Political Donations
Final Report – Volume 1

Panel of Experts
Dr Kerry Schott (Chair)
Mr Andrew Tink AM
The Hon John Watkins

December 2014
First published by the NSW Department of Premier and Cabinet in December 2014.

Disclaimer

While every reasonable effort has been made to ensure that this document is correct at the time of printing, the State of NSW, its agents and employees, disclaim any and all liability to any person in respect of anything or the consequences of anything done or omitted to be done in reliance upon the whole or any part of this document.

Copyright Notice

In keeping with the NSW Government’s commitment to encourage the availability of information, you are welcome to reproduce the material that appears in this report for personal, in-house or non-commercial use without formal permission or charge. All other rights are reserved. If you wish to reproduce, alter, store or transmit material appearing in this report for any other purpose, request for formal permission should be directed to the General Counsel, NSW Department of Premier and Cabinet, 52 Martin Place, SYDNEY NSW 2000. You are required to acknowledge the source of the material.

The views expressed herein are those of the Expert Panel on Political Donations and do not necessarily represent the views of the State of New South Wales.
Contents
Preface ........................................................................................................................................................................ i
A Note on Consultation .................................................................................................................................................... iii
Chapter 1 – Summary and Recommendations .............................................................................................................. 1
  Executive summary .......................................................................................................................................................... 1
    Background ............................................................................................................................................................... 1
    Funding of elections, parties and candidates ................................................................................................................ 2
    Total ban on political donations .................................................................................................................................. 3
    Other limits on political donations ............................................................................................................................. 3
    Public funding ............................................................................................................................................................. 5
    Governance ................................................................................................................................................................. 7
    Expenditure caps ......................................................................................................................................................... 7
    Third-party campaigners .............................................................................................................................................. 8
    Disclosure .................................................................................................................................................................. 9
    Penalties, compliance and enforcement ...................................................................................................................... 9
  Recommendations ........................................................................................................................................................ 11
Chapter 2 – Introduction .................................................................................................................................................. 18
  Context to the Panel’s inquiry ....................................................................................................................................... 18
  Terms of Reference ....................................................................................................................................................... 24
Chapter 3 – Overview of election funding in New South Wales ....................................................................................... 26
  Background ................................................................................................................................................................. 26
  Discussion and conclusions ........................................................................................................................................ 31
Chapter 4 – Total Ban on Political Donations .................................................................................................................. 33
  Introduction ................................................................................................................................................................. 33
  Background ................................................................................................................................................................. 34
  Public interest considerations ......................................................................................................................................... 35
  Constitutional issues .................................................................................................................................................... 36
  ‘Opt-in, opt-out’ full public funding .............................................................................................................................. 38
  Discussion and conclusions ........................................................................................................................................ 39
Chapter 5 – Other Limits on Political Donations ............................................................................................................... 42
  Bans on certain types of political donations .................................................................................................................. 43
  Background ................................................................................................................................................................. 43
  Discussion and conclusions ........................................................................................................................................ 45
  Caps and other restrictions on political donations ...................................................................................................... 51
Independent Oversight of Election Funding Law ................................................................. 129
Background.......................................................................................................................... 129
Discussion and conclusions .............................................................................................. 129
Chapter 11 – Penalties, Compliance and Enforcement .................................................... 132
Background.......................................................................................................................... 132
Discussion and conclusions .............................................................................................. 134

Figures

Figure 1  Alleged flow of donations through the Free Enterprise Foundation
Figure 2  Alleged flow of Brickworks donations through the Free Enterprise Foundation
Figure 3  Overall sources of funding for election campaign-related expenditure
Figure 4  Overall sources of funding for administration expenditure
Figure 5  Total electoral expenditure by parties and candidates
Figure 6  Total campaign spending by parties, their endorsed candidates and Independents – 1 July 2010 to 30 June 2011
Figure 7  Campaign expenditure by the major parties and others: constant 2011 dollars
Figure 8  Expenditure caps for the 2011 and 2015 elections
Figure 9  2007 advertising expenditure (in 2011 dollar figures) as a percentage of the caps on ‘electoral communications expenditure
Figure 10  Public funding July 2009 to 30 June 2013
Figure 11  Payments ($) actual ‘funding linked to electoral expenditure’ model vs projected ‘dollar per vote’ model – 2011 first preference votes assumed
Figure 12  Total election campaign funding to parties represented in NSW Parliament calculated on 2011 First Preference Votes
Figure 13  Increase in funding – the Administration Fund replaces the Political Education Fund ($ million)
Figure 14  Maximum reimbursement under the Administration Fund (2014)
Figure 15  Annual Funding to parties from the Administration Fund (after 2010) and Political Education Fund (to 2010)
Figure 16  Payments from the Political Education Fund and the Administration Fund – Liberals and Nationals
Figure 17  Payments from the Political Education Fund and the Administration Fund – Labor Party and Country Labor
Figure 18  Payments from the Political Education Fund and the Administration Fund – other parties
Figure 19  Third-party campaigner expenditure – 2011 State election
Figure 20  Legal status and number of intra-party units of NSW political parties
Preface

I am pleased to deliver the final report of the ‘Panel of Experts – Political Donations’ to the Governor and the Premier. Premier Baird established the Panel in response to public concern about political donations and their influence. This concern has been heightened by recent investigations led by the Independent Commission Against Corruption (ICAC) into corrupt conduct involving illegal donations. Both of the major parties have been implicated. This followed previous allegations at ICAC of serious corruption by Labor government Ministers.

During the course of its inquiry, the Panel gained insights from many people ranging from interested members of the public to those with longstanding involvement in the administration of political parties. What stands out are the feelings of shock and disgust at the brazen way in which some candidates and MPs have apparently sidestepped political donations laws for personal and political gain. These sentiments are shared by my fellow Panel members the Hon John Watkins and Mr Andrew Tink AM, both of whom have expressed utter abhorrence for what is alleged to have occurred within their respective parties.

Despite the allegations currently before ICAC there is cause for optimism. The laws in New South Wales governing electoral expenditure and political donations are the most strict in Australia. There is room for improvement, but the general framework established by the Election Funding, Expenditure and Disclosures Act 1981 (NSW) (the Act) is a good foundation on which to start.

That said, strict laws are of little use if they are not properly enforced. We have put forward a number of proposals aimed at strengthening the investigative and enforcement capacity of the NSW Electoral Commission. These recommendations are important if the Electoral Commission is to be an effective watchdog and regulator.

The other area where the Panel recognised a need for reform was governance of the major parties. Even if our recommendations for legislative reform are adopted, nothing will change unless the major parties behave ethically and act lawfully. Other recipients of public funds must abide by well-established rules for accountability and acquittal and parties should be no different. Compliance with election funding law should be valued.

Unfortunately the Panel remains sceptical that this is case for some MPs and members of political parties. Cultural change will take time. We are hopeful that all sides of politics will embrace our recommendations and make a genuine effort to improve behaviour and governance so that the events that led to the apparent breaches of the Act and earlier corruption investigations are not repeated. If the political parties of our State fail to do so, the public’s contempt for politics and politicians will only increase.

On behalf of the Panel, I sincerely thank everyone who made submissions, met with us or appeared at the Panel’s round table discussions. We received many helpful suggestions and interesting ideas. Your contributions have greatly assisted the Panel with its work.

