Chair of the NSW Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 9.

⁹²⁰ Liberal Party of Australia (NSW Division), *Submission 17*, p. 14.

Powers and resources

8.31 The Committee also heard evidence on the impact of political funding reform on the Authority. The Electoral Commissioner told the Committee that additional resources may be required by the Commission and the EFA, to facilitate education of stakeholders and the public:

What I would like to see is when we get the Committee's report I think we would not be in a position to comment at any great length on what additional resources, other than there would be a need for some additional resources if for no other reason than we have to educate the stakeholders and the community.⁹²¹

8.32 The Independent Member for Lake Macquarie, Mr Greg Piper, submitted that in order to be effective, public funding reform would have to involve a boost in the EFA's resources:

For any of the proposed changes there would need to be a significant increase in resources for Elections NSW. They would need to be able to oversight and respond to variations or problems in a timely manner or the value of the changes would be greatly diminished.⁹²²

8.33 Professor George Williams noted that education was important in terms of ensuring candidate compliance with the terms of the scheme:

... You would need a lot of public education but you might say that you are eligible to nominate if you have complied. That is one possibility. You might ensure that the Electoral Commission is putting out notices in the newspapers and elsewhere that if you intend, or have any idea of nominating, be aware that these limits are in place and that you are subject to the law, and that you will be breaking the law if you nominate having spent in excess of that amount. Of course if you do nominate and you do spend in excess, whether before or afterwards, well you suffer the consequences.

... They would be subject to other forms—third parties and things like that—but we are talking here about the very narrow class of people who actually nominate. Obviously you need to tell those people that if they think they might be nominating, they should be aware that they may be incurring legal obligations that may affect their ability to nominate.⁹²³

8.34 The State Director of The National Party (NSW) reflected that there would be a need for education of the public on the reasons for the introduction of a reformed public funding scheme:

... The second point with regard to your concern about a public education campaign, that would clearly need to happen, I would assume. That is something that the Electoral Commission would need to determine. But I assume that one of the recommendations out of this Committee ... I suspect one of them may be that there needs to be some sort of public education campaign to show why this is happening.⁹²⁴

Role of the Auditor-General

8.35 The NSW Auditor-General forms part of the accountability mechanism whereby the Parliament holds the government accountable for fulfilling its responsibilities. Specifically, the Auditor-General is responsible for audits and related services under

⁹²¹ Mr Colin Barry, NSW Electoral Commissioner and Chair of the NSW Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 9.

⁹²² Mr Greg Piper, Independent Member for Lake Macquarie, *Submission 8*, p. 3.

⁹²³ Professor George Williams, *Transcript of evidence*, 1 February 2010, p. 52.

⁹²⁴ Mr Ben Franklin, State Director, Nationals (NSW Branch), *Transcript of evidence*, 1 February 2010, p. 8.

the *Public Finance and Audit Act 1983*, the *Corporations Act 2001*, and other New South Wales Acts. The Audit Office assists the Auditor-General in fulfilling this role.⁹²⁵ The Audit Office's core services are:

- Financial audits – which provide independent opinions on NSW government agencies financial reports.
- Compliance audits – which seek to confirm that specific legislation, directions and regulations have been adhered to by government agencies.
- Performance audits – which determine whether an agency is carrying out activities efficiently, economically and in compliance with the law.
- Protected disclosures – which involve examining allegations of serious and substantial waste of public money under the *Protected Disclosures Act 1994*.⁹²⁶

8.36 In evidence to the inquiry, the Auditor General outlined his current role in relation to the Election Funding Authority as:

... each year staff from the Audit Office check whether payments made by the Election Funding Authority for election expenses comply with the requirements of the *Election Funding and Disclosures Act 1981*. Expenses include the costs of contesting elections for the Legislative Council and the Legislative Assembly.⁹²⁷

8.37 The Legislative Council Select Committee report made a number of recommendations about the role of the Auditor-General in a public funding model, including that the Auditor-General:

- Set a reasonable level for party membership and affiliation fees.
- Set a reasonable limit for intra-party transfers to fund the costs of on-going party administration.
- Set a reasonable limit for the proceeds of merchandising to fund the costs of on-going party administration.
- Set a reasonable limit for bank loans to parties, groups and candidates to fund their election costs.
- Decide on spending caps for candidates and political parties, using caps in overseas jurisdictions as guidance.
- Decide on spending caps for third parties, using caps in overseas jurisdictions as guidance.⁹²⁸

8.38 Participants in the current Inquiry also submitted that the Auditor-General could have a role in a reformed funding scheme, including approving government advertising. This is discussed in Chapter 6 of this report.

8.39 However, the Auditor-General, Mr Peter Achterstraat, expressed the view that his ability to perform audits may be compromised by an involvement in management or policy decisions, suggesting instead that a tribunal could set relevant limits:

⁹²⁵ Audit Office of New South Wales, About us, http://www.audit.nsw.gov.au/info/about_us/role.htm#role (accessed 14 January 2010).

⁹²⁶ Audit Office of New South Wales, About us, http://www.audit.nsw.gov.au/info/about_us/role.htm#role (accessed 14 January 2010).

⁹²⁷ Audit Office of NSW, *Submission 11*, p.1.

⁹²⁸ NSW Parliament, Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, pp. 75, 114, 130, 137.

I am of the firm view that the Auditor-General should not be involved in setting the limits, that is clearly a management decision, almost a policy decision, and the Auditor-General should not be involved in setting policy. ... maybe a remuneration tribunal or something like that should be more involved with setting those limits ...

... Once the Auditor-General starts getting involved in making those sorts of decisions, people later on down the track say he has got no right to do an audit on that.⁹²⁹

⁹²⁹ Mr Peter Achterstraat, Auditor-General, Audit Office of NSW, *Transcript of evidence*, 2 February 2010, pp. 5-6.

Chapter Nine - Compliance and enforcement

Introduction

9.1 An effective system of enforcement is an essential factor in building public confidence in a scheme for the public funding of election campaigns. An enforcement regime focussed on ensuring compliance and providing appropriate sanctions for breaches of the legislation is a necessary prerequisite to obtaining that confidence.

9.2 The view that an effective system of enforcement is necessary was reflected in the comments received by the Committee during the inquiry. As the Public Interest Advocacy Centre (PIAC) explained in its submission to the inquiry:

Accountability is dependent not only on strong disclosure requirements but also on the capacity to have strong electoral law enforced. This requires adequately resourced electoral authorities, enforcement provisions clearly set out in legislation, a penalty regime that can act as a deterrent, and a willingness of decision makers to evaluate the effectiveness of schemes and amend them where necessary.

There is a reasonable concern that political parties prioritise partisan interests over democratic principles when resourcing, creating, amending or neglecting electoral law.⁹³⁰

9.3 In this chapter, the Committee outlines proposals for changes to ensure the requirements of the new scheme are observed without impinging on the ability of players in the election process to engage legitimately in that process. In doing so, the Committee has focussed on:

- remedying existing deficiencies within the present enforcement system;
- trying to balance the need for compliance and sanctions against the operational and administrative needs of political parties and individual candidates;
- incorporating a risk management approach wherever possible as a preventative measure, thereby reducing the need for costs associated with an enforcement system; and
- avoiding an unnecessarily complex enforcement system that would be particularly onerous and difficult to administer.

9.4 The challenges in devising a regulatory regime for ensuring compliance with donation and expenditure caps and disclosure requirements are significant. Referring to the challenges facing enforcement of party finance regulations, Dr Joo-Cheong Tham writes:

Certainly, all laws are vulnerable to non-compliance. Political finance regulation is no exception and the degree of compliance will depend on various factors. It will depend on the willingness of the parties to comply. This, in turn, will be shaped by their views of the legitimacy of the regulation process and their self-interest in compliance. The latter cuts both ways. For example, breaching expenditure limits might secure the culpable party a competitive advantage through increased expenditure, but this needs to be balanced against the risk of being found out and the resulting opprobrium. Weak laws without adequate enforcement or penalties invite weak compliance.⁹³¹

⁹³⁰ Public Interest Advocacy Centre, *Submission 26*, p.11.

⁹³¹ Dr Joo-Cheong Tham, 'Towards a more democratic political funding regime in New South Wales – A report prepared for the New South Wales Electoral Commission, February 2010, p.56.

9.5 However, as Mr Greg Piper MP highlighted in his evidence to the Committee, it would be an impossible task to eliminate completely the potential loopholes open to exploitation under the proposed new scheme:

With so many avenues for political assistance and the kind of “ingenuity” often seen by parties and candidates during an election campaign, it would be naive in the extreme to think that there would not continue to be loopholes within any system. Loopholes can however be reduced as can the value of any benefit derived, but the system will always rely on integrity and unfortunately, integrity can't be legislated.⁹³²

Also, Dr Tham has noted that, ‘political finance regulation will *always* face an enforcement gap’ (original emphasis).⁹³³

9.6 Ultimately, the measure of success for the new public funding scheme proposed by the Committee remains the extent to which it effectively drives cultural change in the area of electoral and political party funding. Underpinning such change is the necessity for the players in the election process, including registered political parties, candidates, donors, groups and third parties, to accept and observe their statutory obligations. The measure of an effective enforcement system will be the extent to which individuals are held to account for their decisions and conduct should they fail to meet their obligations, and the ability to impose appropriate sanctions for breaches of the requirements under the legislation.

Current regulatory system

9.7 The regulation of political donations and electoral expenditure under the *Election Funding and Disclosures Act 1981* (EFD Act) currently focuses on disclosure and reporting obligations for parties, groups, elected members, donors and registered agents. The Election Funding Authority (EFA or ‘the Authority’) undertakes compliance activities, including audits of disclosures and refers matters to the Crown Solicitor for prosecution in relation to non-compliance with the requirements of the legislation.⁹³⁴

Range of offences

9.8 Section 96H of the Election Funding and Disclosures Act, provides for three specific offences relating to disclosures, namely:

- (1) A person failing to lodge, within the required time, a disclosure of political donations received and electoral expenditure incurred (max. penalty - \$22,000)
- (2) A person making a statement in a disclosure or a request for an extension to lodge a disclosure, that the person knows is false or does not reasonably believe to be true (max. penalty - \$22,000 or 12 months imprisonment, or both)
- (3) An elected member, member of a group or candidate who withholds information from the ‘official agent’ in relation to a matter to be disclosed under Part 6, knowing that this will result in a false statement in a disclosure or a request (max. penalty - \$22,000).

⁹³² Mr Greg Piper MP, Independent Member for Lake Macquarie, *Submission 8*, p.3.

⁹³³ Dr Joo-Cheong Tham, ‘Towards a more democratic political funding regime in New South Wales – A report prepared for the New South Wales Electoral Commission, February 2010, p.57.

⁹³⁴ NSW Election Funding Authority, *Annual Report 2008-2009*, p.14.

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In addition, s.96I contains a general provision in relation to the unlawful acts under Divisions 3, 4 and 4A of Part 6 of the Act, which concern the management of donations and expenditure, the prohibition of certain types of political donations and the prohibition of property developer donations as a specific category of donations. Section 96I also makes it an offence for a person to fail to keep for a period of three years those records relating to reportable political donations, or other records, required to be kept under the legislation (see Appendix 2 for existing offences under the Act).

- 9.9 The offence provisions at ss.96H and 96I were inserted in the Act by the *Election Funding Amendment (Political Donations and Expenditure) Act 2008*. The *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009* further amended s.96I by inserting Division 4A, thereby making those unlawful acts relating to prohibited donations from property developers, which are specified in s.96GA, and the offence found at s.96GE(7), offences subject to the general offence provision. The Electoral Commissioner has advised that s.96I(1) creates difficulties for prosecutions and this issue is dealt with in greater detail at paragraphs 1.158 - 1.165.
- 9.10 The *Parliamentary Electorates and Elections Act 1912* includes provisions relating to the offences of bribery, treating, and intimidation, and prohibits certain conduct relating to the conduct of elections. These offence provisions are not dealt with in this report on the basis that they do not primarily concern regulation of electoral expenditure and political donations.

Powers

- 9.11 For the purpose of determining if the EFD Act has been contravened and to perform its compliance functions under the Act, the Authority has the following limited powers:
- *power of inspection (s. 110)* – The EFA may appoint inspectors⁹³⁵ to conduct inspections or make copies of banking and financial records relating to a current or former party, elected member, group, candidate or agent, for the purpose of ascertaining if the Act has been contravened. An inspector may also enter premises where they have reasonable grounds to believe such records are kept. They may request an individual to produce such documents or records and to make inquiries and examine individuals employed or engaged by a bank or financial institution.
 - *compliance audits (s. 110(8))* - The EFA may request any person to provide it with relevant information for the purpose of a compliance audit connected with disclosures of donations and electoral expenditure.
 - *power to demand information of major political donors (s. 110A)*- where the EFA or an authorised member of the Authority's staff reasonably suspects a major political donor has failed to make a disclosure under Part 6 of the Act, they may give a written notice requiring any person reasonably suspected of having information about the electoral expenditure to provide details of the name and address of the donor, information connected with the electoral expenditure, and related documentation for inspection and copying.

⁹³⁵ An Inspector appointed by the EFA for the purposes of s.110 of the Act is either a government employee under the *Public Sector Employment and Management Act 2002* or, if not a government employee, is subject to the control and direction of the Authority in relation to any function under this section (s.110(1)).

- 9.12 It is an offence carrying a penalty of \$11,000 to refuse, intentionally delay or obstruct, or fail to comply with an inspector's request pursuant to s.110 or a requirement by the EFA under s.110A.
- 9.13 Clause 33 of the Election Funding and Disclosures Regulation 2009 provides that the EFA may conduct an audit of compliance with the requirements of Part 6 of the Act by a party, an elected member, group or candidate. Clause 38 requires an official agent to keep all accounts, records, documents and papers relating directly or indirectly to a claim for payment under Part 5 or a disclosure under Part 6, sufficient to disclose 'a true and fair view' of transactions and to enable an audit certificate to be issued. Clause 39 of the Regulation provides that where the EFA considers a claim for payment under Part 5 or a disclosure under Part 6 is not valid, or is incorrect in a material particular, it may issue a notice requiring lodgement of records of political donations and electoral expenditure within a specified time period. Failure to retain the required records or to comply with a notice will incur a maximum penalty of \$2,200. The regulation also makes provision for the retention of certain records, documents and other material, such as DVDs, video tapes and films, and their production.
- 9.14 Problems experienced by the EFA in respect of the issuing of notices in accordance with the regulation are discussed in the EFA's submission to the inquiry into the 2008 local government elections (see Appendix 3, pp.4-5).

Compliance audit program

- 9.15 Following the 2008 amendments to the EFD Act, which empowered the EFA to undertake compliance audits of disclosures lodged by parties, groups and elected members, the Authority reviewed its compliance legislation and commenced development of a new disclosure compliance audit programme. The review sought to determine the extent of the EFA's compliance auditing activities and to ensure consistency with current auditing standards and practices.⁹³⁶ As part of its compliance review, the EFA also distributed practice notes to party and official agents and their appointed auditors, explaining their obligations in relation to the disclosures required to be made by 31 December 2008.⁹³⁷
- 9.16 The EFA has foreshadowed its intention to conduct regular compliance reviews of disclosures and to investigate disclosure matters as they arise. However, the Authority has indicated that it has no precedents or practices in relation to compliance audits.⁹³⁸
- 9.17 At present, the EFA deals with substantive inconsistencies that emerge by:
- requesting individuals to correct inadvertent errors in their disclosures – for example, amending the name of contributors and correcting inaccuracies in political contributions;
 - assessing on a case by case basis the need for enforcement action for non-compliance where an individual has made a false disclosure;

⁹³⁶ NSW Election Funding Authority, *Annual Report 2008-2009*, p.10, 26.

⁹³⁷ NSW Election Funding Authority, *Annual Report 2008-2009*, p.10, 28.

⁹³⁸ NSW Election Funding Authority, *Annual Report 2008-2009*, p.10, 26.

Compliance and enforcement

- assessing complaints of alleged breaches of the Act, which are supported with evidence.⁹³⁹

The compliance audit area has been identified by the EFA as an area for operational and organisational improvement. Important factors to be considered in that process will include the number and type of non-compliances, the audit cycle for the next State general election and high-risk disclosures with the greatest expenditures and donations.⁹⁴⁰

Prosecutions

- 9.18 Proceedings for an offence under the EFD Act may be brought before the Local Court or the Supreme Court, in its summary jurisdiction, and must be commenced within three years of the offence being committed (s.111). The Electoral Commissioner may certify information about the registration status of a party, group or candidate, agent or party agent, and the certificate is admissible in proceedings as prima facie evidence of that status (s.114).
- 9.19 The EFA lists successful prosecutions as one of its performance indicators, with a target of 100%.⁹⁴¹
- 9.20 For the 2007-2008 annual reporting period the EFA reported that in respect of the 2007 State general election a total of 40 referrals had been made to the Crown Solicitor for prosecution of individuals who had failed to submit disclosures or provide substantiating documentation in accordance with the EFD Act: 36 referrals concerned candidates, 1 referral concerned a party agent, 2 concerned Groups and 1 concerned a Party.⁹⁴²
- 9.21 During the 2008-2009 reporting period, the EFA referred eight parties to the Crown Solicitor for non-compliance. At the time of reporting none of the matters referred had resulted in a successful prosecution.⁹⁴³ The EFA also reported that for the previous annual reporting period, 900 donors had been referred to the Crown Solicitor for not submitting a disclosure after the 2007 State general election. Disclosures from 400 donors remained outstanding and prosecution action was continuing. According to the EFA, the reasons for this level of non-compliance with the Act include the complexity of the legislation and the difficulties experienced by stakeholders in understanding their legal obligations.⁹⁴⁴
- 9.22 The difficulties experienced by candidates in State elections in understanding their disclosure obligations under the Act were the subject of evidence taken by the Committee. Mr Peter Besseling MP told the Committee that independent candidates and candidates from small parties experienced greater challenges than candidates from large parties in meeting disclosure and reporting obligations, mainly due to their inability to access the same level of administrative support available to a candidate from a large party:

The Hon. MICK VEITCH: ...we heard from the political parties yesterday, and I think the Shooters in particular mentioned that as a small political party they run a lot of volunteer labour in their office and they are finding it quite difficult to get together the disclosures. As an independent, is that a fair comment for you as well?

⁹³⁹ NSW Election Funding Authority, *Annual Report 2008-2009*, p.10, 26.

⁹⁴⁰ NSW Election Funding Authority, *Annual Report 2008-2009*, p.10, 32.

⁹⁴¹ NSW Election Funding Authority, *Annual Report 2008-2009*, p.10, 8.

⁹⁴² NSW Election Funding Authority, *Annual Report 2007-2008*, pp.38-40.

⁹⁴³ NSW Election Funding Authority, *Annual Report 2008-2009*, p.10, 11.

⁹⁴⁴ NSW Election Funding Authority, *Annual Report 2008-2009*, p.10, 28.

Mr BESSELING: Very much so. During a political campaign and directly following the political campaign, you are one person. You do have volunteers, but, certainly, as soon as the political campaign is over, the difficulties I had with getting the disclosure together was compounded by the fact that okay, I am now a member of Parliament, I need to organise myself for that, I need to get an office together, I need to employ staff, I need to tidy up everything that has gone on through the election, I need to clean up the office that we had as a campaign office and move into the other office. There is a whole broad range of things that impact upon an individual a heck of a lot more than would do a political party...⁹⁴⁵

9.23 In the case of breaches of the Act by local government candidates, the EFA has advised that:

For the first six-monthly disclosure period concluded on 31 December 2008, 360 Local Government candidates who had not appointed an official agent failed to lodge a declaration by the due date, as had 44 groups and 36 retired councillors. In the limited circumstances where enforcement action is possible, the level of resources required by the Authority and the Crown Solicitor's Office to take enforcement action (including prosecution) is considerable and disproportionate to the comparative seriousness of the relevant offence.⁹⁴⁶

9.24 One of the specific factors affecting regulation at the local government level concerns the timeframe that applied in relation to the changes to the legislation: the 2008 amendments received assent on 30 June 2008 and commenced on 10 July; the regulated period for the 2008 local government election commenced on 4 August 2008 and the elections were held on 13 September 2008. In these circumstances, the EFA has indicated that it had 'little opportunity to comprehensively consider the range of practical issues likely to be raised or encountered by stakeholders'. The Authority recounted that campaigning had commenced some months earlier and implementation of the Act was a matter of urgency. As issues emerged the Authority sought advice on the interpretation of the legislation and some of its early advice was subject to further clarification.⁹⁴⁷ The Committee appreciates that these circumstances may have undermined the ability of stakeholders to fully comprehend their obligations and responsibilities under the legislation.

Difficulties with the existing system

2008 Amendments to the Act

9.25 The 2008 changes to the legislation arising from the *Election Funding Amendment (Political Donations and Expenditure) Act 2008* included amongst other measures:

- An increase in the frequency of disclosures from once every four years to once every six months;
- The introduction of a uniform disclosure threshold of \$1,000;
- The imposition of a disclosure obligation on local government councillors in their capacities as councillors;
- Alterations to the manner in which certain individuals assume office as 'official agents';

⁹⁴⁵ Mr Peter Besseling MP, Independent Member for Port Macquarie, *Transcript of evidence*, 2 February, p.

25.

⁹⁴⁶ NSW Election Funding Authority, Submission to the Joint Standing Committee on Electoral Matters Inquiry into 2008 local government elections, *Submission 68*, p.10.

⁹⁴⁷ Election Funding Authority, Answers to questions on notice (Q.4) in respect of Inquiry into 2008 Local Government Elections, 19 August 2009, p.6. See Appendix 4.

Compliance and enforcement

- The specification of a threshold amount of political donations below which an individual in receipt of those donations is deemed to be his or her own official agent; and a requirement on candidates and others to maintain bank accounts dedicated for campaign purposes in certain circumstances.⁹⁴⁸

9.26 The EFA submitted to the joint Standing Committee on Electoral Matter's Inquiry into the 2008 local government elections that there are numerous difficulties with the existing disclosure regime arising from the amendments:

The Authority observes that the amendments go beyond bringing New South Wales into line with the proposals that were at the time – and remain – before the Commonwealth parliament in the form of the *Commonwealth Electoral Amendment (Political Donations and other Measures) Bill 2008 [2009]*. Unlike the Commonwealth proposals, the New South Wales amendments are not confined to the introduction of bi-annual reporting periods and a uniform disclosure limit of \$1,000. The amendments introduce changes to the appointment of 'official agents' and the management of campaign finances, with the result that in some instances it is unclear precisely who is liable for breaching the Act making it difficult for the Authority to administer the Act in a way that gives clarity and direction to stakeholders to comply.

The complexity of the new disclosure legislation not only presents interpretive and administrative challenges for the Authority, but also clouds the obligations and responsibilities of individuals required to disclose. ...⁹⁴⁹

9.27 The EFA noted that the amendments introduced by *Election Funding Amendment (Political Donations and Expenditure) Act 2008* were 'far reaching' and have given rise to inconsistencies, whether or not intentional, within the legislation, including between the interrelationship of the 2008 amendments and the provisions of the original Act.⁹⁵⁰ The inconsistencies led to difficulties in terms of the EFA's management and implementation of the legislation, particularly in relation to educating and managing stakeholders, and in enforcing the statutory provisions.⁹⁵¹ Consequently, the EFA sought advice from the Crown Solicitor on the implications of the amendments, including its capacity to retrospectively designate persons as official agents and the manner in which such designations would work in future.⁹⁵² In April 2009, the EFA informed the Department of Premier and Cabinet (DPC) about the amendments it sought to overcome the problems with the legislation.⁹⁵³

9.28 There appears to have been some disagreement between the EFA and the DPC about the exact nature of the problems being experienced and the solutions needed. According to the Electoral Commissioner, while the issue of resources and clarification of the statutory provisions were connected, the lack of clarity surrounding the legislation was the underlying cause of the resource issues and the situation needed correction:

⁹⁴⁸ NSW Election Funding Authority, Submission to the Joint Standing Committee on Electoral Matters Inquiry into 2008 local government elections, *Submission 68*, p.3.

⁹⁴⁹ NSW Election Funding Authority, Submission to the Joint Standing Committee on Electoral Matters Inquiry into 2008 local government elections, *Submission 68*, p.2.

⁹⁵⁰ Election Funding Authority, Answers to questions on notice (Q.3) in respect of Inquiry into 2008 Local Government Elections, 19 August 2009, p.6. See Appendix 4.

⁹⁵¹ Election Funding Authority, Answers to questions on notice (Q.3) in respect of Inquiry into 2008 Local Government Elections, 19 August 2009, p.6. See Appendix 4.

⁹⁵² Election Funding Authority, Answers to questions on notice (Q.2) in respect of Inquiry into 2008 Local Government Elections, 19 August 2009, p.6. See Appendix 4.

⁹⁵³ NSW Election Funding Authority, Submission to the Joint Standing Committee on Electoral Matters Inquiry into 2008 local government elections, *Submission 68*, p.2

Ms LEE RHIANNON: ... With prosecutions is the problem that the legislation is unwieldy and therefore it is hard to follow through with prosecutions? Or is the problem a lack of resources while you have got prosecutions?

Mr BARRY: ... It almost becomes a circular argument. Our view with Premier and Cabinet has been that the problem is with the legislation. Premier and Cabinet say that the problem is not the legislation, it is just that we do not have the resources. That is nonsense. The law should be simple enough for everyone to understand their obligations. I should not have to employ two full-time lawyers to be able to explain to ordinary citizens their obligations with funding and disclosure. And when it comes time to prosecute people I should not have to engage the Crown Solicitor and get copious advising on whether we can prosecute somebody who simply failed to lodge a return. That is a problem with the law, it is not a resource problem. However, it is a resource problem arising out of the law. And then when you get to section 96 (j) of the Act, which basically says we have to be able to convince a court that that person did what they did knowing it was an offence. The Crown Solicitor says that that is just bizarre. We have to fix up that.⁹⁵⁴

9.29 The four main problem areas were described in detail by the EFA in its submission to the 2008 local government elections inquiry (see Appendix 3). Put briefly, they may be summarised as:

- i. *Difficulties in identifying persons capable of prosecution for failure to lodge disclosures* - The EFA argues that the deeming provision that applies where there is a failure to appoint official agents is difficult to invoke because it is based on a threshold factual premise about the acceptance of donations, which is difficult to establish.
- ii. *Ambiguity in the term of office of official agents* - The EFA argues that there is considerable uncertainty about when the term of an official agent can be held to have terminated. This in turn creates difficulties in determining when the obligations of an official agent expire.
- iii. *Ambiguity as to the conditions under which an individual is a 'candidate'* - The EFA considers that, given the varying definitions of candidate, there is uncertainty about the circumstances in which a person who satisfies one of those definitions is required to appoint an official agent and, further, there is uncertainty about the point in time at which a person can be held to have ceased being a candidate.
- iv. *Confusion resulting from the complexity of the threshold condition that triggers an obligation to open a campaign account and appoint an official agent* - The EFA argues that the circumstances in which expenditure can occur without the need to appoint an official agent or open an expenditure account are confusing and unnecessarily complicated.⁹⁵⁵

9.30 In light of the Crown Solicitor's advice, the EFA attempted to remedy the problems by exercising its power to designate individuals as official agents. However, the Authority found this to be an unsatisfactory arrangement, preferring instead that elected members be empowered to appoint their own official agent.⁹⁵⁶ It

⁹⁵⁴ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, Transcript of *in camera* evidence, 22 February 2010.

⁹⁵⁵ NSW Election Funding Authority, Submission to the Joint Standing Committee on Electoral Matters Inquiry into 2008 local government elections, *Submission 68*, pp.3-10.

⁹⁵⁶ Election Funding Authority, Answers to questions on notice (Q.2) in respect of Inquiry into 2008 Local Government Elections, 19 August 2009, p.6. See Appendix 4.

subsequently proposed several amendments, which are reproduced in full at Appendix 4, to this report. The Committee will be reporting on the 2008 local government elections inquiry shortly and, in the interim, has chosen to deal with the EFA's proposed amendments as part of the public funding inquiry, rather than taking a piecemeal approach.

Proposals for greater clarity

9.31 The changes proposed by the Authority are aimed at giving greater clarity to the meaning of terms and provisions in the legislation, removing any ambiguities and streamlining the operation of the Act. They include the following proposed amendments to the Act:

Candidates

- *Definition* - Clarify the meaning of 'candidate' to require individuals intending to accept gifts or incur electoral expenditure in connection with a candidacy at a future election to register, and for the definition of 'candidate' occurring in more than one place in the Act to be contained entirely within section 4.
- *Registration* - Enable automatic registration of a candidate where a person nominates at election instead of requiring separate registration, and ensure a candidate retains that status (even if elected) until such time as the candidate's agent has complied with the reporting obligations under the EFD Act and finalised all financial matters relating to the election; replace the Register of Candidates with a list of registered candidates on the EFA website.
- *Appointment of official agents for candidates* – Require a candidate to appoint an agent at the time of their nomination or registration, and to ensure the agent gives written acceptance of the appointment and completes online training.

Groups

- *Definition* - Require a group (being two or more persons) intending to accept gifts or incur electoral expenditure in connection with a candidacy at a future election to register, and for the definition of 'group' occurring in more than one place in the Act to be contained entirely within section 4.
- *Registration* - Enable automatic registration of a group where it successfully forms at election instead of requiring separate registration, and ensure a group retains that status until such times as the group's agent has complied with the reporting obligations under the EFD Act and finalised all financial matters relating to the election; replace the Register of Groups with a list of registered groups on the EFA website.
- *Appointment of official agents in relation to candidates* – Require a group to appoint an agent as a requirement of forming a group at election or upon registration as a group, and to ensure the agent gives written acceptance of the appointment and completes online training.

Registers of Official Agents and Party Agents

- Remove all references to the Register of Official Agents and the Register of Party Agents, both of which do not serve any practical purpose; make available on the EFA website instead a list of registered official agents and a list of party agents.
- *Appointment of official agents in respect to elected Members* – afford an elected member who is not a member of a registered party the capacity to appoint their own official agent, rather than the current situation where the EFA designates an official agent in this case.

Refund of nomination fee

- Candidates classed as being eligible to receive the refund of their deposit at an election on the basis that a disclosure was received for the reporting period in which the election day occurred.

Offences

- Remove the reference to an individual ‘knowing’ that an act is unlawful from the offence provision at s.96l of the Act, thereby removing the requirement for actual not constructive knowledge of an offence.⁹⁵⁷

9.32 The Committee notes that clarification of the requirements and obligations for stakeholders under the Act may assist individuals to comply with the legislation and streamline its operation. The implications of the knowledge element of the offence provision at s.96l are considered below.

Achieving prosecutions

9.33 The Committee is concerned about the significant problems the EFA has identified with the enforcement provisions found in the existing legislation, particularly in respect of the capacity to initiate prosecutions:

S96l of the EF&D Act presently provides that a person who does any act knowing it is unlawful under Divisions 3 and 4 of Part 6 of the Act is guilty of an offence. The aspect of “knowing” presents a significant barrier to successful prosecution and might be considered for review.

Unlawful acts under Divisions 3 and 4 of Part 6 include, but are not limited to, accepting reportable political donations without appointing an official agent, accepting gifts in kind valued in excess of \$1,000, and accepting anonymous donations.

The EFA is advised that S96l requires *actual* knowledge of the unlawful activity not *constructive* knowledge. For example, it would not be enough to establish that a candidate or official agent had attended seminars or training or been issued with guidelines or other advisory information.⁹⁵⁸

9.34 Mr Barry elaborated on the implications of this test in relation to the initiation of prosecutions for breaches under the *Election Funding and Disclosures Act 1981*, as it currently stands:

⁹⁵⁷ Election Funding Authority, Answers to questions on notice in respect of Inquiry into 2008 Local Government Elections, Question1 and table. See Appendix 4.

⁹⁵⁸ Election Funding Authority, Answers to questions on notice (Question1) to Inquiry into 2008 Local Government Elections, 19 August 2009, p.6. See Appendix 4.

Compliance and enforcement

The Act has a fundamental principle in section 96I that is a major impediment to any successful prosecutions in that we have to establish that at the time a person committed an offence they knew that what they were doing was illegal. ... It cannot just be drawing a conclusion because you gave somebody a manual or you gave them training: "You ought to have known it was illegal." That is not the test. You have to prove that they knew it was illegal. We have a very difficult piece of legislation to administer. Not that we are in the business of wanting to get heads on stakes in Martin Place, but an important part of the law is if you cannot enforce it, it makes it very difficult to get people to play the game.⁹⁵⁹

The EFA has indicated that the effect of the construction of the general offence provision with regard to the 'knowledge' element is to 'confine prosecutions to instances in respect of which an admission has been made'. The prosecution would need to show 'beyond reasonable doubt, that the person knew and understood the law in the relevant respect and acted in defiance of it'.⁹⁶⁰

9.35 The offence provision at s.96I applies to unlawful acts under Divisions 3, 4 and 4A of Part 6 of the Act, which govern the management of donations and expenditure, prohibited political donations and prohibited property developer donations. Unlawful acts under these divisions, which are subject to fines (a penalty of \$22,000 for a party or \$11,000 for others), and are captured as offences by s.96I include:

- using political donations to a party other than for the objects and activities of the party, in particular, using political donations to a party for personal use (s.96);
- accepting political donations to an elected member, unless the member has an official agent to whom the donations must be made - s.96A(1);
- accepting political donations to a group or candidate, unless they are registered and have an official agent, to whom the donations must be made - s.96A(2);
- using political donations to an elected member, group or candidate to incur electoral expenditure or for reimbursement of same, unless the donations are paid by the official agent into a campaign account and the payment is made from that account - s.96A(3)⁹⁶¹;
- payments by elected members, groups or candidates for electoral expenditure for their own election or re-election, unless the payments are made from their campaign account, properly kept - s.96A(5);
- using political donations to an elected member, group or candidate otherwise than to incur electoral expenditure or reimbursement for the same, or for an authorised purpose - s.96A(6);
- accepting a reportable political donation, unless required details relating to the donation are recorded and a receipt provided (such record must be kept for 3 years) – s.96C;

⁹⁵⁹ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 12.

⁹⁶⁰ NSW Election Funding Authority, Submission to the Joint Standing Committee on Electoral Matters Inquiry into 2008 local government elections, *Submission 68*, p.5. See Appendix 3.

⁹⁶¹ Section 96(7) clarifies that it is not unlawful to accept donations and incur electoral expenditure without a campaign account if the donations are not reportable and do not total to more than \$1,000 for the election period, or the donations are not reportable and the total amount of expenditure for the election period doesn't total more than \$1,000.

- accepting a reportable political donation that is required to be disclosed, unless it is made by an individual or an entity with an Australian Business Number – s.96D;
- making indirect campaign contributions to a party, elected member group or candidate, of the type specified in this section⁹⁶² (e.g. providing office accommodation, vehicles or other equipment for no or inadequate consideration to be used solely or substantially for an election campaign) – s.96E(1);
- accepting indirect campaign contributions prohibited under s.96E(1) – s.96E(2);
- accepting a reportable political donation required to be disclosed if it is anonymous – s.96F.
- receiving a reportable loan, other than from a financial institution, without recording the required details – s.96G(1);
- making a political donation as a property developer; making a political donation on behalf of a property developer; accepting a political donation made by, or on behalf of, a property developer; a property developer soliciting another person to make a political donation; or a person soliciting someone, on behalf of a property developer, to make a political donation – s.96GA.

9.36 Significantly, the offence found at s.96GE(7) in Division 4A of Part 6, under which anyone providing information to the EFA in connection with an application to determine that a person is not a property developer, knowing the information to be false or misleading in a material particular, is an offence that carries a maximum penalty of \$2,200 or imprisonment for 12 months, or both.

9.37 In order to overcome the ‘onerous burden’ the EFA considers this places on the prosecution, Mr Barry advised the Committee that the ‘knowledge’ element should be removed from s.96I:

As mentioned in previous correspondence, the Crown Solicitor has advised that this hurdle is almost impossible for the prosecution to make out. In my view the knowledge element (inserted in s.96I in 2008) should be removed. I note that in taking this approach it would not displace the common law defence of mistake of fact. This would be a matter for a competent court to consider.⁹⁶³

9.38 The Electoral Commissioner has indicated that it is not proposed that the change suggested to s.96I will impact upon the existing offence provisions at s.96H.⁹⁶⁴

9.39 The amendment proposed by the EFA to s.96I, if implemented, seems to involve removing the ‘knowledge’ element from the provision altogether, rather than any modification of the element so that it would still provide for ‘constructive knowledge’ to be proven. Constructed this way, ‘strict liability’ then appears to apply to the unlawful acts currently captured as offences by s.96I. In the case of s.96GE the resulting ‘strict liability’ offence would be one to which a possible prison sentence might apply. However, the Committee’s recommendation to repeal Division 4A of Part 6 of the Act, concerning the specific prohibition on developer donations, means this particular offence should no longer apply.

⁹⁶² Types of contributions excluded under the Act from indirect campaign contributions include, amongst other things, volunteer labour or incidental or ancillary use of vehicles or equipment by volunteers. s.96E(3)

⁹⁶³ Letter to Committee Manager, dated 3 March 2010.

⁹⁶⁴ Letter to Committee Manager, dated 3 March 2010.

Conclusion

- 9.40 The Committee's position on the proposed changes to the general offence provision at s.96I of the EFD Act is dealt with in more detail in paragraphs 1.158 - 1.165. The Committee notes that the change proposed by the Electoral Commissioner is aimed at facilitating the EFA's ability to prosecute offences under the Act as it currently stands. The Commissioner has not proposed any change to the common law defence of 'reasonable mistake', which is available in relation to a strict liability offence (unless expressly specified as not applying). Mr Barry has indicated that such matters would be for the courts to determine. The Committee strongly supports the availability of this defence in the event that the proposed amendment proceeds.
- 9.41 It is evident to the Committee that the offence provisions within the EFD Act as they currently operate are ineffective. Not only does there appear to be an excessive number of breaches reported since the introduction of the new legislation relating to disclosure requirements but also there have been no successful prosecutions. The Electoral Commissioner has concluded that 'the amended Act is in need of considered and comprehensive revision'.⁹⁶⁵ If, as the Electoral Commissioner has suggested, the terms of the amended EFD Act do not now meet the intended policy objectives, there seems little option but to amend the legislation further to attain clarity around the relevant provisions. The Committee is particularly concerned that the difficulties with interpreting and administering the legislation as it currently stands should be remedied as a matter of some priority, especially in the lead up to the 2011 election.
- 9.42 The application of new penalties under a new scheme for regulating electoral and political party finance is considered at paragraphs 9.96 – 9.112 of the report.

Audit certificates and the EFA's audit capacity

Audit certificates

- 9.43 During evidence to the Committee, the Electoral Commissioner indicated that there were deficiencies with the audit certificate, which accompanies disclosures and claims for public funding made to the EFA, as an effective accountability measure.
- 9.44 Under s.96K of the EFD Act a disclosure of donations and electoral expenditure under Part 6 is to be accompanied by an auditor's certificate:
- 96K Audit certificate**
- (1) A declaration of disclosures under this Part (other than a declaration lodged by a major political donor) is to be accompanied by a certificate of an auditor stating:
 - (a) that the auditor was given full and free access at all reasonable times to all accounts and documents of the agent responsible for lodging the declaration and of the party, elected member, group or candidate (as the case requires) relating directly or indirectly to any matter required to be disclosed under this Part, and
 - (b) that the auditor duly examined such of those accounts and documents as the auditor considered material for the purposes of giving the certificate, and

⁹⁶⁵ NSW Election Funding Authority, Submission to the Joint Standing Committee on Electoral Matters Inquiry into 2008 local government elections, *Submission 68*, p.10; also Election Funding Authority, Answers to questions on notice (Q.3) in respect of Inquiry into 2008 Local Government Elections, 19 August 2009, p.6. See Appendix 4.

- (c) that the auditor received all information and explanations that the auditor asked for with respect to any matter required to be set out in the declaration, subject to the qualifications (if any) specified in the certificate, and
- (d) that the auditor has no reason to think that any statement in the declaration is not correct.

9.45 A similar audit certificate requirement applies under s.75 of the EFD Act in respect of claims for public funding under Part 5, which are not deemed to have been validly lodged unless they are accompanied by an audit certificate.

9.46 The Election Funding Authority is currently developing a desk-top audit capacity but at present can only conduct such audits for the routine disclosure period and only capturing elected members. Approximately 1500 disclosures are subject to desk-top audit every six months.⁹⁶⁶ However, Mr Brian DeCelis, Director, Funding and Disclosures, NSW Electoral Commission, advised the Committee that the EFA does not have the capacity to desk-top audit the financial records generated in relation to each election, which means that the audit certificate currently accompanying a claim for public funding under Part 5 of the Act assumes greater significance:

Mr De CELIS: ... Once we get into an election period and we have the financial turnover that is involved in an election, I do not have the resources framed and skilled to do that type of desk-top audit.

So, we are forced really into relying very much on the audit certificate that currently accompanies claims for payment. There are difficulties even with that, of course we now know from a recent experience that what we all understood to be an audit certificate is not even an audit certificate. We understand that from auditors who have explained it to us and we have been in contact with the Australian Accounting Standards Board... There are issues with that structure itself. We see great differences between auditing a candidate's disclosure as opposed to a party's disclosure. If we are going to deal with a candidate's disclosure, which in this model is only \$50,000 as opposed to a party's which is in the vicinity of—

CHAIR: \$11 million.