The Panel would like to thank the Secretariat for their timely and thoughtful work. Kate Boyd (Senior Principal Legal Officer, NSW Department of Premier and Cabinet) led the Secretariat team. Our understanding of what has become a very difficult piece of legislation would have been incomplete without Kate Boyd’s intellectual input and comment. Madeleine Foley (Director, Committees) and Carly Maxwell (Director, Committees) were seconded from their roles with the Departments of Legislative Council and Legislative Assembly respectively. We relied heavily on their excellent working knowledge of the NSW electoral system. The extensive public consultation process undertaken by the Panel would simply not have been
possible without their expertise in this area. So to the Secretariat, our sincere thanks and appreciation.

In particular, I wish to thank my colleagues on the Panel, the Hon John Watkins and Mr Andrew Tink AM, for their rigour and dedication, and the deep sense of public duty they brought to the Panel’s inquiry. It has been a privilege to work with them.

Kerry Schott
Chair
A Note on Consultation

The Panel’s consultations on the terms of reference were invaluable and provided the foundation of what we hope is a rigorous and informed report.

We invited written submissions through a public call for submissions. There was a strong response to our inquiry and the Panel received over 70 submissions. Many of them were from people who care deeply about this matter and have thought about it carefully. The submissions are published on the Panel’s website.

During the submission period we published five Working Papers. The Panel also produced an Issues Paper that highlighted the key questions being considered by the Panel.

We held discussions with numerous stakeholders. We met with each of the six parties represented in the NSW Parliament and the two independent MPs, to hear their views on election funding reform as well as how specific proposals were likely to affect them. We also met with the NSW Auditor-General, Unions NSW and other interested parties who could assist us in specific areas. In particular, the Panel worked with the NSW Electoral Commission and the ICAC throughout the inquiry.

We released a short Interim Report outlining our preliminary views and expressing in-principle support for certain key measures. Shortly afterward the Premier introduced the Election Funding, Expenditure and Disclosures Amendment Bill 2014. The Act was assented to in October 2014 and implemented the measures for which we expressed in-principle support, as well as making additional changes.

The Panel’s website was the key means for keeping stakeholders informed of our work. The webpage can be accessed at: www.dpc.nsw.gov.au/announcements/panel_of_experts_-political_donations. We also issued several Media Releases to keep the public informed of our activities. We hosted an online discussion to provide another way for people to have their say.

The Panel held four round table discussions with leading academics and constitutional experts. The discussions were open to the public and the transcripts are published on our website. The Panel also sought legal advice from David Jackson AM QC because of the interesting constitutional matters that arise in this field.

Volume 2 of this Final Report includes the legal advice from Mr Jackson as well as the list of submissions received and academic participants in the round table discussions. Our published work including the five Working Papers, Issues Paper and Interim Report is also contained in Volume 2 of this Final Report.
Chapter 1 – Summary and Recommendations

Executive summary

Background

The Panel was established in response to public concerns about the influence of political donations. People are rightly suspicious about donations and their potential to influence policy and government decisions. This is one reason why there are laws regulating election funding.

In 2014, the ICAC held public hearings in Operations Spicer and Credo. These hearings involved allegations that political donations were accepted from banned donors; that some were made in breach of the applicable caps; that false invoices were created to hide donations; and that schemes were devised to ‘wash’ illegal donations through the federal branch of the Liberal Party and channel them back into New South Wales.

These particular allegations followed earlier findings of serious fraud and corruption involving Labor government Ministers. Millions of dollars were involved. It was alleged for example that the tender for mining leases was ‘rigged’ to the personal benefit of two Ministers and others; that the terms and conditions of valuable café leases at Circular Quay were set favourably to benefit a Minister’s family; and that an attempt was made to improperly award the right to provide water and sewerage services in the developing north-west region of Sydney.

Together with the alleged breaches of election funding laws these matters, not surprisingly, have led the community to distrust politicians and to question the integrity of government. Trust is an important foundation of parliamentary democracy and the Premier’s action in 2014 to establish this Panel is a first step towards restoring trust. Further action to implement our recommendations for reform is the next step towards ensuring the integrity of government and all those involved in it.

The Election Funding, Expenditure and Disclosures Act 1981 (NSW) (the Act) consists of four key components: disclosure of political donations and campaign spending; caps and bans on political donations; caps on election spending; and public (taxpayer) funding for elections and party administration costs. Together these measures lessen the risk of corruption and undue influence and establish a fair and transparent scheme for election funding. While the Panel supports the key components of the Act, it has become a complicated and unwieldy piece of legislation and this impedes compliance. The Act needs immediate, comprehensive review – not more ad hoc amendments. The Act should be rewritten with clear policy objectives in mind (Recommendation 1).

Presently, different election funding laws apply in each jurisdiction and NSW parties are part of federal structures. This creates opportunities for avoidance and undermines the effectiveness of the NSW election funding regime. We recommend that the Premier support coordinated national reform of election funding laws, and that this be pursued via the Council of Australian Governments (COAG) process (Recommendation 2). Consistent disclosure obligations would be a good start. While we support coordinated national reform of election funding laws, we would not support New South Wales (the most strict of all jurisdictions)
moving to the lowest common denominator and taking steps away from transparency simply for the sake of national consistency.

There is no point in making recommendations unless they are considered and, if supported, acted upon. We recommend that the Premier report to the NSW Parliament on progress in implementing our recommendations. This should occur in June 2015 and then annually until all recommendations are dealt with (Recommendation 3).

The Panel is concerned that prior to its appointment, some of those involved in the administration of the major parties appeared to take little responsibility for compliance with election funding laws, and indeed other corrupt activities, that are alleged to have occurred under their watch. We are also concerned that the behaviour appeared to be undetected for so long – both within the parties, and by the NSW Electoral Commission.

There have been systemic failures in terms of compliance with and enforcement of the Act. These failures can be attributed to two things: poor governance within the major parties, and barriers to effective regulation by the NSW Electoral Commission (previously the Election Funding Authority). For various reasons, the Electoral Commission has focused on relatively low-level compliance issues at the expense of developing its investigative and enforcement roles. These latter roles are critical to maintaining the integrity of the electoral system. The Panel considered both systemic failures and has recommended changes that should, over time, improve party governance (Recommendations 33 to 41) and remove barriers to effective enforcement by the NSW Electoral Commission (Recommendations 43 to 48).

**Funding of elections, parties and candidates**

Political donations from private sources are an important source of funds for political parties. Parties and candidates also receive funds from taxpayers. These public funds are allocated to three separate funds for three different purposes: the Election Campaigns Fund (for reimbursing election campaign expenditure), the Administration Fund (for reimbursing the administrative expenses of parties) and the Policy Development Fund (a small fund to assist new parties with policy development).

In the four-year period that includes the 2011 election, political parties and candidates in New South Wales spent about $50 million on electoral expenditure. About $22 million was funded by the public and the remaining $28 million was from private sources.

Over this four-year period total administration costs appear to be around $50 million. About 60 percent of all administration expenses of parties and candidates is covered by public funds. These figures are rough estimates as reporting on them by parties and candidates is incomplete.

Finally, during the four-year period from 2009 to 2013, the Policy Development Fund allocated about $45,000 in public funds to new and smaller parties to help them meet the costs of policy development.

The level of public funding in New South Wales is significantly higher than in other jurisdictions and is generous by international standards. Banning political donations in favour of full public funding would probably require an additional $48 million over a four-year period. The total cost of banning political donations in favour of full public funding over a four-year election cycle would be about $100 million.
Total ban on political donations

Following recent events at the ICAC, there have been suggestions that political donations from private and other sources should be banned and that this would restore public trust in the integrity of the political system.

The Panel could find no real evidence to support this argument. Our research into other jurisdictions indicates that only one other nation, Tunisia, has implemented a pure full public funding model, and that this was a special measure designed to support its first democratic elections since the historic Arab Spring. Other measures such as disclosure, caps on donations, and more rigorous investigation and enforcement appear to be a more promising and direct path to combat undue influence and corruption.

Many opposed a total ban on political donations and argued that modest political donations are a valid and important way for people to express their voice. Recent behaviour, it was noted, has led us to forget that in a democracy small donations play an important role in keeping those seeking public office responsive to their constituents. The Panel agrees.

The practical difficulties associated with a total ban on political donations are, in our view, insurmountable. If political donations were to be completely eliminated from the system, public funds would need to be provided to all those who seek to contest elections or contribute to the public debate, including new parties and third-party campaigners. Clearly it would not be feasible for the State to fund every prospective candidate or third party. This raises questions about who would be eligible for public funding and how much they would be eligible for. The Panel finds that are no adequate answers to these questions.

The Panel also considered whether a total ban on political donations would be constitutional. We conclude that it is likely that the High Court would strike down such a ban on the ground that it would breach the implied freedom of political communication mandated by the Commonwealth Constitution. We are not convinced that banning modest donations and moving to full public funding would be a proportionate means to achieve a legitimate anti-corruption end.

The ALP suggested an opt-in, opt-out full public funding model to overcome the constitutional problems with a total ban on political donations. Parties could voluntarily refuse political donations from private sources as a condition of receiving full public funding. For those who did choose to opt out, corruption risks would still abound. An opt-in, opt-out model also raises the same practical difficulties as a total ban on political donations in terms of deciding who would be eligible to opt in (e.g. new parties, third-party campaigners) and how much funding they would be entitled to receive.

The Panel concluded that a total ban on political donations would not be feasible, or constitutional, or in the public interest. For these reasons, the Panel recommends that a total ban on political donations should not be pursued. The Panel does not support an opt-in, opt-out model as an alternative to a total ban on political donations (Recommendation 4).

Other limits on political donations

Strict laws apply to political donations in New South Wales. They can be summarized as follows:

- Anonymous donations of $1,000 or more are banned, as are donations from property developers and tobacco, gambling and liquor businesses.
- Donations from foreign sources are banned.
• Donations to parties are capped at $5,000 per year and donations to candidates, groups, elected Members and third party campaigners are capped at $2,000 per year.

• In-kind donations are capped at $1,000.

• Membership and affiliation fees cannot be used for the purposes of electoral expenditure.

While there have been systemic failures in terms of enforcement (as outlined above), the Panel generally supports these limits on donations. Banning anonymous donations is sound policy and is consistent with many other jurisdictions. The current limit of $1,000 aligns with the disclosure threshold and reduces the administration burden associated with grassroots fundraising events where many small donations from a large number of people are accepted. The Panel does, however, recommend that small anonymous donations be made exempt from the rules that require multiple donations from the same source to be aggregated for the purposes of the caps on political donations. As a practical issue, aggregation of small anonymous donations is onerous and has little benefit. Our recommendation is consistent with the approach taken in Western Australia (Recommendation 5).

The ban on foreign donors is common to many countries and its retention is supported (Recommendation 6). David Jackson AM QC advised the Panel that the ban on foreign donations, as amended by the Election Funding, Expenditure and Disclosures Amendment Act 2014, does not raise any constitutional issues.

The Panel considered whether specific groups (property developers and liquor, tobacco and gambling businesses) should continue to be banned from making political donations. Many pointed out that the ban on specific donors is unnecessary and does not serve a legitimate anti-corruption end given that political donations are capped at relatively modest levels.

The High Court will soon determine whether the ban on specific donors is constitutionally valid following a legal challenge brought by former Newcastle Lord Mayor Jeff McCloy. The Panel does not wish to pre-empt the High Court’s decision. The Panel notes, however, that if the ban is struck down by the High Court or repealed, political donations from banned donors, including developers, will remain uncapped at the local government level. Accordingly, the Panel recommends that the prohibited donor provisions be retained for the time being, subject to the outcome of the McCloy case and the introduction of caps for local government (Recommendation 7).

For the avoidance of doubt, we do not support a ban on political donations for the purposes of electoral expenditure only. This would lead to a situation where donations could be used for administration costs or some other purpose but not for election expenses. There seems to be no reason why that would improve integrity or be helpful in preventing corruption.

The Panel considered the level of the current caps on political donations and concludes they are about right. They should increase with inflation over time (Recommendation 8). We support separate caps for parties and candidates. The Panel also heard arguments that the caps on donations to parties and candidates should be combined, and that all political donations for the benefit of a party and any of its endorsed candidates should be made directly to the party. While this may suit some parties, the Panel is concerned that this degree of centralization might actually create corruption risks at the candidate level. Further, it would restrict the freedom of individuals to directly support their preferred candidate with a modest donation. It is not unusual for people to support a candidate and not his or her party.
The Panel recommends that in-kind donations be subject to the same caps as other political donations. We are not inclined to recommend lifting the current restrictions on the use of party subscription fees for electoral expenditure (Recommendation 9).

We also oppose the suggestion that corporations and other entities (e.g. unions) should be required to obtain shareholder or member support before making a donation. Such a step is not needed given the modest size of political donations that are allowed by law. If other transparency measures such as real-time disclosure are in place, such donations will be apparent to those members and shareholders who may be interested.

**Public funding**

It is usual in Australia and internationally to provide some public funding to political parties. The levels of public funding provided in New South Wales are higher than in other jurisdictions, particularly when both election campaign and administration funding are taken into account.

The Panel supports some public funding of election expenditure by parties and candidates but not without limits. Because parties perform key functions in a parliamentary democracy it is argued they deserve support from public funds. Parties represent opinions, they provide a vehicle for participation and they can form government. A small number question this position and think public funding should not be provided to political parties at all.

On balance, the Panel supports public funding so long as it is expended on costs central to our system of democracy and not just on what parties may consider to be necessary. Some funding of expenditure by parties and candidates on elections certainly seems warranted.

The question is how much support should taxpayers be expected to provide for election campaign expenditure?

The 2015 election will be conducted under a new funding arrangement which will significantly increase public funding for that election only. Overall taxpayers will be up for an additional $11.5 million. The total amount of public funding for election campaigns is expected to increase from $21.5 million in 2011 to $33 million in 2015.

The Panel considers that the 2015 funding model should be treated as a one-off measure. The level of election campaign funding should be reduced after the 2015 election to the levels that were in place for the 2011 election. We support retaining the ‘funding linked to electoral expenditure’ model, where parties and candidates are partly reimbursed after the election up to the level of their actual expenditure. The Panel would support linking a portion of public funding to electoral support (for example, by allocating a small proportion of public funding on a ‘dollar per vote’ basis) although this is not our preferred option (Recommendation 14). Whatever funding model is adopted, the Panel strongly believes that it should not provide for ‘full’ public funding (i.e. where parties are entitled to be reimbursed for the full amount they are permitted to spend on election campaigns). As noted above, the Panel supports a return to the funding levels that were in place for the 2011 election, where parties were entitled to be reimbursed for about 75 percent of the amount they were permitted to spend on their election campaigns.