Mr De CELIS: ... about \$7 or \$8 million; that is not something you simply audit.⁹⁶⁷

9.47 Further advice from the Electoral Commission indicates that the current type of audit undertaken in relation to disclosures made to the EFA appears to be an 'audit review', which involves simply checking available financial records, rather than the independent verification of those records and their reliability, as is the case with an 'audit certificate':

Audit "Review" v Audit "Certificate"

We would understand that the current requirement under the Act requires an audit "review" rather than an audit "certificate" in terms of Australian auditing standards.

A review consists of the auditor inquiring of the client in order to verify the financial records. Unless deemed necessary, the auditor is not required to obtain any independent corroboration to substantiate those records. In contrast, as part of a certified audit, the auditor must obtain independent evidence to substantiate the assertions made by the client.

⁹⁶⁶ Mr Brian DeCelis, Director, Funding and Disclosures, Electoral Commission NSW, Transcript of *in camera* evidence, 22 February 2010, p 29.

⁹⁶⁷ Mr Brian DeCelis, Director, Funding and Disclosures, Electoral Commission NSW, Transcript of *in camera* evidence, 22 February 2010, p 29.

Compliance and enforcement

A review does not require the auditor to formulate an “opinion” as to the financial records as is required under standard rules for a certified audit.

However, it is acknowledged that a review can cost significantly less than a certified audit.

The concern for the Election Funding Authority is what reliance it can place on the audit undertaken, in respect to any disclosure, so as not to erode the integrity of the disclosure and the Authority if it is to solely rely on the audit.⁹⁶⁸

9.48 The Committee understands the essential difference between an audit and a review of a financial report relies upon the following distinction:

An **audit** is a detailed process that provides a high level of assurance to the users of financial reports.

The objective of an audit of a financial report is to enable the auditor to express an opinion whether the financial report is prepared, in all material respects, in accordance with an applicable financial reporting framework. When forming an opinion on the financial report the auditor needs to evaluate whether, based on the audit evidence obtained, there is reasonable assurance about whether the financial report taken as a whole is free from material misstatement.

...

An auditor is required to conduct audit procedures in accordance with the auditing standards, in order to detect material misstatements and carry out specific procedures to reduce fraud risk.

A **review**, in contrast to an audit, is not designed to obtain reasonable assurance that the interim financial report is free from material misstatement.

A review consists of making enquiries, primarily of persons responsible for financial and accounting matters, and applying analytical and other review procedures. A review may bring significant matters affecting the interim financial report to the auditor's attention, but it does not provide all of the evidence that would be required in an audit.

The objective of a review of an interim financial report differs significantly from that of an audit conducted in accordance with Auditing Standards. A review of an interim financial report does not provide a basis for expressing an opinion whether the financial report gives a true and fair view, or is presented fairly, in all material respects, in accordance with the applicable financial reporting framework...⁹⁶⁹

9.49 The advice of the EFA also needs to be balanced against evidence taken by the Committee that the cost of the audit requirement for independent candidates and candidates from small parties represents a reasonably significant impost:

The Hon. MICK VEITCH: ... Smaller parties and candidates who run as independents bring this all to account and meeting the compliance requirements can become quite onerous, or it has been said can become quite onerous. Who should conduct the audits of the declarations that have been lodged and who should bear the cost?

Mr FREEMANTLE: You are quite correct there. We received \$53,000 in round figures last year or the previous year from the Political Education Fund and it cost us \$1600 for an auditor, which is a quite substantial amount for us. I have seen one proposal where

⁹⁶⁸ E-mail from Mr Brian DeCelis, 5 March 2010.

⁹⁶⁹ <http://www.asic.gov.au/asic/asic.nsf/byheadline/For+users+of+financial+reports?openDocument#8>

those auditing costs would be particularly earmarked, that there would be public funding for the auditing costs as well, on top of the public education funding.⁹⁷⁰

9.50 A similar point was made in relation to the proposal that third parties should also be required to report on political expenditure. Unions NSW gave evidence supporting a simple compliance regime:

The Hon. MICK VEITCH: ...Do you have a view about when you should report, how often you should report and what would be the degree of compliance and reporting that was required to adequately meet third party reporting?

Mr LENNON: You have got to make it as simple as possible. ... we do have to have some set of rules about these sorts of things, and once you start, of course, it starts to expand and compliance becomes very difficult.⁹⁷¹

9.51 The difficulties experienced by the EFA with the audit certificate provisions contained in the EFD Act were raised towards the end of the Committee's inquiry and is an area that requires further clarification. For instance, on the basis of the evidence and information available to the Committee, it would appear that although the legislation specifies that an 'audit certificate' is to accompany certain documents, the EFA appears to assert that, in effect, it receives an audit review opinion instead. This suggests to the Committee that the problem lies not with the legislative provision but with its interpretation and application. This is a matter on which the Electoral Commissioner should be further consulted.

9.52 The Committee notes the advice it has received from the EFA, regarding any enhancement to the Authority's audit capacity and powers:

Any changes proposed to the legislation with a view to strengthening the audit and compliance provisions need to consider a number of aspects:

(a) There needs to be a discretionary provision for the Authority to require:

- additional documents or information from the stakeholder
- additional documents or information from the auditor
- the auditor to undertake any additional tests of the disclosure as required
- an investigation of any matter related to disclosure. (In this regard, the present provisions are unworkable particularly in regards to the appointment of inspectors). It is proposed that "inspectors" or "investigators" are persons or organisations appointed by the Authority.

(b) It is proposed also that, in addition to the above:

- registered political parties lodge (as their disclosure) their annual financial statements (or in the form of their annual financial statements if six monthly disclosures are still required) accompanied by an audit certificate (not an audit review) from a registered company auditor.
- all other stakeholders be required to lodge a disclosure accompanied by an audit certificate (not an audit review) from a registered company auditor but the Authority have the discretion to require such audit certificates be issued by an audit practitioner (being a Certified Practising Accountant, a member of the

⁹⁷⁰ Mr Graham Freemantle, Acting State Manager, Christian Democratic Party, *Transcript of evidence*, 2 February 2010, p. 31.

⁹⁷¹ Mr Mark Lennon, Secretary, Unions NSW, *Transcript of evidence*, 2 February 2010, p. 51.

National Institute of Chartered Accountants or a member of the National Institute of Accountants).⁹⁷²

Comparative jurisdictions

Overview

- 9.53 In the absence of any jurisdictions within Australia moving to adopt a regulatory scheme for the public funding of election campaigns, which includes caps on expenditure and limits on donations, the Committee has had regard to the systems for regulating electoral and political party funding that operate in some comparable overseas jurisdictions.
- 9.54 The Committee has considered the main features of these systems, from which it is apparent that regulation of the funding provisions forms the core function of the electoral authorities concerned and requires a substantial commitment of resources to investigative and compliance activities. Another feature of the overseas jurisdictions is a broad approach to penalties, ranging from low-level monetary penalties and civil sanctions for more minor breaches through to prison sentences for serious offences. Strict liability offences feature in some of the overseas schemes and appropriate defences are available. In addition to prosecution action, administrative arrangements are also utilised as part of the regulatory approach, for example, compliance agreements.
- 9.55 In the case of the UK Electoral Commission, the change from a largely 'supervisory' and monitoring role to a proactive investigative role has been accompanied by a full public consultation process. A similar development in New South Wales would involve significant changes to the operation of the EFA and would necessitate adequate funding and resources to enable the Authority to perform a similar role.

Canada

Federal level

- 9.56 The Commissioner of Canada Elections has responsibility for enforcement and compliance of Canadian federal electoral laws. The Commissioner's responsibilities cover all provisions within the Canada Elections Act.⁹⁷³
- 9.57 Offences against the Act are found throughout the Act, however, sections 480 to 499 detail all of the offences and categorise them according to whether intent is required and the prosecution burden of proof.⁹⁷⁴ A table detailing the strict liability offences contained within the Act is given at Appendix 6 of the Report. Penalties can either be a fine or imprisonment or both. Additional penalties that a court may impose include:
- performing community service
 - performing the obligation that gave rise to the offence

⁹⁷² E-mail from Mr Brian DeCelis, 5 March 2010.

⁹⁷³ See section 509 *Canada Elections Act* and

<http://www.elections.ca/content.asp?section=gen&document=ec90560&dir=bkg&lang=e&textonly=false>
accessed on Friday 19 March 2010

⁹⁷⁴ <http://www.elections.ca/content.asp?section=gen&document=ec90560&dir=bkg&lang=e&textonly=false>
accessed on Friday 19 March 2010

- compensating for damages, or any other reasonable measure the Court considers appropriate
- a fine of up to five times the election advertising expenses limit exceeded by a third party
- with respect to certain offences, the deregistration of a party and liquidation of its assets, and the liquidation of the assets of the party's registered associations⁹⁷⁵

9.58 Elections Canada provides a convenient list of the offences contained in the Act. They are as follows:

- illegally attempting to influence the vote of an elector or the results of an election
- illegally hampering or delaying the electoral process
- contravening the limits and obligations set out for contributions and expenses, including circumventing, attempting to circumvent or colluding in circumventing the rules for ineligible contributors, for concealing a contributor's identity and for exceeding contribution limits
- contravening the limits and obligations set out for third party election advertising
- publishing the results of an election opinion poll during the blackout period or without the accompanying information required by the Act
- election advertising during the blackout period
- prematurely publishing election results
- partisan action by an election officer
- using personal information from a voters list or from the National Register of Electors for unauthorised purposes
- acting as an officer of a registered political party while knowing that the party does not include participating in public affairs among its essential objectives
- as a party leader, certifying a declaration or report while knowing that the document contains false or misleading information
- accepting or soliciting contributions for a political entity while representing to the contributor that part or all of the contribution could be transferred to some person or entity other than the registered party, candidate, leadership contestant or electoral district association
- failure to register (referendum committee)⁹⁷⁶

9.59 The Act also provides that certain offences are considered illegal practices or corrupt practices.⁹⁷⁷ If found guilty of illegal practice or corrupt practice, in addition to any other penalty, the person loses the right to be a candidate at a federal election, to sit as a Member in the House of Commons and to hold office appointed by the Crown or Governor in Council for a period of five years in the case of an illegal act and seven years in the case of a corrupt practice.⁹⁷⁸

9.60 Alongside prosecution as a method of enforcement the Canada Elections Act also provides the Commissioner of Canada Elections the authority to enter into compliance agreements.⁹⁷⁹ Where the Commissioner believes, on reasonable grounds, that a person has committed or is likely to commit an offence against the Act, the Commissioner and that person may enter into a compliance agreement. The

⁹⁷⁵ <http://www.elections.ca/content.asp?section=gen&document=ec90560&dir=bkg&lang=e&textonly=false>
accessed on Friday 19 March 2010

⁹⁷⁶ <http://www.elections.ca/content.asp?section=gen&document=ec90560&dir=bkg&lang=e&textonly=fals>
accessed on Friday 19 March 2010

⁹⁷⁷ Sections 502(1) and (2) *Canada Elections Act*

⁹⁷⁸ Section 502(3) *Canada Elections Act*

⁹⁷⁹ Section 517 *Canada Elections Act*

Compliance and enforcement

agreement is voluntary and sets out terms and conditions aimed at ensuring compliance with the Act.⁹⁸⁰ If a compliance agreement is entered into then that matter cannot be referred to the Director of Public Prosecutions for prosecution.⁹⁸¹ If the matter has been referred then it is suspended. However, in the event of non-compliance proceedings can either be referred or resumed depending on the situation.⁹⁸²

New Zealand

9.61 New Zealand is currently reviewing its electoral funding regime. In 2007 New Zealand implemented a number of reforms to its electoral funding regime by the passing of the *Electoral Finance Act 2007*.⁹⁸³ However, in March 2009 the *Electoral Finance Act* was repealed and an interim electoral finance regime was established. The interim regime sees New Zealand return to provisions contained in the *Electoral Act 1993*, however, it does retain some of the amendments and provisions from the 2007 reforms.

9.62 The present compliance and enforcement provisions in New Zealand are currently contained in the *Electoral Act 1993*. The 2007 reforms significantly increased the fines and periods of imprisonment for corrupt and illegal practices and also raised the penalty levels for other electoral finance offences.⁹⁸⁴ These reforms were retained as part of the interim electoral finance regime.

9.63 The Issues Paper produced by the Ministry of Justice as part of the review into the electoral funding regime, provides a convenient summary of the types of offences created by the *Electoral Act 1993*:

The *Electoral Act 1993* creates a number of offences, which are classified as corrupt practices, illegal practices or summary offences. The maximum penalty for a corrupt practice (for example, bribery, knowingly exceeding campaign spending limits, or knowingly filing a false return) is two years imprisonment and a \$100,000 fine. The maximum penalty for an illegal practice (for example, paying for something prohibited by the *Electoral Act 1993*, or carelessly filing an incorrect return) is a \$40,000 fine. The highest penalties are reserved for constituency candidates or party secretaries.⁹⁸⁵

9.64 For more detail on offences against the *Electoral Act 1993* see Appendix 8.

9.65 At present the Chief Electoral Office has responsibility for administering the law relating to candidates and the Electoral Commission has responsibility for administering the law relating to political parties.⁹⁸⁶ If either agency considers that a breach of the *Electoral Act 1993* has occurred they have a duty to report that belief to the New Zealand police.⁹⁸⁷

⁹⁸⁰ Section 517(2) *Canada Elections Act*

⁹⁸¹ Section 517(6) *Canada Elections Act*

⁹⁸² Section 519 *Canada Elections Act*

⁹⁸³ For a discussion on the reasons that led to the 2007 reforms see Legislative Council Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, p 26

⁹⁸⁴ New Zealand Ministry of Justice, Electoral Finance Reform, *Issues Paper*, p 58

⁹⁸⁵ New Zealand Ministry of Justice, Electoral Finance Reform, *Issues Paper*, p 61

⁹⁸⁶ New Zealand Ministry of Justice, Electoral Finance Reform, *Issues Paper*, p 60

⁹⁸⁷ See sections 205P and 206P *Electoral Act 1993*

9.66 There is currently a Bill before the New Zealand Parliament,⁹⁸⁸ which seeks to create a new Electoral Commission that will combine the functions of the Chief Electoral Office and the current Electoral Commission into one independent body. Reform will occur in two stages. The first stage involves the establishment of the new Electoral Commission and the transfer of the statutory functions of the current Chief Electoral Office and Electoral Commission to the new body on 1 October 2010. The second stage will provide for the transfer of the Chief Registrar of Elector's responsibility for the electoral roll to the new Electoral Commission on 1 October 2012.⁹⁸⁹

United Kingdom

9.67 The system for regulating political party finance and electoral expenditure in the United Kingdom has been subject to significant reform within the last twelve months, the results of which are not yet apparent. Following a number of comprehensive, independent reviews,⁹⁹⁰ which highlighted the need for the Electoral Commission to have a more proactive investigative role, a greater advisory role on compliance, and a comprehensive system of graduated civil financial penalties, the Government introduced legislation to strengthen the regulatory role of the Electoral Commission.⁹⁹¹ In proposing new legislation, the Government acknowledged problems relating to loopholes in legislation passed in 2000 that allowed unincorporated associations to obscure the original source of donations to parties. This highlighted the necessity for better regulation of third-party campaigning organisations.⁹⁹²

9.68 The *Political Parties and Elections Act 2009* (PPE Act) amended the *Political Parties, Elections and Referendums Act 2000* (PPER Act) by introducing a wider range of civil sanctions and increased investigatory powers for the Electoral Commission 'to enable it to become a more robust regulator'.⁹⁹³ The range of increased powers provided for by the amendments incorporate:

- *Investigatory powers* – retention of the existing power to require access to information for certain purposes, including an investigation of a potential criminal offence, from individuals and bodies subject to regulation by the Commission, where the information is reasonably required to enable the Commission to perform its functions;

⁹⁸⁸ *Electoral Administration Amendment Bill 2009*. The Bill was introduced on 22 October 2009 with its First Reading on 27 October 2009. The Bill has currently been referred to the Justice and Electoral Committee who are due to report by 27 April 2010. See http://www.parliament.nz/en-NZ/PB/Legislation/Bills/9/2/e/00DBHOH_BILL9636_1-Electoral-Administration-Amendment-Bill.htm accessed on Thursday 18 March 2010.

⁹⁸⁹ See Regulatory Impact Statement for *Electoral Administration Amendment Bill 2009*, Executive Summary, p 1 accessed at <http://www.justice.govt.nz/policy-and-consultation/regulatoryimpactstatements/electoral-administration-amendment-bill/electoral-administration-amendment-bill> on Thursday 18 March 2010.

⁹⁹⁰ See The Committee on Standards in Public Life, *Review of the Electoral Commission*, Cmd 7006, January 2007; Constitutional Affairs Committee, *Party Funding*, December 2006; Sir Hayden Phillips, *Strengthening Democracy: Fair and Sustainable Funding of Political Parties*, March 2007; Public Administration Select Committee *Propriety and Peerages*, December 2007.

⁹⁹¹ Ministry of Justice, *Party finance and expenditure in the United Kingdom, The Government's proposals*, Cmd 7329, June 2008.

⁹⁹² Media release Ministry of Justice, "White Paper on party finance and expenditure in the United Kingdom," 16 June 2008, www.justice.gov.uk/news/announcement160608a.htm p.2

⁹⁹³ Explanatory notes, *Political Parties and Elections Act 2009* (UK), p.1; Ministry of Justice, 'Impact Assessment of Political Parties and Elections Act – Reform of the Electoral Commission', 20 July 2009, p.5 Assessment <http://www.ialibrary.berr.gov.uk/ImpactAssessment/?IAID=c42b5d63d8864be6a43be9604d48415f>

Compliance and enforcement

- a wider investigatory power to issue a notice to a person to produce information, where a possible offence or breach is suspected – the information is not limited to that relating to income or expenditure and the power may be exercised in respect of individuals or bodies not usually regulated by the Commission (e.g. donors to political parties);
- the power for an authorised investigator to ask a person questions reasonably considered relevant to the investigation (s.19B PPER Act);
- the power to enter premises to inspect and make copies of relevant documents where the Commission is *not* conducting a criminal investigation (the use of this inspection power is restricted to registered parties, recognised third parties, permitted participants and members' associations, and its exercise is dependent on judicial approval, i.e. a warrant issued by a magistrate.)

Civil sanctions – These include:

- *fixed monetary penalties*,⁹⁹⁴ which can be imposed on any regulated individual or body, including a party, and where the Commission is satisfied beyond a reasonable doubt that a prescribed offence has been committed or a breach has occurred (the penalty may be appealed to the Commissioner);
- *discretionary requirements*, i.e. imposition on a person of a monetary penalty or an instruction to take certain action, where the Commission is satisfied beyond a reasonable doubt that a prescribed offence has been committed or a breach has occurred;
- *stop notices* to prevent a person from continuing or repeating activity, where the Commission reasonably believes this will, or be likely to, lead to the commission of an offence or breach. Provision is made to appeal a stop notice; and
- *enforcement undertakings*, being an undertaking from a person regulated by the Commission, including a party, to take certain action to prevent recurrence of an offence or breach and to restore the situation (again the Commission must have reasonable grounds).⁹⁹⁵

9.69 Defences are available in respect of offences. For example, where a party or treasurer is charged with an offence of accepting an impermissible donation they will not be guilty if they can show they took all reasonable steps to verify the donor was a permissible donor, and that they believed this to be the case (s.56(3)(a)). In the case of certain offences relating to the reporting of accounts, donations, and loans a determination as to whether or not an offence has been committed will involve consideration of whether or not there was a reasonable excuse for the breach.

9.70 In response to parliamentary debate on the Bill concerning safeguards for the use of its new powers, the Electoral Commission indicated that it would develop 'formal risk assessment tools in line with Hampton principles' to help target its advisory and

⁹⁹⁴ Variable monetary penalties also are included in the statutory instrument.

⁹⁹⁵ Explanatory notes, *Political Parties and Elections Act 2009* (UK), pp.3-4; Draft Statutory Instruments, The Political Parties, Elections and Referendums (Civil Sanctions) Order 2010 http://www.opsi.gov.uk/si/si2010/draft/pdf/ukdsi_9780111491751_en.pdf

regulatory resources effectively.⁹⁹⁶ The reference to Hampton principles relates to a 2005 report by Philip Hampton into the UK regulatory system, entitled *Reducing Administrative Burdens: Effective Inspection and Enforcement*. Commissioned by the British Government. The Hampton report recommended several principles to underpin efficient enforcement of regulations. They included: ‘the use of comprehensive risk assessments, provision of authoritative and accessible advice, and proportionate and meaningful sanctions’.⁹⁹⁷ Proactive initiatives for providing advice on matters of interpretation and general guidance concerning the new legislative requirements was seen as one way to minimise the number of inadvertent breaches, thereby reducing the need for compliance activity by the Commission.⁹⁹⁸

9.71 The UK Electoral Commission has reported that:

[The] changes will allow us to act proportionately to ensure compliance. They will allow us to, where appropriate, move away from referring a case for criminal investigation or the rigid imposition of a statutory fine, and instead use constructive new approaches. For example, we may decide that it is more appropriate to issue a notice requiring a non-compliant body to take specific steps to become compliant, such as training party officers or amending systems. Another important change proposed is to provide us with the ability to request information from any relevant person in the course of an investigation, rather than just those we regulate.⁹⁹⁹

9.72 The legislation was passed on 21 July 2009 and has yet to commence. In the interim, the Electoral Commission will continue to use its existing powers, which means it cannot obtain documents or information from bodies that are not regulated under PPERA and interviews can only be conducted by consent. Matters may still need to be referred to the police in order to obtain necessary information to facilitate an investigation.¹⁰⁰⁰

9.73 As the reforms have not come into effect at this stage, the Committee is unable to draw conclusions about their effectiveness or assess their impact. However, reviewing the initiatives undertaken by the UK Electoral Commission in preparation for the commencement of the legislation has been valuable in assessing the

⁹⁹⁶ UK Electoral Commission, *Investigation and Enforcement: The Electoral Commission’s Proposed Approach*, January 2009, p.5.

⁹⁹⁷ *Investigation and Enforcement: The Electoral Commission’s Proposed Approach*, January 2009, p.5. The Hampton Report set out the following principles of inspection and enforcement: regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most; regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take; all regulations should be written so that they are easily understood, easily implemented, and easily enforced, and all interested parties should be consulted when they are being drafted; no inspection should take place without a reason; businesses should not have to give unnecessary information, nor give the same piece of information twice; the few businesses that persistently break regulations should be identified quickly, and face proportionate and meaningful sanctions; regulators should provide authoritative, accessible advice easily and cheaply; when new policies are being developed, explicit consideration should be given to how they can be enforced using existing systems and data to minimise the administrative burden imposed; regulators should be of the right size and scope, and no new regulator should be created where an existing one can do the work; and regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection. See <http://www.berr.gov.uk/files/file22988.pdf>

⁹⁹⁸ Ministry of Justice, ‘Impact Assessment of Political Parties and Elections Act – Reform of the Electoral Commission’, 20 July 2009, p.5.

⁹⁹⁹ UK Electoral Commission, *Annual report 2008-9*, HC 847, 20 July 2009, p.6.

http://www.electoralcommission.org.uk/__data/assets/pdf_file/0008/78812/EC-annual-report-2008-9-english.pdf

¹⁰⁰⁰ <http://www.electoralcommission.org.uk/party-finance/enforcement/other-enforcement-actions>

Compliance and enforcement

important policy considerations to be taken into account when conferring these types of compliance and investigatory powers in an enforcement system.

- 9.74 Under the Act, the UK Electoral Commission is required to publish guidance on how it intends to use its new powers and sanctions, and to review and consult on the guidance. In July 2009, the Electoral Commission released a consultation paper on the changes made by the PPE Act that explained its proposed new enforcement regulatory policy, the Commission's enforcement objectives, and its method for delivering those objectives. The 15-week consultation period expired on 1 November 2009 and gave interested stakeholders an opportunity to comment on the Electoral Commission's proposals before the policy was finalised.¹⁰⁰¹
- 9.75 The consultation paper explains that the Electoral Commission intends to use formal risk assessment tools to gauge when a proactive approach to offering advice would be appropriate and how to best target its advisory and audit resources. This process involves the Commission in profiling key organisations that it regularly deals with, such as registered political parties, constituency accounting units and third parties. In reviewing a case to determine if enforcement action is necessary, the Commission outlined three factors that it would consider: the evidence, the public interest, and proportionality.¹⁰⁰² The consultation paper provides a detailed and considered account of the Electoral Commission's proposed risk management approach, the proposed use of its supervisory and investigative powers and the application of various sanctions.
- 9.76 In response, the Chair of the Committee on Standards for Public Life expressed support for the risk based approach and proportionate response to sanctions proposed in the policy.¹⁰⁰³ Other stakeholders also supported the wider range of penalties and civil sanctions available to the Electoral Commission and noted the Commission's recognition of the need to factor into the regulated environment the role of volunteers working for political parties.¹⁰⁰⁴ Some of the concerns expressed in the responses relate to:
- the extent of publicity in relation to investigations and possible damage to reputation;
 - the period of time in which an appeal can be lodged and the ability to appeal both the finding of an offence as well as the sanction;

¹⁰⁰¹ The consultation process involved meeting with organisations and individuals regulated by the Electoral Commission including MPs, registered political parties (including volunteer treasurers and regional staff) and other regulatory bodies. The Commission also gave presentations to panels comprising political parties with representation in UK legislatures. Independent research was commissioned on the views of the public and volunteer treasurers. <http://www.electoralcommission.org.uk/party-finance/enforcement>.

¹⁰⁰² UK Electoral Commission, *Better regulation of party and election finance - A public consultation on the Electoral Commission's future enforcement policy following changes made by the Political Parties and Elections Act 2009*, July 2009, p.6. http://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/83074/Better-regulation-of-party-and-election-finance-consultation-2.pdf

¹⁰⁰³ Response to consultation from Sir Christopher Kelly, Chair of the Committee on Standards in Public Life, dated 11 December 2009. http://www.electoralcommission.org.uk/__data/assets/pdf_file/0005/84362/CSPL---Consultation-response.pdf

¹⁰⁰⁴ Response to consultation by Dr. Gwenllian Lansdown, Chief Executive, Plaid Cymru, dated 29 October 2009. http://www.electoralcommission.org.uk/__data/assets/word_doc/0008/81863/Plaid-Cymru.doc

- further clarification on the extent of the proposed use of risk profiling and its implementation;¹⁰⁰⁵
- the impact of the level of proposed financial penalties on small interest groups, as distinct from major political parties;¹⁰⁰⁶
- the impact of the policy on volunteer local party treasurers;
- the appropriateness of a regulatory approach based on Hampton principles;
- potential administrative burden of the regulatory requirements for parties and individuals;
- limitations arising from specifying sanctions in secondary legislation;
- providing for a civil sanction to be imposed as an alternative where the decision has been made not to undertake a criminal prosecution;
- the need for variable monetary penalties.¹⁰⁰⁷

9.77 It was anticipated that the outcome of the consultation would be published early in 2010 and provided to UK Government before the sanction regulations are approved by Parliament. The Electoral Commission plans to publish its new enforcement policy before applying the new sanctions under the Act.¹⁰⁰⁸ At the time of preparing this report, the UK Electoral Commission was working to refine and finalise its enforcement policy, while awaiting the introduction and debate of the statutory instrument that will give effect to the new civil sanctions. The new powers and civil sanctions are expected to commence on 1 July 2010 after the next parliamentary general election, which must be held by 3 June 2010.¹⁰⁰⁹

9.78 Another area of consultation in 2008 related to standard requirements for the annual statements of accounts to be submitted to the Electoral Commission by registered political parties. The Commission has reported that, following discussions with political parties, it concluded there are important transparency benefits to be gained from a mandatory approach to such reporting but that this would be impractical to introduce before 2011. It hopes to attain transparency without imposing unnecessary burdens on parties and their staff.¹⁰¹⁰

Features of a new enforcement system

The need for clarity in the enforcement system

9.79 Associate Professor Twomey advocated a system that is 'simple, transparent and easy to administer' as well as taking into account the need to 'eliminate loopholes that could be exploited and the need to reduce reliance on taxpayers' money'.¹⁰¹¹ In

¹⁰⁰⁵ Response from the Chairman of the Conservative Party, Eric Pickles MP.

¹⁰⁰⁶ Response from the Molesey Residents Association.

¹⁰⁰⁷ Response from the Chief Executive of the Scottish National Party, Peter Murrell.

¹⁰⁰⁸ UK Electoral Commission, *Better regulation of party and election finance - A public consultation on the Electoral Commission's future enforcement policy following changes made by the Political Parties and Elections Act 2009*, July 2009, p.1.

http://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/83074/Better-regulation-of-party-and-election-finance-consultation-2.pdf

¹⁰⁰⁹ E-mail from M. Gallagher, Policy and Risk Manager, The Electoral Commission, dated 16 March 2010.

¹⁰¹⁰ Electoral Commission, *Annual report 2008-9*, HC 847, 20 July 2009, p.9.

¹⁰¹¹ Associate Professor Anne Twomey, *Submission 2*, p. 4.

her submission, she warned against creating too burdensome a compliance regime, which may inhibit the ability of political parties to operate:

... regulating all aspects of the operation of political parties might result in governments being too closely involved in the running of political parties tying them up in such red tape that there would be enormous compliance costs in meeting all the relevant restrictions'.¹⁰¹²

9.80 In support of her position, Associate Professor Twomey highlighted the problems created in the United States, where 'compliance costs are so great that Presidential nominees who accept public funding, and are as a consequence denied access to private donations, are still permitted to raise donations solely for the purpose of meeting compliance costs'¹⁰¹³. Professor Williams concurred:

Professor WILLIAMS: ... The last principle that I would put on the table is that you have to minimise compliance costs, and it must be an efficient and cheap system to run. The last thing you would want are some of the problems that we have in the United States of America and elsewhere where compliance costs are so high that they themselves lead a trend towards excessive fundraising.¹⁰¹⁴

9.81 The Greens also submitted that 'the costs of compliance [should] be considered in any public funding model'.¹⁰¹⁵

9.82 PIAC considered that compliance would be best served by avoiding an overly complex regulatory scheme for the funding of elections. It submitted:

A simpler system arguably also results in simpler compliance requirements, which in turn could result in reduced possibility of loopholes being found. This is another important equity issue because the major players are better resourced to find such legal loopholes.¹⁰¹⁶

9.83 The ICAC recommended that in order to promote compliance and reduce legal loopholes legislation be drafted so as to avoid 'thickets of regulations'.¹⁰¹⁷ Dr Waldersee explained the effect of excessive regulation in his evidence:

Dr WALDERSEE: ... Once you have "thickets of regulation" compliance starts to drop because people cannot or will not comply with what is required, and once your compliance drops, then your transparency drops. It becomes this problematic cycle.¹⁰¹⁸

9.84 The ICAC emphasised the importance of drafting the legislation to minimise opportunities to circumvent its provisions:

Strong motivations exist for political parties and other interested parties to attempt to circumvent legislative provisions of the kind contemplated. Various ingenious methods, apparently unforeseen by legislators, have been deployed in those countries which have introduced similar legislation.¹⁰¹⁹

9.85 To some extent, there may be features of the electoral system that support aspects of the regulatory regime proposed by the Committee, independent of an enforcement system. Dr Joo-Cheong Tham's approach is to focus on those areas of a regulated

¹⁰¹² Associate Professor Anne Twomey, *Submission 2*, pp. 3-4.

¹⁰¹³ Associate Professor Anne Twomey, *Submission 2*, p. 4.

¹⁰¹⁴ Professor George Williams, UNSW, *Transcript of evidence*, 1 February 2010, p.36.

¹⁰¹⁵ Mr David Shoebridge, Convenor, The Greens NSW, *Submission 19*, p.18.

¹⁰¹⁶ Public Interest Advocacy Centre, *Submission 26*, p.8.

¹⁰¹⁷ The Hon David Ipp QC, Commissioner, Independent Commission Against Corruption, *Submission 14*, p.3.

¹⁰¹⁸ Dr Robert Waldersee, Independent Commission Against Corruption, *Transcript of evidence*, 2 February 2010, p.11.

¹⁰¹⁹ The Hon David Ipp QC, Commissioner, Independent Commission Against Corruption, *Submission 14*, p.2.

public funding scheme that would make it susceptible to non-compliance. In doing so, he noted that the potential for gaps or loopholes in any enforcement regime, for instance in relation to expenditure limits, is insufficient cause to forgo regulation.

- 9.86 According to Dr Tham, in-built features of the electoral system may also work to support the imposition and enforcement of expenditure limits:

The key issue is whether there is something peculiar to such limits that make it particularly vulnerable to non-compliance. It is this that is hard to make out. On its face, the regulation of political expenditure would be easier to enforce than regulation of political funding because a large proportion of such expenditure is spent on visible activity like political advertising and broadcasting. Further, the parties themselves, in a competitive system, have incentives to monitor each others' spending.¹⁰²⁰

- 9.87 The issue of in-built incentives for non-compliance is critical to the strength of any legislative reform package. The ICAC urged the Committee to look at the overall effect of proposed systems of electoral funding to determine whether they would create incentives to breach the law and engage in corrupt conduct. They highlighted the system in the US as illustrating this point:

One of the combinations likely to be conducive to corruption is providing public funding well below the amount needed and capping donations at \$1,000, without capping direct or third party expenditure. This combination of arrangements has contributed to some of the problems that have emerged in the U.S. system.

For example, a model that provides low cost access to the media reduces the demand for media funding and therefore reduces the power of third party advertisers to engage in dealings. Conversely a cap on donations coupled with a low level of public funding but unlimited expenditure and no assistance on media expenses could be expected to maximise the power of third party groups to engage in dealings, as has been seen in the U.S.¹⁰²¹

- 9.88 Consequently, ICAC recommended that election finance models 'be examined for both unintended incentives and opportunities to behave corruptly as well as the corruption prevention efficacy of the models'.¹⁰²²

Transparency and accountability

- 9.89 Annual disclosure and audited statements - In the proposed public funding scheme, which involves providing significant levels of public funding to political parties and candidates for election campaigns, as well as public funding for the operational expenses of parties, transparency and accountability in respect of the use made of such funding is a reasonable expectation. It also is essential for compliance.
- 9.90 There was support among some inquiry participants for increased public disclosure and scrutiny of party expenditure generally. To ensure that those receiving public funding for political purposes comply with election finance law, ICAC recommended that they 'should be required to publish an annual statement containing relevant information about income and expenses', including:

¹⁰²⁰ Dr Joo-Cheong Tham, 'Towards a more democratic political funding regime in New South Wales – A report prepared for the New South Wales Electoral Commission, February 2010,, p.57.

¹⁰²¹ The Hon David Ipp QC, Commissioner, Independent Commission Against Corruption, *Submission 14*, pp.5-6.

¹⁰²² The Hon David Ipp QC, Commissioner, Independent Commission Against Corruption, *Submission 14*, p.6.

Compliance and enforcement

A record of all contributions from identified third parties, whether by money or other means, directly or indirectly received, in the year in question.

Full details of all expenses for political purposes of whatever kind, incurred in the year in question out of public funding.

Full and detailed explanations of any difference between the party's current assets as reflected in its previous annual statement and contributions and other monies received, on the one hand, and expenditure on the other. Any change in the amounts reflected for current assets and all use of monies received in the period in question must be reconciled with expenditure.¹⁰²³

9.91 Professor Williams held a similar view, telling the Committee:

Professor WILLIAMS: ... a change I would like to see ... would be that, where a political party receives public funding, extra compliance mechanisms are introduced in terms of democratic accountability as part of the role of political parties and the transparency that goes with their accounts. I would say if the public is really going to be forking out the money in any more significant way, then political parties need to bear far higher responsibilities that go with that. ...¹⁰²⁴

9.92 ICAC submitted that an independent statutory body should audit this annual statement. As well, 'each entity should be obliged to publish its annual audited accounts in some public form and, in particular, on the internet'.¹⁰²⁵ Both the Greens and PIAC stressed the importance of transparency and independent verification of expenditure: The Greens submitted:

To ensure compliance annual auditing of any party or candidate who receives public funding must be compulsory.

Continuous disclosure of electoral expenses to be required for the three-month period up to and including any election.¹⁰²⁶

9.93 PIAC suggested 'that political parties [should] be required to provide full disclosure of their financial status, similar to the requirements for listed companies under the Corporations Act 2001 (Cth)' and 'that political parties and Independent members of parliament / candidates be required to have their returns independently audited'.¹⁰²⁷ According to PIAC,

Countries such as the United Kingdom, the United States of America and Canada all require much more frequent reporting and some countries, such as New Zealand, require returns (at least from parties with significant income) to be checked for accuracy by an independent auditor. Canada requires particular standards in reporting to ensure easy comprehension and an independent review of a political entity's books and records.

Critical to the effectiveness of any disclosure requirements is whether or not they result in the true source and total amounts of donations being disclosed.

An effective accountability system must include three key components:

- controlling the use of influential associated entities and third parties;
- reporting requirements are inconsistent [sic] and inadequate [sic];

¹⁰²³ The Hon David Ipp QC, Commissioner, Independent Commission Against Corruption, *Submission 14*, p.4.

¹⁰²⁴ 1 February transcript, p.43.

¹⁰²⁵ The Hon David Ipp QC, Commissioner, Independent Commission Against Corruption, *Submission 14*, p.4.

¹⁰²⁶ Mr David Shoebridge, Convenor, The Greens NSW, *Submission 19*, p.18.

¹⁰²⁷ Public Interest Advocacy Centre, *Submission 26*, p.13.

- an effective enforcement system.¹⁰²⁸

9.94 Mr Besseling MP expressed the view that the level of transparency for political parties was lower than that which applied to candidates. In terms of a cap on political expenditure he supported an expenditure cap per electorate and an overarching cap for political parties in each electorate. This in turn would necessitate greater disclosure by political parties about their expenditure:

The Hon. DIANE BEAMER: Then we would have to change the way in which parties are operating now.

Mr BESSELING: Yes, and it leads to my other point, not only equity but transparency. At the moment we have a situation where individual candidates will provide public disclosure of their electoral funding or their expenditure and the donations received, where it is not incumbent upon political parties to do that for the individual electorates. It comes under the broader banner of the political party. I think some consideration needs to be given to that for those overarching ideals of equity and transparency.¹⁰²⁹

9.95 The proposal put to the Committee that disclosure under the EFD Act should occur on an annual basis also may have advantages in terms of the audit processes undertaken by the EFA. Mr DeCelis advised the Committee that moving to an annual disclosure period would enable the EFA to align its auditing processes with those applicable at Federal level, thereby eliminating the need for multiple disclosures for parties and broadening the financial information available to the EFA for its compliance auditing role. Mr DeCelis informed the Committee:

Mr De CELIS: ... one idea we had on the table was to move from the six-monthly disclosure period to a 12-monthly disclosure period. ...To favour it might be a little bit strong, but we certainly think it worthy of strong consideration to move to an annual disclosure period ... an annual disclosure in the regulated model would work. It gives advantages to the parties. At least in the current model, parties have difficulty in trying to deal with the \$1,000 in aggregate in the financial year, over two disclosure periods. It causes some angst.

One of the great benefits we see from it is that if the type of disclosure from parties was made to be similar to that which is currently required at the Federal level, which is *full disclosure of all income and expenditure by a party, not just electoral income and expenditure*, we could sit comfortably with the Commonwealth in processing and dealing with disclosures on an annual basis from parties, which is currently the case at the Federal level. Hopefully we would be able to work out some process, where, if we are both getting the same information, that would assist the parties immensely to move to an annual financial year as opposed to six monthly disclosures (emphasis added).¹⁰³⁰

Offences and penalties under a new scheme

9.96 A new scheme for the public funding of election campaigns, involving expenditure caps and limits on donations, will lead to new offences under the EFD Act in recognition of the new obligations and responsibilities imposed as a result of an integrated package of reforms. During the course of the inquiry, the Committee received submissions and heard evidence on a wide range of options in relation to proposed penalties for non-compliance under a new scheme, including monetary penalties, civil sanctions and imprisonment. A common perspective heard throughout

¹⁰²⁸ Public Interest Advocacy Centre, *Submission 26*, p.10.

¹⁰²⁹ 2 February transcript, p.20.

¹⁰³⁰ In camera transcript 22 February 2010, p.29.

the inquiry was that the consequences for individuals who fail to comply with the legislation should be proportionate to the seriousness of the offence and its repercussions.