We support expanding the types of campaign expenditure that can be reimbursed from public funding. The current narrow definition of electoral communication expenditure skews spending in a particular direction. There seems no reason to limit the conduct of campaigns in this manner (Recommendations 13). For similar reasons, we also support broadening the types of campaign expenditure caught by the spending caps.

We support retaining the reimbursement model, where parties and candidates are reimbursed for election campaign costs after the election. The distinct advantage of a
reimbursement scheme is that parties and candidates can only receive public funding up to the level of their actual campaign expenditure and cannot profit from standing for election.

Advance payments to assist parties with their up-front election costs should be increased to 50 percent of a party’s entitlement at the previous election (Recommendation 15). Endorsed candidates’ public funding entitlements should be paid directly to candidates unless they elect otherwise, as was the case before the 2014 amendments (Recommendation 16).

While funding for election campaigns is monitored and checked by the Electoral Commission for compliance with guidelines and laws, the audit of administration costs and expenses appears to be less focused. There is a lot of compliance checking but what constitutes admissible expenses on administration can be ambiguous. Why these expenses are worth funding from the public purse is not clear or widely understood. The Panel heard arguments that there has been little consideration of the policy reasons behind the level of administration funding.

Public funding of administration costs has increased substantially over the years, as shown in the graph below.

**Annual Funding to Parties from the Administration Fund (after 2010) and Political Education Fund (to 2010)**

![Graph showing annual funding to parties from the Administration Fund and Political Education Fund](image)

*Projected amounts based on maximum reimbursements.

Most other jurisdictions do not provide public money for party administration, and the levels provided in New South Wales are much higher than those that do. Total administration funding of about $11 million is available in 2014. The Liberal Party, National Party and Labor Party are able to claim $2.8 million per annum each. The remainder is claimed by minor parties and Independents.

The Panel supports some level of public funding for administration costs. We consider the amount of public funding should be scaled back to the levels that were in place before the most recent increases in 2014 (Recommendation 18). This would take the level of public funding for administration costs back to around $9 million in total per year from the current level of $11 million.

We also recommend clearer rules about what types of expenses can be claimed for administration and that payments should be conditional on appropriate governance standards and conditions (Recommendations 17 and 33). Such accountability is simply in line with all other entities that receive public funds. The NSW Electoral Commission should actively monitor claims to ensure they comply with both the letter and spirit of the law. The Electoral Commission should also investigate the use of these funds where there is any
suspicion of a material breach and the increases in penalties should assist with enforcement (Recommendation 19).

**Governance**

The Panel strongly believes that public funding should be conditional on good governance practices and assurance that the public funds are expended and accounted for appropriately. This requirement is similar to that placed on other recipients of public funds.

There are currently very few legislated governance standards or requirements on parties who receive public funds. This is exacerbated by the fact that the major parties are unincorporated (or voluntary) associations similar to community groups and sporting clubs.

The major parties are not legal entities and as such they cannot be prosecuted or fined. At the same time the major parties are in receipt of millions of dollars of public funds. Their governance simply does not reflect the importance of their stature. The law should be amended so that parties are deemed to be legal entities for the purposes of prosecution and penalties (Recommendation 39).

The senior officeholders in the major parties are not subject to the statutory duties required of company or not-for-profit directors. The common law duties that apply to office holders in the major parties do not carry statutory penalties and civil sanctions are rare. These duties should be codified in the Act (Recommendation 35).

The Panel has concerns about the level of financial reporting and auditing by the political parties that receive administration funding. Given the amounts of public money involved these parties should produce annual financial statements to the same standard as a corporation. To ensure the integrity and independence of audits we have concluded that the use of public funds by these parties should be audited by the NSW Auditor General reporting to the NSW Electoral Commission (Recommendations 37 and 38).

Candidates and senior party officials should be legally responsible for compliance. The scheme of party agents currently in place should be abolished so responsibility rests with those in the top ranks of the party. Responsibility should not be contracted out (Recommendation 40).

Independent oversight of election funding laws is required. Unsurprisingly there is likely to be agreement between the major parties to increase public funding if the decision rests with them alone. This will be at the expense of taxpayers if there is no independent oversight. There is also a possibility (not without precedent) that the party in power can amend the rules for their own electoral advantage. For these reasons, we have recommended that there be independent oversight of any changes in public funding for any purpose (Recommendation 42).

These will be radical changes for the major parties and for the regulator. They are an important step towards restoring community trust in politicians, parties and government. Where substantial sums of public funding are paid there must be clear accountability, clear rules and proper enforcement. This applies to all other entities in receipt of public monies and political parties should be no different. Indeed, one could argue that given their role in the government of this State their governance requirements should be even more stringent.

**Expenditure caps**

Expenditure on election campaigns is capped by law. The intent of these caps is to limit the expenditure ‘arms race’ between parties which has escalated due to the fact that (other
things being equal) money wins elections. Expenditure caps also promote fairness between electoral contestants, including limiting electoral advantage enjoyed by wealthy candidates and parties.

In the 2011 election the ALP and the Coalition spent around $16.1 million and $18.6 million each on their respective campaigns. This represented about 85 per cent of campaign expenditure by all parties and candidates.

The expenditure cap for parties contesting Legislative Assembly seats is $100,000 per seat, plus an additional $100,000 cap per seat for each of their candidates. If a party runs candidates in all 93 seats, as the Labor party and the Coalition usually do, the total combined cap for election expenditure is $18.6 million. The expenditure cap for parties primarily contesting the Legislative Council is just over $1 million. The expenditure cap for independent candidates is $150,000.

Campaign expenditure caps apply in the six-month period before the election. The expenditure caps currently apply to spending on media and internet advertisements, election material, and staff engaged in election campaigns. Legislation was passed in 2014 to extend this definition to include market research and campaign travel costs. We support broadening the types of campaign expenditure caught by the caps further by removing the reference to categories of spending and capturing all election expenditure which seeks to influence voting at an election (Recommendation 11). In relation to the party electorate-specific caps, we support broadening the definition of electorate-based expenditure so that it includes all expenditure that tries to persuade electors to vote for or against a candidate in a particular electorate (Recommendation 12).

There is widespread support for expenditure caps, including by the Panel. The levels of the caps seem to be appropriate, including the automatic adjustment of the caps for inflation (Recommendation 10). There was some suggestion that the caps on electoral communication expenditure should be lower, and to some extent, broadening the definition of expenditure which falls under the caps has this effect.

**Third-party campaigners**

Third-party campaigners are organisations or individuals who are not contesting the election but who finance campaigns on specific issues to influence policy and the election outcome. Regulation of third parties is a challenge. The Panel believes they should be free to participate in election campaigns but they should not be able to drown out the voices of parties and candidates who are the direct electoral contestants. In Australia there is a longstanding concern on the conservative side of politics that trade unions provide an unfair advantage to the Labor Party. There is also a high level of concern about the increase in third-party campaigning and the emergence of US-style Political Action Committees. These groups incur very large expenditure and have the potential to undermine the role of parties and candidates in election campaigns.

There is widespread support for third-party participation in elections within limits. Their donations and spending are capped in the same way as parties and candidates. The Panel supports this approach. The current third-party spending cap of $1 million is, however, too high and we suggest halving the spending cap to $500,000 to guard against third parties coming to dominate election campaigns (Recommendation 31).