A tiered approach to penalties

9.97 The Electoral Commissioner has indicated that he supports 'a penalty infringement scheme for minor breaches of the Act relating to failure on the part of parties to perform certain duties under the Act'. Under such a scheme:

Certain breaches of the Act, including such things as a candidate failing to appoint an agent, an agent failing to lodge a declaration on behalf of a candidate and failing to lodge a declaration by the statutory time, could be subject to a penalty infringement scheme. This would be similar to the infringement scheme that applies to failure to vote...where a person fails to vote at a State or Local Government election the New South Wales Electoral Commission (NSWEC) is required under law to send to each apparent non voter a failure to vote penalty notice. The elector is invited to either declare that they did vote or, if they did not vote, to offer an excuse for failing to vote and if it is deemed to be a valid and sufficient excuse to have the matter withdrawn. If an elector fails to respond to the notice or fails to provide a valid and sufficient excuse, then the elector is required to pay a statutory penalty.¹⁰³¹

9.98 The Electoral Commissioner has suggested the following approach:

First, any excess expenditure incurred by a candidate or a registered political party should be recovered by the EFA as a debt due to the State.

Second, provisions where the excess does not exceed \$2,000 could be put in place that would be subject to a penalty infringement notice scheme.

Third, where expenditure exceeds \$2,000 the matter could be taken to court with a penalty provision of up to \$100,000. In my view, once a matter is taken to court there needs to be considerable penalties as a deterrent to any candidate or registered political party who may otherwise regard the penalty to be just an additional cost to running the campaign.

Fourth, as a further deterrent to candidates, political parties and third parties to overspend the expenditure cap there needs to be a provision in the *Parliamentary Electorates and Elections Act 1912* that broadens the powers of the Court of Disputed Returns to enable the court to consider, as a basis of a challenge to a successful candidate, that the successful candidate overspent their expenditure limit and that this directly impacted on the result of the election. This would then enable the Court of Disputed Returns to declare the elected candidate not elected and require a new election to be held.¹⁰³²

9.99 The Electoral Commissioner's proposal accords with other evidence and submissions provided to the Committee. A number of submissions stated that there should be sanctions for non-compliance ranging from on-the-spot fines for small, inadvertent breaches to imprisonment and loss of office for serious offences. The ICAC argued that:

The legislation should provide for sanctions for non-compliance with the legislative provisions. The sanctions should provide substantial fines and imprisonment for individuals.

...

¹⁰³¹ Letter to the Committee Manager, 3 March 2010.

¹⁰³² Letter to the Committee Manager, 3 March 2010.

The deterrent effect of such sanctions will depend on the efficiency of the regulatory requirements and the effectiveness of the investigatory body.¹⁰³³

9.100 Under the public funding model originally proposed by the NSWEC, the following penalties were recommended in relation to breaching the proposed expenditure caps:

Table 38

Expenditure caps

Sanction recommended by NSWEC

Registered political parties (RPP) - If a RPP exceeds the general campaign spending limit	Liable for a penalty 3 times the amount by which they exceeded the spending limit.
Candidates (endorsed/Independent) - If RPP/candidate exceeds the election campaign spending limit	Liable for a penalty 3 times the amount by which they exceeded the spending limit.
Groups and Ungrouped candidates - If RPP, group or ungrouped candidate exceeds the election campaign spending limit	Liable for a penalty 3 times the amount by which they exceeded the spending limit.
Third parties - If a third party/entity exceeds the expenditure limit (proposed expenditure cannot exceed \$200,000)	Liable for a penalty 3 times the amount by which they exceeded the spending limit.

9.101 In addition to monetary penalties, both the Greens and PIAC submitted that there should be different types of penalties for commission of offences, including in terms of the ability to obtain public funding. The Greens submitted that:

Suggested penalties for breach to include total or partial loss of public funding; hefty fines, confiscation of unlawful donations, and in extreme cases of over expenditure disqualification as a candidate, councillor or member of parliament.¹⁰³⁴

9.102 PIAC also considered that 'public funding should be made dependent on compliance with expenditure reporting requirements and limits being met'.¹⁰³⁵ In addition, PIAC proposed that there should be a range of penalties and civil sanctions available under a new scheme, which would be commensurate with the nature of the breach. It submitted :

PIAC is supportive of the use of administrative incentives as well as of criminal penalties for serious breaches.

PIAC supports the Canadian system where enforcement provisions are set out in legislation and a range of offences, from trivial to severe, are defined.

PIAC also supports administrative sanctions, such as the withholding of election funding if reporting requirements are not met and the suspension of registered political parties for non-compliance. Such measures could be useful in enhancing compliance and potentially reduce more serious offences.

However, PIAC did not support an opt-out system as in the case of the US, where candidates may elect not to receive public funding and, therefore, not be subject to certain limits on expenditure and donations. Rather PIAC advocated that disclosure

¹⁰³³The Hon David Ipp QC, Commissioner, Independent Commission Against Corruption, *Submission 14*, p.5.

¹⁰³⁴ Mr David Shoebridge, Convenor, The Greens NSW, *Submission 19*, p.18.

¹⁰³⁵ Public Interest Advocacy Centre, *Submission 26*, p.5.

requirements and caps on expenditure and donations should exist concurrently with administrative sanctions.¹⁰³⁶

9.103 The academic experts participating in the roundtable emphasised the necessity for breaches of requirements under a new scheme to carry possible legal and political consequences. Associate Professor Orr suggested that breaching the expenditure caps should have significant political repercussions, referring to earlier Australian cases where elected members had lost their seat:

Dr ORR: ... I think you need a system where there are significant potential deterrents, not just on the registered officer or secretary or treasurer but on the party leader—systems including double penalties for going over the limit on public funding but also the potential of serious political consequences; in other words, people not being able to stand for re-election—for example, party leaders as well as the apparatchiks who have to carry the can. ...

...

The Hon. MICHAEL VEITCH: So you are advocating that a breach of the expenditure limits could be added to that list of reasons why you cannot be a candidate in public elections?

Dr ORR: Otherwise you have the problem of people knowingly going over the limit and copping some kind of fine, as corporations do all the time.¹⁰³⁷

9.104 The Greens also supported matters being brought before a court exercising similar jurisdiction to the Court of Disputed Returns:¹⁰³⁸

Penalties to be imposed by a court modelled on the Court of Disputed returns in cases where breaches of the electoral funding and expenditure rules are identified.¹⁰³⁹

9.105 Significantly, it is relevant to note that the *Parliamentary Electorates and Elections Act 1912* enables the Court of Disputed Returns to declare void the election of a candidate on the grounds of illegal practices. Section 164 provides as follows:

164 Voiding election for illegal practices

(1) If the Court of Disputed Returns finds that a candidate has committed or has attempted to commit the offence of bribery or treating or undue influence, his or her election, if he or she is a successful candidate, shall be declared void.

(2) No finding by the Court of Disputed Returns shall bar or prejudice any prosecution for any illegal practice.

(3) The Court of Disputed Returns shall not declare that any person returned as elected was not duly elected or declare any election void:

¹⁰³⁶ Public Interest Advocacy Centre, *Submission 26*, p.12.

¹⁰³⁷ 1 February transcript, p.58.

¹⁰³⁸ Part 6 of the *Parliamentary Electorates and Elections Act 1912* enables the validity of any election or return to be disputed by petition to the Supreme Court, sitting as the Court of Disputed Returns, within forty days of the return of the writ. Section 164 of the Act provides that the Court of Disputed Returns shall declare void the election of a successful candidate if it finds that the candidate has committed or attempted to commit, the offence of bribery, treating, or undue influence. The Court cannot declare an election void or a successful candidate not duly elected on the ground of either, any illegal practice committed by someone other than the candidate and without the candidate's knowledge or authority, or on the ground of any illegal practice other than bribery treating or corruption or the attempt of the same, unless it is satisfied that the election result was likely to be affected.

¹⁰³⁹ Mr David Shoebridge, Convenor, The Greens NSW, *Submission 19*, p.18.

(a) on the ground of any illegal practice committed by any person other than the candidate and without his or her knowledge or authority, or

(b) on the ground of any illegal practice other than bribery, treating, or corruption or attempted bribery, treating, or corruption,

unless the court is satisfied that the result of the election was likely to be affected, and that it is just that the candidate should be declared not to be duly elected or that the election should be declared void.

9.106 The Committee notes that the proposal to include unlawful acts as part of the new scheme for regulating electoral expenditure and political party funding, for instance, breaching the expenditure caps, as a ground to enliven s.164 of the *Parliamentary Electorates and Elections Act 1912* may need careful consideration. In particular, the Committee is keen to avoid any unintended consequences arising from the construction of an amending provision. It is particularly concerned to ensure an appropriate fit between the range of newly created offences under the proposed scheme and s.164 as constructed. It would be highly undesirable in the view of the Committee if, by creating new offences, s.164 was enlivened unintentionally, possibly as a result of a lack of clarity around the meaning of such terms as ‘corrupt conduct’ and ‘undue influence’. In the case of the former, the Committee notes that the definition of corrupt conduct in the ICAC Act is complex and a matter for some interpretation.

9.107 It also is necessary to ensure an appropriate fit between newly created electoral offences and existing statutory provisions relating to the disqualification of Members and eligibility to nominate and stand as a candidate

9.108 Factors that witnesses felt should be considered when setting appropriate penalties included whether the offence was committed intentionally and whether it had a significant impact on the election result. Professor Williams and Associate Professor Twomey both made this point:

Professor WILLIAMS: I think it depends on the nature of the offence, but if someone has deliberately misused the system to create a circumstance where they have an unfair advantage and have so won the election, then yes, I think [not being able to stand as a candidate] should be a consequence. On the other hand, if it is reckless, inadvertent, a small amount or an accountancy problem and things like that, in those circumstances that consequence should not follow and there should perhaps be a fine.
...

Professor WILLIAMS: ... you need graduated offences because if even the most minor breach means you lose your seat it is too harsh. There will be circumstances in which that is not reasonable. I would be looking at intent, in particular the magnitude of the offence. If it is in the serious category, then yes. If it is in the serious category it probably is an example where you have a very significant and unfair advantage and you have deliberately sought it.

Assoc. Prof. TWOMEY: Similar things happen in relation to bribery, so you would be looking at similar penalties to electoral bribery.¹⁰⁴⁰

9.109 Mr Besseling MP held a similar perspective on the need for proportionate sanctions, which he outlined in evidence:

¹⁰⁴⁰ 1 February transcript, p.59. The maximum penalty for electoral bribery under s.147 of the *Parliamentary Electorates and Elections Act 1912* is an \$11,000 fine or imprisonment for 3 years, or both.

CHAIR: If it is a minor financial breach, whereas if it is a substantial breach and it can be established that there was an intent to mislead, that the penalty should be much higher again and include forfeiture of the result.

Mr BESSELING: And I think not only the intention, but the influence. If it is a substantial breach that heavily influenced the result, that definitely should be something that was considered.¹⁰⁴¹

9.110 The Committee also took evidence that existing offence provisions did not quite capture the nature of the offences that would apply under a regulatory regime relating to expenditure caps nor would they appropriately confer liability for offences.

Associate Professor Orr told the Committee:

Assoc. Prof. ORR: ... I think you have to put in place a system of strong potential deterrents, in particular because bribery is not quite the metaphor and neither is the nineteenth-century approach to restricting expenditure at constituency level. We have very centralised parties with centralised controlled expenditure, so you need to have mechanisms and threats and potential penalties that will fall heavily on those people who have the power, which tends to be a very small number of people in the head offices.¹⁰⁴²

9.111 Overall, there was agreement with the proposition that the penalty to apply to an offence should be proportionate to the nature of the breach:

CHAIR: Is there a general acceptance of the view that penalties for exceeding expenditure caps should depend on the nature of the offence? If it is a minor, inadvertent exceeding of the cap it would not carry a full-scale penalty, whereas if you have doubled the amount you should be spending the scale of penalties would escalate. Is that essentially agreed?

Assoc. Prof. TWOMEY: Yes.

Professor WILLIAMS: Yes.¹⁰⁴³

9.112 Although opinion seemed to diverge over which body was best placed to determine serious matters and enforce the relevant penalties, the view was commonly held that criminal offences needed to reside with the courts, which could exercise some discretion, while other sanctions could be imposed through administrative proceedings. The following evidence from Professor Williams and Associate Professor Orr illustrates this point:

Dr ORR: In principle we then have to ask who is going to be handing out these penalties. If it is a court in a kind of semi-criminal case, the courts usually have some discretion. If it is an administrative body or the Electoral Commission deciding how much public funding to withhold, that is a slightly different kettle of fish.

Professor WILLIAMS: It would have to be a court, would it not, given the seriousness of the offence. There would need to be a fair trial. Also, the experience is that if you give any power like this to the Electoral Commission they are not going to use it. They have not in the past because it is very difficult for electoral commissions to get involved in these issues. It is best if it is just dealt with by the appropriate authorities. ...

Dr ORR: ... The penalty would be an administrative penalty of withholding, say, double the amount you went over in your public funding. That is not something I would want to throw into the hands of a criminal court because it is not going to end up being a real

¹⁰⁴¹ 2 February transcript, p.21.

¹⁰⁴² 1 February transcript, p.59.

¹⁰⁴³ 1 February transcript, p.59.

deterrent. You might have one or two cases that will flop and everyone will shrug their shoulders and laugh at the system.

Ms LEE RHIANNON: Are you saying you do not think it should be a criminal court matter but a matter for the Electoral Commission?

Dr ORR: If the penalty is administrative and it is being applied on the party, for example, I do not see why that should be held to the criminal standard of the burden of proof. On the other hand, if we are talking about disabling a Premier or a senior political figure from standing in a future election, that is something that would have to have a high standard of proof.¹⁰⁴⁴

Liability for offences

Who should be liable for an offence?

9.113 On the issue of liability for offences, it is relevant to note that the Australian Government's Green Paper on electoral reform identified a number of problems when devising an enforcement scheme for public funding at the Commonwealth level, including:

- The need for effective penalties that accommodate a range of options appropriate for the nature of the offence – administrative options for less serious compliance breaches and criminal penalties for serious offences;¹⁰⁴⁵ and
- Inability to prosecute political parties, as distinct from party agents, and the largely unsuccessful prosecution of party agents for offences at Commonwealth level.¹⁰⁴⁶

9.114 The offence provisions at s.96H and s.96I of the EFD Act (NSW) apply to persons and individuals responsible for disclosures. Section 90 specifies that the person responsible for making a disclosure under Part 6 of the Act is as follows:

- In the case of the party – the party agent;
- In the case of an elected member – the official agent of the Member;
- In the case of a group or candidate – the official agent of the group or candidate; and
- In the case of a major political donor – the political donor.

9.115 When dealing with these issues at the Commonwealth level, the Green Paper notes that the application of offence provisions in such circumstances may not effectively deter political parties from breaching the statutory obligations and requirements.¹⁰⁴⁷ As the Green Paper notes, there are disadvantages in prosecuting the party agent rather than the political party:

¹⁰⁴⁴ 1 February transcript, pp.59-60.

¹⁰⁴⁵ Australian Government, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, Commonwealth of Australia, December 2008, p.70.

¹⁰⁴⁶ Australian Government, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, Commonwealth of Australia, December 2008, pp.70-71.

¹⁰⁴⁷ Green Paper p.71

Compliance and enforcement

- The party agent may be liable to repay overpayments or prohibited donations from their own pocket and the party that committed the offence has no obligation to support the agent.
- The party agent may legitimately claim not to know about the offences that have been committed.

Possible options were posed in the paper, including continuing to require parties to have agents, requiring political parties to incorporate or amending legislation to give a registered political party standing before a Court for prosecution.

9.116 Requiring parties to incorporate raises problems. The Green Paper notes that most political parties do not hold assets of their own and may not be able to pay back any overpayments granted, thereby leaving deregistration of the party as one possibility.¹⁰⁴⁸ Further, requiring political parties to incorporate may have ‘far-reaching consequences for internal party practices’.¹⁰⁴⁹

9.117 During the course of the Committee’s inquiry, PIAC also emphasised the potential constitutional difficulties associated with treating parties as corporations:

While political parties are categorised as voluntary associations there are obvious problems in imposition of penalties. ...

While it might seem a relatively straightforward matter to add a requirement that in order to be eligible for election funding, a party must be a body corporate limited by guarantee, able to sue and be sued; and to incorporate requirements relating to public reporting and audits as a condition of electoral funding, the Constitutional implications of such a step would require careful consideration; not least in relation to any potential breach of the implied freedom relating to matters of political communication. ... however, these arguments need to be balanced against the public interest in a strong representative democracy, where citizens participate in the political process and elected members are free to work unencumbered by undue influence, conflict of interest or corrupt practice.

In the interim, perhaps the most appropriate course, consistent with the existing law and the present (somewhat anomalous) juridical status of parties, is for penalties to apply by way of deduction from, or withholding or repayment of funding provided under [electoral legislation].¹⁰⁵⁰

The question of intent

9.118 The issue of whether intent should form a necessary element of any offence relating to breaches of disclosure requirements under a new scheme was raised by the ICAC in its submission to the inquiry. It argued that:

Intention to deceive should not be an element of any offence relating to false disclosure or non-disclosure as such an element has historically been extraordinarily difficult to prove with the consequence that few convictions are obtained.¹⁰⁵¹

9.119 As the Committee considers this issue to be a very important one, with serious implications for both regulating bodies and those in breach of the legislation, considerable attention has been given to the question of intent as a necessary part of an offence. Its relevance to the problems experienced by the EFA in administering

¹⁰⁴⁸¹⁰⁴⁸ Australian Government, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, Commonwealth of Australia, December 2008, p.71.

¹⁰⁴⁹ Green Paper p.72.

¹⁰⁵⁰ Public Interest Advocacy Centre, *Submission 26*, p.12.

¹⁰⁵¹ The Hon David Ipp QC, Commissioner, Independent Commission Against Corruption, *Submission 14*, p.5.

the existing offence provisions contained in the EFD Act has been referred to at paragraphs 9.33 – 9.39. However, acts for which an individual would be automatically guilty of committing an offence also need to be considered in the context of a new scheme and the various types of offences that would be created when expenditure caps and limits on donations are in place.

- 9.120 The issue of strict liability offences has been considered previously by the Legislation Review Committee of the NSW Parliament. In 2006 the Committee produced a discussion paper as a result of concern that strict and absolute liability offences ‘displace the common law rule that the prosecutor must prove beyond reasonable doubt that the offender intended to commit an offence’, unless the individual can show ‘they made an honest and reasonable mistake of fact’. Another available defence may be ‘due diligence’.
- 9.121 The Legislation Review Committee’s report notes that strict and absolute liability usually applies to regulatory offences where it is particularly important to maximise compliance, although strict liability also may apply to certain criminal offences, including serious offences.¹⁰⁵² The Committee concluded that although there may be appropriate circumstances in which to impose strict or absolute liability, this should only occur ‘after careful consideration on a case by-case basis’, where there are ‘highly compelling public interest grounds.’¹⁰⁵³ In the Committee’s view imprisonment is an inappropriate penalty for an offence where the person may be guilty without having intended to commit the offence. While there may be some circumstances in which high level monetary penalties may be appropriate, for example, an offence with very serious public health or safety consequences, the Committee believed it ‘may be more suitable to assess the appropriateness or otherwise of a monetary penalty for a strict liability offence on a case-by-case basis rather than adopt an arbitrary cap’.¹⁰⁵⁴
- 9.122 In considering the application of strict liability offences in a regulatory scheme for electoral and political party funding, the Committee on Electoral Matters has had regard to the following principles, adopted by the Legislation Review Committee for considering bills that include strict liability offences:

General principles to govern the use of strict or absolute liability:

- 1) Fault liability is one of the most fundamental protections of the criminal law and to exclude this protection is a serious matter. It should only ever be excluded if, and to the extent that, there are sound and compelling public interest justifications for doing so.
- 2) Strict and absolute liability should not be used merely for administrative convenience.
- 3) The intention to impose strict or absolute liability should be explicitly stated in legislation.
- 4) As a general rule, strict and absolute liability should be provided by primary legislation, except for offences with minor penalties.
- 5) Strict and absolute liability should depend *as far as possible* on the actions or lack of action of those who are actually liable for an offence, rather than be imposed on parties who must by necessity rely on information from third parties.

Applicability of defences to strict and absolute liability offences

¹⁰⁵² Legislation Review Committee, *Strict and absolute liability, Responses to the Discussion Paper*, Report no.6, 17 October 2006, p.2

¹⁰⁵³ *ibid*, p.3

¹⁰⁵⁴ *ibid*, p.3-4.

- 6) Appropriate defences should be available to ensure that a person is not punished for a strict liability offence if there are exonerating circumstances and if punishment would not serve the objective of the legislation.

Penalties for strict and absolute liability offences

- 7) Strict liability offences should not be punishable by imprisonment, unless there are highly compelling and extraordinary public interest justifications for doing so.
- 8) ...
- 9) Monetary penalties for particular strict and absolute liability offences must be set at an appropriate and justifiable level having regard to the lack of fault of the person punished and the legislative objective. ...¹⁰⁵⁵

9.123 Strict liability offences were the subject of debate recently during the passage of the Political Parties and Elections Bill 2009 through the UK House of Commons. During committee stage of the bill, concern was expressed about the way in which certain offences in the principal act, the *Political Parties, Elections and Referendums Act 2000* (PPERA) were framed, and their implications for a person who, acting in good faith, makes a genuine error.

9.124 Certain offences in the PERA¹⁰⁵⁶ relating to the submission of accounts, and donation and loan reports to the Electoral Commission, only allowed a defence to be taken into account after it had been determined that an offence had been committed – the reporting breaches were automatically offences under the Act. The PERA did provide for a defence of '[taking] all reasonable steps and exercised all due diligence'. However, in seeking to provide the Electoral Commission with a 'more proportionate range of civil sanctions' under the new legislation, it was suggested that taking the defence into account at an earlier point in time, before the point of charge, would be desirable.¹⁰⁵⁷ This approach would '[allow] the reason for the failure to be taken account of at an earlier stage so that a genuinely inadvertent error made with good reason will not be regarded as an offence'. The Ministry for Justice proposed that the offences concerned be recast to with the defence of 'reasonable excuse' so that an individual or regulated body would have an opportunity 'to put forward mitigating factors to the Electoral Commission or Police/Crown Prosecution Service, but without creating a blanket excuse for non-compliance'. It reported that the Electoral Commission supported the changes as the new defences were 'more proportionate, providing greater protection to those [regulated] and more certainty to the Commission and to prosecuting authorities'.¹⁰⁵⁸

¹⁰⁵⁵ The Committee adopted four additional principles in relation to absolute liability, however, these are not replicated here as the inclusion of absolute liability offences is not being contemplated. NSW Parliament, Legislation Review Committee, *Strict and absolute liability, Responses to the Discussion Paper*, Report no.6, 17 October 2006, pp.13-14.

¹⁰⁵⁶ Identified by the Ministry for Justice as sections 47, 65, 71S, para. 12 of sch.7, and para. 12 of sch. 7A. Ministry for Justice, Impact Assessment of political Parties and Elections Act – 'Reasonable Excuse', dated 20 July 2009, p.3. available at the Department for Business Enterprise and Regulatory Reform, <http://www.ialibrary.berr.gov.uk/ImpactAssessment/?IAID=bce6a3db6a7e4f2693bc8bd89969aaf1>

¹⁰⁵⁷ Ministry for Justice, Impact Assessment of political Parties and Elections Act – 'Reasonable Excuse', dated 20 July 2009, pp.1, 2. available at the Department for Business Enterprise and Regulatory Reform, <http://www.ialibrary.berr.gov.uk/ImpactAssessment/?IAID=bce6a3db6a7e4f2693bc8bd89969aaf1>

¹⁰⁵⁸ Ministry for Justice, Impact Assessment of political Parties and Elections Act – 'Reasonable Excuse', dated 20 July 2009, pp.1,3,4. <http://www.ialibrary.berr.gov.uk/ImpactAssessment/?IAID=bce6a3db6a7e4f2693bc8bd89969aaf1>

Investigations and prosecutions

9.125 During the inquiry the Electoral Commissioner proposed that under a new public funding scheme the EFA should have an enhanced compliance audit capacity and that it should be empowered to undertake investigations.¹⁰⁵⁹ This represents a significant shift from the views expressed by the Electoral Commissioner during the inquiry of the Legislative Council Select Committee on Electoral and Political Party Funding in NSW in 2008. At that stage, the Electoral Commissioner was adamant that the EFA should not have an investigatory role, as this would involve significant duplication of effort with existing law enforcement and investigatory bodies.

Background - The Legislative Council Select Committee inquiry

9.126 During the Legislative Council Select Committee inquiry, Dr Joo-Cheong Tham recommended that the EFA be given investigative powers modelled on those of the Australian Electoral Commission, which authorise the AEC to 'compel the production of information and evidence if he or she reasonably suspects that such information is relevant to determining whether disclosure obligations have been complied with.'¹⁰⁶⁰ However, the Select Committee noted that Mr Barry did not support this proposal, on the basis that establishing an investigation unit would necessitate a restructure of the EFA with a need for additional resources and recruitment of staff with specialist expertise, leading to duplication of resources:

I do not think we want to be duplicating existing resources in the State, and I would have thought that subject to any legal impediment, what would be more appropriate if the Authority is satisfied that a prima facie matter needs to be investigated, it would be better off going to either the New South Wales Police to investigate or, indeed, to the ICAC, both organisations who have expertise in investigation.

... If it was the Government's and the Parliament's intention that we undertake that role in a similar way to what the Australian Electoral Commission does in order to fulfil its obligation, that is a completely different way of operation and that would require changes to the Act and would require reconsidering of the funding structure for the Authority.¹⁰⁶¹

9.127 In considering the Authority's powers, the Legislative Council Select Committee agreed that the electoral funding system was essentially based on self-regulation and stated that 'this must be remedied urgently'.¹⁰⁶² The Select Committee noted that, although the ICAC has powers to investigate corrupt conduct, the strict definition of corrupt conduct would not capture most breaches of electoral finance law. It concluded that:

The EFA must also have the power to identify suspected breaches of the Act. Once a possible breach is identified it should be referred to another body for investigation. Possible breaches could be referred to the ICAC if they potentially fall within the definition of corrupt conduct. The Committee believes that in addition to the ICAC, there needs to be an alternative reference point to which breaches could be referred.

The Committee is loathe to recommend the establishment of an investigations unit within the EFA, given the compelling arguments put by Mr Barry concerning duplication

¹⁰⁵⁹ Letter from the Electoral Commissioner to the Committee Manager, dated 3 March 2010.

¹⁰⁶⁰ NSW Parliament, Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, pp. 196-7.

¹⁰⁶¹ NSW Parliament, Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, pp. 199-200.

¹⁰⁶² NSW Parliament, Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, p. 201.

of resources. The Committee supports examination of alternative reference points, for example a specialist unit within NSW Police, such as the unit now responsible for investigating white-collar crime.¹⁰⁶³

- 9.128 The Select Committee requested the Premier to review the Authority's powers to identify suspected breaches of the electoral funding scheme, with suspected breaches being referred to a designated reference point for investigation.¹⁰⁶⁴
- 9.129 A related issue considered by the Select Committee concerned the adequacy of staffing and resources available to the EFA, with many participants claiming that the the Authority required more staff to administer the scheme and ensure compliance with the law.¹⁰⁶⁵ The Select Committee observed that, although the EFA cannot employ staff, it is assisted by clerical officers and a Secretary employed by the NSWEC. In considering the staffing of the Authority, the Select Committee concluded that its recommendations for reform would result in 'a dramatic change in the EFA's workload' and would require the Authority to employ staff with specialist skills to monitor compliance with the funding scheme.¹⁰⁶⁶ As a result, the Select Committee recommended that the Premier allocate additional resources to the EFA including: staff to monitor compliance with and identify prima facie breaches of the electoral funding scheme; capital resources to acquire information technology to improve the Authority's webpage and facilitate online lodgement of disclosure returns; and expert staff to establish and administer the Authority's information technology systems.¹⁰⁶⁷
- 9.130 The Government's response to the Select Committee report states that recent amendments to the Act have given enforcement powers to the EFA, which enable it 'to conduct compliance audits, and ... to require any person to provide it with relevant information for this purpose.'¹⁰⁶⁸
- 9.131 However, s.110(8) inserted in the Act as a result of the amendments made by the *Election Funding Amendment (Political Donations and Expenditure) Act 2008*, provides that the Authority 'may request any person to provide it with relevant information for the purposes of compliance audits in connection with disclosures under Part 6.' It appears relevant when considering the EFA's powers to require the production of records and information, that the power to *request* information under s.110(8) does not appear to involve the power to *compel* the production of information relevant to a compliance audit in connection with a disclosure under Part 6 of the Act. Combined with difficulties the EFA has noted in relation to its power to issue notices under clause 32 of the Election Funding and Disclosures Regulation 2004 and its description of the inspection provisions as 'resource-intensive', the

¹⁰⁶³ NSW Parliament, Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, p. 201.

¹⁰⁶⁴ NSW Parliament, Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, p. 201.

¹⁰⁶⁵ NSW Parliament, Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, pp. 197, 209-10.

¹⁰⁶⁶ NSW Parliament, Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, pp. 210-11.

¹⁰⁶⁷ NSW Parliament, Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, p. 211.

¹⁰⁶⁸ NSW Government, *Response to the report of the Select Committee on Electoral and Political Party Funding*, p. 9, <[http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/\\$FILE/081219%20Government%20Response.pdf](http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/$FILE/081219%20Government%20Response.pdf)> accessed 12 January 2010.

powers available to the EFA to obtain the information necessary to undertake its compliance role appear to remain inadequate.¹⁰⁶⁹

- 9.132 In terms of funding and resources, the Government responded that significant additional funding had been granted to the EFA to enable it to perform its new functions and that the Commissioner would be consulted about the need for further funding. In 2008-2009 the EFA reported an increase in employee related expenses from \$440,000 in 2008 to \$969,541, and an increase in other operating expenses from \$101,000 in 2008 to \$963,309. This increase in expenses, which is captured within the NSW Electoral Commission's accounting framework, was attributed to the impact of the *Election Funding and Disclosures Act 1981*. In order to meet the new requirements of the legislation, the number of staff positions and the associated operational budget for the Election Funding Authority was increased.¹⁰⁷⁰ The NSWEC reported that \$1,999,000 was spent on a new branch to deal with election funding and disclosures¹⁰⁷¹ and that the increased administrative support it provided to the EFA, as a consequence of the legislative changes, involved establishing six positions, two of which were filled during the 2008-2009 reporting year, with the position of Director, Funding and Disclosure to be filled in the next financial year.¹⁰⁷² The Committee is not aware of the course of negotiations through which the NSWEC obtained additional funding to enable it to meet the additional operating costs associated with the EFA's new responsibilities.

Current inquiry

- 9.133 Participants in the current inquiry argued that additional funding would be required for the ICAC or the EFA to recruit staff to undertake a compliance and investigative role. In their submission to the inquiry, ICAC recommended that 'a well-funded investigative unit should be established and hosted by the Electoral Commission.'¹⁰⁷³ The Nationals recommended that the EFA should be responsible for auditing the accounts of registered parties and candidates:

To help ensure compliance with finance and disclosure laws, the requirement that returns be audited should be retained. Provisions should also be put in place, similar to those which currently exist, giving the Election Funding Authority the power to inspect the accounts of all political parties and candidates.¹⁰⁷⁴

- 9.134 The Greens also suggested that an independent commissioner should be appointed to the EFA, to undertake an oversight role and initiate prosecutions for breaches in relation to the funding scheme:

Such a position would be modelled on the existing statutory position of the Director of Public Prosecutions. This officer would be given the role of general oversight of the electoral funding and expenditure scheme and standing to commence prosecutions for breaches.¹⁰⁷⁵

¹⁰⁶⁹ For a detailed account of the problems associated with the EFA's regulatory power to issue notices under the Regulation see the EFA submission to the 2008 Local Government elections inquiry, submission no.68 pp.4-5.

¹⁰⁷⁰ EFA *Annual Report for 2008-2009*, p.47.

¹⁰⁷¹ NSWEC *Annual Report for 2008-2009*, p.106.

¹⁰⁷² NSWEC *Annual Report for 2008-2009*, p.62.

¹⁰⁷³ The Hon David Ipp QC, Commissioner, Independent Commission Against Corruption, *Submission 14*, p.4.

¹⁰⁷⁴ National Party, *Submission 18*, p. 9.

¹⁰⁷⁵ The Greens, *Submission 19*, p. 18.

Compliance and enforcement

- 9.135 The Independent Commission Against Corruption's principal functions include investigating allegations of corrupt conduct¹⁰⁷⁶ for which purpose the Commission has a specialist investigation division and is able to exercise coercive powers, including the power to obtain information and summon witnesses.¹⁰⁷⁷ However, as the Legislative Council Select Committee has observed many breaches of electoral finance law may not constitute corrupt conduct under the ICAC Act.
- 9.136 During the current inquiry, the Committee heard from the Executive Director of the ICAC's Corruption Prevention, Education and Research Division, Dr Waldersee, who noted when questioned about compliance and the prosecution of offences, that the ICAC does not have any power to prosecute and that it may instead be more appropriate for the Electoral Commission to refer offences for prosecutions to the police or DPP:
- ... You are right in noting that our powers revolve around the ability to obtain information and publicly expose it. We have almost no powers whatsoever in terms of actual prosecution. We make recommendations only to the DPP.
- ...
- ... Our view is it would probably have to sit either with the police, but the problem is they tend to be a bit busy and it is a little bit outside their mainstream activity. In other jurisdictions the compliance usually runs through an electoral commission of some sort, both Canada and the US. Without being definitive in any way, I would have thought it would essentially sit there, but that is not a constitutional law expert's view. That just would appear to be the logical place.¹⁰⁷⁸
- 9.137 In terms of investigative powers, Dr Waldersee stated that the EFA may require additional powers, depending on the nature of the investigations that it may need to conduct. He said,
- ... It is very hypothetical as to what the Electoral Commissioner would run into. A vast amount of what is needed to work out what has happened can be done through ASIC searches and someone to work out these lead to who. Ultimately, to look at bank transfers and so on you do need some powers.¹⁰⁷⁹
- 9.138 The Electoral Commissioner advised that legislative reform and additional resources would be required by the EFA in order to investigate and enforce compliance under a new scheme. Mr Barry proposed the following expanded investigative role for the EFA in respect of enforcing a new public funding scheme:
- First, the EFA would need more comprehensive and extended investigative and audit powers. The EFA would need to be able, on its own initiative, to commence an investigation into any breaches of the Act.
- Second, the EFA would need funds to establish an audit and investigation unit and to engage investigators to undertake actual investigations on any matter. No detailed analysis can be done at this stage in terms of the budget. ... The EFA would need to establish a full-time audit and investigation unit to carry out initial desktop audits in order to establish whether there are any matters that need to be investigated. Due to the volume and size of disclosures and the cyclical nature of the work it is unlikely that the EFA would need more than an additional four or five permanent staff to oversee and

¹⁰⁷⁶ *Independent Commission Against Corruption Act 1988*, s.13

¹⁰⁷⁷ *Independent Commission Against Corruption Act 1988*, Division 2

¹⁰⁷⁸ Dr Robert Waldersee, Executive Director, Corruption Prevention, Education and Research Division, ICAC, *Transcript of evidence*, 2 February 2010, p. 9.

¹⁰⁷⁹ Dr Robert Waldersee, Executive Director, Corruption Prevention, Education and Research Division, ICAC, *Transcript of evidence*, 2 February 2010, p. 11.

develop the necessary skills to manage the audit and investigation unit. Nevertheless, such staff would need to have high level skills in the area of legal, auditing and investigation. As well, there would need to be a budget to engage investigators, Regrettably, the NSWEC, which hosts the EFA, has run out of accommodation space and we would need to rent additional space on another floor of the building to accommodate an expanded EFA unit. This is likely to add about \$500,000 per annum to the NSWEC's budget for additional office accommodation together with a cone off cost of around \$500,000 for fit out. With respect to the budget to engage both additional permanent staff and investigators, the cost is unknown. The EFA would need to seek advice from other organizations about the likely cost. However, as an estimate at this stage to be tested I would think it to be somewhere between \$800,000 and \$1,000,000 per year.¹⁰⁸⁰

A risk management approach to investigations

- 9.139 A risk management approach also may help to achieve a more efficient enforcement system for the new public funding scheme. In this regard, the approach of the UK Electoral Commission to the introduction of its new responsibilities for investigations and enforcement introduced by the *Political Parties and Elections Act 2009* may be instructive.
- 9.140 The Committee anticipates that the introduction of a new regulatory scheme in New South Wales will necessitate the EFA providing extensive guidance to stakeholders on their new obligations and responsibilities under the legislation. The EFA currently produces several guides for parties, candidates and donors, and it is envisaged that the Authority will need to be resourced to undertake additional stakeholder education programs. The value of such measures to improved regulation would appear to the Committee to be ably demonstrated by the high incidence of breaches under the EFD Act which appear to have arisen due to problems in interpreting the existing disclosure and reporting provisions.

¹⁰⁸⁰ Letter from the Electoral Commissioner to the Committee Manager, dated 3 March 2010.

Chapter Ten - Local government

10.1 The terms of reference for the inquiry direct the Committee to inquire into a public funding model for political parties and candidates to apply at both state and local government levels. In this chapter, the Committee examines the current situation with respect to funding of parties and candidates at the local government level in New South Wales, before considering issues particular to local government. The Committee outlines the relevant recommendations of the Legislative Council Select Committee inquiry, and examines the views of participants in the current inquiry.

Current system

10.2 There is no provision for public funding of local government election campaigns in New South Wales¹⁰⁸¹ However, disclosure requirements consistent with those applying at the state government level are in place, with the provisions of the *Election Funding and Disclosures Act 1981* that relate to political donations and electoral expenditure also apply to local government elections and elected councillors.¹⁰⁸² In 2008 and 2009 a number of legislative amendments resulted in caps and bans on some donations to political parties, including banning those from developers, which impact on local government. The Election Funding Authority administers the disclosure requirements for local government.

Legislative Council Select Committee Report

10.3 The Committee received little evidence during the current inquiry on electoral and political finance reform for local government. In particular, the Committee did not receive a submission from the principal stakeholder, the Local Government and Shires Associations. However, the Legislative Council Select Committee on Electoral and Political Party Funding heard from a range of stakeholders and made the following comments and recommendations.

10.4 The Legislative Council Select Committee considered the advantages and disadvantages of implementing public funding reform at the local government level, and identified certain areas that needed to be addressed during any review of local government funding reform. The Select Committee noted that further review and consultation was required to assess the complex issues raised by the local government context:

The current electoral funding and disclosure scheme was not designed with local government in mind. Because of this the intricacies of local government have never been considered in their own right. While local government deserves nothing less than close and careful attention in the process of reforming the electoral funding and disclosure scheme, this inquiry is not placed to do that. Rather, the Committee identifies areas to be addressed in the ongoing consultation about reforming the electoral funding and disclosure scheme.¹⁰⁸³

¹⁰⁸¹ Section 54A of the *Election Funding and Disclosures Act 1981* states that Part 5 of the Act, which deals with the public funding of election campaigns, does not apply to local government elections.

¹⁰⁸² *Election Funding and Disclosures Act 1981* s.83. Section 328A of the Local Government Act 1993 requires council general managers to keep a register of copies of current disclosure declarations of political donations lodged with the Election Funding Authority.

¹⁰⁸³ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, p. 162.

10.5 The Select Committee considered that, although the same scheme should apply to local and state government in principle, the complexity of local government elections means that it is difficult to apply the provisions for a state model to local government. The number of council areas, different sizes of council areas, the number of candidates standing, and the proportion of candidates standing as independents pose challenges for a local government model. Participants in the Select Committee inquiry called for similar principles and controls to apply at both state and local elections. The Select Committee considered the following aspects of the electoral funding scheme and their application to local government.¹⁰⁸⁴

Public funding

10.6 The Select Committee noted that the rationale for the introduction of public funding for state elections, that is, preventing undue influence and corruption, is particularly relevant to local government. Several participants in the inquiry supported the introduction of public funding, either through in-kind or direct financial support, arguing that it would bring consistency and improve accountability.

10.7 However, other participants questioned the necessity of public funding, pointing to a potential escalation in election spending, with public funding and political donations combining to increase campaign expenditure. The possibility of nuisance candidates being encouraged by the prospect of receiving funding was also raised during the inquiry.¹⁰⁸⁵ In terms of eligibility for funding, the Select Committee noted that detailed consideration of proposed criteria or thresholds for candidates was required, due to the large number of independent candidates standing for election and the possibility that such candidates may be disadvantaged.¹⁰⁸⁶

10.8 Determining a level of funding that would be adequate without being excessive was also identified as an important issue, with the Select Committee noting that the Local Government and Shires Association had not developed a proposed level for funding. Some inquiry participants suggested that public funding should be set at a much lower rate for local government elections than for state elections¹⁰⁸⁷

10.9 Differences in the size of councils, the diversity of communities within rural and regional councils and metropolitan councils, in addition to large variations in the amount currently spent by candidates on local government campaigns were identified by the Select Committee as relevant factors that would require consideration in determining an appropriate level of funding.¹⁰⁸⁸ The Select Committee also noted that candidates running for popular election as mayor during a four-yearly general election may require greater public funding than those mayoral candidates who are elected annually by councillors.¹⁰⁸⁹

¹⁰⁸⁴ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, pp. 162-3.

¹⁰⁸⁵ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, pp. 164-6.

¹⁰⁸⁶ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, pp. 164-5.

¹⁰⁸⁷ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, p. 167.

¹⁰⁸⁸ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, pp. 166-7. For example, evidence received by the Select Committee indicated that some rural candidates spend as little as \$80 to \$100, while metropolitan candidates spend as much \$20,000 on their campaigns.