This reduction in the spending cap should occur along with the introduction of a new aggregation provision to prevent:

a) parties from avoiding their own spending caps by establishing front organisations to incur electoral expenditure on their behalf; and
b) third-party campaigners from acting in concert with others to incur electoral expenditure in excess of the caps on third-party expenditure (*Recommendation 32*).

**Disclosure**

Timely and meaningful disclosure is the cornerstone of any effective campaign funding regime. Many jurisdictions have on-line, real time disclosure of political donations. New South Wales still operates an archaic paper-based disclosure system. Reporting is so delayed as to be of little interest to voters. The Panel urges the NSW Electoral Commission to replace its paper-based disclosure process with an on-line disclosure system as soon as possible (*Recommendation 23*). Freeing up resources in this manner should allow the Electoral Commission to focus on investigation and enforcement.

The Act should be amended to require real-time disclosure of political donations of $1,000 or more in the six-month period before each election (*Recommendation 25*). Online disclosure should be mandatory for political parties that receive payments from the publicly-funded Administration Fund. The Electoral Commission should supplement raw disclosure data with explanatory material and analysis to inform the public about donations activity (*Recommendation 24*).

There was some support for a reduction in the disclosure threshold. The Panel considers that the current threshold of $1,000 is reasonable. That said, disclosure should be more detailed. First, political parties should identify political donations that have been solicited by or made for the benefit of a particular candidate (*Recommendation 26*). The public can then scrutinize the links between donations and decisions. Second, parties and candidates should be required to disclose the terms and conditions of any loans (*Recommendation 27*). This will prevent the use of sham loans to avoid the cap on political donations.

Parties should be required to identify all electoral expenditure incurred for the purposes of influencing the voting in particular electorates (*Recommendation 28*). The Panel recognizes that this may not be easy as a single item of electoral expenditure may influence the voting in multiple electorates. The Panel therefore recommends that the Electoral Commission issue guidelines to help parties comply with this disclosure obligation. This will make it easier to assess compliance with the electorate-based expenditure caps. We did hear anecdotal evidence of spending beyond the caps in marginal electorates. This is a foreseeable temptation for both parties and candidates and the regulator should monitor spending in such electorates closely.

Parties should disclose details of electoral expenditure that is incurred in the capped expenditure period so that compliance with the overall cap on electoral expenditure can be assessed (*Recommendation 29*). Finally, associated entities of political parties should have the same disclosure obligations as parties to reduce the opportunities for avoidance (*Recommendation 30*).

**Penalties, compliance and enforcement**

While New South Wales has the strictest election funding laws in Australia, they have been accompanied by poor compliance and soft enforcement. Until recently, penalties have been low. In any case, offences have been difficult for the regulator to prosecute. Our Interim Report (Appendix 8) suggested tougher penalties for breaches of the Act and an extension of time for commencing prosecutions from three years to ten years.

The 2014 legislative changes have significantly increased maximum penalties and extended the time period for commencing prosecutions in line with the Panel’s Interim Report. These
are welcome improvements but there are still several barriers to compliance and enforcement.

Those offences that require the prosecution to prove knowledge or intent should be retained but must be simplified to improve the chances of successful prosecutions by the NSW Electoral Commission (Recommendation 45). The maximum penalty that can be imposed by local courts should be increased in light of the recent increases in penalties under the Act (Recommendation 43).

We also favour retaining strict liability offences for failing to lodge a disclosure and failing to keep records as these obligations are central to the election funding scheme (Recommendation 44). We support a new strict liability offence for lodging an incomplete disclosure similar to offences that exist in Queensland and the ACT. These obligations are crucial to the overall transparency aims of the Act. Strict liability for non-compliance with these offences is therefore appropriate.

Criminal prosecution should be a last resort. The NSW Electoral Commission must have a range of other enforcement options available to it if it is to be an effective, risk-focused regulator. These should include civil penalties and the power to withhold public funding (Recommendation 46). The Panel also supports measures to assist the NSW Electoral Commission with its transition from an administrative and compliance focus to risk-based regulation, consistent with the ICAC’s recent recommendations (Recommendation 47).

Education of candidates and Members of Parliament is strongly supported. We urge the Electoral Commission to deliver a thorough and engaging education program before the 2019 election (Recommendation 49). MP’s should be required to attend the NSW Parliament’s induction program and continuing education program, with financial penalties for failure to attend. The Party leader and whips should embrace this measure and encourage compliance (Recommendation 50).
Recommendations

**Recommendation 1**
That the Government immediately review the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) so that it is simple, easy to understand and has clear policy objectives.

**Recommendation 2**
That the Premier support co-ordinated national reform of election funding laws, and seek to put the issue on the COAG agenda.

**Recommendation 3**
That the Premier report on the progress made in implementing the Panel’s recommendations in June 2015 and annually thereafter, and that these reports be tabled in the NSW Parliament.

**Recommendation 4**
That the Government not pursue:

a) a total ban on political donations on the grounds that it is not in the public interest, not feasible in practice, and not likely to survive constitutional challenge; or

b) an opt-in, opt-out full public funding scheme as an alternative to a total ban on political donations.

**Recommendation 5**
That:

a) the ban on anonymous political donations above a certain amount be retained; and

b) the provisions that aggregate multiple political donations from the same donor be amended so that small anonymous donations are exempt.

**Recommendation 6**
That the ban on political donations from foreign sources be retained.

**Recommendation 7**
That the ban on political donations from prohibited donors (property developers and liquor, gambling and tobacco industry business entities) be retained for the time being, subject to:

a) the High Court’s decision in *McCloy v New South Wales*; and

b) the introduction of caps on political donations for local government.

**Recommendation 8**
That the current caps on political donations be retained and adjusted annually for inflation, rounded up to the nearest whole number multiple of $100.

**Recommendation 9**
That:
a) the cap on indirect campaign contributions (or in-kind donations) be made consistent with the caps that apply to other political donations (i.e. $2,000 for donations to candidates and $5,000 for donations to parties); and

b) the NSW Electoral Commission issue guidelines to help smaller parties and volunteers better understand their obligations in relation to in-kind donations.

Recommendation 10

That the current caps on electoral expenditure be retained and adjusted before each election for inflation, rounded up to the nearest whole number multiple of $100.

Recommendation 11

That all electoral expenditure incurred for the purpose of influencing the voting at an election be caught by the caps on electoral expenditure.

Recommendation 12

That the electorate-based caps on expenditure by political parties apply to all expenditure which encourages or tries to persuade electors to vote for or against a candidate in a particular electorate.

Recommendation 13

That:

a) all expenditure incurred for the purpose of influencing the voting at an election be reimbursable from the Election Campaigns Fund; and

b) the NSW Electoral Commission issue guidelines on the costs that can be reimbursed as electoral expenditure.

Recommendation 14

That:

a) the ‘funding linked to electoral expenditure’ model that operated for the 2011 State election for calculating entitlements from the Election Campaigns Fund be reinstated following the 2015 election; and

b) if the Government decides to pursue a ‘dollar per vote’ model, it should only be used to allocate a small proportion of public funding, with the remainder to be allocated on a ‘funding linked to electoral expenditure’ basis; and

b) whatever public funding model is adopted, it should not provide for ‘full’ public funding (i.e. where parties and candidates are entitled to be reimbursed for the total amount they are permitted to spend on election campaigns).

Recommendation 15

That advance payments to parties from the Election Campaigns Fund be increased from 30 percent to 50 percent of a party’s entitlement at the previous election.

Recommendation 16

That a candidate’s entitlement from the Election Campaigns Fund be paid directly to the candidate, unless the candidate directs otherwise.
Recommendation 17
That there be clear rules, and that the NSW Electoral Commission issue guidelines, for the costs that can be reimbursed from the Administration Fund.

Recommendation 18
That the model for calculating entitlements from the Administration Fund which operated immediately prior to the 2014 amendments to the Act be reinstated.

Recommendation 19
That the NSW Electoral Commission focus on:

a) strategic oversight of the Administration Fund to ensure the integrity and proper use of the Fund; and

b) monitoring and enforcing the rules to prevent the use of administration funds for electoral expenditure.

Recommendation 20
That the Policy Development Fund be renamed the ‘New Parties Fund’ to better reflect its aims.

Recommendation 21
That:

a) payments from the ‘New Parties Fund’ be retained at the current levels and adjusted annually for inflation, rounded up to the nearest whole number multiple of $100;

b) electoral expenditure for the purpose of influencing the voting at an election in election years be reimbursable from the 'New Parties Fund'; and

c) that the ability for parties to be reimbursed for administration expenses in non-election years be retained.

Recommendation 22
That the process for making claims for payment from the 'New Parties Fund' be streamlined.

Recommendation 23
That the NSW Electoral Commission replace paper-based disclosures with an online disclosure system as soon as possible.

Recommendation 24
That the NSW Electoral Commission supplement disclosures with explanatory material and analysis to inform the public about the sources and amounts of political donations.

Recommendation 25
That online, real-time disclosure of political donations of $1,000 or more be introduced for the six-month period before the election.

Recommendation 26
That political parties be required to identify where a political donation has been solicited by, or made for the direct benefit of, an endorsed candidate of the party.
Recommendation 27
That parties and candidates be required to disclose the terms and conditions of reportable loans (other than loans from financial institutions).

Recommendation 28
That:
   a) political parties be required to identify electoral expenditure aimed at influencing the voting in a specific electorate; and
   b) the NSW Electoral Commission issue guidelines to assist parties to comply with this disclosure obligation.

Recommendation 29
That for the six months before the election, political parties and candidates be required to specify the details of electoral expenditure incurred and the total electoral expenditure.

Recommendation 30
That:
   a) specific provisions be introduced regulating ‘associated entities’ (being entities that are controlled by a political party or that operate solely for the benefit of a political party); and
   b) that the disclosure obligations of associated entities be the same as those of political parties.

Recommendation 31
That the cap on electoral expenditure by third-party campaigners be decreased to $500,000 and adjusted annually for inflation, rounded up to the nearest whole number multiple of $100.

Recommendation 32
That:
   a) the electoral expenditure of a political party and its ‘associated entities’ be aggregated for the purposes of the party’s expenditure cap;
   b) the definition of ‘associated entity’ be limited to those entities that are controlled by a party or elected Member, or that operate solely for the benefit of a party or elected Member; and
   c) a third-party campaigner be prohibited from acting in concert with others to incur electoral expenditure that exceeds the third-party campaigner’s expenditure cap.

Recommendation 33
That:
   a) political parties that receive public funding for administration expenses be required to regularly submit details of their governance standards and accountability processes to the NSW Electoral Commission; and
   b) the payment of public funding for administration expenses be conditional on NSW Electoral Commission approval of those standards and processes.
Recommendation 34

That:

a) parties be required to regularly submit a list of senior officeholders to the NSW Electoral Commission for approval as a condition of receiving administration funding. The Panel expects that, at a minimum, the NSW Branch of the Labor Party would nominate its President, Deputy Presidents, General Secretary and Assistant General Secretaries, and the NSW Division of the Liberal Party would, at a minimum, nominate its President and Vice-Presidents, Treasurer and State Director;

b) the Commission only approve the list if it is satisfied that the nominated officers have sufficient seniority, control and decision-making authority to be responsible for the party’s compliance with the Act; and

c) the approved officeholders, and a brief description of their roles and responsibilities, be published on the NSW Electoral Commission’s website.

Recommendation 35

That:

a) the common law duties that already apply to senior officeholders of both incorporated and unincorporated associations be codified in the Act; and

b) senior officeholders who breach these duties be personally liable for offences and penalties under the Act.

Recommendation 36

That there be a duty for senior officeholders to report any election funding law breaches or suspected breaches to the NSW Electoral Commission.

Recommendation 37

That:

a) the current requirement for double-auditing of disclosures of political donations and electoral expenditure and claims for payment of public funding be removed; and

b) the NSW Auditor-General be responsible for the auditing of the disclosures and claims for all political parties that receive public funding for administration expenditure.

Recommendation 38

That:

a) political parties be required to produce annual financial statements that comply with Australian Accounting Standards, as a condition of receiving public funding for administration expenditure;

b) the NSW Auditor-General be responsible for auditing these statements; and

c) a summary of these statements be published on the NSW Electoral Commission’s website.
**Recommendation 39**
That registered political parties be deemed to be legal entities for the purposes of prosecutions and the imposition of penalties under the Act.

**Recommendation 40**
That the scheme of party and official agents be abolished and that candidates and elected Members be responsible for compliance with the Act.

**Recommendation 41**
That:

a) parties be required to nominate a senior officeholder to lodge disclosures and claims for payment on behalf of the party, for example, the State Director of the Liberal Party or the General Secretary of the Labor Party; and

b) this officeholder be approved by the NSW Electoral Commission as a person of seniority and standing within the party.

**Recommendation 42**
That:

a) an independent body be established to approve any changes to levels of public funding for any purpose, including election campaigns and administration, following a referral by the Premier; and

b) this body consist of a retired judge and a person with financial or audit skills.

**Recommendation 43**
That the maximum monetary penalty that can be imposed by the local court for offences be increased as part of the review of the Act.

**Recommendation 44**
That:

a) the strict liability offences for failing to lodge a disclosure and failing to keep records be retained; and

b) a new strict liability offence be created for lodging incomplete disclosures.

**Recommendation 45**
That the offences under the Act that require the prosecution to prove knowledge, awareness or intent be simplified to maximise the chances of successful prosecutions.

**Recommendation 46**
That a range of mid-level enforcement options be made available to the NSW Electoral Commission, including the ability to withhold public funding entitlements from parties and candidates.

**Recommendation 47**
That measures be introduced to support the NSW Electoral Commission to transition from a focus on administration to risk-based regulation.
Recommendation 48

That the NSW Electoral Commission conduct a root and branch review to identify gaps between its organisational capabilities and the demands of best practice electoral regulation.

Recommendation 49

That the NSW Electoral Commission be given a specific education function and that the Commission deliver an extensive and engaging education program before the 2019 State election.

Recommendation 50

That:

a) Members of Parliament be required to attend a mandatory induction and continuing education program delivered by the NSW Parliament, with non-participation to result in the following penalties:
   i. failure to attend annual seminar – withhold a portion of a party’s administration funding (for an endorsed Member) and/or some part of a Member’s entitlements; and
   ii. failure to complete the online education module on ethics – withhold a Member’s first salary payment pending completion.

b) the Premier refer this recommendation to the Parliamentary Remuneration Tribunal for a special determination.
Chapter 2 – Introduction

- The Panel of Experts on Political Donations in New South Wales was appointed under Letters Patent issued by the Governor on 25 June 2014, with a reporting date of 31 December 2014. The Panel members are Dr Kerry Schott (Chair), the Hon John Watkins and Mr Andrew Tink AM.