¹⁰⁸⁹ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, p. 167.

Local government

- 10.10 The source of public funding was considered, with the Select Committee noting that inquiry participants 'suggested that it would be untenable to expect local councils to foot the bill for the introduction of public funding', particularly given the increasing cost of local government elections due to recent changes which centralised the administration of local elections.¹⁰⁹⁰ Participants reflected that, if public funding were to be provided by the state government, community support for such reform would need to be assessed.¹⁰⁹¹
- 10.11 The Select Committee concluded that further investigation of public funding for local government elections was required, given the lack of available data on local government campaign spending and donations, and the lack of specific proposals for public funding received during its inquiry. Although the principles for a public funding scheme would apply to local government, the Select Committee considered that several issues needed further, detailed consideration, including eligibility criteria, the setting of funding levels and distribution of funding.
- 10.12 The Select Committee was concerned that public funding may prompt nuisance candidates and result in rising campaign costs, while also noting that limiting donations without providing alternative funding may be unfair.¹⁰⁹² Notwithstanding these concerns, the Select Committee supported the introduction of public funding for local government elections, recommending:

That the Premier investigate public funding for local government election campaigns to deter corruption and undue influence. Public funding could be financed by the State Government. A detailed and wide-ranging review should be undertaken, to develop a proposed design for the scheme. The review should involve extensive stakeholder consultation, and community consultation to ascertain what level of electoral funding would be supported by the public.¹⁰⁹³

Caps and bans on donations

- 10.13 Developer donations at the local government level were identified by the Select Committee as an area in 'urgent need of reform', with significant community concern following ICAC's investigation into corruption at Wollongong Council.¹⁰⁹⁴ The Select Committee noted that the limited availability of electronic records detailing the number of donations made it difficult to assess the level of donations, with electronic records due to be provided by the EFA in time for the 2008 local government elections.
- 10.14 Inquiry participants expressed concern and opposition to donations from developers, noting their potential to influence planning decisions. The Select Committee concluded that its recommendation to ban all but small individual donations was the best way to address community concern. If donations were not limited, measures to limit the influence of donations on the planning process would need to be introduced.

¹⁰⁹⁰ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, pp. 168-9.

¹⁰⁹¹ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, p. 169.

¹⁰⁹² Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, pp. 169-70.

¹⁰⁹³ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, p. 170.

¹⁰⁹⁴ Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, report 1, June 2008, p. 170.

Caps on expenditure

10.15 The Select Committee noted that it was not able to examine local government election spending levels, due to the lack of available data. Some participants in the inquiry indicated that spending was increasing, while others submitted that the amount spent by candidates varied greatly.¹⁰⁹⁵ The Select Committee reflected that, if public funding were to be introduced, regulation of spending would need to be considered, with spending caps being an appropriate way to control expenditure. The Select Committee supported differential spending caps as a way of allowing for complexities in council elections, recommending that the Premier investigate differential spending caps, tailored to apply to different council areas and mayoral elections, with spending caps to be set after public consultation.¹⁰⁹⁶

Disclosure

10.16 Participants in the Legislative Council Select Committee inquiry stressed the importance of timely, pre-election disclosure of donations, with support being expressed for consistent disclosure requirements for state and local elections. The EFA emphasised the difficulties associated with administering local government disclosures, due to the large number of candidates. The Select Committee concluded that there should be consistency between state and local disclosure requirements, and that pre-election disclosure should be introduced to enable voters to make informed decisions.¹⁰⁹⁷

10.17 The government response to the Select Committee's report stated that the *Local Government Act 1993* and the *Environmental Planning and Assessment Act 1979* had been amended, with the aim of improving transparency in the planning approval process, to:

- (a) require the General Manager of each council to record how each councillor votes on planning decisions and maintain a public register of those votes, helping to improve transparency in the local government planning approval process;
- (b) require the General Manager of each council to refer to the Director General of the Department of Local Government any reasonable suspicion that a councillor has breached the Model Code of Conduct relating to the disclosure of, or management of any perceived conflict of interest arising from, political donations;
- (c) enable the Director General of the Department of Local Government to refer any such allegation to the Pecuniary Interest and Disciplinary Tribunal; and
- (d) require public disclosure of all reportable political donations made to the Minister for Planning (or his or her party) and local councillors, and all gifts made to local councillors and council staff, at the time certain planning applications are made.¹⁰⁹⁸

¹⁰⁹⁵ Legislative Council Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, p. 181.

¹⁰⁹⁶ Legislative Council Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, pp. 182-4.

¹⁰⁹⁷ Legislative Council Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, pp. 186-7.

¹⁰⁹⁸ NSW Government, *Response to the report of the Select Committee on Electoral and Political Party Funding*, pp. 2-3,

[http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/\\$FILE/081219%20Government%20Response.pdf](http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/$FILE/081219%20Government%20Response.pdf) (accessed 12 January 2010).

Inquiry participants' views

10.18 During the current inquiry, the Committee received very little evidence on public funding for local government elections. The submissions that did address the local government context stressed the need for additional time in order to allow for consideration of issues particular to local government. Very few of the submissions received by the Committee provided specific and detailed proposals for a public funding model for the local government level. The Greens submission did set out a public funding model, recommending that:

Public funding should be extended on a reimbursement basis to local council elections with the suggested size of maximum funding pool for each council or ward the same as applies for Legislative Assembly seats, adjusted according to the number of voters on the electoral roll for each council or ward.¹⁰⁹⁹

10.19 In evidence to the Committee on 9 December 2009, the Electoral Commissioner suggested that, given the limited timeframe for the Committee's inquiry and the complexity of issues relating to local government, it 'might be wise to allow any new scheme recommended for State parties and candidates to be implemented before any final recommendation regarding local government is made.'¹¹⁰⁰ He pointed to a number of additional issues to be considered when implementing public funding for local government:

- How to deal with single-issue local parties.
- The relative size and immaturity of local government parties as compared to state registered parties.
- Parties that are registered for both state and local government purposes.¹¹⁰¹

10.20 The Commissioner stated that 'these interconnecting issues are very important, and any deliberation on recommendations would be advantaged if there was an opportunity to review the implementation of a political finance scheme at the State election'.¹¹⁰² He also made the important point that, as there is currently no public funding regime for local government elections, there is no existing model on which to build.¹¹⁰³

10.21 In its submission to the inquiry, the NSW Electoral Commission reiterated the need for more time to consider the application of a model to the local government context. The Commission pointed out that, given the limited time available, it had not been able to consider all necessary factors relevant to local government elections. The Commission stated that the funding model it was proposing would need further analysis to ensure its success for local government:

... successful outcomes from this Inquiry are more likely to be achieved if it were to concentrate on State elections only. The timeframes for this Inquiry do not allow for the Authority to properly consider all the necessary intricacies of local government elections in a publicly funded model. For this reason, whilst it is considered that the model

¹⁰⁹⁹ The Greens NSW, *Submission 19*, p. 4.

¹¹⁰⁰ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 5.

¹¹⁰¹ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 5.

¹¹⁰² Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 5.

¹¹⁰³ Mr Colin Barry, NSW Electoral Commissioner and Chair of the Election Funding Authority, *Transcript of evidence*, 9 December 2009, p. 6.

proposed would substantially sit comfortably in the local government arena, there are matters of detail that need to be carefully analysed and considered in order for it to be successful. It is intended that a model for local government be tendered at a later date.¹¹⁰⁴

10.22 Several inquiry participants also expressed the view that a public funding model for local government would require further consideration, and that any model should be developed following a trial of the state government funding model.

10.23 Mr Ben Franklin, State Director of the Nationals, agreed that further consideration was needed to address issues relevant to local government:

... I note in Mr Barry's verbal submission that he has agreed that local government considerations should be extracted from this process and considered after the election. To me that would seem logical. There appear to be a whole range of other issues that will come up with local government that do not come up with State elections. So to me that seems eminently sensible.¹¹⁰⁵

10.24 Mr Greg Piper, the Independent Member for Port Macquarie, submitted that he did not support a public funding model for local government elections. Mr Piper told the Committee that 'it would be difficult to find a justification for outsourced contributions to a candidate in local government elections and, as with State elections and in some ways more so in local government areas, there are other benefits or assistance that candidates need ... equally as important as financial contributions'.¹¹⁰⁶

10.25 Mr Piper also noted that the following factors resulted in a 'high degree of complexity in local government elections':

- size of electorates
- population of electorates
- the prevailing media and communications
- presence or otherwise of ward divisions
- and the method of electing the mayor.¹¹⁰⁷

10.26 In evidence to the Committee, Mr Piper elaborated on the differences between council electorates in terms of population, ward systems and mayoral elections. Mr Piper also noted that access to and availability of media varied greatly depending on the local government area:

... Local government, of course, ranges from some rural councils of a few thousand people up to Blacktown, pushing 400,000 plus maybe. There are huge variations in population, variations in whether or not they use ward systems for election and whether or not you will contest a ward or whether it is across the entire city, whether or not they have a popularly elected mayor and whether or not that mayor is aligned to a group, as was my example in Lake Macquarie. So there are certainly many variables.

One variable that comes to mind is, as you reiterate, the media and the environment that exists around there. Not all areas are equally provided with community media, for example, the free weekly newspapers, or even a wide range of radio opportunities if

¹¹⁰⁴ Electoral Commission NSW, *Submission 30*, p. 1.

¹¹⁰⁵ Mr Benjamin Franklin, State Director, NSW National Party, *Transcript of evidence*, 1 February 2010, p. 6.

¹¹⁰⁶ Mr Greg Piper, Member for Port Macquarie, *Transcript of evidence*, 2 February 2010, pp. 35-6.

¹¹⁰⁷ Mr Greg Piper, Member for Port Macquarie, *Transcript of evidence*, 2 February 2010, pp. 34-5.

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they wish to use that. Obviously some electorates are very well accommodated for all range of media, with maybe three or four weekly newspapers that are available.¹¹⁰⁸

10.27 Mr Piper stated that, although he supported expenditure caps and donation restrictions for local government, changes to the current system would require detailed consideration due to the complexity of local government elections. According to Mr Piper, this should involve 'comprehensive consultation with councils and the Local Government and Shires Association and in my view would require a delayed introduction of changes for this level of government.'¹¹⁰⁹ In terms of formulating expenditure caps, Mr Piper told the Committee that careful consideration of a proposed cap was required:

... I think that this actually needs some further consideration. I would hate to see an opportunity squandered by introducing a rule change for local government that might need further review later on, so this is why I have suggested that perhaps the inquiry hold back on making a recommendation on that for the time being.

Local government has many more variables than State Government, with respect. State Government, if we are talking about the Legislative Assembly, and we roughly have the same number of electors, that is not the case in local government. Setting aside the LC again, the field for the Legislative Assembly is generally much smaller than some councils, where we see a massive number of candidates, up over 20 candidates in some wards, let alone in some whole local government areas, so I think there are a number of complications there in that sense and it would be, I think, unwise of me to tell you how that formula for a cap in local government could be prescribed¹¹¹⁰

10.28 Dr Norman Thompson, Director of the NSW Greens Democracy4Sale project agreed that reform of local government funding should occur after the next state election. According to Dr Thompson, 'local government reform should be put aside and worked through after the 2011 NSW state election.'¹¹¹¹

10.29 Dr Thompson submitted that, although his funding reform proposals related primarily to the state level, the following principles were also applicable to a local government funding and disclosure model:

- Transparency
 - Donations received during a campaign be disclosed electronically to the EFA and published on the EFA website.
 - Details of donations, including their recipients and sources, for contributions 'funnelled through political parties for the 2008 local government elections must now be fully disclosed'.
 - Donations that are made to specific electorate and council campaigns should be identified as funding those campaigns, and not disclosed by the party head office.
 - The disclosure threshold for donations should be set at \$500.
- Membership fees: party membership fees should not exceed \$1,000. Union affiliation fees received by the ALP should be covered by a proposed ban on third

¹¹⁰⁸ Mr Greg Piper, Member for Port Macquarie, *Transcript of evidence*, 2 February 2010, p. 39.

¹¹⁰⁹ Mr Greg Piper, Member for Port Macquarie, *Transcript of evidence*, 2 February 2010, p. 35.

¹¹¹⁰ Mr Greg Piper, Member for Port Macquarie, *Transcript of evidence*, 2 February 2010, pp. 36-7.

¹¹¹¹ NSW Greens Democracy4Sale research project, *Submission 16*, p. 2.

party donations, to prevent parties from forming associated entities in order to circumvent bans.¹¹¹²

- 10.30 The Liberal Party submitted that certain key features of their suggested model were applicable to local government. Specifically, capped donations from individuals enrolled to vote could be deposited in local government campaign accounts, with bans on donations from third parties, such as companies and unions, and intra-party funds transfers. Campaign expenditure limits (covering a regulated period of 6 months) could be set, based on a dollar amount for each elector in an undivided council or council ward.¹¹¹³
- 10.31 Under the Liberal Party proposal, public funding could be introduced for the local government level, with electoral expenditure being reimbursed if a 4% threshold was reached, up to a maximum of 50% or 75% of actual expenditure depending on electoral performance. However, the Liberal Party also submitted that an alternative would be to not provide public funding for local government, instead setting a low expenditure cap, noting that 'this may be preferable due to the large number of separate contested elections.'¹¹¹⁴
- 10.32 In terms of the regulation of third party expenditure, the Liberal Party acknowledged that it may be preferable to delay implementation of any reforms until after the next state election to gauge the operation of restrictions at the state level:
- The most difficult decision would be what to do about third party electoral expenditure. It may well be that the Electoral Commissioner's suggestion of delay may well be advisable in this area of new regulation. A decision could be made based on a judgement of the efficiency and effectiveness of the operation of the third party provisions ... during the 2011 State general election.¹¹¹⁵
- 10.33 The Greens submitted that local government election expenditure should be capped at a modest level 'reflecting the grassroots nature of local politics.'¹¹¹⁶ In particular, the Greens proposed the following expenditure caps:
- Election expenditure caps by candidates and a group of candidates, at either 50 cents per voter, calculated on a per capita basis according to the number of voters on the electoral roll in the local government area/ward; or \$10,000 per local council area or ward, whichever is the greater amount.
 - State-wide party expenditure caps for local government elections set at \$500,000, separate from campaign expenditure incurred by the party's candidate or group of candidates for local council areas/wards.
 - Third party expenditure caps of \$5,000 for a local government election in any given local council area or ward.¹¹¹⁷
- 10.34 The Christian Democratic Party (CDP) submitted in favour of public funding for local government for reasons of equity and consistency, on the basis that 'public funding payouts are limited (by capping, for example), and donations are limited to \$1,000 per person only each per year.'¹¹¹⁸ The CDP advocated the abolition of the current public funding eligibility threshold of 4% of first preference votes for state elections,

¹¹¹² NSW Greens Democracy4Sale research project, *Submission 16*, pp. 3, 6-9.

¹¹¹³ Liberal Party of Australia (NSW Division), *Submission 17*, p. 28.

¹¹¹⁴ Liberal Party of Australia (NSW Division), *Submission 17*, p. 28.

¹¹¹⁵ Liberal Party of Australia (NSW Division), *Submission 17*, p. 28.

¹¹¹⁶ The Greens NSW, *Submission 19*, p. 14.

¹¹¹⁷ The Greens NSW, *Submission 19*, pp. 4-5.

¹¹¹⁸ Christian Democratic Party, *Submission 28*, p. 14.

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stating that public funding 'should only be used to reimburse genuine election expenditure with receipts.'¹¹¹⁹ The CDP submitted that this principle should also apply at the local government level, if public funding is introduced. According to the CDP's proposal, all candidates would receive public funding based on the number of primary votes they receive, with a gradual reduction in funding as the primary vote increases, and public funding being capped at 50% of the total vote. Candidate nomination fees would be increased to \$500 to discourage frivolous nominations.¹¹²⁰

10.35 In evidence to the Committee, Mr Graham Freemantle, Acting State Manager of the CDP, expressed in-principle support for public funding. He stated that independent candidates should be encouraged to participate in local government and any public funding model should provide additional support for such candidates. Mr Freemantle also observed that the introduction of public funding would provide equity for candidates contesting local government elections, as well as improving consistency between different levels of government:

The CDP have an a very strong belief that local government should not be dominated by the major political parties, as occurs at present, and thus we believe that a public funding model for local government elections should give preference to independent candidates or candidates from the minor parties.

We also support the concept of public funding for local government elections, because this gives equity to the candidates, encourages Independents and gives some consistency between the two different levels of government.¹¹²¹

10.36 Mr Freemantle echoed the views of other participants in recommending that 'the model for State Government elections should be considered first, as a first stage, and then ... the model for local government elections after that exercise has been completed.'¹¹²²

10.37 The Public Interest Advocacy Centre (PIAC) noted that local government is distinct from other levels of government as there is no current provision for the public funding of council elections. PIAC expressed the view that local government should be included in any equitable political financing reform, stating that the principles and aims of such reform apply equally to local government. PIAC also noted that a lack of funding could reduce the breadth of candidates standing for council elections:

PIAC submits that equitable funding arrangements for local government elections must be part of any reform of political financing. The fact that candidates for local government elections cannot attract any public election funding can result in a narrowing of the field of candidates, as only wealthy individuals or those who attract donations can run

¹¹¹⁹ Christian Democratic Party, *Submission 28*, p. 3.

¹¹²⁰ Mr Graham Freemantle, Acting State Manager, Christian Democratic Party, *Transcript of evidence*, 2 February 2010, pp. 27-8.

¹¹²¹ Mr Graham Freemantle, Acting State Manager, Christian Democratic Party, *Transcript of evidence*, 2 February 2010, p. 28.

¹¹²² Mr Graham Freemantle, Acting State Manager, Christian Democratic Party, *Transcript of evidence*, 2 February 2010, p. 28.

effective campaigns. The need to remove sources of potential conflict of interest or undue influence through donations and other means is important for all levels of government.¹¹²³

¹¹²³ Public Interest Advocacy Centre, *Submission 26*, p. 3.

Appendix 1 – Funding model

Proportionate model

Based on the existing public funding formula for the constituency fund ie. a pool of money for each district based on the total number of electors and divided in proportion to first preference votes amongst those parties and candidates that achieve over 4% of first preference votes. No candidate is entitled to more than 50% of the total pool of public funding for each district.

The following tables show the amounts of public funding based on an amount per elector of **\$2, \$2.50, and \$3** respectively, for the following electorates

Ballina
Balmain
Gosford
Ku-ring-gai
Maitland
Manly
Monaro
Murray-Darling
Newcastle
Northern Tablelands

The figures in the tables are based on the average number of enrolled voters per seat for the 2007 election, being 47032.

Formula for determining public funding (from the Election Funding and Disclosures Act)

$$C = (F \times CV) / TEV$$

C is the amount payable (in \$) to a candidate

F is the total amount (in \$) available for distribution in an electoral district (determined by the average number of enrolled voters per seat x \$2, \$2.50 and \$3)

At \$2 = \$94,064

At \$2.50 = \$117,580

At \$3 = \$141,096

CV is the number of primary votes received by the candidate¹¹²⁴

TEV is the total number of primary votes in an electorate minus primary votes for candidates who received less than 4% and are therefore not eligible for public funding

No candidate can receive more than 50% of the available funding.

At \$2 = \$47,032

At \$2.50 = \$58,790

At \$3 = \$70,548

¹¹²⁴ The source of first preference votes for the 2007 is Electoral Commission NSW, http://www.elections.nsw.gov.au/state_government_elections/election_results/legislative_assembly_results/2007_state_election (see District Summary results – the “Check Count & Dec” column)

Ballina

Candidate	Party	Result (%)	Primary vote	Expenditure (\$)	Entitlement (at \$2)	Amount Paid (\$2)	Paid / Expenditure	Entitlement (at \$2.50)	Amount Paid (\$2.50)	Paid / Expenditure	Entitlement (at \$3)	Amount Paid (\$3)	Paid / Expenditure
John Bailey	The Greens	19.44	7,861	9,164	18,876	9,164	100%	23,595	9,164	100%	28,314	9,164	100%
Flora Boyd	Australians Against Further Immigration	1.36	551	0	0	0		0	0		0	0	
Melanie Doreian	Labor	23.07	9,330	17,804	22,403	17,804	100%	28,004	17,804	100%	33,605	17,804	100%
Don Page	Nationals	54.36	21,983	47,000	47,032	47,000	100%	58,790	47,000	100%	70,548	47,000	100%
Benjamin Smith	Australian Democrats	1.77	714	0	0	0		0	0		0	0	
		Total formal votes	40,439		Undistributed funds	20,096		Undistributed funds	43,612		Undistributed funds	67,128	
		TEV	39,174										

Balmain

Candidate	Party	Result (%)	Primary vote	Expenditure (\$)	Entitlement (at \$2)	Amount Paid (\$2)	Paid / Expenditure	Entitlement (at \$2.50)	Amount Paid (\$2.50)	Paid / Expenditure	Entitlement (at \$3)	Amount Paid (\$3)	Paid / Expenditure
Verity Firth	Labor	39.22	16,562	46,240	39,880	39,880	86%	49,850	46,240	100%	59,821	46,240	100%
Jane Hyde		2.34	987	6,219	0	0		0	0		0	0	
Edward Okulicz	Australian Democrats	2.09	881	0	0	0		0	0		0	0	
Rochelle Porteous	The Greens	29.53	12,471	22,746	30,029	22,746	100%	37,536	22,746	100%	45,044	22,746	100%
Peter Shmigel	Liberal	23.75	10,031	70,059	24,154	24,154	34%	30,192	30,193	43%	36,231	36,231	52%
Jane Ward		3.07	1,297	5,990	0	0		0	0		0	0	
		Total formal votes	42,229		Undistributed funds	7,283		Undistributed funds	18,401		Undistributed funds	35,879	
		TEV	39,064										

Joint Standing Committee on Electoral Matters

Appendix 1 – Funding model

Gosford

Candidate	Party	Result (%)	Primary vote	Expenditure (\$)	Entitlement (at \$2)	Amount Paid (\$2)	Paid / Expenditure	Entitlement (at \$2.50)	Amount Paid (\$2.50)	Paid / Expenditure	Entitlement (at \$3)	Amount Paid (\$3)	Paid / Expenditure
Marie Andrews	Labor	42.66	18,448	28,901	43,023	28,901	100%	53,779	28,901	100%	64,535	28,901	100%
Bryan Ellis	Save our Suburbs	1.21	524	443	0	0		0	0		0	0	
George Grant	Christian Democratic Party	2.87	1,241	2,004	0	0		0	0		0	0	
Chris Holstein	Liberal	34.82	15,057	89,768	35,115	35,115	39%	43,894	43,894	49%	52,672	52,672	59%
Hillary Morris	The Greens	6.88	2,977	6,374	6,943	6,374	100%	8,678	6,374	100%	10,414	6,374	100%
Robert Moulds	Australians Against Further Immigration	2.64	1,141	1,744	0	0		0	0		0	0	
Debra Wales		8.91	3,852	20,295	8,983	8,983	44%	11,229	11,229	55%	13,475	13,475	66%
		Total formal votes	43,240		Undistributed funds	14,691		Undistributed funds	27,182		Undistributed funds	39,674	
		TEV	40,334										

Ku-ring-gai

Candidate	Party	Result (%)	Primary vote	Expenditure (\$)	Entitlement (at \$2)	Amount Paid (\$2)	Paid / Expenditure	Entitlement (at \$2.50)	Amount Paid (\$2.50)	Paid / Expenditure	Entitlement (at \$3)	Amount Paid (\$3)	Paid / Expenditure
Suzanne Gemmell	The Greens	13.17	5,592	6,347	13,397	6,347	100%	16,747	6,347	100%	20,096	6,347	100%
Adrian Macarthur-King	Labor	13.75	5,839	8,000	13,989	8,000	100%	17,486	8,000	100%	20,984	8,000	100%
Barry O'Farrell	Liberal	65.55	27,831	42,237	47,032	42,237	100%	58,790	42,237	100%	70,548	42,237	100%
Michael Sun	Unity Party	1.86	790	0	0	0		0	0		0	0	
Jeannette Tsoulos	Australian Democrats	2.36	1,002	0	0	0		0	0		0	0	
Witold Wiszniewski	Christian Democratic Party	3.30	1,402	3,964	0	0	%	0	0		0	0	
		Total formal votes	42,456		Undistributed funds	37,480		Undistributed funds	60,996		Undistributed funds	84,512	
		TEV	39,262										

Maitland

Candidate	Party	Result (%)	Primary vote	Expenditure (\$)	Entitlement (at \$2)	Amount Paid (\$2)	Paid / Expenditure	Entitlement (at \$2.50)	Amount Paid (\$2.50)	Paid / Expenditure	Entitlement (at \$3)	Amount Paid (\$3)	Paid / Expenditure
Peter Blackmore		26.58	11,942	118,896	24,997	24,997	21%	31,247	31,247	26%	37,496	37,496	32%
Jan Davis	The Greens	5.03	2,262	3,935	4,735	3,935	100%	5,919	3,935	100%	7,102	3,935	100%
Robert Geoghegan	Liberal	20.51	9,218	150,038	19,296	19,296	13%	24,119	24,119	16%	28,943	28,943	19%
Frank Terenzini	Labor	39.66	17,823	27,770	37,308	27,770	100%	46,635	27,770	100%	55,962	27,770	100%
Kellie Tranter		8.22	3,692	4,279	7,728	4,279	100%	9,660	4,279	100%	11,592	4,279	100%
		Total formal votes	44,937		Undistributed funds	13,787		Undistributed funds	26,230		Undistributed funds	38,673	
		TEV	44,937										

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Appendix 1 – Funding model

Manly

Candidate	Party	Result (%)	Primary vote	Expenditure (\$)	Entitlement (at \$2)	Amount Paid (\$2)	Paid / Expenditure	Entitlement (at \$2.50)	Amount Paid (\$2.50)	Paid / Expenditure	Entitlement (at \$3)	Amount Paid (\$3)	Paid / Expenditure
Michael Baird	Liberal	45.12	18,284	263,434	44,268	44,268	17%	55,335	55,335	21%	66,402	66,402	25%
David Barr		31.23	12,655	58,693	30,640	30,640	52%	38,300	38,300	65%	45,959	45,959	78%
Neil Hamilton	Australians Against Further Immigration	1.09	443	0	0	0		0	0		0	0	
Daniel Pearce	Labor	9.82	3,981	5,970	9,639	5,970	100%	12,048	5,970	100%	14,458	5,970	100%
Walter Vanderpoll	Christian Democratic Party	1.41	573	4,002	0	0		0	0		0	0	
Sarah Weate	The Greens	9.70	3,931	7,652	9,518	7,652	100%	11,897	7,652	100%	14,276	7,652	100%
Penelope Wynne		1.63	660	5,829	0	0		0	0		0	0	
		Total formal votes	40,527		Undistributed funds	5,534		Undistributed funds	10,323		Undistributed funds	15,112	
		TEV	38,851										

Monaro

Candidate	Party	Result (%)	Primary vote	Expenditure (\$)	Entitlement (at \$2)	Amount Paid (\$2)	Paid / Expenditure	Entitlement (at \$2.50)	Amount Paid (\$2.50)	Paid / Expenditure	Entitlement (at \$3)	Amount Paid (\$3)	Paid / Expenditure
Frank Fragiacomio		2.80	1,155	6	0	0		0	0		0	0	
David Madew	Nationals	39.34	16,244	49,811	38,070	38,070	76%	47,587	47,587	96%	57,105	49,811	100%
Catherine Moore	The Greens	9.99	4,123	6,675	9,663	6,675	100%	12,078	6,675	100%	14,494	6,675	100%
Steven Whan	Country Labor	47.88	19,769	69,083	46,331	46,331	67%	57,914	57,914	84%	69,497	69,083	100%
		Total formal votes	41,291		Undistributed funds	2,988		Undistributed funds	5,403		Undistributed funds	15,527	
		TEV	40,136										

Murray-Darling

Candidate	Party	Result (%)	Primary vote	Expenditure (\$)	Entitlement (at \$2)	Amount Paid (\$2)	Paid / Expenditure	Entitlement (at \$2.50)	Amount Paid (\$2.50)	Paid / Expenditure	Entitlement (at \$3)	Amount Paid (\$3)	Paid / Expenditure
Peter Black	Country Labor	37.02	15,015	20,687	37,233	20,687	100%	46,542	20,687	100%	55,850	20,687	100%
Thomas Kennedy		2.64	1,069	2,691	0	0		0	0		0	0	
Ronald Page		1.41	571	1,163	0	0		0	0		0	0	
Judith Renner	The Greens	2.42	983	0	0	0		0	0		0	0	
John Williams	Nationals	56.51	22,918	78,675	47,032	47,032	60%	58,790	58,790	75%	70,548	70,548	90%
		Total formal votes	40,556		Undistributed funds	26,345		Undistributed funds	38,103		Undistributed funds	49,861	
		TEV	37,933										

Newcastle

Candidate	Party	Result (%)	Primary vote	Expenditure (\$)	Entitlement (at \$2)	Amount Paid (\$2)	Paid / Expenditure	Entitlement (at \$2.50)	Amount Paid (\$2.50)	Paid / Expenditure	Entitlement (at \$3)	Amount Paid (\$3)	Paid / Expenditure
Hilda Armstrong		0.40	168	451	0	0		0	0		0	0	
Martin Babakhan	Liberal	9.79	4,129	29,148	9,461	9,461	32%	11,826	11,826	41%	14,191	14,191	49%
Bryce Gaudry		21.03	8,870	34,706	20,324	20,324	59%	25,405	25,405	73%	30,486	30,486	88%
Noel Holt		0.26	110	0	0	0		0	0		0	0	
Simon Hutabarat		0.73	306	1,085	0	0		0	0		0	0	0%
John Lee	Christian Democratic Party	1.27	535	1,507	0	0		0	0		0	0	0%
Jodi McKay	Labor	31.22	13,166	54,324	30,167	30,167	56%	37,709	37,709	69%	45,251	45,251	83%
Michael Osborne	The Greens	11.21	4,729	9,854	10,835	9,854	100%	13,544	9,854	100%	16,253	9,854	100%
John Tate		24.09	10,159	198,654	23,277	23,277	12%	29,096	29,096	15%	34,916	34,916	18%
		Total formal votes	42,172		Undistributed funds	981		Undistributed funds	3,690		Undistributed funds	6,399	
		TEV	41,053										

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Appendix 1 – Funding model

Northern Tablelands

Candidate	Party	Result (%)	Primary vote	Expenditure (\$)	Entitlement (at \$2)	Amount Paid (\$2)	Paid / Expenditure	Entitlement (at \$2.50)	Amount Paid (\$2.50)	Paid / Expenditure	Entitlement (at \$3)	Amount Paid (\$3)	Paid / Expenditure
Vanessa Bible	The Greens	3.16	1,418	0	0	0		0	0		0	0	
Phillip Kelly	Nationals	17.73	7,951	26,380	17,592	17,592	67%	21,990	21,990	83%	26,388	26,380	100%
Isabel Strutt	Christian Democratic Party	2.02	904	6,367	0	0		0	0		0	0	
Richard Torbay		72.74	32,615	73,523	47,032	47,032	64%	58,790	58,790	80%	70,548	70,548	96%
Phillip Usher	Country Labor	4.34	1,947	4,000	4,308	4,000	100%	5,385	4,000	100%	6,462	4,000	100%
		Total formal votes	44,835		Undistributed funds	25,440		Undistributed funds	32,800		Undistributed funds	40,168	
		TEV	42,513										

Appendix 2 – Table of existing offences and penalties under the *Electoral Funding and Disclosures Act 1981*

Table 1: Existing offences and penalties under the <i>Electoral Funding and Disclosures Act 1981</i>	
<p>Register of candidates - Amendment of Register Part 4, Division 2 – Registration</p>	<p>s.38(1) - Failure by official agent to furnish a detailed statement in writing to the EFA within 30 days of an alternation to any of the particulars in the Register of Candidates relating to a candidate or group, where the particulars are of the kind required to be stated in the application for registration of the candidate or group. Maximum penalty: 2 penalty units (\$220)</p>
<p>Register of party agents – Requirement to appoint, register and notify the EFA of party agents. Part 4, Division 3</p>	<p>s.41 - If a party commits an offence under this section, each person who is an officer of the party, at the time the offence is committed, is guilty of an offence and liable to a penalty not exceeding 100 penalty units¹¹²⁵ (up to \$11,000), and the party is liable to a penalty not exceeding 200 penalty units (up to \$22,000).</p>
<p>NB. The EFA has recommended that the Register of Party Agents required to be kept under s.39 of the Act serves no practical purpose and should be removed, and that as an alternative a list of party agents should be available on the EFA website. There would seem to be a need for some consideration of any implications such a change may have for the offence provision found at s.41(10). Presumably, parties would still need to notify the EFA of the appointment of their agent and failure to notify may still be an offence, regardless of the absence of a register.</p>	
<p>Registration for candidates, party agents, official agents (general provisions). Part 4, Division 6</p>	<p>s.54 – A person who in any application or statement made or furnished in relation to registration, includes a statement that is false or misleading in a material particular, knowing it to be false or not reasonably believing it to be true, is guilty of an offence and liable to a penalty not exceeding 100 penalty units. (up to \$11,000)</p>
<p>Public funding payments Part 5, Division 7 – Public Funding of election campaigns</p>	<p>s. 77(6) – Failure by an agent to comply with any reasonable condition determined by the EFA in relation to the disbursement of public funding payments by an agent. s.77(7) provides for a defence to a prosecution for an offence under s.77(6) if the agent establishes that they did not know, and could not reasonably have been expected to know, that the condition applied. Maximum penalty: 100 penalty units (\$11,000)</p>

¹¹²⁵ *Crimes (Sentencing Procedure) Act 1999 No 92*

s.17 Penalty units - Unless the contrary intention appears, a reference in any Act or statutory rule to a number of penalty units (whether fractional or whole) is taken to be a reference to an amount of money equal to the amount obtained by multiplying \$110 by that number of penalty units.

Table 1: Existing offences and penalties under the <i>Electoral Funding and Disclosures Act 1981</i>	
<p>Public funding of election campaigns - false statements Part 5, Division 7</p>	<p>s.82 - A person who, in any claim lodged with the EFA for a payment, makes a false or misleading statement, knowing it to be false or not reasonably believing it to be true, is guilty of an offence. A candidate or member of a group who, gives or withholds giving information to the official agent of the candidate or group in relation to any matter to be included in a claim for a payment, knowing this will result in the making of a false or misleading claim by the agent in whole or in part is guilty of an offence. Maximum penalty: 200 penalty units (\$22,000) or imprisonment for 2 years, or both.</p>
<p>Political donations & electoral expenditure - Prohibition of property developer donations Part 6, Division 4A</p>	<p>s.96GE - Determination by Authority that person not a property developer Offence of providing information to the EFA in connection with an application for a determination that a person is not a property developer, knowing the information to be false or misleading in a material particular. Maximum penalty: 200 penalty units (\$22,000) or imprisonment for 12 months, or both.</p>
<p>Political donations & electoral expenditure - Offences relating to requirements re disclosure of donations and electoral expenditure Part 6, Division 5</p>	<p>s.96H (1) An offence of failing to lodge a declaration of a political donation or electoral expenditure within the time required. Maximum penalty: 200 penalty units. (2) An offence of making a statement in a declaration or other disclosure under this Part, or in a request for an extension to the due date for the disclosure, that the person knows to be false or that the person does not reasonably believe is true. Maximum penalty: 200 penalty units or imprisonment for 12 months, or both. (3) An offence by an elected member, member of a group or candidate who, in relation to a matter required to be disclosed by their official agent, gives or withholds information to or from the agent knowing that it will result in the agent making of a false statement in a disclosure or request under this Part. Maximum penalty: 200 penalty units (\$22,000).</p>

Table 1: Existing offences and penalties under the <i>Electoral Funding and Disclosures Act 1981</i>	
<p>Political donations & electoral expenditure – other offences Part 6, Division 5</p>	<p>s.96I</p> <p>(1) An offence of doing any act knowing that it is unlawful under the provisions governing management of donations and expenditure, prohibited political donations, and prohibited property developer donations (i.e. Divisions 3, 4 or 4A).</p> <p>Some of the unlawful acts included in these divisions, which are captured as offences by way of s.96I, are: using political donations to a party other than for the objects and activities of the party, in particular, using political donations to a party for personal use (s.96); acceptance by an elected member of political donations without appointing an official agent to whom the donations must be made - s.96A(1); accepting political donations to a group or candidate that is not registered and has not appointed an official agent, to whom such donations must be made -s.96A(2); use of political donations for electoral expenditure unless the donations are paid by the official agent into a campaign account and the payment is made from that account -s.96A(3); failure to record the details of a reportable political donation – s.96C;making indirect campaign contributions of the type prohibited under the Act – s.96E; accepting anonymous political donations – s.96F; receiving a reportable loan without making required records – s.96G; unlawful acts relating to political donations by property developers – s.96GA.</p> <p>(2) An offence of failing to keep for at least 3 years:</p> <p>(a) a record made by the person under s.96C relating to a reportable political donation, or</p> <p>(b) any other record required by regulation to be kept for that period.</p> <p>Maximum penalty: In the case of a party, 200 penalty units (\$22,000) or in any other case, 100 penalty units (\$11,000).</p>
<p>Part 6A Political Education Fund - False statements</p>	<p>s.97K</p> <p>(1) An offence of making a statement that is false or misleading in a material particular, in any claim lodged with the EFA for a payment or in any declaration under this Part, knowing it to be false or not reasonably believing it to be true. Liable to a penalty not exceeding 100 penalty units (\$11,000).</p> <p>(2) An offence of giving or withholding information to the party or agent, in relation to any matter to be included in a claim or declaration under this Part, knowing that it will result in the making of a false or misleading claim or declaration in whole or in part. Liable to a penalty not exceeding 100 penalty units (\$11,000).</p>

Appendix 3 – Election Funding Authority submission to the Inquiry into 2008 local government elections

SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

15 June 2009

SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

The Operation of the *Election Funding and Disclosures Act 1981* in the Context of the 2008 Local Government Elections

Introduction

The Election Funding Authority of NSW welcomes the opportunity to make a submission to the Committee concerning the significant amendments made to the *Election Funding and Disclosures Act 1981* ('the Act') shortly prior to the 2008 Local Government Election.

The Authority supports legislative measures that improve transparency and accountability in election funding and disclosure. However, the interrelationship between amendments introduced under the *Election Funding Amendment (Political Donations and Expenditure) Act 2008* with the existing Act provisions has resulted in a disclosure regime that is complex and unclear. This has caused confusion and uncertainty for some stakeholders.

The Authority observes that the amendments go beyond bringing New South Wales into line with the proposals that were at the time – and remain – before the Commonwealth Parliament in the form of the *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008 [2009]*. Unlike the Commonwealth proposals, the New South Wales amendments are not confined to the introduction of bi-annual reporting periods and a uniform disclosure limit of \$1,000. The amendments introduce changes to the appointment of 'official agents' and the management of campaign finances, with the result that in some instances it is unclear precisely who is liable for breaching the Act making it difficult for the Authority to administer the Act in a way that gives clarity and direction to stakeholders required to comply.

The complexity of the new disclosure legislation not only presents interpretive and administrative challenges for the Authority, but also clouds the obligations and responsibilities of individuals required to disclose. The commencement of the legislation some two months prior to the Local Government Election held on 13 September 2008 may have contributed to some stakeholder difficulties.

The Authority sets out the four most significant issues associated with the amended Act. In identifying these issues, the Authority draws on its experience since the amendments were introduced and observes that they are amongst some twenty (20) issues in total identified by the Authority to date and communicated to the Department of Premier and Cabinet ('DPC') in April 2009 (copy of table of issues attached).

The Authority would be pleased to provide the Joint Standing Committee with a proposal address the issues identified if and when requested to do so.

Brief overview of the principal amendments to the Act

The principal amendments to the Act may be summarised thus:

- An increase in the frequency of disclosures from once every four years to once every six months;
- The introduction of a uniform disclosure threshold of \$1,000;
- The imposition of a disclosure obligation on local government councilors in their capacities as councilors;
- Alterations to the manner in which certain individuals assume office as 'official agents';
- The specification of a threshold amount of political donations below which an individual in receipt of those donations is deemed to be his or her own official agent; and
- A requirement on candidates and others to maintain bank accounts dedicated for campaign purposes in certain circumstances.

The issues associated with the amended Act

The Authority considers the following to be the four most significant issues associated with the amended Act

1. Difficulties in identifying persons capable of prosecution for failure to lodge disclosures

In the event that a candidate fails to appoint an official agent, the Authority's capacity to successfully prosecute that candidate for failure to disclose hinges upon its ability to prove that the candidate did *not* in fact accept in excess of a specified amount of money¹ as a political donation (proof of which establishes that the candidate is deemed to be his or her own official agent). It is very difficult in practice to prove matters of that kind in court.

The Act imposes responsibility for lodging disclosures not on those who directly participate in Local Government elections – but, rather, on the participants' respective 'official agents'. The official agents are responsible for managing political donations and electoral expenditure in the manner prescribed by the Act. The Act requires the official agents of candidates, groups and elected councillors to each maintain, in certain circumstances, a dedicated bank account (called a 'campaign account') into which all donations are to be deposited and out of which all expenditure is to be incurred. The official agents are liable not only for failure to lodge declarations by the due date, but also for failure to properly account for and manage donations and expenditure.