- The Panel was established in response to increasing public concerns about the influence of political donations. This concern followed evidence of alleged breaches of NSW election funding law aired during the ICAC’s public hearings in Operations Spicer and Credo in 2014.

- The ICAC has heard allegations that candidates and parties evaded election funding law by accepting donations from banned donors, accepting payments above the donations caps, and devising schemes to hide prohibited donations.

- The Panel is concerned that the alleged breaches of election funding law went undetected for so long – both within the parties, and by the NSW Electoral Commission.

Context to the Panel’s inquiry

There is merit in setting out the alleged breaches of the Act being investigated by the ICAC. Election funding laws are there for good reason: to establish a fair and transparent scheme for regulating election funding, expenditure and disclosure, and to help prevent corruption and undue influence in the government of the State. Compliance with the Act is important if the public is to have confidence in the political process.

In Operation Spicer, the ICAC is investigating allegations that certain MPs and others corruptly solicited, received and concealed political donations from various sources, including prohibited donors, in return for agreeing (tacitly or otherwise) to favour the interests of those donors. The investigation centres on the following issues related to the 2011 election campaign:

- allegations that certain people within the NSW Liberal Party instituted a scheme to circumvent the ban on property developer donations by ‘washing’ donations at the federal level before directing them back to New South Wales;

- allegations of secret property developer donations to Liberal candidates on the Central Coast and around Newcastle;

- allegations of donations above the legally permitted amount; and

- allegations of corrupt conduct by Labor Party MPs and indirect campaign contributions by a property developer in relation to the campaign for Newcastle.

In Operation Credo, the ICAC is investigating allegations that persons who had an interest in Australian Water Holdings Pty Ltd (AWH) sought to adversely affect the functions of Sydney Water Corporation for financial gain. This investigation has in turn raised concerns about the involvement of party officials in AWH, and political donations made by AWH.

These are the latest in a long line of ICAC investigations into the potentially corrupting influence of political donations on government decisions. The ICAC has conducted at least a dozen investigations in this area, notably investigations into planning decisions made by Wollongong City Council in 2008, Rockdale City Council in 2002 and Tweed Shire Council in
1990. It is evident that the ICAC considers political donations to be a significant corruption risk. Compliance with election funding law is an important and indeed obvious way to avoid corruption or at least lessen the risk of corruption.

The ICAC released a corruption prevention report in December 2014. The report made recommendations in four key areas.

1. Shifting the focus of the election funding regulator, the NSW Electoral Commission, to regulatory oversight and governance of political parties, which can be achieved by reducing the administration burden of the current scheme.

2. Holding senior party officeholders accountable through the registration process.

3. Penalising parties for failing to maintain effective internal controls, including by the potential loss of public funding.

4. Enhancing transparency to promote public scrutiny of political donations.

The ICAC’s recommendations largely align with the Panel’s views set out in this report. We strongly agree with the ICAC on the need for the NSW Electoral Commission to become a strong and effective regulator; to increase the accountability of parties and senior officeholders in response to the large amounts of public funding provided to parties; and to greatly improve the frequency and quality of disclosure.

The ICAC’s corruption prevention report is a high level review of the design of the election funding scheme. The Panel examined not only the scheme’s design but also issues affecting its operation. The ICAC’s report is therefore an important accompaniment to the recommendations made in this report.

Subject to the outcome of High Court proceedings in Cuneen v ICAC, the ICAC intends to report in early 2015 on the allegations investigated in Operations Spicer and Credo. The following section sets out the alleged breaches of the Act examined at the ICAC’s public hearings.

Allegations of co-ordinated attempts to circumvent the ban on developer donations

Since 2009, property developers have been banned from making political donations in New South Wales. This ban is intended to protect the integrity of the NSW planning and development approval process. It does not apply at the federal level. The ICAC is examining allegations that the NSW Liberal Party used the Canberra-based Free Enterprise Foundation as a means of receiving and disguising donations from prohibited donors. The Free Enterprise Foundation is an ‘associated entity’ of the Liberal and National Parties of Australia under the Commonwealth Electoral Act 1918 (Cth). It is alleged that the Free Enterprise Foundation transferred $700,000 to the NSW Liberals in December 2010 (just before the donations caps came into force in January 2011). The following chart shows how it is alleged that the money flowed from donors, through the Federal party and back to the State branch. If proven, this would have contravened the Act because it is unlawful for a party to accept a political donation made by someone on behalf of a property developer.

Figure 1 – Alleged flow of donations through the Free Enterprise Foundation
The ICAC examined the example of Brickworks, a company that operates a property development arm and could therefore be a ‘prohibited donor’ in New South Wales. Brickworks is not a prohibited donor in the federal jurisdiction and it donated $125,000 to the Free Enterprise Foundation in December 2010. The Managing Director of Brickworks, Lindsay Partridge, gave evidence that Brickworks intended the $125,000 donation to be sent to the NSW Liberals for use in the NSW election campaign. Mr Partridge told the ICAC that at the time the donation was made, he was not aware that Brickworks was a prohibited donor. Mr Partridge said that Brickworks had earlier donated $250,000 to the Free Enterprise Foundation in July 2010, with a request that $50,000 each be directed to the NSW, Queensland and West Australian branches of the Liberal Party. Mr Partridge told the ICAC that the money was not distributed as Brickworks requested; the Federal party kept most of the money and $50,000 went to New South Wales. This led Mr Partridge to comment that ‘giving money to the Liberal Party was like giving a hot chip to a bunch of seagulls, the seagull that’s got the chip in his mouth doesn’t necessarily get to eat it’. Mr Partridge told the ICAC that Brickworks donated to the Free Enterprise Foundation as it was a way ‘to donate funds to the Liberal Party discreetly’.

The following chart shows how it is alleged that Brickworks’ donations flowed through the Free Enterprise Foundation to the NSW Liberals.

Figure 2 – Alleged flow of Brickworks donations to the NSW Liberals

<table>
<thead>
<tr>
<th>Donations from Brickworks</th>
<th>Free Enterprise Foundation</th>
<th>NSW Liberals</th>
</tr>
</thead>
<tbody>
<tr>
<td>$125,000 &amp; $250,000</td>
<td></td>
<td>$125,000 &amp; $50,000 (of $250,000)</td>
</tr>
</tbody>
</table>

The ICAC is also examining allegations that the Free Enterprise Foundation was used to ‘wash’ donations intended for specific candidates, including $18,000 from property developer Buildev to Londonderry MP Bart Bassett. The ICAC is investigating the allegation that the donation was linked to Mr Bassett supporting development applications from Buildev while he was Mayor of Hawkesbury Council, an allegation that Mr Bassett has denied.

Some donors have said that they were not aware that their donations were allegedly being channelled back to New South Wales in contravention of NSW election funding law. For example, Westfield’s Mark Ryan gave evidence at the ICAC that Westfield was aware it was banned from making donations in New South Wales. Mr Ryan denied that the $150,000 Westfield donated to the Free Enterprise Foundation in December 2010 was intended for the NSW election campaign, stating that it was intended for the Federal Liberal Party. Similarly, when Nathan Tinkler was questioned on donations to the Free Enterprise Foundation he said that the money was intended to go to the Federal Liberal Party.