Having regard to Local Government elections only, the following outlines the manner in which official agents acquire office, depending upon individual circumstances:

¹ See detailed discussion later in this section on the \$1,000 threshold amount.

- The official agents of Local Government candidates and groups are *appointed* by the respective candidates or groups;
- Candidates who fail to appoint an official agent, and provided that they have not accepted in excess of a specified amount of money as a political donation, are *deemed* to be their own official agents, as are the head candidates of groups who fail to appoint official agents; and
- Pursuant to a decision taken by the Authority on 13 February 2009, all elected councillors who for the time being are not also candidates, are *designated* to be their own official agents.

Subject to the matters discussed in (2) of the submission below, there are no legal barriers to the prosecution of official agents who hold office by way of appointment. That is because it is comparatively uncontroversial to identify appointed official agents. In the second half of 2008, approximately 90 official agents who failed to lodge declarations were appointed by candidates and groups at the Local Government Election.

However, some 400 of the Local Government candidates or head candidates who failed to lodge declarations for the second half of 2008 did *not* appoint official agents. The Authority's capacity to commence prosecution proceedings in these cases is contingent upon the operation of the s. 49 deeming provision. The deeming provision operates by force of the Act to deem individual candidates and head candidates to be their own official agents *subject to a threshold condition* specified in s. 96A(7) of the Act. In brief, the threshold condition is that the candidate has not accepted in excess of \$1000 in political donations over the election period (as to the full complexity of the threshold condition, see the discussion under (4) of the submission below).

The threshold was introduced via the insertion of sub-section 1A into s. 49 as part of the amendments made to the Act in 2008. The result is that to establish that the deeming provision is engaged in a particular instance, it is necessary to prove that the candidate or group had *not* accepted in excess of \$1000 in political donations over the election period.

The Authority is advised that it is particularly difficult in practice to prove beyond reasonable doubt that an individual has *not* received a specified amount of money. While the Authority is competent to issue notices under clause 32 of the *Election Funding and Disclosures Regulation 2004* requiring candidates and others to supply any records of political donations made or received or electoral expenditure incurred, records of that kind may in a particular case be incomplete or inconclusive. An individual might simply not create full and accurate records as required under s. 96C of the Act and clauses 22-28 of the Regulation. Failure to supply full and accurate records would presumably be an inadequate basis for prosecuting the individual for failure to disclose in reliance on the deeming provision, as there is no obligation on an individual to accompany a response to a clause 32 request with an explanation as to precisely what any records indicate and what they do not indicate. In other words, the obligation to respond to a notice is discharged upon the supply of "records" alone. To obtain an explanation in connection with any records supplied (or the absence thereof), the Authority would have to engage the Act's resource-intensive inspection provisions. Conversely, an individual who *does* respond to a clause 32 notice by supplying records in his or her possession may well demonstrate that the deeming provision is *not* engaged in his or her case and that he or she is consequently immune from prosecution

for failure to disclose. That would be the case where the individual supplies records showing that he or she has in fact accepted at least \$1000 in political donations. The anomalous result is that unless a candidate appoints an official agent, the candidate is immune from prosecution for failure to disclose; only candidates who accept comparatively insignificant donations are liable in that respect. With this in mind, a decision of the Authority to commence any prosecutions for failure to disclose might well bring the disclosure regime into disrepute.

An additional difficulty attends prosecuting a candidate for accepting donations without appointing an official agent or maintaining a campaign account. It would be necessary not merely to prove the relevant omission(s), but to prove that the candidate knew the omission(s) were unlawful in the circumstances. That is a consequence of the unusual wording of the Act's general offence provision (s. 96I), which presumably requires the prosecution to show that the individual charged had *actual* knowledge of the unlawfulness of his or her conduct, and not just constructive knowledge imputed, for example, from the contents of correspondence sent by the Authority to the individual. The 'knowledge' component of the general offence provision effectively confines prosecutions to instances in respect of which an admission has been made. Given that admissions are made very rarely (and may be inadmissible in the absence of a prior caution), it appears that the legislature wished to effectively foreclose the possibility of prosecuting individuals for offences other than those enumerated in s. 96H(1)(2), and (3) (namely, failure to lodge declarations, the making of a false statement in a declaration and misleading an official agent) except where it can be shown, beyond reasonable doubt, that the person knew and understood the law in the relevant respect and acted in defiance of it.

It therefore appears that, for practical purposes, the only charge to which the Authority could confidently consent is a charge for failure to respond to a clause 32 notice in the limited circumstances where the relevant individual fails to supply the receipt/acknowledgement book issued by the Authority. However, an individual who simply supplies a blank receipt/acknowledgement book would appear to have discharged his or her obligations under the notice. That is because an individual presumably has no obligation under clause 32 to supply "records" not in his or her possession (records that are not in his or her possession either because they were not retained or because they were never created), and nor does an individual have an obligation to give reasons for not supplying "records". And for precisely the same reasons, failure to respond in any manner to a clause 32 notice would not expose the individual to prosecution for failure to disclose in reliance on the deeming provision. Hence while failure to respond in any manner (including a failure to supply a receipt/acknowledgement book) would amount to evidence that the relevant individual had not complied with the clause 32 notice, the evidence would be of no use beyond a charge laid in respect of a failure to respond to the notice.

In February 2009, in an attempt to at least partially cure some of the difficulties identified above, the Authority considered exercising its power to *designate* certain individuals to be their own official agents. The Authority was then of the opinion that exercise of the designation power might, at least in some cases, overcome the obstacle to prosecution arising from the deeming provision discussed above (and it is also apparent that designation does not operate subject to any threshold condition). Hence the Authority considered designating the candidates who unsuccessfully contested the election held on 13 September 2008 and the candidates who were successful on that occasion and

who subsequently became elected councillors. However, the Authority subsequently obtained legal advice to the effect that there are two obstacles to this strategy. First, the designation power does not extend to *candidates*. That is because (a) – (f) inclusive of the s. 4 definition of ‘official agent’ operate to assign an official agent to *all* categories of candidate; hence the designation power, which is exercisable only in respect of “any other case”, does not extend to any candidate (that advice is apparently notwithstanding the reference in (g) of the s. 4 definition to “the elected member or *candidate*”). And second, it is doubtful that the Authority has power to designate a person as his or her own official agent in February 2009 for the purposes of a disclosure period that was then concluded, as to do so could amount to a retrospective imposition of criminal liability (that is because the designation would have operated to impose the statutory obligations of an official agent on the person designated, without the consent of the person designated, after the conclusion of the period during which the person designated would have been obliged to discharge those statutory obligations). Hence the Authority decided to exercise the designation power *with prospective effect only* and in respect of all elected councillors who do not otherwise have official agents and who are not also candidates.

These interrelated difficulties impair the operation of the deeming provision, a provision that is crucial to the proper functioning of the penalty provisions of the Act.

2. Ambiguity in the term of office of official agents

The amended Act is unclear as to the precise time at which certain official agents cease to hold office, and hence whether those individuals are liable as official agents for failure to disclose.

The initial policy consideration for ‘official agents’ appears to be that candidates, groups, elected councillors and political parties ought not to manage their own donations and expenditure where significant amounts of money are involved. The Act provides that donations and expenditure are instead to be managed by individuals either appointed by the candidate, group, elected councillor or political party or who hold office in accordance with the other procedures outlined above in (1). Once he or she assumes office, the official agent is responsible for depositing any political donations above the \$1,000 threshold amount into a campaign account and for issuing receipts to donors. At the conclusion of the reporting period, the official agent is responsible for lodging a disclosure of donations received and expenditure incurred and including with the disclosure copies of receipts issued.

It is clear that an official agent ceases to hold office upon death, resignation or revocation by the individual responsible for the appointment. It is not clear, however, whether there are additional circumstances capable of terminating an official agent’s term of office. The amended form of the Act retains provision for a non-continuous Register of Official Agents (‘ROA’), into which the Authority must enter the names of the official agents. The ROA is non-continuous in so far as it expires the day before any subsequent general election, at which point a new ROA is created. Given that the non-continuity of the ROA is contrasted with a continuous Register of *Party Agents* (‘RPA’), the Authority considers that the terms of office of the official agents whose names are recorded in the ROA expire upon the expiration of that register.

The immediate practical implication of this conclusion is that in the lead-up to a general election, the individuals who retain appointed official agents must be instructed to renew the appointment or to make a fresh one. Not only is the issuing of this kind of instruction administratively inconvenient both to candidates and to the Authority² (considering that the lead-up to an election is hardly the appropriate time to engage in the appointment of persons responsible for managing election finances), but it is likely to be met with a high degree of non-compliance. Many individuals will simply fail to renew the appointment. And in the event that a new appointment is in fact made and a prior official agent replaced, the original agent is presumably obliged to transfer to the new agent all necessary records and the control of any campaign account (even though the Act does not expressly so prescribe, which is a defect in itself).

It is also arguable that the term of office of an appointed official agent expires upon a change in the status of the principal (i.e. a change in the capacity in which the individual responsible for the appointment participates in an electoral event, such as an instance where a successful 'candidate' becomes an 'elected member'³). In the event that a candidate becomes an elected councillor at an election, the change in status corresponds with the expiration of the ROA and the consequential necessity to renew the appointment of any official agent; however, if a candidate is unsuccessful at the election, and ceases to be a 'candidate' 30 days after the poll pursuant to s. 84(3) (see the discussion in (3) below), it is unclear whether the official agent retains office until the conclusion of the disclosure period. And if the agent does retain office until that time, it is unclear whether the official agent retains office until the conclusion of the eight-week period within which the declaration must be lodged. These ambiguities obscure the identities of the individuals required to lodge a disclosure and, if necessary, to make any necessary amendments to a disclosure.

However, it is clear that the terms of s. 46 prevent an individual who is not a 'candidate' from either revoking the appointment of an official agent or appointing another. Similarly, given the terms of s. 49, an individual who is not a 'candidate' is ineligible to be deemed to be his or her own official agent (i.e. an elected member or an elected member who has since resigned).

3. Ambiguity as to the conditions under which an individual is a 'candidate'

The amended Act's lack of clarity with respect to the definition of 'candidate' obscures the scope of persons competent to appoint, and revoke the appointment of, official agents.

The Act employs three definitions of 'candidate', each applicable in different circumstances and for different purposes:

- s. 4: "candidate, in relation to an election, means a person nominated as a candidate at the election ... and includes a person ... registered as ... a candidate";

² The Authority did not issue this instruction prior to the 2008 Local Government Election because it was not certain that it had to.

³ Which is the term used in the Act to refer to an elected councillor.

- s. 84(2): a candidate is a person who accepts political donations; and
- s. 84(3): a person nominated as a candidate ... remains a candidate until 30 days after polling day.
- Under s. 46 of the Act, the categories of persons empowered to appoint and revoke the appointment of official agents are limited to *candidates* and *groups*. As discussed in (2) above, this competency limitation may pose difficulties where a change occurs (between or within disclosure periods) to the status of the individual responsible for appointing the official agent.

Given that the latter two definitions of 'candidate' (above) are restricted in terms to Part 6 of the Act (and hence do not in terms apply to Part 4 of the Act, which provides for the appointment and revocation of official agents), it appears that only a 's. 4 candidate' is competent to appoint and revoke the appointment of an official agent. In other words, only a person nominated at, or registered for, an election is competent to appoint and revoke the appointment of an official agent.

In the event that an individual becomes a 'candidate' under s. 84(2) as a consequence of accepting political donations – and who for that reason assumes an obligation to register as a (s. 4) 'candidate' under s. 96A(2) – at what point does his or her 'candidacy' end? Does candidacy end:

- (a) once the Register of Candidates expires;
- (b) at the conclusion of whatever election for which monies were originally raised; or
- (c) at whatever election monies are in fact expended?

Even if it is argued that an individual retains, for the duration of a particular disclosure period, competence to appoint and revoke an official agent simply by virtue of having been a 'candidate' at some point within that period it remains unclear whether the individual's 'candidacy' continues up until the last date for lodging a declaration (or even beyond that date in the event that an extension is granted).

4. Confusion resulting from the complexity of the threshold condition that triggers an obligation to open a campaign account and appoint an official agent

The requirement to maintain a campaign account and appoint an official agent arises once the \$1,000 threshold amount in political donations is accepted and/or electoral expenditure is incurred. However, the precise wording of the provisions that prescribe the threshold amount is so complex and ambiguous that it is difficult for its meaning to be accurately conveyed.

Subject to receiving political donations/ incurring electoral expenditure in excess of the threshold amount, the Act requires candidates, groups and elected councillors to maintain separate⁴ 'campaign accounts'.. The threshold amount (or 'condition') was simplified in (1) above in the following terms: that the candidate (or relevant

⁴ A joint campaign account can be maintained in certain circumstances where there is a joint official agent.

individual/entity) has not accepted in excess of \$1000 in political donations over the election period. However, the threshold condition is in fact much more complex.

The threshold condition is expressed in s. 96A(7) as an exemption and is situated within a broader provision that imposes a general requirement to maintain a campaign account. The threshold condition has two limbs, namely:

- (a) the political donations are not reportable political donations and the total amount of those donations for the election period does not exceed \$1,000; or
- (b) the political donations are not reportable political donations and the total amount of electoral expenditure for the election period does not exceed \$1,000.

(And there is a third limb, not relevant here).

A superficial reading of the threshold condition might suggest that an individual who either receives more than \$1000 in political donations or who incurs more than \$1000 in electoral expenditure must maintain a campaign account. A conclusion to that effect might well be in accordance with a sensible policy as to the conditions under which individuals *ought* to be required to maintain campaign accounts. However, a closer reading of the section reveals:

- 1) that the two limbs are separated by a disjunctive 'or' (the result being that an individual need satisfy only one, and not necessarily both, to attract the exemption);
- 2) that each limb contains two sub-limbs joined by a conjunctive 'and' (the result being that an individual must satisfy both sub-limbs to satisfy the respective limb); and
- 3) that it is unclear whether there is a sequential relationship between the concepts referred to in the sub-limbs comprising limb (b): in other words, it is unclear whether the electoral expenditure refers to expenditure of 'reportable political donations' only.

Putting aside the lack of clarity outlined in (3), it appears that an individual or entity in fact attracts the exemption where:

- He/she/it does not receive any 'reportable political donations' (i.e. donations equalling or exceeding \$1000 aggregated over a financial year if sourced from the one donor) *and* he/she/it does not also receive in excess of \$1000 in total donations over the election period (i.e. \$1000 aggregated over a different period – the *election period* - and *irrespective of the identity of the donor(s)*).

Or

- He/she/it does not receive any 'reportable political donations' (i.e. donations equalling or exceeding \$1000 aggregated over a financial year if sourced from the one donor) *and* his/her/its expenditure does not exceed \$1000.

The Authority observes that an individual or entity is able to attract the exemption on the basis of (a) despite having incurred in excess of \$1000 in electoral expenditure. Hence a candidate could spend \$50,000 without opening a campaign account (or, indeed, appointing an official agent: see brief discussion below). That is not an absurd result if the object of the Act is to account for the use by candidates of money derived *from other people*. Whether the legislature in fact intended this result is, of course, another matter.

Additional and unnecessary complication also results from the combination of the concept of 'reportable political donation' in limbs (a) and (b) with, in the case of (a), 'donations ... [that do] not exceed \$1,000', and in the case of (b), 'expenditure ... [that] does not exceed \$1,000'. In the case of (a), receipt of exactly \$1,000 might disqualify someone from satisfying the first sub-limb but not the second sub-limb (depending upon the timing and source(s) of the donation(s)).

As the s. 49 deeming provision applies only to those exempt from maintaining a campaign account, the complexity in the operation of the threshold condition reverberates through to the requirement of a group or candidate to have an appointed official agent – (and a member, group or candidate to have a campaign account) as a precondition to receiving donations, a requirement which is *not* subject to an exemption.

Conclusion

The recent level of non-compliance with the Act is at least in part explained by the Act's complexity in terms of legal interpretation and accessibility. For the first six-monthly disclosure period concluded on 31 December 2008, 360 Local Government candidates who had not appointed an official agent failed to lodge a declaration by the due date, as had 44 groups and 36 retired councillors. In the limited circumstances where enforcement action is possible, the level of resources required by the Authority and the Crown Solicitor's Office to take enforcement action (including prosecution) is considerable and disproportionate to the comparative seriousness of the relevant offences.

For the foregoing reasons, it is the view of the Authority that the amended Act is in need of considered and comprehensive revision.

THE ELECTION FUNDING AND DISCLOSURES ACT 1981
- ISSUES

EF&D Act	CURRENT PROVISIONS
<p>1 Reliance on the deeming provision to prosecute persons for failure to disclose</p>	<p>Successful prosecution of a Local Government candidate for failure to disclose, where the candidate has not appointed an official agent, hinges upon the operation of the deeming provision provided for in s. 49(1). However, the deeming provision applies only to candidates who had not reached the donations/expenditure threshold specified in s. 96A(7) at the relevant time, and consequently, the provision is not engaged without affirmative proof by the prosecution that the candidate had <i>not</i> in fact reached the threshold. The Crown Solicitor has advised that it is particularly difficult in practice to prove beyond reasonable doubt matters of negative financial fact.</p> <p>To assist in proving the engagement of the deeming provision, the Authority is competent to issue notices under clause 32 of the Regulation requiring a candidate to lodge records of political donations made or received or electoral expenditure incurred. However, records lodged in response to a clause 32 notice might not cover the entirety of the relevant period (as there is no obligation to keep records for more than three years), and in any event would not necessarily be conclusive as to what they prove or do not prove. While failure to respond to a clause 32 notice in as offence in itself, it remains unclear precisely what would have to be shown to sustain a charge under that clause: presumably, the prosecution would have to prove that records existed and were not produced.</p> <p>A candidate who remains silent as to whether or not he or she reached the threshold at the relevant time will <i>not</i> thereby incriminate him or herself in respect of some other offence, such as failure to appoint an official agent when required to so. Prosecution for failure to appoint an official agent is subject to the requirement in s. 96I to prove that the accused <i>knew</i> that the relevant conduct was unlawful (a requirement which appears to contemplate <i>actual</i> knowledge of illegality, and not mere constructive knowledge imputed e.g. from the Authority's provision of literature to the accused). In any event, the two offences – failure of a deemed official agent to disclose, and failure to appoint an official agent when required to do so – cannot be charged in the alternative because the prima facie evidence required to support an element of the latter (namely, that the threshold <i>had</i> been reached) would undermine the evidentiary foundation for the corresponding element</p>

	<p>of the former</p> <p>The deeming provision also applies to independent candidates for State Parliament.</p>
<p>2 The scope of the deeming provision</p>	<p>s. 49</p> <p>Where a candidate or group fails to appoint an official agent, the candidate or head candidate within the group (as applicable) is deemed to be the official agent subject to the candidate or group not reaching or exceeding the donations/expenditure threshold. However, the provision does not operate in respect of persons whose only status is that of elected member (or, indeed, <i>former</i> elected member). This is an apparent oversight that mirrors the incompetence of elected members to appoint or revoke the appointment of official agents.</p>
<p>3 Persons competent to appoint and revoke the appointment of official agents</p>	<p>ss. 46 and 4</p> <p>The categories of persons empowered to appoint and revoke the appointment of official agents are limited to <i>candidates</i> and <i>groups</i>. This limitation may result in difficulty where a change occurs in the status of the 'principal' (i.e. the person on behalf of whom an official agent holds office) between or within disclosure periods. For example, it appears that a candidate who becomes a Local Government Councillor cannot revoke the appointment of his or her official agent and is required to retain the official agent he or she appointed at the time he or she was a candidate. Similarly, an elected member who unsuccessfully recontests an election (or resigns from office mid-term) may not satisfy the definition(s) of 'candidate' at the time a declaration for the relevant disclosure period is due, and will therefore be incompetent to appoint a fresh official agent at that time should it become necessary to do so. The precise nature of the difficulty here is dependent upon whether or not the term of office of an official agent survives the expiration of the Register of Official Agents and/or a change in the status of the principal (see discussion in (5)). Even if an agent's term of office does <i>not</i> survive either of those events, a candidate who becomes an elected member will be incompetent to appoint a fresh official agent if and when required.</p>

ss. 4, 84(2) and 84(3)

The precise scope of the class of persons who satisfy the definition(s) of 'candidate' is relevant to an identification of those competent to appoint and revoke the appointment of an official agent. The Act employs several definitions of 'candidate' - found in ss. 4, 84(2) and 84(3) - each of which is applicable in different circumstances and for different purposes. Given that neither the s. 84(2) definition (a candidate is a person who accepts political donations) nor the s. 84(3) definition (a person remains a candidate until 30 days after polling day) *in terms* apply to Part 4 (which provides for the appointment and revocation of official agents), it is at least arguable that only the s. 4 definition bears upon the operation of that Part. The s. 4 definition provides: "candidate, in relation to an election, means a person nominated as a candidate at the election ... and includes a person ... registered as ... a candidate". It is nevertheless unclear whether the section 4 definition is restricted in scope by the phrase "at an election", and hence whether an individual is incapable of being a candidate by force of s. 4 at a time otherwise than "at an election". If an individual is incompetent to appoint a fresh official agent once his or her status as a 'candidate' has lapsed, it would not be possible to identify an official agent responsible for lodging a declaration by the due date.

If an individual becomes a 'candidate' by force of S. 84(2) as a consequence of accepting political donations - and who for that reason assumes an obligation to register as a (s. 4) 'candidate' under s. 96A(2) - when does his or her 'candidacy' end? Upon the expiration of the Register of Candidates? At whichever election for which the funds were originally raised? Or at whichever election the funds are in fact expended?

Even if it is argued that an individual's 'candidacy' at any point within a disclosure period establishes and preserves, for the entirety of that disclosure period, the individual's status as a 'candidate' for the (Part 4) purposes of revoking and appointing an official agent as required, it is still necessary to determine whether the provisions ought to be interpreted so that candidacy continues up until the last date for lodgement of a declaration (and even beyond that date if an extension is granted).

4 The mechanism for the appointment of group official agents

s. 46

A group may appoint and revoke the appointment of an official agent for the group. However, the Act does not prescribe any method by which an appointment is effected. It is unclear whether appointment is made by unanimous vote of all members of the group, by majority vote or by the 'head' candidate.

<p>5 The term of office of official agents</p>	<p>ss. 46, 44 and 47.</p> <p>In consultation with the Department of Premier and Cabinet, the Authority has until very recently operated under two assumptions: 1) that the term of office of an official agent can carry-over from one election period to the next without a fresh appointment; and 2) that the term of office of an official agent is <i>not</i> contingent upon the recording of the name of the official agent in the Register of Official Agents ('ROA'), notwithstanding the Authority's statutory obligation under s. 47 to register an official agent upon receipt of a notice of appointment. The implication of these assumptions is that an official agent holds office until death, resignation or revocation. However, the Authority now has preliminary (verbal) advice from the Crown Solicitor to the effect that the term of office of an official agent expires upon the expiration of the ROA, which occurs the day before a given general election. According to the Crown Solicitor, that is a consequence of the express discontinuity of the ROA in contrast with the continuity of the Register of <i>Party</i> Agents. The Crown Solicitor has also advised that the term of office of an official agent expires upon a change in the principal's status. If these interpretations be correct, the term of office of an official agent extends from the time the Authority receives a notice of appointment until the death, resignation or revocation of the agent, or until the day before the next general election, or until a change in the principal's status (whichever occurs first), unless the agent is lawfully re-appointed for a fresh term.</p>
<p>s. 51</p>	<p>There does not appear to be any provision for the expiration of an ROA kept for a by-election.</p>
<p>6 The power of the Authority to designate persons as official agents</p>	<p>s. 4</p> <p>The Authority has recently attempted to at least temporarily resolve the incapacity of elected members to appoint official agents by exercising its implied power under the definition of 'official agent' in s. 4 of the Act to <i>designate</i> certain elected members to be their own official agents. The terms of the designation also permit elected members to nominate other persons as their official agents, whereupon the designation operates in respect of the persons so nominated.</p> <p>The Authority is aware of four limitations associated with the exercise of the designation power:</p>

1. It has no retrospective effect

The Crown Solicitor has advised that a purported designation by the Authority of an elected member as his or her own official agent, for the purposes of establishing an obligation to lodge a declaration for a disclosure period concluded at the time of the designation, would amount to a retrospective imposition of criminal liability and would for that reason be inoperative without specific statutory authorisation. Hence the Authority has only exercised the designation power in respect of all Local Government members and independent members of State Parliament for the purposes of the current and future disclosure periods. In other words, it will not be able to rely on designation as a means for identifying official agents in respect of e.g. Local Government members for the disclosure period 1 July 2008 to 31 December 2008.

2. It does not extend to candidates

The Crown Solicitor has advised that the designation power does not extend to the designation of 'candidates'. The Authority is therefore incompetent to designate e.g. a candidate in one of the up-coming by-elections as his or own official agent where the candidate has failed to appoint one, even if it does so *prospectively* upon receipt of an application by the individual to register for the by-election. While *successful* candidates at the by-elections in March 2009 will become elected members and hence subject to the designation, the *unsuccessful* candidates will remain outside the scope of the designation; hence it will not be possible to take action against anyone **for failure to disclose** in respect of any of the unsuccessful candidates who fail to appoint an official agent.

Notwithstanding the advice we have received from the Crown Solicitor in this respect, it remains unclear precisely who satisfies the definition of 'candidate' for the purposes of an individual's ineligibility to be subject to a designation. Is a person who is a 'candidate' pursuant to s. 84(2) – and not a candidate by force of any other provision – a 'candidate' for the purposes of designation? Arguably, a person who is *not* a candidate for the purposes of the s. 4 definition of 'candidate' remains outside the terms of the designation by virtue of the fact that the designation power arises out of the terms of the s. 4 definition.

3. Ambiguity in the relationship between a purported designation and a prior appointment

It is unclear whether a purported designation by the Authority overrides an appointment of an official agent made by a principal when he or she was a candidate. This issue is relevant if an assumption is made that the

	<p>term of office of an appointed official agent prima facie survives a change in the principal's status from candidate to elected member, a view which was (as discussed above in (5)) until very recently favoured by the Authority but now controverted by the Crown Solicitor. Undoubtedly, anyone prosecuted as an official agent would wish to challenge the veracity of his or her appointment, designation or continuance in office.</p> <p>4. <u>It operates 'behind closed doors'</u></p> <p>The designation power is less than ideal in so far as the persons subject to it are not readily identifiable on the face of the legislation. One means by which persons are normally able to identify whether or not they are subject to an obligation that arises by virtue of being an official agent is registration in the ROA: however, the Act does not oblige or empower the Authority to register any <i>designated</i> official agents. The result is that designation imposes liability for a criminal offence on the basis of an executive decision - albeit one formally recorded - taken in closed session of the Authority. The comparative opacity surrounding designation is compounded by the ambulatory nature of the class of persons subject to it (a class that expands and contracts as people enter and leave it).</p>
<p>7 The definition of 'official agent'</p>	
<p>s. 4</p>	<p>The opinion of the Crown Solicitor (as discussed above in (6)) to the effect that the designation power does not extend to 'candidates' derives from the view that sub-parts (g) and (f) of the s. 4 definition of 'official agent' combine to exclude <i>all</i> 'candidates' from the scope of the designation power. However, the Authority observes that that conclusion is despite the inclusion of the word 'candidate' in sub-part (g); hence the s. 4 definition of 'official agent' is unclear with respect to its impact upon the scope of the designation power.</p>
<p>8 The scope of disclosure and other obligations in the light of changing and/or multiple capacities</p>	
<p>s. 94</p>	<p>With respect to some individuals in particular, it is unclear how many declarations must be lodged for each disclosure period. While s. 94 provides that an item disclosed in a person's capacity as an elected member need not also be disclosed in the person's capacity as a candidate (and vice versa), it is unclear whether a successful candidate who becomes an elected member is obliged to lodge a total of <i>two</i> declarations covering both his or her sequential capacities.</p>

<p>The Act</p>	<p>The Act does not clearly specify whether or not the several capacities (or statuses) that an individual might have are sequential or coterminous. For example, it is unclear whether becoming an elected member precludes an individual from assuming the status of 'candidate' at the same time by force of s. 84(2) (i.e. as a consequence of receiving political donations). Arguably, the use of the word 'individual' in s. 84(2) contemplates an elected member becoming a 'candidate' as a consequence of receiving political donations, and hence imposes an obligation on the elected member as a <i>candidate</i> under s. 96A(2) to register as a candidate. That is despite the fact that s. 96A(1) does <i>not</i> require an elected member to register as a candidate as a precondition to accepting political donations. As a matter of policy, the Authority observes that it is likely the extended definition of 'candidate' in s. 84(2) is intended to only encompass persons who are not elected members and who for that reason lack a disclosure obligation; however, the apparent application of s. 84(2) to elected members appears to beneficially impact upon the operation of the official agency provisions of the Act, by – at least arguably, given the qualification in s. 84(2) “for the purposes of this Part” - conferring on elected members the capacity to appoint and revoke official agents.</p>
<p>9</p>	<p>The disclosure of small donations that become reportable by aggregation</p>
<p>ss. 86(1) and (2), and 92(3)</p>	<p>The Act requires disclosure of 'reportable political donations', defined as political donations of or exceeding \$1000. The Act provides for the aggregation of two or more political donations of less than \$1000 if they are made by the same entity to the same recipient within one financial year. In the event that a recipient of an aggregated reportable political donation has already declared one or more 'small donations' constituting that aggregate total, it is unclear whether the recipient must again disclose each and every component part of the aggregate total.</p>
<p>10</p>	<p>The scope of the 'relevant disclosure period' for a candidate</p>
<p>s. 89</p>	<p>This section sets out the basic six-month disclosure periods for which disclosures must be lodged. It also stipulates a 'first relevant disclosure period' applicable to <i>candidates</i> only, and does so by reference to the relevant individuals' political history. There is scope for confusion in the section's utilisation of the phrase 'the first relevant disclosure period', which is the same as the phrase used in the transitional provisions contained in Schedule 2, Part 5, s. 17. It is unclear whether s. 89(2) is an-ongoing provision designed to catch</p>

	<p>first-time candidates at every future election and by-election, or merely a transitional provision designed to 'sunset' at a specified point in time.</p>
<p>11 The scope of 'electoral expenditure' that must be disclosed</p> <p>ss. 88(1) and (2), 87, 93 and 86</p>	<p>There is no express obligation on a party, elected member, group or candidate to disclose political donations <i>made</i>. Thus a candidate who makes a political payment to the group of which he or she is a member is under no express obligation to disclose it, unless the payment is somehow subsumed under the rubric of 'electoral expenditure incurred'. The general definition of 'electoral expenditure' in s. 93 is expressed to encompass all expenditure incurred in connection with a State or Local Government election, and is complemented by the items of electoral expenditure listed in s. 87. While the list in s. 87 does not include 'political donations made', it appears that the list is not exhaustive (a view supported by the general terms of s. 93). The list also makes reference under part (i) to "expenditure classified as electoral expenditure by the Authority". The Authority has published in its <i>Funding and Disclosure Guide</i> a remark to the effect that 'electoral expenditure' includes a donation made by a candidate to the group of which he or she is a member. However, it is clearly unsatisfactory for a disclosure obligation to rest upon either the arguable open-endedness of the definition of 'electoral expenditure' or upon remarks published by the Authority in a guide.</p>
<p>12 Exemptions with respect to the maintenance of a campaign account and/or an official agent</p> <p>s. 96A</p>	<p>The Act requires an elected member, group or candidate to maintain a 'campaign account' kept in accordance with s. 96B as a precondition to receiving donations and incurring expenditure. An exemption from this requirement is attracted where the relevant person fails to reach a specified threshold in respect of donations received and/or expenditure incurred. The problem identified by the Authority concerns the complexity in the threshold(s) on the basis of which the exemption is attracted, as set out in s. 96A(7)(a): it is difficult (bordering on impossible) to explain to people precisely under what conditions the exemption is attracted.</p> <p>The exemption has two limbs, namely:</p> <p>(a) the political donations are not reportable political donations and the total amount of those donations for the election period does not exceed \$1,000; or</p>

(b) the political donations are not reportable political donations and the total amount of electoral expenditure for the election period does not exceed \$1,000. (There is a third limb, not relevant here).

It is plain from the employment of the word 'or' between the two limbs that the limbs are *disjunctive*: one need only satisfy one of the two (and not necessarily both) to attract the exemption. It is also plain that both limbs contain two *conjunctive* elements, *both* of which must be satisfied as relevant. Thus a candidate would attract the exemption where:

- He or she does not receive any 'reportable political donations' (i.e. donations equalling or exceeding \$1000 aggregated over a financial year if sourced from the one donor) *and* he or she does not also receive in excess of \$1000 in total donations over the election period (i.e. \$1000 aggregated over a different period - the *election period* - and *irrespective of the identity of the donor(s)*).

Or

- His or her expenditure does not exceed \$1000 *and* he or she does not also receive any 'reportable political donations' (i.e. donations equalling or exceeding \$1000 aggregated over a financial year if sourced from the one donor).

Reliance on (a) to attract the exemption is not precluded by expenditure incurred in excess of \$1000: e.g. a candidate could spend \$100,000 without opening a campaign account (or appointing an official agent: see box immediately below). That result is not an absurdity if one considers that the object of the Act is to account for the use by candidates of *other people's money* only; however, it may not reflect the policy intention underlying the Act.

The relationship between the two elements in (b) is unclear. Does 'electoral expenditure' here refer only to expenditure of *the donations received*? In limbs (a) and (b), the concept of 'reportable political donation' is combined with, in the case of (a), 'donations ... [that do] not exceed \$1,000', and in the case of (b), 'expenditure ... [that] does not exceed \$1,000'. In the case of (a), receipt of exactly \$1,000 might disqualify someone from satisfying the first sub-limb but not the second (depending upon the timing and source(s) of the donation(s)).

s. 49	As the deeming provision applies only to those exempt from maintaining a campaign account, the problems associated with the complexity in the threshold reverberate through to the requirement of an elected member, group or candidate to have an official agent - i.e. appointed, <i>ex officio</i> , deemed or designated - as a precondition to receiving donations (a requirement which is <i>not</i> subject to an exemption).
13 Disbursement of surplus funds in campaign accounts	
s. 96B	The section provides that surplus funds in a campaign account are to be disbursed to a party of which the relevant individual was a 'member' (and by which the individual was not necessarily endorsed). In the case of an individual who was a member of, but not endorsed by, a party, it is possible that the provision could frustrate the wishes of a donor by affecting the disbursement of surplus donations to the party. The Authority notes that the matter appears capable of satisfactory resolution by way of the regulation making power under s. 96B(7).
s. 96B	The section does not appear to contemplate the distribution of surplus funds in a group campaign account to the candidates who comprised it where the candidates do not have their own campaign accounts. It is unclear whether in that situation any surplus funds would be distributed to a party of which the candidates were 'members' (endorsed or otherwise), to the members of the group, despite the fact that they lack their own campaign accounts (a result that would not contravene 96A(7) if the donations were below the threshold), or to a charity nominated by the members of the group. If it is the final alternative, the Act does not appear to specify a mechanism in accordance with which the members of the group could nominate a charity (mirroring the defect identified in (4)).
s. 96B	The Act is silent as to whether campaign accounts must be <i>closed</i> at any particular point in time.
s. 96B	The lack of a precise and comparatively restrictive definition of 'charity' may open the possibility that individuals establish their own 'charities' purely for the purpose of syphoning distributions.

	The sub-section does not appear to permit a candidate or group to return an unwanted political donation.
14 The making of joint donations	
ss. 86, 92(3) and 96D	The Act does not contemplate the making and disclosure of joint political donations. In the event that a donation is made jointly by two natural persons (perhaps out of a joint bank account), there is no provision for the aggregation of that donation (or part thereof) with any subsequent donation made by one of the individuals comprising the joint donors.
15 Extension of due date for lodgement	
ss. 96L and 106	Section 96L(3) imposes an eight-week limit on the extension the Authority may grant "under this section" for the lodgement of a declaration. However, no consequential amendment has been made to s. 106, which still provides that "The Authority may ... extend the time for doing anything under this Act ... notwithstanding any other provision of this Act, and whether or not the time for doing the thing under any such provision has expired".
16 Breach of the Act for failure to register as a candidate	
ss. 4, 84(2), 31, 96A(2) and 96B(6)	It is unclear whether an individual who retains surplus political donations in a campaign account for the purposes of a future election is under an obligation to register as a s. 4 candidate once a new register is created.
17 Conflation of party 'membership' and party 'endorsement'	
s. 4	The s. 4 definition of 'official agent' assigns the Party Agent of a party to State MPs and State candidates who are 'members' of the party. Hence a State candidate who is a member of, <i>but not endorsed by</i> , a party is required to have the party agent as his or her official agent.

<p>18 Discrepancy between due dates</p>	<p>ss. 74, 76, 88, 91 and clause 6 of the Regulation.</p>	<p>Claims for public funding for a state election campaign must be lodged before the expiration of 120 days after the day for the return of the writs. Claims must be "vouched for in the prescribed manner", which entails, by virtue of clause 6 of the Regulation, attaching a Part 6 declaration to the claim. In the event that an election is held at the beginning of a six-month disclosure period, a claim for public funding would have to be lodged before the Part 6 declaration is capable of being lodged.</p>
<p>19 Discrepancies in threshold amounts of money</p>	<p>ss. 86(1), 96A (7) and 96E(3).</p>	<p>The amount of \$1000 is employed frequently throughout the Act as a threshold upon which certain benefits and obligations hinge. However, at times the Act specifies "\$1000 or more" and at others "in excess of \$1000". The distinction is idiosyncratic and compounds the confusion in certain provisions of the Act. For example, s. 86 defines 'reportable political donation' with reference to an amount "of or exceeding \$1000", while s. 96A requires the establishment of a campaign account with reference to an amount that "does not exceed \$1000".</p>

Appendix 4 – Election Funding Authority answers to questions on notice for Inquiry into 2008 local government elections

ELECTION FUNDING AUTHORITY

Joint Standing Committee on Electoral Matters - Inquiry into the 2008 Local Government Elections - Questions on Notice

Question 1

The Committee welcomes the statement on page 2 of the Authority's submission that it would be pleased to provide the Committee with a proposal to address the issues raised in its submission. Could the Authority provide such a proposal to the Committee prior to the hearing on 26 August 2009, at which Mr Colin Barry, Chair, Election Funding Authority (EFA), will be giving evidence?

Response

A table is attached as Appendix 1 outlining the proposals that are considered appropriate to address issues identified with the legislation.

The document is not intended to establish policy but, rather, offer amendments to the current model that will remove the complexities which are confusing to stakeholders and which are proving difficult in the management and administration of the Act.

The Authority cannot be certain as to whether matters it considers to be inconsistencies within the current legislation were intended but is of the view that any such matters should be identified for consideration.

Question 2

The submission refers to advice given by the Crown Solicitor's Office to the EFA. Please indicate for the Committee the nature of this advice and what implications it has for the operation of the Election Funding and Disclosures Act 1981 (EFDA).

Response

The legal advice referred to in Point 1. of the Authority's submission refers to advice sought from the Crown Solicitor's Office in respect to clarification of the designating of persons to be official agents pursuant to part (g) of the definition of official agents in S4 of the Act.

The advice dealt with the Authority's capacity to retrospectively designate persons as official agents pursuant to S4 of the Act, and, the manner in which future designations may be made (whether by naming individual elected members or by class of persons).

On the basis of the advice, the Authority designated:

- any local government councillor who is an elected member within the meaning of the Act, but who for the time being is not also a candidate, to be the councillor's own official agent; and
- any elected member of Parliament who is an elected member within the meaning of the Act, who for the time being is not also a candidate, and who is not a member of a registered party within the meaning of that Act, to be the member's own official agent.

The advice received from the Crown Solicitor did give rise to further matters which were the subject of subsequent correspondence.

As a consequence of the advice from the Crown Solicitor's Office, the Authority exercised its capacity to designate persons as official agents pursuant to S4 of the Act but the Authority considers this to be an unsatisfactory arrangement and would prefer that elected members are empowered in the Act to appoint their own official agent.

Question 3

Page 10 of the EFA submission indicates that "it is the view of the Authority that the amended Act is in need of considered and comprehensive revision". In general, what needs to be done to improve the EFDA? Is it a matter of simplifying and clarifying the provisions recently added to the Act, or does the EFDA need a complete overhaul?

Response

The Authority recognises that there needs to be two considerations in any revision of the Act.

Firstly, there needs to be a policy consideration of the preferred model. The Authority has not, at this time, given consideration to this aspect on the basis that the Authority recognises that the preferred model is the prerogative of the Government of the day. However, any model needs to be capable of being easily understood by those required to comply.

The second consideration is that the Act is capable of being interpreted so as to facilitate effective implementation and administration consistent within the intent of the policy. This is the aspect which the Authority has concerned itself with in suggesting that the Act is in need of considered and comprehensive review.

The original Act was created in 1981 and has been subject to a number of subsequent amendments. The amendments introduced in 2008 were far reaching and had the affect of imposing additional policy considerations on an existing model resulting in inconsistencies (whether intentional or not) within the legislation and complexities which continue to give rise to uncertainty in their implementation. These issues are not confined to within the amendments introduced in 2008 but, in many respects, their interrelationship with the provisions of the original Act.

The resultant inconsistencies and complexities have presented difficulties for the Authority in the administration and implementation of the Act, particularly in the education and management of stakeholders, and enforcement of many provisions of the Act.

The Authority considers that a rewrite of the Act would present an opportunity to revisit the policy objectives of the Act and whether those objectives are being met by the current legislation and, in doing so, also have regard to the ability of the Act to be easily understood by stakeholders.

Question 4

Submissions 17 and 32 reported conflicting advice being given in relation to the amendments to the Election Funding and Disclosures Act 1981 (EFDA). Page 8 of the EFA's submission indicates that "the precise wording" of the provision in the EFDA relating to the \$1,000 campaign threshold is "so ambiguous that it is difficult for its meaning to be accurately conveyed".

- a. *Could the complexity of, and ambiguities in, many of the provisions in the EFDA have resulted NSW Electoral Commission (NSWEC) and EFA staff giving inconsistent or conflicting advice?*
- b. *In preparation for the elections of 13 September 2008, what training was provided to NSWEC and EFA staff with regard to the changes to the EFDA?*

Response

The amendments to the legislation in 2008 were assented to on Monday 30 June 2008 with a commencement date of 10 July 2008. The “regulated period” for the 2008 local government election commenced on Monday 4 August 2008 with election day being Saturday 13 September 2008.

It is fair to say that the initial advice given to some stakeholders in respect to the interpretation of the amendments to the Act did subsequently alter as the practical examples identified greater complexity within certain provisions.

The short timeframe between the commencement of the amended Act and the commencement of the “regulated period” for the election offered little opportunity to comprehensively consider the range of practical issues likely to be raised or encountered by stakeholders. It needs to also be borne in mind that in many respects campaigning had commenced some months earlier and the urgency surrounding the implementation of the Act was self evident.

Any inconsistent or conflicting advice was not a result of a number of different staff members having differing interpretations in respect to any particular matter. The Authority had instituted strict protocols for minimising inconsistent advice. As issues emerged and stakeholders asked more specific questions it was necessary to obtain legal advice in order to provide guidance to stakeholders. ,

Following legal advice and further consideration of practical issues raised by stakeholders it was, in a few instances, necessary to revise previous advice or provide further clarification.

Help desk staff were available at the 2008 local government election as the initial contact point to deal with enquiries relating to funding and disclosure matters. This staff referred to a prepared manual to handle any enquiries. However, senior experienced staff were available to deal with any calls escalated beyond that initial contact point. Registered political parties had direct contact with senior staff.

Question 5

The Committee understands from the EFA submission that the EFDA enables a candidate to spend \$100,000 on a campaign without opening a campaign account, provided they are using their own, and not other people's, money.

- a. *Is this the EFA's understanding?*
- b. *Are there any consequences of the changes to provisions relating to donations that appear to be unintended?*

Response

In order for an individual to be captured by the Act as a “candidate”, the individual must do one of the following:

- nominate as a candidate at a State or local government election
- apply for, or be registered as, a candidate with the Authority
- accept a gift which is solely or substantially for a purpose related to being a candidate at a future election

In the circumstance that (in a particular disclosure period) an individual is using \$100,000 of their own money to incur electoral expenditure, has received no donations and has not been captured by the Act as a candidate, the legislation does not require that individual to:

- register (as a candidate) with the Authority
- appoint an official agent
- open a campaign account
- lodge a disclosure (for that particular disclosure period)

This situation could occur in the disclosure period from 1 July 2010 to 31 December 2010 in the lead up to the 2011 State general election due to be held on 26 March 2011.

To extend this example, if the same individual used a further \$100,000 of their own money to incur electoral expenditure in the following disclosure period 1 January 2011 to 30 June 2011, and still not have received any donations, the individual would:

- be captured by the Act as a candidate at the time they nominate as a candidate for the election
- be required to lodge a disclosure (that would require previous expenditure to be disclosed for a period linked to the candidate's individual circumstances)

However, the candidate would still not be required to:

- appoint an official agent
- open a campaign account

Question 6

What issues raised in the EFA submission are relevant to state elections, and could these issues pose problems for the conduct of the 2011 state election?

Response

It is considered that none of the issues raised are confined to local government elections and are, potentially, issues that could emerge at the 2011 NSW State general election.

However, the benefit of the experience at the 2008 local government election has provided the opportunity to be proactive in addressing these issues subject to any amendments to the legislation which may occur in the future.

Matter	Proposal	Comment
Definition of Candidate	To include a person who is nominated as a candidate at an election, a person who intends to accept gifts or incur electoral expenditure for a purpose related to a candidacy at a future election and a person applying for registration as, or registered as, a candidate.	<ul style="list-style-type: none"> • To require a person to register who intends to accept a gift for a purpose related to a candidacy at a future election. Presently, the Act infers that registration is required from a person after they receive a gift. • To require a person to register who intends to incur electoral expenditure for a purpose related to a candidacy at a future election. These persons are not presently required to register. • The definition of candidate to be captured, in its entirety, in S4 of the Act. Some aspects of the extended definition are embodied in S84(2) and 96A(2) of the Act.
Registration of Candidates	<p>Registration of a candidate to be automatic in those instances where a person nominates as a candidate at an election.</p> <p>Registration to be required in those instances where a person intends to accept gifts or incur electoral expenditure for a purpose related to a candidacy at a future election.</p> <p>A candidate remains registered as a candidate up to and following the election and until such time as the candidate’s agent (being either appointed or ex officio) finalises all financial management matters associated with the candidacy and complies with reporting obligations under the EF&D Act.</p>	<ul style="list-style-type: none"> • Registration of a candidate to be automatic in those instances where a person nominates at an election. Presently, persons who nominate at an election are required to separately register with the Election Funding Authority as a candidate. • It is not clear from the Act as to when a person ceases to be a candidate. Clarification in the Act would be beneficial and, in this regard, it is proposed that a “candidate” should continue to retain that status until such time as the candidate’s agent (being either appointed or ex officio) finalises all financial management matters associated with the candidacy and complies with reporting obligations under the EF&D Act. • It is further proposed that the “candidate” would, if elected, assume the status of “elected member”, as defined in the Act, but would continue to hold the dual status of “candidate” until such time as the candidate’s agent (being either appointed or ex officio) finalises all financial management matters associated with the candidacy and complies with reporting obligations under the EF&D Act.

Joint Standing Committee on Electoral Matters

Appendix 1

<p>Register of Candidates</p>	<p>All references to a Register of Candidates are removed.</p>	<ul style="list-style-type: none"> • The Register of Candidates has served no practical purpose and it is proposed that all references in the Act to the Register be removed. • The Register of Candidates presently is in force from polling day at one general election until the day before election day at the next general election. • In so far as the cessation of the Register may terminate the period for which a person is a candidate, there is uncertainty as to how this may impact on the person’s disclosure obligations. • For further information see comments under “Registration of Candidates”. • It is desirable that the period for which a person remains a candidate sits comfortably with the regime of six monthly disclosures. • As an alternative to a Register of Candidates, it is considered that a list of registered candidates should be available on the EFA website.
<p>Appointment of Official Agent (in respect to Candidates)</p>	<p>A person must appoint an official agent as a requirement of registration as a candidate. The official agent takes office immediately upon appointment. The agent would remain as the agent until such time as they finalise all financial management matters associated with the election and complies with reporting obligations under the EF&D Act, or, upon revocation, resignation or death.</p>	<ul style="list-style-type: none"> • This would entail a candidate appointing an agent as a requirement of nomination at an election or, otherwise, upon registration as a candidate. • The nominated official agent would be required to accept the appointment (in writing) and complete the online training as a condition to their registration and, consequently, the registration of the candidate by whom they have been nominated. • This change would remove the present difficulties associated with the requirement for the candidate to appoint an agent prior to exceeding the \$1,000 threshold.

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<p>Definition of Group</p>	<p>To include any group created pursuant to S81C of the PE&E Act or S308A of the LG Act, two or more persons who intend to accept gifts or incur electoral expenditure for a purpose related to a group at a future election and two or more persons applying for registration as, or registered as, a group.</p>	<ul style="list-style-type: none"> • To require a group to register who intends to accept a gift for a purpose related to a candidacy at a future election. Presently, the Act infers that registration is required from a group after they receive a gift. • To require a group to register who intends to incur electoral expenditure for a purpose related to a candidacy at a future election. These persons are not presently required to register. • The definition of group to be captured, in its entirety, in S4 of the Act. Some aspects of the extended definition are embodied in S84(2) and 96A(2) of the Act.
<p>Registration of Groups</p>	<p>Registration of a group to be automatic in those instances where a group successfully forms at an election. A group remains registered up to and following the election and until such time as the group's agent (being either appointed or ex officio) finalises all financial management matters associated with the group and complies with reporting obligations under the EF&D Act.</p>	<ul style="list-style-type: none"> • Registration of a group to be automatic in those instances where a group successfully forms at an election. Presently, groups which form at an election are required to separately register with the Election Funding Authority as a group. • It is not clear from the Act as to when a group ceases to exist. Clarification in the Act would be beneficial and, in this regard, it is proposed that a "group" should continue to retain that status until such time as the group's agent (being either appointed or ex officio) finalises all financial management matters associated with the group and complies with reporting obligations under the EF&D Act.

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<p>Register of Groups</p>	<p>All references to a Register of Groups are removed.</p>	<ul style="list-style-type: none"> • The Register of Groups has served no practical purpose and it is proposed that all references in the Act to the Register be removed. • The Register of Groups is an inherent aspect of the Register of Candidates and consequently is in force from election day at one general election until the day before election day at the next general election. • In so far as the cessation of the Register may terminate the period for which a group exists, there is uncertainty as to how this may impact on the group’s disclosure obligations. • For further information see comments under “Registration of Groups”. • It is desirable that the period for which a group exists sits comfortably with the regime of six monthly disclosures. • As an alternative to a Register of Groups, it is considered that a list of registered groups should be available on the EFA website.
<p>Appointment of Official Agent (in respect to Groups)</p>	<p>A group must appoint an agent as a requirement of registration as a group. The agent takes office immediately upon appointment. The agent would remain as the agent until such time as they finalise all financial management matters associated with the election and complies with reporting obligations under the EF&D Act, or, upon revocation, resignation or death.</p>	<ul style="list-style-type: none"> • This would entail a group appointing an agent as a requirement of forming a group at an election or, otherwise, upon registration as a group. • The nominated official agent would be required to accept the appointment (in writing) and complete the online training as a condition to their registration and, consequently, the registration of the candidate by whom they have been nominated. • This change would remove the present difficulties associated with the requirement for the group to appoint an agent prior to exceeding the \$1,000 threshold.

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Appendix 1

Register of Official Agents	All references to a Register of Official Agents are removed.	<ul style="list-style-type: none"> • The Register of Official Agents has served no practical purpose. • The Register of Official Agents presently is in force from election day at one general election until the day before election day at the next general election. • In so far as the cessation of the Register may terminate the period for which an official agent holds office, there is uncertainty as to how this may impact on the status of the official agent and their disclosure obligations. • It is desirable that the period for which an official agent holds office sits comfortably with the regime of six monthly disclosures. • As an alternative to a Register of Official Agents, it is considered that a list of registered official agents should be available on the EFA website.
Register of Party Agents	All references to a Register of Party Agents are removed.	<ul style="list-style-type: none"> • The Register of Party Agents has served no practical purpose. • The Register of Party Agents presently is in force on a continuous basis which is inconsistent with the treatment of other registers under the Act having limited lives. • As an alternative, a list of party agents should be available on the EFA website.
Appointment of Official Agent (in respect to Elected Members)	To provide elected members who are not a member of a registered party with the capacity to appoint their own agent. On becoming an elected member it is proposed that the person who is, at that time, the official agent for the elected member in their capacity as a candidate would automatically become the official agent. The official agent would remain as the official agent until such time as their appointment is revoked or upon resignation or death.	<ul style="list-style-type: none"> • The EF&D Act does not presently enable an elected member who is not a member of a registered party to appoint their own agent. • This category of persons is presently required to have an official agent “designated” by the Election Funding Authority. • In the absence of a person being nominated by the elected member for this appointment, the Authority will designate the elected member to be their own agent. • It is considered that these elected members should have the capacity to appoint their own official agent.

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Refund of Nomination Fee	<p>A candidate would only be eligible to receive the refund of their deposit at an election on the basis that a disclosure(s) was received for the reporting period in which election day occurred. It is proposed that this initiative be considered in conjunction with the suggestion that all candidates/groups receive a refund of their nomination. (This might include consideration of an increase in the nomination fee.)</p>	<ul style="list-style-type: none"> This would require affected nomination provisions and prescribed forms within the PE&E and LG Acts (and possibly Regs) to be amended.
Offences	<p>S96I of the EF&D Act presently provides that a person who does any act knowing it is unlawful under Divisions 3 and 4 of Part 6 of the Act is guilty of an offence. The aspect of “knowing” presents a significant barrier to successful prosecution and might be considered for review.</p>	<p>Unlawful acts under Divisions 3 and 4 of Part 6 include, but are not limited to, accepting reportable political donations without appointing an official agent, accepting gifts in kind valued in excess of \$1,000, and accepting anonymous donations.</p> <p>The EFA is advised that S96I requires <i>actual</i> knowledge of the unlawful activity not <i>constructive</i> knowledge. For example, it would not be enough to establish that a candidate or official agent had attended seminars or training or been issued with guidelines or other advisory information</p>

Appendix 5 – Electoral regulations in international jurisdictions

	Canada	New Zealand	United Kingdom
Donations			
Individuals	Only Canadian citizens or residents. \$1100 annual cap to parties and candidates. \$20 cap on cash donations. Fees for party membership are donations. Candidates can donate extra \$1,000 to own campaign. ¹¹²⁶	No limit for New Zealand residents. \$1000 cap for anonymous and overseas donations. ¹¹²⁷	No limit for UK voters. Candidates: £50 cap for anonymous or foreign donations. Parties: £500 cap for anonymous or foreign donors. ¹¹²⁸
Corporations, etc	Ban on donations from corporations, trade unions, and anonymous donations. ¹¹²⁹	No limits for New Zealand donors (e.g. corporations, trade unions and trusts). \$1000 cap for overseas organisations. ¹¹³⁰	Candidates: £50 cap for foreign corporations. Parties: £500 cap for foreign corporations. ¹¹³¹
Disclosure			
Disclosure Threshold	Parties: \$200 per quarter. Candidates: \$200 for an election. ¹¹³²	Candidates: \$1,000. Parties: \$10,000. ¹¹³³	Parties: £7,500. Candidates: £50. 3 rd Parties: £5,000. ¹¹³⁴
Frequency of Disclosure	Parties: quarterly. Candidates: post election. ¹¹³⁵	Parties: annually, unless over \$20,000 then within 10 days. Candidates: post election ¹¹³⁶	Parties: quarterly. Candidates: post election. 3 rd Parties: post election. ¹¹³⁷

¹¹²⁶ Elections Canada, <http://www.elections.ca> (accessed 8 February 2010); Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf (accessed 20 February 2010);

¹¹²⁷ New Zealand Ministry of Justice, *Electoral Finance Reform, Proposal Document*, pp. 20-21, <http://www.justice.govt.nz/policy-and-consultation/electoral/electoral-finance-reform/documents/Electoral%20Finance%20Reform%20Proposal%20Document.pdf> (accessed 5 March 2010)

¹¹²⁸ Legislative Council Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, p. 31 and Donations and loans: Guidance for political parties in Great Britain, pp. 11-12,

http://www.electoralcommission.org.uk/_data/assets/pdf_file/0005/82076/PPE-Act-Factsheet-v2.pdf

¹¹²⁹ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, p. 93

¹¹³⁰ New Zealand Ministry of Justice, *Electoral Finance Reform, Proposal Document*, p. 21

¹¹³¹ Legislative Council Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, p. 31 and Donations and loans: Guidance for political parties in Great Britain, pp. 11-12,

http://www.electoralcommission.org.uk/_data/assets/pdf_file/0005/82076/PPE-Act-Factsheet-v2.pdf

¹¹³² Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, p.93

¹¹³³ New Zealand Ministry of Justice, *Electoral Finance Reform, Proposal Document*, p. 21

¹¹³⁴ The Electoral Commission, *The Political Parties and Elections Act 2009*,

www.electoralcommission.org.uk/_data/assets/pdf_file/0005/82076/PPE-Act-Factsheet-v2.pdf (accessed 23 February 2010) and New Zealand Ministry of Justice, *Electoral Finance Reform, Proposal Document*, pp. 93-94.

¹¹³⁵ Legislative Council Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, p. 30 and Elections Canada, <http://www.elections.ca> (accessed 8 February 2010).

¹¹³⁶ Legislative Council Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, pp. 30-31

Appendix 5 – Electoral regulations in international jurisdictions

Expenditure			
Regulated period	Begins with issue of the writ and ends on election day. ¹¹³⁸	3 months before election day. ¹¹³⁹	Parties: 365 days before election day. Candidates: Long campaign begins after Parliament has been sitting for 55 months, ends date Parliament dissolved; Short campaign begins with formal nomination, ends polling day. ¹¹⁴⁰
Party	1. \$0.70 x number of voters in electorates contested. ¹¹⁴¹	\$1,000,000, plus \$20,000 for each electorate contested. ¹¹⁴²	Greater of £30,000 per electorate contested; or £810,000 (in England). ¹¹⁴³
Candidate	1. (\$2.07 x first 15,000 voters) + (\$1.04 x next 10,000 voters) + (\$0.52 x voters over 25,000) 2. Adjusted for districts with small number of voters or large areas. ¹¹⁴⁴	Limit: \$20,000. ¹¹⁴⁵	Long campaign: £25,000 plus 5p per voter in electorate Short campaign: £7,150 plus 5p per voter in electorate. ¹¹⁴⁶
Regional Issues	Adjustment for large electorates: Candidate's limit increased by the lesser of \$0.31 per square kilometre or 25% of the amount calculated above. ¹¹⁴⁷		Spending limit is 2p more per voter in county electorates. ¹¹⁴⁸
3 rd Party Spending	Total expense limit: \$187,650 Expense limit by electorate: \$3,753. ¹¹⁴⁹	Ban on 3 rd party advertising on TV or radio. Advertising which promotes candidate/party counts against	Spending limit for whole UK: £1,184,259. £500 limit on advertising which promotes or

¹¹³⁷ The Electoral Commission, <http://www.electoralcommission.org.uk> (accessed 19 February 2010) and Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008

¹¹³⁸ Elections Canada, *Election Handbook for Candidates, their official agents and auditors*, pp. 27 <http://www.elections.ca> (accessed 8 February 2010).

¹¹³⁹ New Zealand Ministry of Justice, *Electoral Finance Reform, Proposal Document*, p. 25

¹¹⁴⁰ The Electoral Commission, *Party campaign expenditure*, <http://www.electoralcommission.org.uk/elections/election-spending/party-campaign-expenditure> (accessed 9 February 2010) and The Electoral Commission, *Guidance for candidates and agents: The 2010 UK Parliamentary general elections in Great Britain*, pp. 67-68

¹¹⁴¹ Elections Canada, *Registered Party Handbook*, <http://www.elections.ca/content.asp?section=pol&document=page4index&dir=pol/ec20229&lang=e&textonly=false>, (accessed 10 March 2010), p.34

¹¹⁴² New Zealand Ministry of Justice, *Electoral Finance Reform, Proposal Document*, p. 23

¹¹⁴³ The Electoral Commission, *Party campaign expenditure*, <http://www.electoralcommission.org.uk/elections/election-spending/party-campaign-expenditure> (accessed 9 February 2010)

¹¹⁴⁴ Elections Canada, *Election Handbook for Candidates, their official agents and auditors*, <http://www.elections.ca> (accessed 8 February 2010), pp. 28-29

¹¹⁴⁵ New Zealand Ministry of Justice, *Electoral Finance Reform, Proposal Document*, p. 23

¹¹⁴⁶ The Electoral Commission, *Guidance for candidates and agents: The 2010 UK Parliamentary general elections in Great Britain*, p. 68-69

¹¹⁴⁷ Elections Canada, *Election Handbook for Candidates, their official agents and auditors*, <http://www.elections.ca> (accessed 8 February 2010), p. 29

¹¹⁴⁸ The Electoral Commission, *Guidance for candidates and agents: The 2010 UK Parliamentary general elections in Great Britain*, p. 68-69

		candidate/party limit. No limit on advertising that doesn't support particular party/candidate. ¹¹⁵⁰	disparages particular candidate. 3 rd parties intending to spend over £10,000 must register with Electoral Commission. ¹¹⁵¹
Type of expenditure	Expenses incurred to directly promote or oppose a party or candidate during regulated period. Expenses include: - advertising or promotional material - staff costs - meeting costs - election surveys and research. ¹¹⁵²	Parties: Expenses incurred in producing party advertisements. Candidates: Expenses incurred in producing candidate advertisements. ¹¹⁵³	Parties: Expenses aimed at promoting or procuring electoral success for the party or directed at enhancing the standing of the party. Expenses include: party political broadcasts; advertising; unsolicited material sent to voters; manifestos and other documents; market research; press conferences and dealings with the media; transport; rallies and other events. Candidates: All expenses used for the purposes of the candidate's election. ¹¹⁵⁴ Expenses include: advertising; unsolicited materials sent to electors; some types of transport; public meetings; staff costs; accommodation; administrative costs, such as telephone and stationery costs. ¹¹⁵⁵
TV and Radio Broadcasts	Limits on the provision of television time. ¹¹⁵⁶	Ban on paid election broadcasts. ¹¹⁵⁷	Ban on paid broadcast media advertising. ¹¹⁵⁸

¹¹⁴⁹ Elections Canada, <http://www.elections.ca> (accessed 8 February 2010)

¹¹⁵⁰ New Zealand Ministry of Justice, *Electoral Finance Reform, Proposal Document*, p. 32 and 36

¹¹⁵¹ The Electoral Commission, *Non-party campaigners Guidance on expenditure and donations for elections in 2010*, p.4; <http://www.electoralcommission.org.uk/party-finance/legislation/third-partiespermitted-participants/third-parties> and <http://www.electoralcommission.org.uk/guidance/those-we-regulate/non-party-campaigners> (accessed 3 March 2010).

¹¹⁵² Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, http://www.efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf (accessed 2 March 2010). p. 59 and Elections Canada, *Election Handbook for Candidates, their official agents and auditors*, <http://www.elections.ca> (accessed 8 February 2010), p. 27

¹¹⁵³ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 59

¹¹⁵⁴ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 59

¹¹⁵⁵ Dr Joo-Cheong Tham, *Towards a more democratic political funding regime in New South Wales*, February 2010, p. 59 and The Electoral Commission, *Guidance for candidates and agents: The 2010 UK Parliamentary general elections in Great Britain*, p. 70

¹¹⁵⁶ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, p. 93

Public funding			
Calculation and allocation	Candidates: reimbursed 60% of expenses, if they receive at least 10% of votes. Parties: reimbursed 50% of expenses, if it receives at least 2% of national votes, or at least 5% of votes in contested electorates. ¹¹⁵⁹	Parties receive a broadcasting allocation. Total allocation \$3,211,875. Split between eligible parties. ¹¹⁶⁰	Parties receive free party political broadcasts and free election postage. Total amount approx £121 million. ¹¹⁶¹
Ongoing Administration	Parties: quarterly allowance. Calculation: Number of votes x \$0.4375. ¹¹⁶²	MPs and parties represented in Parliament receive funding. ¹¹⁶³	Electoral Commission can allocate up to £2 million each year to assist in developing policies. Split between eligible parties. ¹¹⁶⁴

NB. In all jurisdictions donations can be monetary or non-monetary.

Donations

Individuals
Corporations etc

Caps and bans on donations (supply side)

Any caps on donations from individuals
Any bans or caps on donations from corporations, unions, others, etc

Disclosure

Disclosure Threshold
Frequency of Disclosure

Requirements for political parties to disclose donations

Minimum donation amount that needs to be disclosed
How often do they need to disclose information about donations

Expenditure

Party
Candidate
Timing
after issue of writs)
Regional Issues
3rd Party Spending

Caps on expenditure (demand side)

Limits on the amount a party can spend on its campaign
Limits on the amount a candidate can spend on their campaign
Timing of any expenditure caps (eg. to apply 6 months prior to election or
Do candidates in regional areas have a higher cap than others?
Limits on third party spending & comparison with party spending

¹¹⁵⁷ Legislative Council Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, pp. 30-31

¹¹⁵⁸ Legislative Council Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, p. 31.

¹¹⁵⁹ Elections Canada, <http://www.elections.ca> (accessed 8 February 2010)

¹¹⁶⁰ New Zealand Ministry of Justice, *Electoral Finance Reform, Proposal Document*, p. 12

¹¹⁶¹ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008

¹¹⁶² Elections Canada, <http://www.elections.ca> (accessed 8 February 2010)

¹¹⁶³ New Zealand Ministry of Justice, *Electoral Finance Reform, Proposal Document*, p. 17

¹¹⁶⁴ The Electoral Commission, *Public Funding*, http://www.electoralcommission.org.uk/party-finance/public_funding (accessed 4 March 2010).

Appendix 5 – Electoral regulations in international jurisdictions

Type of expenditure	Prohibition on particular types of electoral expenditure
Public funding	
Calculation and allocation or per candidate?	How is public funding calculated and allocated? Also is it allocated per party
Timing	When is it paid?
Ongoing Administration	Is there public funding for a party's ongoing administration costs?

Appendix 6 – Table of Canadian strict liability offences

Canada Elections Act Strict Liability Offences			
Election Officers – Offences under Part 3	Offences	Punishment*	Maximum Penalty
failure to return election documents and election materials – paragraph 43(c)	484(1)	500(1)	\$1,000 fine, three month imprisonment, or both
returning officer – failure to take necessary election proceedings (wilfully) – subsection 24(3)	(2)(a)	500(3)	\$2,000 fine, six month imprisonment, or both
refusal to give access to building or gated community – subsection 43.1(1)	(b)	500(3)	\$2,000 fine, six month imprisonment, or both
Candidates – Offences under Part 6	Offences	Punishment*	Maximum Penalty
failure to appoint official agent – subsection 83(1)	486(1)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to appoint auditor – subsection 83(2)	(1)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to appoint a replacement official agent or auditor – section 87	(1)	500(1)	\$1,000 fine, three month imprisonment, or both
accepting prohibited gift or other advantage – subsection 92.2(1)	(1)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to provide statement within required period – subsection 92.2(5)	(1)	500(1)	\$1,000 fine, three month imprisonment, or both
providing incomplete statement – paragraph 92.6(1)(b)	(1)	500(1)	\$1,000 fine, three month imprisonment, or both
Voting – Offences under Part 9	Offences	Punishment*	Maximum Penalty
failure to allow time to vote – employer – subsection 132(1)	489(1)(a)	500(1)	\$1,000 fine, three month imprisonment, or both
making deductions from employees' wages for time given to vote – subsection 133(1)	(a)	500(1)	\$1,000 fine, three month imprisonment, or both
prohibited use of loudspeaker – section 165	(b)	500(1)	\$1,000 fine, three month imprisonment, or both
wearing of emblems, etc., in polling station – paragraph 166(1)(b)	(c)	500(1)	\$1,000 fine, three month imprisonment, or both
Special Voting Rules – Offences under Part 11	Offences	Punishment*	Maximum Penalty
failure to take required measures re ballots and special ballots – returning officer – section 275	491(1)	500(1)	\$1,000 fine, three month imprisonment, or both
Counting Votes – Offences under Part 12	Offences	Punishment*	Maximum Penalty
failure to safeguard ballot box – returning officer – section 292	492(1)	500(1)	\$1,000 fine, three month imprisonment, or both
Communications – Offences under Part 16	Offences	Punishment*	Maximum Penalty
failure to indicate authority for election advertising – candidate, registered party or person acting on behalf of a candidate or registered	495(1)(a)	500(1)	\$1,000 fine, three month imprisonment, or both

party – section 320			
failure to provide election survey information – subsection 326(1) or (2)	(b)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to provide report on election survey results – sponsor of an election survey – subsection 326(3)	(b)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to indicate survey not based on recognized statistical methods – section 327	(c)	500(1)	\$1,000 fine, three month imprisonment, or both
Third Party Election Advertising – Offences under Part 17	Offences	Punishment*	Maximum Penalty
exceeding election advertising expense limits – subsections 350(1) to (3)	496(1)(a)	500(1) 500(6) (exception 503(1)-(3))	\$1,000 fine, three month imprisonment, or both Third parties liable to fines five times the amount they overspent on advertising
failure to identify self in advertisement – section 352	(b)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to register – subsection 353(1)	(c)	500(1) 505(3)	\$1,000 fine, three month imprisonment, or both If convicted as a group or corporation, liable to a \$10,000 fine
failure to appoint financial agent – section 354	(d)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to appoint auditor – subsection 355(1)	(d)	500(1)	\$1,000 fine, three month imprisonment, or both
use of anonymous contributions – subsection 357(3)	(e)	500(1)	\$1,000 fine, three month imprisonment, or both
use of foreign contributions – section 358	(e)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to file election advertising report – subsection 359(1)	(f)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to provide bills or receipts on request – subsection 359(9)	(f)	500(1)	\$1,000 fine, three month imprisonment, or both
Finance – Offences under Part 18	Offences	Punishment*	Maximum Penalty
failure to provide statement of assets and liabilities or related documents – registered party – section 372	497(1)(a)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to comply with requirements re officers, chief agent, registered agents or auditor – subsection 375(3) or, registered party or eligible party – subsection 374.1(4), section 378, subsection 379(1) or (2) or section 380	(b)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to report changes to registered party information – registered party – subsection 382(1) or (4)	(c)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to confirm validity of information on party – registered party – section 384	(d)	500(1)	\$1,000 fine, three month imprisonment, or both

failure to provide financial transactions return or election expenses return or related documents – chief agent of a deregistered political party – section 392	(e)	500(1) 506	\$1,000 fine, three month imprisonment, or both Deregistered party that offends this section is liable to \$25,000 fine
failure to provide financial transactions return or related documents – chief agent of a merging registered party – section 403	(h)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to register – electoral district association – section 403.01	(h.01)	500(1)	\$1,000 fine, three month imprisonment, or both
financial activity during an election period – electoral district association of a registered party – section 403.04	(h.02)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to provide statement of assets and liabilities or related documents – registered association – section 403.05	(h.03)	500(1)	\$1,000 fine, three month imprisonment, or both
making erroneous declaration – financial agent of a registered association – section 403.051	(h.031)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to comply with requirements re: appointment of electoral district agent – registered association – subsection 403.09(2)	(h.04)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to comply with requirements re: appointment of financial agent or auditor – registered association – section 403.12, 403.13 or 403.14	(h.05)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to report changes to registered association information – registered association – subsection 403.16(1)	(h.06)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to confirm validity of information concerning association – registered association – section 403.17	(h.07)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to provide financial transactions return for fiscal period or related documents – financial agent of a deregistered electoral district association – section 403.26	(h.08)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to provide financial transactions return or related documents – financial agent of a registered association – subsection 403.35(1), (2) or (4)	(h.09)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to forward undetermined contributions – financial agent of a registered association – section 403.36	(h.1)	500(1)	\$1,000 fine, three month imprisonment, or both
providing incomplete financial transactions return – financial agent of a registered association – paragraph 403.38(b)	(h.11)	500(1)	\$1,000 fine, three month imprisonment, or both
making contribution while ineligible – person or entity – subsection 404(1)	(i)	500(1)	\$1,000 fine, three month imprisonment, or both

Appendix 6 – Table of Canadian strict liability offences

failure to return or pay amount of ineligible contribution – chief agent of a registered party, financial agent of a registered association, official agent of a candidate or financial agent of a leadership contestant or nomination contestant – subsection 404(2)	(i.1)	500(1)	\$1,000 fine, three month imprisonment, or both
making prohibited transfer – registered party or electoral district association of one – subsection 404.3(1)	(i.2)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to issue receipt – person who is authorized to accept contributions on behalf of a registered party, a registered association, a candidate, a leadership contestant or a nomination contestant – section 404.4	(i.3)	500(1)	\$1,000 fine, three month imprisonment, or both
circumventing contribution limit – person or entity – subsection 405.2(1)	(i.4)	500(1)	\$1,000 fine, three month imprisonment, or both
concealing source of contribution – person or entity – subsection 405.2(2)	(i.5)	500(1)	\$1,000 fine, three month imprisonment, or both
making indirect contributions – individual – subsection 405.3	(i.6)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to return or pay amount of contribution – person authorized under this Act to accept contributions – section 405.4	(i.7)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to document payment – subsection 410(1) or (2)	(j)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to provide documentation of expenditures – person authorized to pay petty expenses – subsection 411(3)	(k)	500(1)	\$1,000 fine, three month imprisonment, or both
paying excessive petty expenses – person authorized to pay petty expenses – subsection 411(4)	(k)	500(1)	\$1,000 fine, three month imprisonment, or both
exceeding election expense limit – chief agent – subsection 423(1)	(l)	500(1) 507	\$1,000 fine, three month imprisonment, or both Registered party that offends this section is liable to \$25,000 fine
colluding to circumvent election expense limit – registered party or third party – subsection 423(2)	(l)	500(1) 507	\$1,000 fine, three month imprisonment, or both Registered party that offends this section is liable to \$25,000 fine
failure to provide financial transactions return or related documents – chief agent – section 424	(m)	500(1) 507	\$1,000 fine, three month imprisonment, or both Registered party that offends this section is liable to \$25,000 fine
failure to provide quarterly return – chief agent – section 424.1	(m.1)	500(1)	\$1,000 fine, three month imprisonment, or both

Appendix 6 – Table of Canadian strict liability offences

failure to forward undetermined contributions – registered agent – section 425	(n)	500(1) 507	\$1,000 fine, three month imprisonment, or both Registered party that offends this section is liable to \$25,000 fine
providing incomplete financial transactions return – chief agent – paragraph 427(b)	(o)	500(1) 507	\$1,000 fine, three month imprisonment, or both Registered party that offends this section is liable to \$25,000 fine
failure to provide election expenses return or related documents – chief agent – section 429	(q)	500(1) 507	\$1,000 fine, three month imprisonment, or both Registered party that offends this section is liable to \$25,000 fine
providing incomplete election expenses return – chief agent – paragraph 431(b)	(q.01)	500(1) 507	\$1,000 fine, three month imprisonment, or both Registered party that offends this section is liable to \$25,000 fine
failure to report provincial division changes – chief executive officer of a provincial division – subsection 435.02(5)	(q.011)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to inform of leadership contest or related changes – registered party – subsection 435.04(1) or (2)	(q.02)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to register for a leadership contest – person – subsection 435.05(1)	(q.03)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to comply with requirements re appointment of leadership campaign agent, financial agent or auditor – leadership contestant – subsection 435.08(2) or section 435.11, 435.12 or 435.13	(q.04)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to report changes to leadership contestant information – leadership contestant – subsection 435.15(1) or (2)	(q.05)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to file statement of withdrawal – leadership contestant – section 435.16	(q.06)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to file statement of withdrawal of acceptance of leadership contestant – registered party – section 435.17	(q.07)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to satisfy bank account requirements – financial agent of a leadership contestant – section 435.21	(q.08)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to pay recoverable claim in timely manner – leadership contestant or financial agent of one – section 435.24	(q.09)	500(1)	\$1,000 fine, three month imprisonment, or both

failure to provide leadership campaign return or related documents – financial agent of a leadership contestant – subsection 435.3(1), (2) or (6)	(q.1)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to comply with a requirement of the Chief Electoral Officer – financial agent of a leadership contestant – subsection 435.3(4)	(q.11)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to send declaration re: leadership campaign return to agent – leadership contestant – subsection 435.3(7)	(q.12)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to provide return on contributions or related documents – financial agent of a leadership contestant – subsections 435.31(1) to (3)	(q.13)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to forward undetermined contributions – financial agent of a leadership contestant – section 435.32	(q.14)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to provide updated financial reporting documents – financial agent of a leadership contestant – subsection 435.35(1) or (3)	(q.15)	500(1)	\$1,000 fine, three month imprisonment, or both
providing incomplete financial return – leadership contestant or financial agent of one – paragraph 435.43(b)	(q.16)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to dispose of surplus leadership campaign funds – financial agent of a leadership contestant – subsection 435.45(2) or section 435.46	(q.17)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to satisfy bank account requirements – official agent – section 437	(r)	500(1)	\$1,000 fine, three month imprisonment, or both
incurring more than maximum allowed for notice of nomination meetings – official agent, candidate or person authorized under paragraph 446(c) – subsection 439(2)	(s)	500(1) 502(1)(c)	\$1,000 fine, three month imprisonment, or both
exceeding election expenses limit – official agent, candidate, person authorized under paragraph 446(c) – subsection 443(1)	(s)	500(1) 502(1)(c)	\$1,000 fine, three month imprisonment, or both
colluding to circumvent election expense limit – official agent, candidate, person authorized under paragraph 446(c) or third party – subsection 443(2)	(s)	500(1) 502(1)(c)	\$1,000 fine, three month imprisonment, or both
failure to pay recoverable claim in timely manner – official agent – subsection 445(1)	(t)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to provide electoral campaign return or related documents – official agent – subsections 451(1), (2), (3) or (4)	(u)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to comply with a requirement	(u.1)	500(1)	\$1,000 fine, three month

of the Chief Electoral Officer – official agent – subsection 451(2.2)			imprisonment, or both
failure to send declaration re electoral campaign return to agent – candidate – subsection 451(5)	(v)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to pay value of undetermined contribution – official agent – section 452	(w)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to provide updated electoral campaign return or related documents – official agent – section 455	(x)	500(1)	\$1,000 fine, three month imprisonment, or both
providing incomplete electoral campaign return – official agent – paragraph 463(1)(b)	(y)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to dispose of surplus electoral funds – official agent – subsection 472(2) or section 473	(z)	500(1)	\$1,000 fine, three month imprisonment, or both
improper or unauthorized transfer of funds – registered agent or financial agent – section 476	(z.1)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to return unused income tax receipts – official agent – subsection 478(2)	(z.2)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to file a report of nomination contest – registered party or registered association – subsection 478.02(1)	(z.21)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to appoint financial agent – nomination contestant – section 478.04	(z.22)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to comply with requirements re appointment of financial agent – nomination contestant – section 478.06, 478.07 or 478.08	(z.23)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to report changes in nomination contestant information – nomination contestant – subsection 478.1(1) or (2)	(z.24)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to satisfy bank account requirements – financial agent of a nomination contestant – section 478.12	(z.25)	500(1)	\$1,000 fine, three month imprisonment, or both
exceeding nomination campaign expenses limit – nomination contestant or the financial agent of one – subsection 478.15(1)	(z.26)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to pay recoverable claim in timely manner – nomination contestant or financial agent of one – subsection 478.17(1)	(z.27)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to provide nomination campaign return or related documents – financial agent of a nomination contestant – subsection 478.23(1), (2) or (6)	(z.28)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to comply with a requirement of the Chief Electoral Officer – financial agent of a nomination contestant – subsection 478.23(4)	(z.29)	500(1)	\$1,000 fine, three month imprisonment, or both

Appendix 6 – Table of Canadian strict liability offences

failure to send declaration re: nomination campaign return to agent – nomination contestant – subsection 478.23(8)	(z.3)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to forward undetermined contributions – financial agent of a nomination contestant – section 478.24	(z.31)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to appoint auditor – nomination contestant – subsection 478.25(1)	(z.32)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to comply with requirements re appointment of auditor – nomination contestant – subsection 478.25(4) or (5) or section 478.26	(z.33)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to provide updated financial reporting documents – financial agent of a nomination contestant – subsection 478.3(1) or (3)	(z.34)	500(1)	\$1,000 fine, three month imprisonment, or both
providing incomplete financial return – financial agent of a nomination contestant – paragraph 478.38(b)	(z.35)	500(1)	\$1,000 fine, three month imprisonment, or both
failure to dispose of surplus nomination campaign funds – financial agent of a nomination contestant – subsection 478.4(2) or section 478.41	(z.36)	500(1)	\$1,000 fine, three month imprisonment, or both
General – Offences under Part 21	Offences	Punishment*	Maximum Penalty
removal of posted election documents – subsection 548(1)	499(1)	500(1)	\$1,000 fine, three month imprisonment, or both
taking false oath – subsection 549(3)	(2)(a)	500(5) 502(1)(e)	\$5,000 fine, five year imprisonment, or both
compelling or inducing false oath (knowingly) – subsection 549(4)	(a)	500(5) 502(1)(e)	\$5,000 fine, five year imprisonment, or both
signing document that limits freedom of action in Parliament – candidate (knowingly) – section 550	(b)	500(5) 502(1)(f)	\$5,000 fine, five year imprisonment, or

Appendix 7 – Table of other Canadian offence provisions and penalties

Public funding schemes in certain Canadian jurisdictions – offence provisions, penalties and investigation		
Types of offences and penalties		
Canada (Federal scheme)	Canada - Quebec	Canada - Ontario
<p>General offences</p> <ul style="list-style-type: none"> - Illegal practice: 5 years - Corrupt practice: 7 years <p>Additional penalties for corrupt or illegal practices</p> <ul style="list-style-type: none"> - Cannot be elected as a member - Cannot sit as a member - Cannot be nominated or appointed to office <p>Other - May be ordered to: do community service; pay amount equal to financial benefit or contribution resulting from offence; pay compensation for damages; perform obligation, non-performance of which resulted in offence; take any other reasonable measure considered appropriate by the court.</p>	<p>General offences</p> <ul style="list-style-type: none"> - Fine not more than \$500 - Corrupt practice: 5 years <p>Additional penalties for corrupt or illegal practices</p> <ul style="list-style-type: none"> - Cannot be nominated as a candidate - Cannot be elected as a member - Cannot sit as a member - Cannot be nominated or appointed to office - Cannot vote <p>Other – Loses right to engage in partisan work for 5 years</p>	<p>General offences</p> <ul style="list-style-type: none"> - Fine not more than \$5000 - Corrupt practice: 8 years <p>Additional penalties for corrupt or illegal practices</p> <ul style="list-style-type: none"> - Cannot be nominated as a candidate - Cannot be elected as a member - Cannot sit as a member - Cannot be nominated or appointed to office
Specific offences:	Specific offences:	Specific offences:
Access – up to \$2,000, 6mths or both	Access – \$100-\$1,000	
False statements – up to \$5,000, 5 years or both	False statements - \$100-\$3,000	-
False information on voters lists – up to \$5,000, 5 years or both	False information on voters lists – \$500-\$2,000	False information on voters lists – up to \$5,000
Use of information on voters lists – up to \$5,000, 1 year or both	Use of information on voters lists \$500-\$30,000	Use of information on voters lists – up to \$5,000
Voting or bribery – up to \$5,000, 5 years or both	Voting or bribery – \$500-\$2,000; Bribery : \$1,000-\$10,000	Voting or bribery – up to \$5,000
Impersonation of elector -	Impersonation of elector - \$500-\$2,000	Impersonation of elector -
Intimidation – up to \$5,000, 5 years or both	Intimidation –\$1,000-\$30,000	Intimidation –
Secrecy – Up to \$5,000, 5 years or both	Secrecy - \$1,000-\$30,000	Secrecy – up to \$5,000
Ballots - Up to \$5,000, 5 years or both	Ballots - \$100-\$3,000	Ballots – up to \$5,000 and 6 months
Election officers – up to \$1,000, 3 months or both	Election officers - \$100-\$2,000	Election officers – up to \$5,000, 6 months or both
Advertising and survey – Up to \$5,000, 5 years or both, or \$25,000 fine only	Advertising and survey - \$500-\$10,000	Advertising and survey – up to \$50,000
Election signs – up to \$1,000, 3 months or both	Election signs - \$200-\$1,000	Election signs -
Broadcasting - \$25,000; or \$5,000, 5 years or both	Broadcasting - \$500-\$10,000	Broadcasting – up to \$50,000

Public funding schemes in certain Canadian jurisdictions – offence provisions, penalties and investigation		
Third party advertising – up to \$5,000, 5 years or both plus fines 5 times excess spending	Third party advertising - \$500-\$10,000	Third party advertising -
Election finances – on summary conviction: up to \$2,000, 1 year or both; on conviction on indictment: up to \$5,000, 5 years or both	Election finances - \$1,000-\$30,000	Election finances – up to \$50,000
Investigations		
Canada (Federal scheme)	Canada - Quebec	Canada - Ontario
Commissioner of Canada Elections ** ** an independent officer appointed by the Chief Electoral Officer under the Canada Elections Act, whose duty is to ensure that this Act is complied with and enforced s.509	Chief Electoral Officer (CEO) or person appointed by him or her	Chief Electoral Officer (CEO)
Canada (Federal scheme)	Canada - Quebec	Canada - Ontario
DPP institutes proceedings	CEO	General offences: Chief Electoral Officer Election financing: Chief Electoral Officer
Canada (Federal scheme)	Canada - Quebec	Canada - Ontario
- 5 years from date on which Commissioner becomes aware of facts giving rise to prosecution and no later than 10 years from date of offence - 1 year from date of defendant's return if they have absconded from the jurisdiction	1 year after prosecutor becomes aware of commission of offence, but no later than 5 years after date of offence	General offences – 90 days following date of official election return, by CEO may commence action at any time. Election financing: 2 years after facts become known to CEO
Canada (Federal scheme)	Canada - Quebec	Canada - Ontario
- Canada, Trial Division of Federal Court - Ontario, Superior Court of Justice - Quebec, Superior Court - Nova Scotia, British Columbia, Yukon, Northwest Territories, Supreme Court - New Brunswick Manitoba, Saskatchewan and Alberta, Queen's Bench - Prince Edward Island, Newfoundland, Labrador, Trial Division of Supreme Court - Nunavut, Nunavut Court of Justice	Court of Quebec	Varies by case.

Appendix 8 – Table of New Zealand offence provisions and penalties

New Zealand – offence provisions and penalties <i>Electoral Act 1993</i>			
SUMMARY OFFENCES	CORRUPT PRACTICE OFFENCES	ILLEGAL ACTIVITY OFFENCES	CORRUPT PRACTICE AND ILLEGAL ACTIVITY OFFENCES
<p>Section 116 offences relating to use of electoral information - \$50,000 in the case of information supplied, received, or used for a commercial purpose; \$10,000 in any other case</p> <p>Section 117 offences in respect of manipulating or processing electoral information - \$50,000</p> <p>Section 117A offence relating to misuse of electoral information supplied under section 111D - \$50,000</p> <p>Section 118 false statements or declarations - \$2,000 or 3 months imprisonment</p> <p>Section 119 wilfully misleading Registrar - \$2,000</p> <p>Section 121 failure to deliver application - \$2,000</p> <p>Section 197 interfering with or influencing voters - \$20,000</p> <p>Section 200 erasing and altering official mark on ballot paper - \$2,000</p>	<p>Section 215 Personation</p> <p>Section 216 Bribery</p> <p>Section 217 Treating</p> <p>Section 218 Undue influence</p> <p>Section 224 Punishment</p> <p>2 years imprisonment and/or a fine of \$100,000 in the case of a candidate or a party secretary convicted for corrupt practice in relation to donations and expenditure offences or \$40,000 for any other case</p> <p>Section 199A publishing false statements to influence voters</p> <p>Section 201 offences in respect of ballot papers and ballot boxes</p> <p>Section 204 Infringement of secrecy constitutes corrupt practice</p>	<p>Section 219 Payments for exhibition of election notices</p> <p>Section 220 Providing money for illegal purposes</p> <p>Section 221 Advertisements for candidates and political parties</p> <p>Section 221A Electoral advertisements</p> <p>Section 222 Procurement of voting by unqualified voters</p> <p>Section 224 Punishment</p> <p>Fine of \$40,000 in the case of a candidate or a party secretary convicted for illegal activity in relation to donations and expenditure offences or \$10,000 in any other case.</p> <p>Section 205G Periods for claiming and paying candidate's election expenses</p>	<p>Section 205F offence to pay election expenses in excess of prescribed maximum - a corrupt practice if he or she knew the payment was in excess of the prescribed maximum amount; or</p> <p>an illegal practice in any other case, unless he or she proves that he or she took all reasonable steps to ensure that the election expenses did not exceed the prescribed maximum amount.</p> <p>Section 205N offences relating to return of candidate's election expenses - a corrupt practice if he or she filed the return knowing it to be false in any material particular; or an illegal practice in any other case, he or she had no intention to misstate or conceal the facts; and he or she took all reasonable steps in the circumstances to ensure that the information was accurate.</p> <p>Section 206D offence to pay election expenses in excess of prescribed maximum - a corrupt practice if he or</p>

New Zealand – offence provisions and penalties <i>Electoral Act 1993</i>			
SUMMARY OFFENCES	CORRUPT PRACTICE OFFENCES	ILLEGAL ACTIVITY OFFENCES	CORRUPT PRACTICE AND ILLEGAL ACTIVITY OFFENCES
<p>Section 201 offences in respect of ballot papers and ballot boxes – 2 years if Returning Officer or a polling place official; 6 month if any other person. NOTE this is also deemed a corrupt practice offence</p> <p>Section 205N offences relating to return of candidate's election expenses - \$40,000; and if he or she has been elected, a further fine not exceeding \$400 for every day that he or she sits or votes in the House of Representatives until the return is filed. NOTE also a corrupt practice offence or an illegal activity offence in certain circumstances</p> <p>Section 205O obligation to retain records necessary to verify return of candidate's election expenses - \$40,000</p> <p>Section 206N offences relating to return of party's election expenses - \$40,000 NOTE also a corrupt practice offence or an illegal activity offence in certain circumstances</p> <p>Section 206O obligation to retain records necessary to verify return of party's</p>		<p>Section 206E periods for claiming and paying party's election expenses</p> <p>Section 208F offence of prohibited disclosure</p>	<p>she knew the payment was in excess of the prescribed maximum amount; or an illegal practice in any other case, unless he or she proves that he or she took all reasonable steps to ensure that the election expenses did not exceed the prescribed maximum amount.</p> <p>Section 206N offences relating to return of party's election expenses - a corrupt practice if he or she filed the return knowing it to be false in any material particular; or an illegal practice in any other case unless the party secretary proves that he or she had no intention to misstate or conceal the facts; and he or she took all reasonable steps in the circumstances to ensure that the information in the return was accurate.</p> <p>Section 207J offence relating to contravention of section 207I(1) - a corrupt practice if the circumvention is wilful; or an illegal practice in any other case. A candidate or party secretary who contravenes section 207I is guilty of an illegal practice.</p> <p>Section 207L offence relating to contravention</p>

New Zealand – offence provisions and penalties <i>Electoral Act 1993</i>			
SUMMARY OFFENCES	CORRUPT PRACTICE OFFENCES	ILLEGAL ACTIVITY OFFENCES	CORRUPT PRACTICE AND ILLEGAL ACTIVITY OFFENCES
<p>election expenses - \$40,000</p> <p>Section 207D offence relating to contravention of section 207C - \$40,000</p> <p>Section 207F offence relating to contravention of section 207EA - \$40,000</p> <p>Section 207H offence relating to contravention of section 207GA - \$40,000</p> <p>Section 207M Records of candidate donations - \$40,000</p> <p>Section 207N Records of party donations - \$40,000</p> <p>Section 209B offences relating to return of candidate donations - \$40,000; and if he or she has been elected, a further fine not exceeding \$400 for every day that he or she sits or votes in the House of Representatives until the return is filed. NOTE also a corrupt practice offence or an illegal activity offence in certain circumstances</p> <p>Section 209C obligation to retain records necessary to verify return of</p>			<p>of section 207K(1) - a corrupt practice if the circumvention is wilful; or an illegal practice in any other case. A candidate or party secretary who contravenes section 207K(2) or (3) is guilty of an illegal practice.</p> <p>Section 209B offences relating to return of candidate donations - a corrupt practice if he or she filed the return knowing it to be false in any material particular; or an illegal practice in any other case unless the candidate proves that he or she had no intention to misstate or conceal the facts; and he or she took all reasonable steps in the circumstances to ensure that the information in the return was accurate.</p> <p>Section 210D offences relating to return of party donations - a corrupt practice if he or she filed the return knowing it to be false in any material particular; an illegal practice in any other case unless the party secretary proves that he or she had no intention to misstate or conceal the facts; and he or she took all reasonable steps in the circumstances to ensure that the information in the return was accurate.</p>

New Zealand – offence provisions and penalties <i>Electoral Act 1993</i>			
SUMMARY OFFENCES	CORRUPT PRACTICE OFFENCES	ILLEGAL ACTIVITY OFFENCES	CORRUPT PRACTICE AND ILLEGAL ACTIVITY OFFENCES
<p>candidate donations - \$40,000</p> <p>Section 210D offences relating to return of party donations - \$40,000 NOTE also a corrupt practice offence or an illegal activity offence in certain circumstances</p> <p>Section 210E obligation to retain records necessary to verify return of party donations - \$40,000</p> <p>Section 227 punishment for disqualified person voting - \$4,000, and his or her vote shall be void.</p>			

Appendix 9 – Submissions

Submission No.	Organisation	Publication Status
1	Professor George Williams	Public
2	Associate Professor Anne Twomey	Public
3	Australian Business Party	Public
4	FamilyVoice Australia	Public
5	Mr Mike Cottee	Public
6	Shire Wide Action Group	Partially Confidential
7	Mr John Phillips	Public
8	Mr Greg Piper MP	Public
9	Mr Eric Jones	Public
10	Mr Peter Draper MP	Public
11	Audit Office of NSW	Public
12 Supplementary 12a	Action on Smoking and Health Australia	Public
13	Mr Bruce Berry	Partially Confidential
14	ICAC	Public
15	Australian Labor Party (NSW Branch)	Public
16	NSW Greens Democracy4Sale Research Project	Partially Confidential
17	Liberal Party of Australia (NSW Division)	Public
18	National Party of Australia (NSW Division)	Public
19	The Greens NSW	Public
20	Mr Brian Gray	Public
21	Mr Barry Richard Benson	Public
22	Urban Taskforce Australia	Public
23	Associate Professor Graeme Orr	Public
24	Unions NSW	Public
25	The Shooters Party	Public
26	Public Interest Advocacy Centre	Public
27	Ms Clover Moore MP	Public
28	Christian Democratic Party	Public
29	Mr Peter Besseling MP	Public
30	NSW Electoral Commission / Election Funding Authority	Public

Appendix 10 – Witnesses

Date	Witness	Position	Organisation
Wednesday 9 December 2009 Parliament House, Sydney	Mr Colin Barry	Electoral Commissioner and Chair of Election Funding Authority	NSW Electoral Commission / Election Funding Authority
	Ms Sonja Hewison	Senior Legal Officer	NSW Electoral Commission
	Mr Robert Armitage	Legal Officer	
Monday, 1 February 2010 Parliament House, Sydney	Mr Ben Franklin	State Director	National Party of Australia (NSW Branch)
	Mr Matt Thistlethwaite	General Secretary	Australian Labor Party (NSW Branch)
	Mr Chris Maltby	Registered Officer	The Greens (NSW Branch)
	Mr David Shoebridge	Convenor	
	Mr Mark Neeham	State Director	Liberal Party of Australia, NSW Division
	Associate Professor Graeme Orr		TC Beirne School of Law, University of Queensland
	Dr Joo-Cheong Tham		Melbourne Law School, University of Melbourne
	Associate Professor Anne Twomey		Sydney Law School, University of Sydney
	Professor George Williams		School of Law, University of New South Wales
Tuesday, 2 February 2010 Parliament House, Sydney	Mr Peter Achterstraat	Auditor-General	Audit Officer of New South Wales
	Mr Tony Whitfield	Deputy Auditor-General	
	Dr Robert Waldersee	Executive Director, Corruption Prevention, Education and Research Division	Independent Commission Against Corruption
	Mr Peter Besseling MP	Member for Port Macquarie	Christian Democratic Party
	Mr Ian Smith	Party Agent	
	Mr Graham Freemantle	Acting State Director	
	Mr Greg Piper MP	Member for Lake Macquarie	Action on Smoking and Health Australia (ASH)
	Mr Stafford Sanders	Communications Officer	
Mr Mark Lennon	Secretary	Unions NSW	
Monday, 22 February 2010 Parliament House, Sydney	Mr Colin Barry	Electoral Commissioner and Chair of Election Funding Authority	NSW Electoral Commission / Election Funding Authority
	Mr Brian DeCelis	Director, Funding and	NSW Electoral Commission

Date	Witness	Position	Organisation
	Mr Trevor Follett	Disclosures Director, Finance and Administration	

Appendix 11 – Minutes

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no.15)

Friday, 20 November 2009 at 9.00 am

Jubilee Room, Parliament House

1. Attendance

Members present: Mr Furolo (Chair), Mr Coombs, Ms Gardiner, Mr Harwin.

Apologies: Ms Beamer, Ms Fazio and Ms Rhiannon

In attendance: Les Gonye, Helen Minnican, Dora Oravecz, Amy Bauder and Emma Wood.

2. Inquiry into public funding of elections

The Chair confirmed receipt of correspondence from the Premier on 19 November 2009 concerning draft terms of reference for the inquiry into public funding of elections.

The Committee discussed the arrangements for the meeting with the Premier to take place at 9.15am. Discussion ensued.

Mr Coombs moved, seconded Mr Furolo, that the meeting be opened to the public and the media be permitted to film and record the Premier's statement to the Committee.

Question put.

The Committee divided.

Ayes: Mr Furolo, Mr Coombs

Noes: Ms Gardiner, Mr Harwin

There being an equal number of votes, the Chair exercised his casting vote, pursuant to Standing Order 283.

Question resolved in the affirmative.

Discussion ensued.

The Committee adjourned for a short period.

The meeting resumed at 9.20am.

Resolved on the motion of Mr Harwin, seconded Mr Coombs, that pursuant to Standing Order 297 the Committee authorises the disclosure of the letter from the Premier received on 19 November 2009 in relation to draft terms of reference for the inquiry.

Discussion ensued.

The meeting was opened to the public and the media at 9.25am. The Premier spoke to the Committee on the inquiry and draft terms of reference, and provided the Committee with a copy of Dr Anne Twomey's paper, *The reform of political donations, expenditure and funding* (November 2008).

The Premier left the meeting at 9.31am and the meeting was closed to the public and media.

The Committee proceeded to deliberate on the inquiry and draft terms of reference. Discussion ensued.

The Committee agreed to seek clarification as to:

- The meaning of the term 'parliamentary representation' in item (b) of the terms of reference; and
- Clarification as to the status of the Commonwealth electoral and donations amending legislation proposed to be introduced into the Australian Parliament in late 2009.

Resolved on the motion of Mr Harwin, seconded Mr Furolo, that the Committee seek an extension until close of business on Monday, 23 November 2009, to submit comments to the Premier on the draft terms of reference.

The Committee discussed forward planning for the inquiry.

Resolved on the motion of Ms Gardiner, seconded Mr Coombs, that the terms of reference for the inquiry be advertised as soon as they are finalised, with a closing date for submissions of mid-late January.

The Committee adjourned at 9:55am, *sine die*.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no.16)

Wednesday, 9 December 2009 at 4.00pm

Waratah Room, Parliament House

1. Attendance

Members present: Mr Furolo (Chair), Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Ms Rhiannon, Mr Veitch.

In attendance: Helen Minnican, Carly Sheen, Amy Bauder and Emma Wood.

2. Public Hearing: Inquiry into the public funding of election campaigns

The press and the public were admitted.

The Chair opened the public hearing and gave a short address on the Committee's inquiry.

Mr Colin Anthony Barry, Electoral Commissioner, New South Wales Electoral Commission (NSWEC) and Chair, Election Funding Authority (EFA), affirmed; Ms Sonja Hewison, Senior Legal Officer, NSWEC, affirmed; Mr Robert Armitage, Legal Officer NSWEC, sworn.

Mr Barry made an opening statement. The Chair commenced questioning of the witnesses, followed by other members of the Committee.

Evidence concluded, the witnesses and public withdrew.

3. Deliberation

i. Minutes

Resolved, on the motion of Mr Harwin, seconded Mr Coombs that the minutes of the meeting of 26 October and 20 November 2009 be confirmed, subject to the following amendment to the minutes of the meeting of 26 October:

Delete heading: 2. Members present

Replace with: 2. Apologies

ii. ***

iii. *Inquiry referral regarding the public funding of election campaigns.*

Resolved, on the motion of Ms Beamer, seconded Mr Coombs that the Committee note the following items of correspondence:

- from the Hon Nathan Rees, Premier, received 3 December 2009, referring the inquiry to the Committee
- from Ms Rhiannon, dated 19 November 2009, and Mr Harwin, dated 23 November 2009, concerning the draft terms of reference for the inquiry,

and authorise the publication of the referral letter from Mr Rees, which accompanied the terms of reference for the inquiry.

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Mr Harwin advised that he has requested that the Committee Manager obtain a copy of the statement by Mr Rees to the Committee regarding the inquiry on 20 November 2009.

Discussion ensued.

The Committee agreed that the Committee Manager seek to obtain a copy of the statement.

Resolved, on the motion of Ms Beamer, seconded by Mr Veitch that:

- the corrected transcript of Mr Barry's evidence given today and any tabled documents, which are not confidential, be authorised for publication and uploaded to the Committee's website
- that prior to Christmas a list of proposed witnesses be distributed to the Committee members for comment
- that the next stage of public hearings of the inquiry be scheduled for the first week in February subject to the availability of a quorum and witnesses
- that submission 1 from Professor Williams be authorised for publication and uploaded on the Committee's website.

iv. ***

v. ***

vi. **General business**

1. The Committee discussed the timetable and forward planning for the public funding of election campaigns inquiry, and hearing dates were confirmed for 1-3 February 2010.

The Committee requested that the Secretariat email Committee members a copy the list of stakeholders to which the Chair will write seeking submissions to the public funding of election campaigns inquiry.

The Committee adjourned at 5.50pm, until a date to be determined.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no.17)

Monday, 1 February 2010 at 10.00am

Room 814-815, Parliament House

1. Attendance

Members present: Mr Furolo (Chair), Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Ms Rhiannon, Mr Veitch.

In attendance: Helen Minnican, Carly Sheen, Dora Oravec and Emma Wood.

2. Deliberative meeting

The Committee discussed the submissions received in relation to the inquiry into the public funding of election campaigns, and the proposed publication orders distributed at the meeting.

Resolved on the motion of Mr Harwin, seconded Mr Coombs, that the Committee publish the submissions received and upload them on its website, with the exception of submission numbers 6, 13 and 16, which would be held over until 2 February 2010 for consideration.

Deliberations concluded at 10.09am.

3. Public hearing: Inquiry into the public funding of election campaigns

The Chair opened the public hearing at 10.10am. The press and the public were admitted. The Chair gave a short address.

Mr Benjamin Franklin, State Director, National Party of Australia (NSW Branch), sworn and examined. The submission from the National Party Australia was incorporated as part of Mr Franklin's evidence.

Mr Franklin made an opening statement.

The Chair commenced questioning of the witness followed by other members of the Committee.

Questioning concluded, the Chair thanked the witness and the witness withdrew.

Mr Matthew Thistlethwaite, General Secretary, Australian Labor Party (NSW Branch), sworn and examined. The submission from the Australian Labor Party was incorporated as part of Mr Thistlethwaite's evidence.

Mr Thistlethwaite made an opening statement.

The Chair commenced questioning of the witness followed by other members of the Committee.

Questioning concluded, the Chair thanked the witness and the witness withdrew.

Mr Christopher Maltby, Registered Officer, The Greens (NSW) and Mr David Shoebridge, Convenor, The Greens (NSW), affirmed and examined. The submission from The Greens (NSW) was incorporated as part of Mr Maltby's evidence.

Mr Shoebridge made an opening statement.

The Chair commenced questioning of the witnesses followed by other members of the Committee.

Questioning concluded, the Chair thanked the witnesses and the witnesses withdrew.

Mr Mark Neeham, State Director, Liberal Party of Australia (NSW Division), sworn and examined. The submission from the Liberal Party of Australia (NSW Division) was incorporated as part of Mr Neeham's evidence.

Mr Neeham made an opening statement.

The Chair commenced questioning of the witness followed by other members of the Committee.

Questioning concluded, the Chair thanked the witness and the witness withdrew.

The Committee took a luncheon adjournment.

The hearing resumed. The press and the public were admitted.

Associate Professor Graeme Orr, TC Beirne School of Law, University of Queensland, affirmed and examined. The submission from Associate Professor Orr was incorporated as part of his evidence. Dr Joo-Cheong Tham, Senior Lecturer, Law Faculty, Melbourne University, affirmed and examined. Professor George Williams, School of Law, University of New South Wales, affirmed and examined. The submission from Professor William was incorporated as part of his evidence. Associate Professor Anne Twomey, Sydney Law School, University of Sydney, sworn and examined. The submission from Associate Professor Twomey was incorporated as part of her evidence.

Associate Professor Orr, Dr Tham, Professor Williams and Associate Professor Twomey made opening statements.

The Chair commenced questioning of the witnesses followed by other members of the Committee.

Questioning concluded, the Chair thanked the witnesses and the witnesses withdrew.

The Committee took a short adjournment.

The hearing resumed. The press and public were admitted.

Mr Robert Borsak, Chairman, The Shooters Party, sworn and examined. The submission from The Shooters Party was incorporated as part of Mr Borsak's evidence.

Mr Borsak made a short opening statement.

The Chair commenced questioning of the witness followed by other members of the Committee.

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Questioning concluded, the Chair thanked the witness and the witness withdrew.

The hearing concluded.

4. Deliberative meeting

• **Minutes**

Resolved, on the motion of Mr Veitch, seconded Mr Harwin, that the minutes of the meeting of 9 December 2009 be confirmed.

• **Transcript**

Resolved, on the motion of Ms Gardiner, seconded Ms Beamer, that the corrected transcript of evidence of the public hearing on 1 February be authorised for publication and uploaded to the Committee's website.

• **Inquiry timeline and correspondence**

A proposed timeline for the inquiry was circulated to members, indicating proposed meeting times and Mr Colin Barry's availability for final evidence. Discussion ensued. The Committee agreed to include preliminary deliberations on the public funding of elections inquiry in the matters for consideration at the meeting to be held on 15 February 2010.

Two confidential draft documents provided to the Committee via e-mail by the Election Funding Authority (EFA) on 29 January 2010 were distributed. The confidential draft documents were noted as being subject to further revision by the EFA and were distributed to Committee members only. Discussion ensued.

Mr Harwin moved that the documents be given a further limited circulation, on a confidential basis, to the general secretaries and parliamentary leaders of the main parties. Discussion ensued. The Committee agreed that the Chair write to Mr Colin Barry, in his capacity as Chair of the EFA, seeking advice as to his position on such limited further distribution.

The Committee directed the Secretariat to provide a collation of issues relating to the inquiry, indicating specific areas of agreement.

Ms Rhiannon informed the Committee about her attendance at the hearing on 2 February. Discussion ensued.

The Committee noted correspondence from the Chair to the Premier, dated 22 January 2010, and to the Special Minister for State, dated 22 January 2010.

The Committee adjourned at 5.30pm, until 2 February 2010 at 10.00am.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no.18)

Tuesday, 2 February 2010 at 10.00am

Room 814-815, Parliament House

1. Attendance

Members present: Mr Furolo (Chair), Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Ms Rhiannon, Mr Veitch.

In attendance: Helen Minnican, Carly Sheen, Dora Oravec and Emma Wood.

2. Public hearing: Inquiry into the public funding of election campaigns

The Chair opened the public hearing at 10.06am. The press and public were admitted. The Chair gave a short address about the hearing and the inquiry.

Mr Peter Achterstraat, Auditor-General, Audit Office of NSW and Mr Tony Whitfield, Deputy Auditor-General, Audit Office of NSW, sworn and examined. The submission from the Audit Office of NSW was incorporated as part of Mr Achterstraat's evidence.

Mr Achterstraat made an opening statement.

The Chair commenced questioning of the witnesses followed by other members of the Committee.

Questioning concluded, the Chair thanked the witnesses and the witnesses withdrew.

The Committee took a short adjournment at 10.35am.

3. Deliberative meeting

Publication of submissions

The Committee considered the publication of submissions nos 6, 13 and 16.

The Committee agreed to publish submission no 6, Shire Wide Action Group, in part, without any identifying details contained in the first paragraph.

Resolved on the motion of Mr Harwin, seconded Mr Coombs, that the Committee publish submission no 13, Mr Bruce Berry, and publish in part the attachment to the submission.

Moved Mr Harwin, seconded Ms Gardiner, that submission no 16, NSW Greens Democracy4Sale Research Project, be published in part and the attachment not be published. Discussion ensued.

The Committee divided.

Ayes: Ms Beamer, Mr Coombs, Mr Furolo, Ms Gardiner, Mr Harwin, Mr Veitch

Noes: Ms Rhiannon

Question resolved in the affirmative.

4. Public hearing: Inquiry into the public funding of election campaigns

The public hearing resumed at 10.44am. The press and the public were admitted.

Dr Robert Waldersee, Executive Director, Corruption Prevention, Education and Research Division, Independent Commission Against Corruption, sworn and examined. The submission from the Independent Commission Against Corruption was incorporated as part of Dr Waldersee's evidence.

Dr Waldersee made an opening statement.

The Chair commenced questioning of the witness followed by other members of the Committee.

Questioning concluded, the Chair thanked the witness and the witness withdrew.

The Committee took a short adjournment at 11.25am.

5. Deliberative meeting

- Correspondence

The Committee noted a letter from the Chair to the Chair of the EFA, dated 2 February, concerning the draft documents provided by the EFA to the Committee on a confidential basis on 29 January. Discussion ensued.

- Further evidence

The Committee discussed the need for further evidence in light of the evidence from the NSW Auditor General.

Resolved on the motion of Mr Harwin, seconded Ms Gardiner, that the Committee seek evidence from the Commonwealth Auditor-General and the Auditor-General of Ontario in relation to the government advertising system in their respective jurisdictions, preferably by video-conference in the case of the latter, and, if evidence is not possible, formal advice be sought by letter from both officers.

- Publication of transcript of evidence and tabled documents

Resolved on the motion of Mr Veitch, seconded Ms Beamer, that:

- The corrected transcript of evidence given and any documents tabled at the public hearing held 2 February 2010, which are not confidential, be authorised for publication and uploaded on the Committee's website.
- Mr Colin Barry be provided with a copy of the uncorrected transcripts of evidence to assist him to prepare the final submissions from the Electoral Commission and the EFA, and to prepare to give further evidence.

6. Public hearing: Inquiry into the public funding of election campaigns

The public hearing resumed at 11.45am. The press and the public were admitted.

Mr Peter Besseling, Independent Member of Parliament for Port Macquarie, on former oath. The submission from Mr Besseling was incorporated as part of his evidence.

Mr Besseling made an opening statement.

The Chair commenced questioning the witness followed by other members of the Committee.

Questioning concluded, the Chair thanked the witness and the witness withdrew.

The Committee took a luncheon adjournment.

The public hearing resumed at 2.09pm. The press and the public were admitted.

Mr Graham Freemantle, Acting State Manager, Christian Democratic Party and Mr Ian Smith, Party Agent and Acting Treasurer, Christian Democratic Party, sworn and examined. The submission from the Christian Democratic Party was incorporated as part of Mr Freemantle's evidence.

The Chair commenced questioning of the witnesses followed by other members of the Committee.

Questioning concluded, the Chair thanked the witnesses and the witnesses withdrew.
The Committee took a short adjournment.

The public hearing resumed at 3.20pm.

Mr Gregory Piper, Independent Member of Parliament for Lake Macquarie and Mayor of the City of Lake Macquarie, on former oath. The submission from Mr Piper was incorporated as part of his evidence.

The Chair commenced questioning the witness followed by other members of the Committee.

Questioning concluded, the Chair thanked the witness and the witness withdrew.

Mr Stafford Sanders, Communications Officer, Action on Smoking and Health Australia, affirmed and examined. The submission from the Action on Smoking and Health Australia was incorporated into Mr Sander's evidence.

The Chair commenced questioning the witness followed by other members of the Committee.

Questioning concluded, the Chair thanked the witness and the witness withdrew.

The Committee took a short adjournment.

The public hearing resumed at 4.29pm.

Mr Mark Lennon, Secretary, Unions NSW, sworn and examined. The submission from Unions NSW was incorporated as part of Mr Lennon's evidence.

The Chair commenced questioning the witness followed by other members of the Committee.

Questioning concluded, the Chair thanked the witness and the witness withdrew.

The public hearing concluded at 5.08pm.

1. Deliberative meeting

Resolved, on the motion of Mr Veitch, seconded Mr Harwin, that the Chair write to Mr Colin Barry seeking details for the last two State elections of the total campaign expenditure per voter, for both the Legislative Assembly and Legislative Council.

The Committee adjourned at 5.23pm, until 15 February 2010 at 10.00am.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no.19)

Monday, 15 February 2010 at 10.00am

Room 1102, Parliament House

1. Attendance

Members present: Mr Furolo (Chair), Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Ms Rhiannon, Mr Veitch.

In attendance: Helen Minnican, Carly Sheen, Dora Oravec and Emma Wood.

2. Confirmation of the minutes

Resolved on the motion of Mr Harwin, seconded Mr Veitch, that the minutes of the public hearings and deliberative meetings held on 1 and 2 February 2010 be confirmed.

3. *****4. Inquiry into the public funding of election campaigns**

- *Correspondence received* – Resolved on the motion of Mr Coombs, seconded Ms Rhiannon, that the Committee formally receive the following items of correspondence relating to the inquiry:
 - Letter from the Director General of the Department of Premier and Cabinet, dated 3 February 2010, in response to the Chair's letter of 22 January
 - Answers to questions on notice received from:
 - The Nationals
 - Dr Tham (submission to federal review of parliamentary entitlements)
 - The Greens
 - The NSW Labor Party
 - Supplementary Submission 12a received from Action on Smoking and Health Australia (ASH)
 - Submission from the NSW Electoral Commission, dated 8 February 2010 including a proposed funding and disclosure model.
 - Response from NSW Electoral Commission to the Committee's request for details of total campaign expenditure per voter for the 2003 and 2007 state elections

The Chair updated Committee members on inquiry arrangements. The Secretariat was requested to circulate the question on notice taken by Associate Professor Twomey at the public hearing on 1 February 2010, in relation to the operation of particular State legislation, to the other roundtable participants for response.

Discussion ensued.

The Committee took a short adjournment.

The Secretariat was requested to circulate notes of the points of consensus reached at the meeting and areas for further discussion with the Electoral Commissioner, to members of the Committee for information.

The Secretariat advised Committee members of forthcoming arrangements made with the NSWEC and EFA regarding the Electoral Commissioner's proposed meeting with the Committee on 22 February.

The Committee adjourned at 1.00pm, until 22 February 2010 at 10.00am.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no.20)

Monday, 22 February 2010 at 10.00am

Waratah Room, Parliament House

1. Attendance

Appendix 11 – Minutes

Members present: Mr Furolo (Chair), Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Ms Rhiannon, Mr Veitch.

In attendance: Helen Minnican, Carly Sheen, and Amy Bauder.

Also present: Ian Rakafia and Albert Kabui (parliamentary officers, National Parliament of Solomon Islands)

2. Confirmation of the minutes

Resolved on the motion of Mr Coombs, seconded Mr Harwin, that the minutes of the deliberative meeting held on 15 February 2010 be confirmed.

3. Inquiry into the public funding of election campaigns – in camera hearing

Mr Colin Anthony Barry, Electoral Commissioner, New South Wales Electoral Commission (NSWEC) and Chair, Election Funding Authority (EFA), Mr Trevor Alan Follett, Director, Finance and Administration, NSWEC, and Mr Brian Vincent De Celis, Director, Funding and Disclosures, NSWEC, all on previous oath or affirmation, further examined.

The Chair welcomed the witnesses and advised that the Committee intended to publish the NSW Electoral Commission's submission, dated 8 February 2010, including the public funding model after the conclusion of proceedings.

Mr Barry made a brief opening statement, advising that the NSW Electoral Commission had commissioned a report from Dr Joo-Cheong Tham, which had been published on the EFA's website and made available to the Committee.

The Chair commenced questioning of the witnesses followed by other members of the Committee.

The Committee took a short adjournment at 12.00 noon.

The in camera hearing resumed at 12.19pm.

Evidence concluded, the witnesses withdrew. The in camera hearing concluded at 1.28pm.

4. Deliberative meeting

a. Correspondence received - Resolved on the motion of Ms Beamer, seconded Mr Coombs, that the Committee formally note receipt of the following items relating to the inquiry:

- o Answers to questions on notice received from:
 - The Audit Office of NSW
 - The Shooters Party
 - Associate Professor Graeme Orr
 - Professor George Williams
 - Dr Joo-Cheong Tham
 - Associate Professor Anne Twomey
- o Report by Dr Joo-Cheong Tham entitled, 'Towards a more democratic political funding regime in New South Wales – A report prepared for the New South Wales Electoral Commission', February 2010 (previously circulated).

b. Publication of submissions and other items – The Committee authorised the following documents for publication, to be uploaded on the Committee's website:

- the aforementioned answers to questions on notice,
- supplementary submission 12a, received from Action on Smoking and Health Australia (ASH), and
- submission 30 from the NSW Electoral Commission, dated 8 February 2010, including the proposed funding and disclosure model.

c. Inquiry into the 2008 local government elections

The Committee noted receipt of the following items of correspondence in relation to the 2008 local government elections inquiry:

- Correspondence received from Western Australia Electoral Commission (previously circulated);
- Correspondence received on from NSWEC on the consultant's report from November 2009. The Chair advised that the Secretariat was in the process of assessing the correspondence and other relevant information to advise the Committee on possible findings and recommendations for inclusion in the Chair's draft report – the correspondence would be distributed with a briefing shortly. The Committee agreed to consider both items of correspondence in detail at a later deliberative meeting.

d. General Business

The Committee discussed forward planning for the remainder of the inquiry.

The Committee agreed that to facilitate the preparation of the Chair's draft report, the Electoral Commissioner would be provided with a copy of the *in camera* transcript on a confidential basis.

The Committee adjourned at 1.34pm, until 26 February 2010 at 11.00am.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no.21)

Friday, 26 February 2010 at 11.05am

Room 1102, Parliament House

1. Attendance

Members present: Mr Furolo (Chair), Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Ms Rhiannon, Mr Veitch.

In attendance: Helen Minnican, Carly Sheen, and Amy Bauder.

2. Confirmation of the minutes

Resolved on the motion of Ms Beamer, seconded Mr Veitch, that the minutes of the *in camera* hearing and deliberative meeting held on 22 February 2010 be confirmed.

3. Inquiry into the public funding of election campaigns

a. Correspondence received - The Committee discussed documents and correspondence, previously circulated, including:

- o Amended public funding model table attached to the NSWEC submission – amendments provided by Mr Brian DeCelis via e-mail dated 24 February 2010;
- o Original spreadsheets from the NSWEC submission, dated 8 February 2010;
- o Additional spreadsheets provided by the NSWEC on the proposed public funding model;
- o Additional information provided by the NSWEC (via e-mail from Mr Brian DeCelis, dated 25 February 2010) in response to a request from the Chair on 23 February, for the consideration of the Committee;
- o Secretariat briefing note on inquiry issues;
- o Briefing notes from the Secretariat concerning election funding models of Canada, New Zealand and the United Kingdom.

A list of matters requiring further advice from the Electoral Commissioner was distributed at the meeting for information.

Resolved on the motion of Ms Beamer, seconded Mr Veitch, that the Committee formally note the amendments requested by the NSWEC to the public funding model arising from the hearing on 22 February 2010, as previously circulated, and the subsequent amendment of submission 30 from the NSWEC on the Committee's website.

Discussion concerning inquiry issues ensued.

The Committee took a short adjournment. Deliberations resumed at 1.03pm.

b. Publication of extracts from the transcript of *in camera* evidence

The Committee discussed the potential need to publish certain sections of the transcript of *in camera* evidence from the Electoral Commissioner, as previously circulated.

Resolved on the motion of Ms Beamer, seconded Mr Veitch, that:

- i. the Electoral Commissioner be provided with a copy of the *in camera* transcript from 22 February 2010, as highlighted, to advise him of those sections of the transcript that the Committee anticipates may be included in the Chair's draft report; and
- ii. the Electoral Commissioner be provided with an opportunity to comment on the proposed publication of these sections of the transcript.

d. Advice from the Crown Solicitor

Briefing note on a jurisdictional issue raised during the Electoral Commissioner's *in camera* evidence on 22 February, circulated for consideration. Discussion ensued.

Resolved on the motion of Ms Beamer, seconded Mr Veitch, that:

- i. advice be sought from the Crown Solicitor on the extent to which any New South Wales legislation and regulations relating to political expenditure by third parties can regulate the activities of entities registered in other jurisdictions; and
- ii. relevant extracts from the transcript of *in camera* evidence taken on 22 February be provided to the Crown Solicitor, on a confidential basis, to assist him in providing the advice.

4. General Business

The Committee discussed forward planning for the remainder of the inquiry.

The Committee adjourned at 1.34pm, until 5 March 2010 at 10.00am.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no.22)

Friday, 5 March 2010 at 10.00am

Room 1102, Parliament House

1. Attendance

Members present: Mr Furolo (Chair), Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Ms Rhiannon.

2. Apologies

Mr Veitch.

In attendance: Helen Minnican, Carly Sheen, and Amy Bauder.

3. Confirmation of the minutes

Resolved on the motion of Ms Beamer, seconded Mr Coombs, that the minutes of the deliberative meeting held on 26 February 2010 be confirmed.

4. Inquiry into the public funding of election campaigns

a. Discussion of inquiry issues

The Chair addressed the Committee on the documents circulated.

Discussion concerning inquiry issues ensued.

The Committee agreed to seek advice on the possible application of state disclosure laws to political donations made in New South Wales as contributions to a federal election campaign.

The Committee took a short adjournment. Deliberations resumed at 12.00 noon.

b. Publication of extracts from the transcript of *in camera* evidence

The Committee noted correspondence from the Electoral Commissioner, dated 3 March 2010, in response to questions concerning enforcement issues, as flagged at the previous meeting, and in relation to the publication of the transcript from 22 February.

Resolved on the motion of Ms Beamer, seconded Ms Rhiannon, that the Committee authorise the publication of the extracts identified from the transcript of in camera evidence from Mr Barry, Mr DeCelis and Mr Follett on 22 February, as considered necessary, for inclusion in the Committee's report on the public funding inquiry.

e. Forward planning

The Committee discussed forward planning for the inquiry.

Resolved on the motion of Ms Beamer, seconded Ms Rhiannon, that the Chair write to the Premier on behalf of the Committee advising of the need for an extension of at least a week in order to report on the public funding of election campaigns inquiry.

f. Advice from the Crown Solicitor

The Chair advised the Committee of the outcome of the request made by the Clerk to the Crown Solicitor seeking advice on a jurisdictional matter, as previously resolved.

Resolved on the motion of Mr Harwin, seconded Ms Rhiannon, that That the Chair write to Mr Paul Miller, Acting Deputy Director General, General Counsel Division of the Department of Premier and Cabinet:

- indicating the Crown Solicitor's response;
- advising of the specific issue on which the Committee wished to obtain advice; and
- asking whether the Department would be prepared to share any advice it had received, relevant to this issue.

The Committee adjourned at 1.03pm, until 8 March 2010 at 4.00pm.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no.23)

Monday, 8 March 2010 at 4.00pm
Room 1102, Parliament House

1. Attendance

Members present: Mr Furolo (Chair), Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Ms Rhiannon, Mr Veitch.

In attendance: Helen Minnican, Carly Sheen, and Amy Bauder.

2. Confirmation of the minutes

Resolved on the motion of Mr Coombs, seconded Mr Veitch, that the minutes of the deliberative meeting held on 5 March 2010 be confirmed.

3. Inquiry into the public funding of election campaigns

a. Discussion of inquiry issues

The Chair addressed the Committee on documents circulated at the meeting in relation to expenditure and public funding for the 2007 State Election.

Discussion concerning inquiry issues ensued.

The Committee requested further information from the Secretariat on projected expenditure and public funding under various models.

The Committee identified a number of questions on which to seek advice from the NSW Electoral Commissioner prior to its next deliberative meeting.

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b. Advice received

The Committee noted:

- the Electoral Commissioner's response to a request for advice on the definition of campaign expenditure, previously circulated (e-mail from Mr Brian DeCelis, 5 March 2010).
- advice from the Electoral Commissioner re provisions of the Election Funding and Disclosures Act relating to audit and investigation, previously circulated (e-mail from Mr Brian DeCelis, 5 March 2010).

The Committee adjourned at 5.54pm, until 12 March 2010 at 12.00noon.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no.24)

Monday, 12 March 2010 at 4.00pm

Room 1102, Parliament House

1. Attendance

Members present: Mr Furolo (Chair), Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Ms Rhiannon, Mr Veitch.

In attendance: Helen Minnican, Carly Sheen, and Amy Bauder.

2. Confirmation of the minutes

Resolved on the motion of Mr Coombs, seconded Mr Veitch, that the minutes of the deliberative meeting held on 8 March 2010 be confirmed.

3. Inquiry into the public funding of election campaigns

The Chair advised the Committee of the extension to the reporting date for the inquiry until 26 March 2010.

a. Correspondence received

The Committee noted correspondence from the Electoral Commissioner, dated 10 March 2010, providing advice on questions arising from the Committee deliberative meeting on 8 March 2010 in relation to third parties and the definition of electoral expenditure.

Discussion ensued.

b. Discussion of inquiry issues

The Chair briefed the Committee on the tables of electoral expenditure previously circulated for information.

Discussion ensued.

Discussion continued on inquiry issues.

The Committee discussed forward planning for the remainder of the inquiry and agreed to the following timetable:

17 March	Deliberative meeting
19 March	Draft report to be distributed
24 March	Deliberative meeting
26 March	Table report

Discussion ensued.

The Committee adjourned at 1:33 pm, until 17 March 2010 at 1:15 pm.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no.25)

Wednesday, 17 March 2010 at 4.00pm

Room 1102, Parliament House

1. Attendance

Members present: Mr Furolo (Chair), Mr Coombs, Ms Gardiner, Mr Harwin, Ms Rhiannon, Mr Veitch.

In attendance: Helen Minnican, Carly Sheen, and Amy Bauder.

2. Apologies

Ms Beamer

3. Confirmation of the minutes

Resolved on the motion of Mr Coombs, seconded Ms Rhiannon, that the minutes of the deliberative meeting held on 12 March 2010 be confirmed.

4. Inquiry into the public funding of election campaigns

a. Correspondence received

The Chair spoke to the Committee on the Crown Solicitor's advice, forwarded from the Department of Premier and Cabinet, and the timeframe for reporting on the inquiry.

The Committee noted correspondence received from:

- Correspondence from Department of Premier and Cabinet, received 16 March 2010, furnishing a copy of advice from the Crown Solicitor as requested by the Committee.
- Correspondence from Senator Ludwig, Special Minister of State, received 15 March 2010, providing advice on the outcomes of the Commonwealth Government's Green Paper on electoral reform.
- ***
- Letter from the Premier, dated 11 March 2010, concerning the Committee's earlier advice re the need for an extension to report on the inquiry into a public funding model for NSW elections.

Discussion ensued.

b. Discussion of inquiry issues

Discussion continued on inquiry issues.

The Committee adjourned at 1:43 pm, until 24 March 2010 at 1:00pm.

Minutes of Proceedings of the Joint Standing Committee on Electoral Matters (no.26)

Wednesday, 24 March 2010 at 1.00pm

Room 1102, Parliament House

1. Attendance

Members present: Mr Furolo (Chair), Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Ms Rhiannon, Mr Veitch.

In attendance: Helen Minnican, Carly Sheen, Amy Bauder, Emma Wood, Dora Oravec.

2. Confirmation of the minutes

Resolved on the motion of Mr Coombs, seconded Mr Veitch, that the minutes of the deliberative meeting held on 17 March 2010 be confirmed.

3. Inquiry into the public funding of election campaigns

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The Committee proceeded to consider the Chair's draft report, as previously circulated on 22 March 2010, and schedules of amendments from the Chair and Committee members (Ms Gardiner, Mr Harwin and Ms Rhiannon).

Discussion ensued.

Ms Gardiner moved that all references to 'Branch' in relation to the National Party, where occurring in the draft report, be removed and the words 'NSW National Party' be inserted instead.

Recommendation 1 – Ms Gardiner moved that the words 'introduce legislation to' be inserted after the word 'Premier' to reflect that the Premier is the Minister responsible for introducing legislation relating to electoral regulation into the Parliament, and that consequential amendments be made to subsequent recommendations throughout the Chair's draft report, where relevant.

Chapter 1

Paragraph 1.3 – Ms Rhiannon moved that the following paragraph 1.3 be deleted:

In their submission to this inquiry, the Labor Party (NSW) indicated that they are 'concerned about the perception that political donations create undue influence in the Australian political system':

This submission will advocate the implementation of an expanded public funding scheme, with caps on donations and expenditure that are consistent with the freedom of political communication implied under the Commonwealth Constitution.

These reforms would help to restore the public's faith in political decision-making, and ensure that all parties and candidates have an opportunity to put a fair case for election.

and the following words inserted instead:

The majority of submissions raised concerns about the current electoral funding system, highlighting that there is a perception that political donations buy influence.

Amendment agreed to.

Paragraph 1.4 – Ms Rhiannon moved that the words 'in those instances where consensus was achieved' be omitted.

Amendment agreed to.

Paragraph 1.6 – Mr Harwin moved that the following words be inserted at the end of the paragraph:

'The Committee believes that reforms should be presented to Parliament for debate as soon as practicable so that they can be implemented for the 2011 state election.'

Amendment agreed to.

Recommendation 1 – Mr Harwin moved that the following words be inserted at the end of the final sentence: 'prior to the 2011 state elections'.

Amendment agreed to.

Paragraph 1.15 – Mr Harwin moved that the words 'current, relatively 'free market' approach to the regulation of the amount 'in the first sentence be deleted and the following words be inserted instead, 'currently unregulated amount'.

Amendment agreed to.

Recommendation 4 – Ms Rhiannon moved that the words 'and all caps to be adjusted according to the CPI' be inserted after 'financial year', and that the words 'subject to guidelines published by the Premier' be deleted.

Amendment agreed to.

Paragraph 1.22 – Mr Harwin moved that the paragraph be deleted:

However, in some cases those living outside NSW may have an interest in the NSW election, for example, those living in towns along the NSW border. Also, NSW registered political parties regularly engage in fundraising for federal election campaigns. As a national approach to political finance reform has yet to be agreed, reform in NSW should respect jurisdictional boundaries and facilitate as much as possible the separate functioning of the federal system. Thus, the Committee considers that donations from individuals should be limited to those on the NSW electoral roll and the Australian electoral roll.

and the following paragraph be inserted instead:

‘However, in some cases those living outside NSW may have an interest in the NSW election. For example, it is common in towns along the NSW border for residents to maintain an interest and involvement in the politics of both State jurisdictions. Some NSW registered political parties allow cross-border membership in those areas. Some NSW residents retire interstate but wish to continue to support parties and candidates from NSW. Furthermore, to limit donations to those individuals enrolled in NSW would limit the capacity of interstate residents to donate to the federal election candidates of NSW registered political parties. Such a provision may be vulnerable to constitutional challenge. For these reasons, the Committee believes it is appropriate to limit political donations to individuals on the NSW electoral roll and/or Australian electoral roll.’

Amendment agreed to.

Recommendation 5 – Ms Beamer moved that the word ‘/or’ be inserted after the word ‘and’. Amendment agreed to.

Paragraph 1.23 – Mr Harwin moved that the word ‘Some’ in the fourth line be deleted and the words ‘The Liberal, Nationals and Greens’ inserted instead. Amendment agreed to.

Paragraph 1.24 – Mr Harwin moved that paragraph 1.24 be deleted and the following words inserted instead:

‘On balance, the Committee believes that banning donations from corporations and other entities is essential to deal with perceptions of undue influence exercised by donors over public policy. A low cap on donations from individuals and a ban on donations from entities will reduce the reliance of the major political parties on a small number of large donors and will encourage parties to broaden their funding base and engage more widely across the community. No compelling evidence was received by the Committee that convinced it to move away from the recommendation of the Legislative Council Select Committee on Electoral and Political Party Funding that a ban should be placed on all but small political donations from individuals.’

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Gardiner, Mr Harwin, Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Mr Veitch

Question resolved in the negative.

Recommendation 6 – Ms Rhiannon moved that the recommendation be deleted and the following words inserted instead, ‘That the Premier ban all donations from corporations and other entities.’

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Gardiner, Mr Harwin, Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Mr Veitch

Question resolved in the negative.

Recommendation 6 – Ms Beamer moved that the words ‘and all caps to be adjusted according to the CPI’ be inserted after the words ‘financial year’. Amendment agreed to.

Appendix 11 – Minutes

Paragraph 1.29 – Mr Harwin moved that the word ‘vote’ be deleted and the word ‘donate’ be inserted instead. Amendment agreed to.

Paragraph 1.29 - Ms Rhiannon moved that the words ‘ however, the Committee considers that only incorporated associations should be eligible to donate’ be inserted after the word ‘donate’. Amendment agreed to.

Recommendation 7 – Mr Harwin moved that the first dot point, ‘a political party registered in New South Wales’ be inserted after the words ‘donate to’ in the first line. Amendment agreed to.

Recommendation 7 – Ms Beamer moved that the words ‘that carries on business in New South Wales’, which follow the word ‘Number’, be deleted.

Discussion ensued. Question put.

The Committee divided.

Ayes: Mr Furolo, Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Mr Veitch

Noes: Ms Rhiannon

Question resolved in the affirmative.

Recommendation 7 – Ms Rhiannon moved that the word ‘unincorporated’ be deleted and the word ‘incorporated’ be inserted instead. Amendment agreed to.

Recommendation 8 – Ms Gardiner moved that the word ‘rescind the ban on developer donations’ be deleted and the following words be inserted instead ‘ include in legislation to reform the electoral and political finance regime, the repeal of those provisions relating to a ban on developer donations’.

Discussion ensued. Question put.

The Committee divided.

Ayes: Mr Furolo, Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Mr Veitch

Noes: Ms Rhiannon

Question resolved in the affirmative.

Recommendation 8 – Ms Rhiannon moved to delete the recommendation.

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Mr Veitch

Question resolved in the negative.

Paragraph 1.31 – Mr Harwin moved that the following words be inserted at the end of the paragraph:

‘The Committee recognises that any law passed by the NSW Parliament restricting an individual from giving more than \$2,000 to a federal candidate of a NSW registered political party may be vulnerable to constitutional challenge.’ Amendment agreed to.

Recommendation 10 – Ms Rhiannon moved that the words ‘and party compulsory levies on parliamentarians’ be inserted after the words ‘membership fees’ in the first dot point. Amendment agreed to.

Recommendation 10 - Ms Rhiannon moved that the amount ‘\$2,000’ be deleted from the second dot point and the amount ‘\$250’ be inserted instead.

The Committee divided.

Ayes: Ms Rhiannon
 Noes: Mr Furolo, Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Mr Veitch
 Question resolved in the negative.

Paragraph 1.43 and Recommendation 11 – Mr Harwin moved that Recommendation 11 be deleted, and that paragraph 1.43 be deleted and the following words inserted instead:

‘Under current NSW law, all membership fees, including affiliation fees, are regarded as donations. With the introduction of donation caps, the Committee sees a legitimate reason to exempt membership fees. However, it is not persuaded that affiliation fees fall into the same category as individual members of affiliated trade unions have not consented to be members of the Australian Labor Party. Therefore, affiliation fees should continue to be regarded as donations under NSW law unless written consent has been obtained for party membership.’

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Gardiner, Mr Harwin,
 Noes: Mr Furolo, Ms Beamer, Mr Coombs, Ms Rhiannon, Mr Veitch
 Question resolved in the negative.

Paragraph 1.43, 1.44 –1.46 – Mr Harwin moved that the words ‘The Liberal and Nationals Members of the Committee strongly disagree with this view’ be inserted at the end of paragraph 1.43 and that paragraphs 1.44, 1.45 and 146 be deleted. Amendment agreed to.

Recommendation 11 – Mr Harwin then moved that recommendation 11 be deleted and the following words inserted instead:

‘That the Premier ensure that where Registered Political Parties receive affiliation fees, those fees only be used for administrative purposes (as with party membership fees) and be used to calculate a reduction of that Party’s Administration Fund allocation by an equivalent amount.’

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Gardiner, Mr Harwin,
 Noes: Mr Furolo, Ms Beamer, Mr Coombs, Ms Rhiannon, Mr Veitch
 Question resolved in the negative.

Recommendation 11 – Ms Rhiannon moved that the recommendation be deleted and the following words inserted instead:

‘That the Premier ensure that where Registered Political Parties receive affiliation fees, those fees only be used for administrative purposes (as with party membership fees) and be used to calculate a reduction of that Party’s Administration Fund allocation by 50 cents in the dollar.’

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Rhiannon
 Noes: Mr Furolo, Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Mr Veitch
 Question resolved in the negative.

Para 1.47 - Ms Gardiner moved that the word ‘or affiliates’ be inserted after the word ‘branches’ and the word ‘or affiliate’ be inserted after the word ‘branch’. Amendment agreed to.

Ms Gardiner moved that the following footnote be inserted after ‘affiliates’:

‘The reference to affiliates has been included to take into account the particular constitutions of the NSW National Party and the Australian National Party’. Amendment agreed to.

Paragraph 1.48 – Mr Furolo moved that after the last sentence in paragraph 1.48 the following words be inserted ‘However, this should not prevent local party branches within NSW transferring funds to the state party branch, subject to state political finance laws.’

Amendment agreed to.

Paragraph 1.49 - Mr Harwin moved that the word ‘from’ be deleted and the word ‘between’ be inserted instead, and that the word ‘to’ be deleted and the word ‘and’ be inserted instead. Amendment agreed to.

Recommendation 12 – Mr Harwin moved that the words ‘except where deposited in the Federal Campaign Account’ be inserted after the word ‘donations’. Amendment agreed to.

Paragraph 1.50 – Ms Gardiner moved that the word ‘one’ be deleted and the word ‘two’ be inserted instead. Amendment agreed to.

Ms Gardiner moved that the following words be inserted after the words ‘funds or assets’:

‘The NSW National Party submitted that:

The principal motivation for the imposition of expenditure caps is to limit the ability of the parties to use pre-existing assets and future income from these assets to outspend newer parties or independent candidates who are prevented from using pre-existing assets to fund their campaigns by new supply-side regulation imposed as a result of this reform.’

Amendment agreed to.

Recommendation 13 – Ms Gardiner moved that the following words be inserted ‘that in preparing legislation the Premier give further consideration’ and the words ‘further consideration be given’ be omitted. Amendment agreed to.

Recommendation 13 - Ms Rhiannon moved that the following words be inserted, ‘Registered parties and their associated entities are prohibited from using any income from held funds or assets for electoral expenditure’. Amendment agreed to.

Recommendation 13 - Ms Rhiannon moved that the following words be inserted ‘Any income deposited in the Administration Account from the held assets of a registered party will reduce the party’s allocation from the Administration Fund by an equivalent amount’.

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Gardiner, Mr Harwin, Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Mr Veitch

Question resolved in the negative.

Paragraph 1.56 and Recommendation 14 – Mr Harwin moved that:

- paragraph 1.56 be amended by deleting the words ‘declare all gifts received over the previous four years when nominating as a candidate for election’ and insert instead the words ‘certify that they have not directly or indirectly received a gift which has enabled them to self-fund. If the candidate is not able to so certify, then they should be required to outline the nature and source of the gift’; and
- the second dot point in Recommendation 14 be deleted and the following words inserted instead ‘require candidates to certify that they have not directly or indirectly received a gift which has enabled them to self-fund, or outline the nature and source of any gift that has enabled them to self-fund’.

Amendments agreed to.

Recommendation 17 – Mr Veitch moved that the words, ‘the Premier ensure that the existing reportable disclosure threshold amount’ be inserted and the words ‘retain the existing disclosure amount’ be deleted, and that the words ‘be retained’ be inserted after the word ‘year’. Amendments agreed to.

Paragraph 1.74 – Mr Harwin moved that the words ‘The Committee agrees that this is an appropriate amount. However’ be deleted and the following words inserted instead, “Some Committee members feel that this amount is too high. It exceeds the combined electoral expenditure of all registered political parties leading up to the 2007 NSW State election other than the Labor Party, for whom it would be a 35 percent reduction. Moreover,”.

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Gardiner, Mr Harwin, Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Mr Veitch

Question resolved in the negative.

Paragraph 1.74 – Mr Harwin moved that the words ‘The Committee agrees that this is an appropriate amount. However’ be deleted and the following words inserted instead, “Some Committee members feel that this amount is too high. Moreover”.

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Gardiner, Mr Harwin, Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Mr Veitch

Question resolved in the negative.

Paragraph 1.74 - Ms Rhiannon moved that the words ‘The Committee agrees that this is an appropriate amount’ be deleted. Amendment agreed to.

Finding 1 – Ms Rhiannon moved that the following words in dot point 3, ‘A cap for each candidate in each Legislative Assembly district of \$100,000’ be deleted and the following words inserted instead, ‘A cap for each candidate in each Legislative Assembly district of \$1/voter on the electoral roll’

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Mr Veitch

Question resolved in the negative.

Finding 1 - Mr Harwin moved that the following words in dot point 3 ‘A cap for each candidate in each Legislative Assembly district of \$100,000’ be deleted. Amendment agreed to.

Finding 1 – Ms Rhiannon moved that the following words, ‘consider the lack of fairness of’ be inserted before the word ‘identical’ in dot point 4 and the words, ‘given that unendorsed candidates do not have the benefit of statewide campaigning expenditure’ be inserted after the word ‘Assembly’.

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Mr Veitch

Question resolved in the negative.

Appendix 11 – Minutes

Finding 1 – Ms Rhiannon moved that the following words in dot point 7 be deleted ‘A total cap on expenditure for political parties contesting all Legislative Assembly seats and the Legislative Council election of approximately \$11 million (as proposed by the Electoral Commissioner)’ and the following words be inserted instead ‘A total cap on expenditure for groups contesting the Legislative Council election of \$1 per enrolled voter’.

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Mr Veitch

Question resolved in the negative.

Finding 1 – Mr Harwin moved that the following words in dot point 7 be deleted ‘A total cap on expenditure for political parties contesting all Legislative Assembly seats and the Legislative Council election of approximately \$11 million (as proposed by the Electoral Commissioner)’. Amendment agreed to.

The Committee took a short adjournment at 2.45pm and resumed deliberations at 3.00pm.

Recommendation 19 and Finding 1 – Ms Gardiner moved that Recommendation 19 and Finding 1, as amended, be deleted:

RECOMMENDATION 19: That as part of comprehensive reform of the political finance system, the Premier introduce caps on expenditure for political parties, candidates and groups contesting state elections.

FINDING 1: In regulating expenditure, the Premier should give consideration to:

- Separate expenditure caps for general campaign expenditure, Legislative Assembly campaign expenditure and Legislative Council campaign expenditure.
- A cap for general campaign expenditure based on the number of seats contested.
- Identical caps for endorsed and unendorsed candidates to the Legislative Assembly.
- Consistent caps across all 93 seats for the Legislative Assembly.
- Linking the cap for Legislative Council expenditure to any cap on third party expenditure.
- The potential loopholes that should be resolved before caps are put in place.
- Linking expenditure caps to inflation.
- Whether any proposed expenditure caps discriminate against independent candidates or new entrants.

and the following words be inserted instead:

RECOMMENDATION 19: That as part of comprehensive reform of the political finance system, the Premier introduce caps on expenditure for political parties, candidates and groups contesting state elections, to:

- a. create separate expenditure caps for general campaign expenditure, Legislative Assembly campaign expenditure and Legislative Council campaign expenditure.
- b. establish a cap for general campaign expenditure based on the number of seats contested.
- c. set identical caps for endorsed and unendorsed candidates to the Legislative Assembly.
- d. set consistent caps across all 93 seats for the Legislative Assembly.
- e. link the cap for Legislative Council expenditure to any cap on third party expenditure.
- f. resolve potential loopholes before caps are put in place.
- g. Link expenditure caps to inflation.
- h. Consider whether any proposed expenditure caps discriminate against independent candidates or new entrants.

Discussion ensued. Question put.

The Committee divided.

Ayes: Mr Furolo, Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Mr Veitch

Noes: Ms Rhiannon

Question resolved in the affirmative.

Finding 2 – Ms Rhiannon moved that the following words be inserted after the last dot point:

‘That a definition of electoral expenditure that just includes advertising and printed materials will discriminate against minor parties claiming election funding.’

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Mr Veitch

Question resolved in the negative.

Finding 2 – Ms Beamer moved that the words ‘and including’ be inserted after the word ‘expenditure’ in the last point of the finding. Amendment agreed to.

Paragraph 1.108 – Mr Harwin moved that the following words be inserted at the end of the paragraph:

‘The Committee notes that such a ban would necessarily extend to the associated entities of a political party, including entities controlling ‘held assets’ and other investments, a well as affiliates with voting rights at Party conferences’.

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Gardiner, Mr Harwin, Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Mr Veitch

Question resolved in the negative.

Finding 3 – Ms Rhiannon moved that the following words be inserted after the word ‘Authority’ in the first dot point ‘where they spend or intend to spend more than \$2000 in the electoral period’.

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Mr Veitch

Question resolved in the negative.

Recommendation 35 – Ms Rhiannon moved that the words ‘or third party’ be inserted after the word ‘candidate’. Amendment agreed to.

Paragraph 1.111 – Mr Harwin moved that the following words ‘of the Legislative Assembly’ be inserted in line 3 of paragraph 1.111 after the word ‘members.’ Amendment agreed to.

Paragraph 1.111 – Mr Harwin moved that the following words at the end of paragraph 1.111 be deleted ‘The average expenditure of the EOMA is \$A47,729 per member each year or 11% of the average annual expenses of members’. Amendment agreed to.

Paragraph 1.116-1.119 & Recommendation 23 – Mr Harwin moved that:

- Paragraph 1.116 be deleted and the following words be inserted instead:
‘The Committee notes that while the Tribunal has laid down particular conditions for use of this entitlement which explicitly excludes its use for expenditure of a “direct electioneering or a political campaigning nature”, the expenditure of such a large amount communicating with constituents during a period when campaign expenditure by an opponent is limited would subvert the spirit of capped expenditure limits. At present, the whole EMOA entitlement for the

financial year can be spent promoting the activities of a MP until the issue of the writs, less than four weeks before polling day. Combined with campaign expenditure, this constitutes an unfair barrier to new candidates and fails second principle relating to fairness. The entitlement to the EMOA during the regulated period should be reviewed by the Tribunal.’; and

- Paragraphs 1.117-1.119 be deleted; and
- Recommendation 23 be deleted and the following words inserted instead:
‘The Committee recommends that the Premier give a reference to the Parliamentary Remuneration Tribunal to consider whether the EMOA should be withdrawn during the regulated period if campaign expenditure limits are adopted.’

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Gardiner, Mr Harwin, Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Mr Veitch

Question resolved in the negative.

Paragraph 1.119 – Mr Veitch moved that after the word ‘incumbents’ in paragraph 1.119, the following words be inserted:

‘The Committee notes that the pre-review process recommended for the regulated election period is not intended to replace the existing audit cycle to which the Electoral Mailout Account and other allowances are regularly subject.’

Amendment agreed to.

Paragraphs 1.120 – 1.132 & Recommendations 24, 25, 26 and 27 – Mr Harwin moved that paragraphs 1.120-1.132 and Recommendations 24-27 be deleted and the following words inserted instead:

1.120 Almost all submissions recommended that reform of Government Advertising arrangements were an essential element of any holistic package of reforms that included limits on campaign expenditure. The misuse of government advertising is seen as a potential loophole that could be used by the governing party to gain advantage over their opponents.

1.121 The Committee was persuaded that this problem should be addressed as part of a reform of arrangements for Government Advertising generally, with no special arrangements for the regulated period. The ‘assurance’ or ‘attestation’ model is preferred, based on a legislated pre-review assessment process of all government advertising by an appropriate independent person to ensure that there is no ‘partisan’ or ‘party political’ content. This was also the conclusion reached by the Legislative Council Select Committee on Electoral and Political Party funding.

1.122 The Select Committee recommended the Government Advertising Act 2004 in Ontario as an appropriate model for reform. Since then, the Australian Capital Territory Assembly has enacted the Government Agencies (Campaign Advertising) Act 2009 This legislation has some similarities to the Ontario model.

1.123 The Committee believes that legislation to proceed with the reform of Government Advertising approval arrangements should be part of the Government’s response to its report, and should proceed as a matter of urgent priority.

Rec 24 The Committee recommends that the Premier present legislation making provision for the pre-review of all Government Advertising by an appropriate independent person to ensure there is no ‘partisan’ or ‘party political’ content, with the Ontario legislation as the preferred model.’

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Gardiner, Mr Harwin, Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Mr Veitch

Question resolved in the negative.

Recommendation 24 – Mr Furolo moved that:

- the following words in Recommendation 24 be omitted:

'The Committee recommends that the Premier amend the Election Funding and Disclosures Act to:

- a. provide for a pre-approval assessment process in relation to government advertising in the regulated election period'

and the following words be inserted instead:

'The Committee recommends that the Premier present legislation making provision for the pre-review of government advertising by an appropriate independent body to:

- a. ensure there is no 'partisan' or 'party political' content, for the regulated election period;'
- the words ' provide for an independent body to conduct the process' be deleted from point (b); and
 - the words 'political advertising for election purposes' be deleted and the words 'partisan' and 'party political' content be inserted instead;
 - and that consequential amendments, to insert the words 'partisan' or party political content' instead of the words ' political advertising for election purposes', be made to the body of the report, where they occur.

Amendments agreed to.

Paragraph 1.147 – Ms Rhiannon moved that the words 'This is fully supported by the Committee.' be deleted. Amendment agreed to.

Paragraph 1.147 – Ms Rhiannon moved that the following words be inserted after paragraph 1.147: The Greens submission set out the case for an entitlement mode. The Australian Electoral Commission also supports an entitlement model. The case for an entitlement model is that it would reduce administration work for political parties and the Electoral Commission, and it also removes the incentive to create invoices to illegally gain additional electoral funding.

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Mr Veitch

Question resolved in the negative.

Recommendation 29 – Mr Veitch moved that the words 'to receive public funding' be inserted after the word 'threshold'. Amendment agreed to.

Paragraph 1.153 – Ms Rhiannon moved that paragraph 1.153 be deleted and the following words be inserted instead:

'The Committee members had different views on this model. Some argued that while it was based on the results of the previous two elections it might not adequately accommodate periods of electoral downturn for parties. Others argued that taking an average of the primary vote over the past two elections was a fairer system as it is based on votes received rather than seats won. It was further argued that taking the average is fair as it takes into account a period of reduced support'

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Mr Veitch

Question resolved in the negative.

Paragraph 1.153 – Ms Rhiannon moved that the following words in paragraph 1.153 be deleted

'The Committee identified the following issues with this model:

- Although based on results at the previous two elections, it might not adequately accommodate periods of electoral downturn for parties

- It might adversely impact on parties operating as a coalition.'

and the following words inserted instead:

'The Committee members had different views on this model. Some Committee members identified that, although based on results at the previous two elections, it might not adequately accommodate periods of electoral downturn for parties and that it might adversely impact on parties operating as a coalition. Others argued that taking an average of the primary vote over the past two elections was a fairer system as it is based on votes received rather than seats won. It was further argued that taking the average is fair as it takes into account a period of reduced support'

Amendment agreed to.

Recommendation 32 – Ms Rhiannon moved that the recommendation be deleted and the following words inserted instead:

'That public funding for the operational and administrative costs of political parties with elected members be introduced and that the annual payment be calculated by the average of a parliamentary party's actual vote from the two most recent general elections in either the LA or the LC, whichever is the higher.

That the annual payment be calculated at \$1.50 per vote.'

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Ms Gardiner, Mr Harwin, Mr Veitch

Question resolved in the negative.

Recommendation 33 - Ms Rhiannon moved that the words 'and independent members of Parliament' be inserted after the word 'parties'.

Discussion ensued. Question put.

The Committee divided.

Ayes: Ms Rhiannon

Noes: Mr Furolo, Ms Beamer, Mr Coombs, Mr Veitch

Question resolved in the negative.

Paragraph 1.166 – Mr Harwin moved that paragraph 1.166 as follows be deleted:

In particular, the Committee does have concerns about the creation of any strict liability offences that may apply to volunteers and other individuals who may incur obligations under the EFD Act but whose involvement in relation to election campaigns and the administration of electoral expenditure or donations occurs on an irregular and not a professional basis. Such persons may largely depend on third parties when meeting their statutory obligations and this would be another factor to consider when making amendments to this general offence provision.

and the following words be inserted instead:

'The Committee does have concerns about the creation of strict liability offences for persons who must by necessity rely on information from third parties, particularly volunteers, to fulfil their disclosure obligations under the EFD Act. As noted in paragraph 9.121, the Legislation Review Committee urges caution when using strict liability offences in these circumstances. Volunteers may also incur obligations under the EFD Act, with which they are unfamiliar. This would be another factor to consider when making amendments to this general offence provision.'

Amendment agreed to.

Recommendation 34 – Mr Veitch moved that the words 'bring forward legislation' be deleted and the following words 'give consideration to bringing forward legislation as follows, in consultation with the Electoral Commissioner' be inserted instead. Amendment agreed to.

Recommendation 34 – Mr Veitch moved that the words ‘make express provision for’ be inserted and the words ‘not affect’ be deleted, and that consequential amendments be made to the body of the report, where relevant. Amendment agreed to.

Recommendation 38 – Ms Rhiannon moved that the following words after ‘1981’ be deleted:

‘to enable the EFA to withhold public funding from a registered political party for non-compliance with the requirements of the proposed new scheme.’

and the following words be inserted instead:

‘so that a registered political party that fails to comply with the requirements of the proposed new scheme, be ineligible for public funding. The Committee notes that there will be an avenue through the courts to prosecute offences for non-compliance’

and that consequential amendments be made to the body of the report, where relevant.

Amendment agreed to.

Para 1.180 – Mr Veitch moved that the following words be inserted at the end of paragraph 1.180:

As noted by Mr DeCelis in evidence to the Committee, this proposal would be consistent with the requirement that applies at federal level and is a matter on which some coordination could occur between the New South Wales Election Funding Authority and the Australian Electoral Commission, to avoid any unnecessary duplication in relation to the provision of records.

Amendment agreed to.

Para 1.186 – Mr Furolo moved that the following paragraph be inserted after paragraph 1.186 and a corresponding amendment be made after paragraph 9.106 in Chapter 9:

‘It also is necessary to ensure an appropriate fit between newly created electoral offences and existing statutory provisions relating to the disqualification of members and eligibility to nominate and stand as a candidate.’

Amendment agreed to.

Resolved on the motion of Mr Harwin that Chapter 1 as amended be adopted.

Chapter 2

Paragraph 2.2 – Mr Harwin moved that the word ‘it’ be deleted and the beginning of the second sentence and the following words be inserted:

“The Select Committee was established in June 2007 arising from community concern that donors were exercising perceived or actual undue influence over the decisions of government at a local, State and Federal level. Chapter 2 of the Select Committee’s report records a chronology of key events, including the ICAC inquiry into allegations of corruption at Wollongong Council, relevant to electoral and political party funding that informed the Committee’s work and recommendations. This inquiry”

Amendment agreed to.

Resolved on the motion of Ms Beamer that Chapter 2 as amended be adopted.

Chapter 3 - Resolved on the motion of Ms Beamer that Chapter 3 be adopted.

Chapter 4 - Resolved on the motion of Ms Beamer that Chapter 4 be adopted.

Chapter 5

Paragraph 5.19, 5.23, 5.25, 5.29 and Table 1, footnote 185, Table 2, footnote 191, Table 3, footnote 192, Table 4, footnote 193. – Mr Harwin moved that:

The following words be inserted at the end of paragraph 5.19:

'The information from Dr Tham refers to funds provided for the 2007, 2003 and 1999 state elections. However, it is important to note that not all funds provided to NSW political parties are used for the purpose of state elections [see para 5.94 on 'Fundraising for federal elections'].'

The following words be deleted from para 5.23 : '1999, 2003 and 2007 NSW state elections' and the following words be inserted instead: 'following periods between state elections: March 1995 - March 1999; from March 1999 - March 2003; and March 2003 - March 2007'.

The following words be inserted into paragraph 5.25 'four year period prior to the', after the word 'lodged for the'

The following words be deleted from para 5.29 : '1999, 2003 and 2007 NSW state elections' and the following words be inserted instead: 'following periods between state elections: March 1995 - March 1999; from March 1999 - March 2003; and March 2003 - March 2007'.

The following words be deleted from the heading for Table 1, '1999, 2003 and 2007' and the following words be inserted instead, 'March 1995-March 2007'.

The following words be added to the end of footnote 185: 'The title of this table has been altered to reflect that not all funds raised by NSW political parties are for the purposes of NSW state elections. The original title of this table as provided by Dr Tham was 'Private and public funding of NSW parties: 1999, 2003 and 2007.'

The following words be deleted from the heading for Table 2, '2007 NSW State Election', and the following words be inserted instead, 'March 2003 - March 2007'.

The following words be added to the end of footnote 191: 'The title of this table has been altered to reflect that not all funds raised by NSW political parties are for the purposes of NSW state elections. The original title of this table as provided by Dr Tham was 'Number of Donors by Donation Amount: 2007 NSW State Election'.'

The following words be deleted from the heading for Table 2, '2003 NSW State Election', and the following words be inserted instead, 'March 1999 - March 2003'.

The following words be added to the end of footnote 191: 'The title of this table has been altered to reflect that not all funds raised by NSW political parties are for the purposes of NSW state elections. The original title of this table as provided by Dr Tham was 'Number of Donors by Donation Amount: 2003 NSW State Election'.'

The following words be deleted from the heading for Table 3, '1999 NSW State Election', and the following words be inserted instead, 'March 1995 - March 1999'.

The following words be added to the end of footnote 193: 'The title of this table has been altered to reflect that not all funds raised by NSW political parties are for the purposes of NSW state elections. The original title of this table as provided by Dr Tham was 'Number of Donors by Donation Amount: 1999 NSW State Election'.'

Paragraph 5.94 – Mr Harwin moved that the following words be added to the end of paragraph 5.94, 'The constitutional and jurisdictional issues which may prevent the NSW Parliament from legislating to cap donations received by NSW political parties for federal election campaigns are further discussed at paragraphs 4.53 – 4.59.'

Amendments agreed to.

Paragraph 5.127 – Ms Gardiner moved the following word be inserted after paragraph 5.127:

'The NSW National Party submitted that:

The principal motivation for the imposition of expenditure caps is to limit the ability of the parties to use preexisting assets and future income from these assets to outspend newer parties or independent candidates who are prevented from using preexisting assets to fund their campaigns by new supply-side regulation imposed as a result of this reform.'

Amendment agreed to.

Paragraph 5.131 – Ms Rhiannon moved that the words 'places restrictions on' be deleted and the following words be inserted instead 'creates requirements in relation to'. Amendment agreed to.

Resolved on the motion of Mr Veitch that Chapter 5, as amended, be adopted.

Chapter 6

Paragraph 6.22 - Mr Harwin moved that the following words be inserted at the end of paragraph 6.22: "Reported expenditure by candidates can be misleading. Totals for candidate expenditure do not include spending by registered political parties in each electoral district on behalf of their candidates."

Amendment agreed to.

Resolved on the motion of Ms Rhiannon, that Chapter 6, as amended, be adopted.

Chapters 7 and 8

Resolved on the motion of Ms Beamer, that Chapters 7 and 8 be adopted.

Chapter 9

Resolved on the motion of Ms Beamer, that Chapter 9, as amended, be adopted.

Chapter 10

Paragraph 10.3 – Mr Harwin moved that the following words be inserted after the first sentence of paragraph 10.3:

'In particular, the Committee did not receive a submission from the principal stakeholder, the Local Government and Shires Associations.'

Amendment agreed to.

Resolved on the motion of Ms Rhiannon, that Chapter 10 as amended be agreed to.

List of recommendations, as amended, agreed to.

The following amendments as circulated in the Chair's schedule of amendments were agreed to:

Paragraph 1.10 -After paragraph 1.10 insert the words, 'For example, in some instances promoting fairness in politics might interfere with the freedom of political communication' after the words 'between principles'.

Paragraph 1.32 - Delete the words 'election purposes and insert instead the words 'party political purposes'.

Recommendation 5 - Replace 'or' with 'and'.

Recommendation 10 delete the words 'cap political membership fees' in dot point 2 and the words 'cap party membership fees' be inserted instead.

Recommendation 18 delete "for" from "align for disclosure audits", so that it reads "align disclosure audits for donations"

Paragraph 1.121 - Delete the words 'in which advertisements are considered against' from the second sentence and insert instead 'and agencies should also observe'.

Paragraph 1.121 - In the last sentence of paragraph 1.121 delete the words 'against which' and insert the word 'for' instead, and delete the words 'reviewed is'.

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Paragraph 1.129 - In the final sentence of paragraph 1.129 delete the words 'existing peer review process' and insert instead the words 'existing principles and peer review' process'.

Paragraph 1.174 – Insert the words 'regulation of' in the second sentence before the words 'third parties'.

Recommendation 29 insert the words 'or member elected' after the words 'primary votes'.

Paragraph 2.11 - Insert the following paragraph after paragraph 2.11:

'On 5 March 2010 the Chair wrote to the Premier to advise that the Committee was not able to report to the Parliament by the original specified date of 12 March 2010. The Premier's response of 11 March 2010 indicated support for a two-week extension to the reporting dates.'

Paragraph 1.179 – That the following paragraph be inserted after paragraph 1.179 and after paragraph 9.106 :

'It also is necessary to ensure an appropriate fit between newly created electoral offences and existing statutory provisions relating to disqualification of members and eligibility to nominate and stand as a candidate.'

Recommendation 43 insert the words 'third parties' after the word 'candidates.'

Chapter 4 - Insert the words 'and constitutional principles' in the heading of Chapter Four.

Paragraph 10.18 - Insert the following words after paragraph 10.18:

'The Greens submission did set out a public funding model, recommending that: 'Public funding should be extended on a reimbursement basis to local council elections with the suggested size of maximum funding pool for each council or ward the same as applies for Legislative Assembly seats, adjusted according to the number of voters on the electoral roll for each council or ward.'

Adoption of the report

Resolved on the motion of Ms Rhiannon, seconded Ms Beamer, that:

- a. the draft report as amended be the Report of the Committee and that it be signed by the Chair and presented to the Houses.
- b. the Chair, the Committee Manager and the Senior Committee Officer be permitted to correct minor, stylistic, typographical and grammatical errors.

The Chair advised that the report would be tabled with the Clerks of both Houses of Parliament on 26 March 2010.

There being no further items of business, the deliberations concluded at 4.31pm and the Committee adjourned *sine die*.