The ICAC questioned senior Liberal Party officeholders on whether they knew and approved the alleged use of the Free Enterprise Foundation to channel donations through the Federal party to the NSW Liberals. The ICAC was told by Paul Nicolaou, who at that time was Executive Chairman of the Millennium Forum (a fundraising body for the NSW Liberals), that he proposed the use of the Free Enterprise Foundation to the State Finance Committee. Mr Nicolaou gave evidence that he ‘assumed that the Finance Committee would have then taken legal advice to ensure that what we would do with the Free
Enterprise Foundation was above board’. The State Finance Director Simon McInnes said that he ‘expressed discomfort’ about donations, including from prohibited donors, being channelled through the Free Enterprise Foundation. Mr McInnes said that he believed that the arrangement was ‘completely legal’, although he concluded: ‘I don’t believe it was in the spirit of the law’. The ICAC also questioned Arthur Sinodinos, previously State Treasurer and Chairman of the Finance Committee. Mr Sinodinos gave evidence that he did not know that developer donations were being channelled through the Free Enterprise Foundation, nor that the Foundation was the biggest donor to the NSW Liberals’ 2011 election campaign. Mr Sinodinos told the ICAC that ‘I don’t accept any responsibility for money being raised from prohibited donors’ because he had made his ‘best endeavours’ to prevent that from happening. Mr Sinodinos noted that under the Act, it is the party agent who is responsible for ensuring compliance with election funding law.

Allegations of illegal donations to Central Coast and Newcastle candidates

In Operation Spicer, the ICAC is also investigating allegations that Liberal candidates attempting to win Labor-held seats on the Central Coast and around Newcastle solicited illegal donations to fund their campaigns. The illegal donations allegedly came from property developers who are banned from donating in New South Wales, and were also above the applicable cap on political donations ($5,000 to a party and $2,000 to a candidate).

On the Central Coast, the ICAC is examining the allegation that Tim Koelma, an adviser to then Shadow Minister Chris Hartcher, created a front company called Eightbyfive for the purposes of channelling developer donations to local candidates. It is alleged that Eightbyfive issued fake invoices to disguise developer donations as payments for services, collecting over $400,000. Mr Hartcher allegedly devised the scheme to win seats for his favoured candidates, thereby bolstering his factional power within the right wing of the NSW Liberals. It is alleged that the payments were used to support the campaigns of Wyong MP Darren Webber and The Entrance MP Chris Spence, in return for which they and Mr Hartcher would allegedly favour the interests of the donors. The ICAC is investigating allegations that Eightbyfive was used to pay the prospective MPs for sham consultancy work, leaving them free to campaign full-time in their electorates. These allegations have been denied: Mr Koelma gave evidence that the payments to Eightbyfive were for consultancy services but that financial documents relating to the work were destroyed by a flood in his garage, while Mr Spence and Mr Webber gave evidence that they were employed by Eightbyfive as government relations consultants. Mr Hartcher denied receiving any benefit from Eightbyfive, whether political or otherwise.

In Newcastle, property developer and then Lord Mayor Jeff McCloy told the ICAC that ‘they all come to see me for money, I feel like a walking ATM some days’ due to the number of times he was allegedly approached for donations by local Liberal candidates in the lead up to the 2011 election. Mr McCloy said that he gave envelopes containing $10,000 in cash to Newcastle MP Tim Owen and Charlestown MP Andrew Cornwall and $1,500 to Swansea MP Garry Edwards. Mr Owen admitted accepting $10,000 from Mr McCloy and then falsely telling the ICAC that he had returned the envelope unopened. Commenting on his campaign funding generally, Mr Owen told the ICAC that he ‘could see that there was a lot of money … sloshing around in the campaign and I used to wonder where the cash came from and I just sort of kept my nose to myself…’. Mr Cornwall admitted to taking an envelope of cash from Mr McCloy but said that he did not bank the money himself and instead gave it to the official agent to deal with it. Mr Edwards also admitted to taking an envelope from Mr McCloy. Mr Edwards said he had not opened the envelope, which he assumed contained a small amount of cash, and that he had passed the envelope to a campaign staffer. Mr McCloy denied that he is a prohibited donor, claiming that he is not a ‘property developer’ within the meaning of the Act because although some of his companies are involved in
property development, he does not make development applications himself.\textsuperscript{38} He has, however, given evidence that he made at least some donations after the spending caps were introduced.\textsuperscript{39} Mr McCloy has commenced proceedings in the High Court challenging the ban on developer donations and the caps on donations.

The ICAC is also examining the allegation that another Newcastle developer, Hilton Grugeon, secretly donated $10,000 to Mr Cornwell. Both Mr Grugeon and Mr Cornwell have denied this claim,\textsuperscript{40} with Mr Cornwell giving evidence that the $10,000 from Mr Grugeon was in return for a painting that Mr Cornwell had given him as a Christmas gift.\textsuperscript{41}

In addition, Mr Grugeon and Mr McCloy gave evidence that they had each paid $10,000 towards the salary of a media staffer in Mr Owen’s office.\textsuperscript{42} Mr Grugeon said that although he knew he was a prohibited donor, he believed that it was legal for him to contribute towards the staffer’s salary as it did not amount to a political donation.\textsuperscript{43} As noted above, Mr McCloy disputes that he is a prohibited donor.

Going back to the 2007 election, when it was still legal for developers to make political donations, Port Stephens MP Craig Baumann told the ICAC that Mr McCloy and Mr Grugeon donated $80,000 to his campaign and admitted that he used invoices to hide the identity of the donors and avoid disclosing the donations.\textsuperscript{44} Mr Baumann gave evidence that Mr McCloy and Mr Grugeon stood to benefit from a proposed development in his local area and he did not want it to look like he was favouring their interests.\textsuperscript{45} Mr Baumann denied that he was influenced by these donations, noting: ‘I don’t see how a recipient of a donation can be corrupted’.\textsuperscript{46} In addition to this non-disclosure Mr Baumann’s accountant admitted that he made a $100,000 campaign donation, rather than paying Mr Baumann’s company for a house being built for him, which reduced the company’s tax bill.\textsuperscript{47}

Allegations of corrupt conduct and indirect campaign contributions in Newcastle

Operation Spicer is not only concerned with the activities of the Liberal Party. The ICAC is investigating allegations that then Labor Minister Jodi McKay’s re-election campaign for the seat of Newcastle was undermined by figures in her own party (including former Ministers Joe Tripodi\textsuperscript{48} and Eric Roozendaal\textsuperscript{49}) allegedly to benefit the business interests of Mr Tinkler. Mr Tinkler part-owned Buildev, whose proposal for a new coal loader was opposed by Ms McKay. Mr Tripodi denied attempting to advantage Buildev,\textsuperscript{50} as did Mr Roozendaal, who gave evidence that after Mr Tripodi brought the Buildev proposal to his attention he activated a process to test its merits.\textsuperscript{51} The irregular activities in the campaign for Newcastle included the production of unauthorised leaflets to discredit Ms McKay,\textsuperscript{52} leaflets which Mr Tripodi admitted to ICAC that he assisted to produce.\textsuperscript{53} Mr Tripodi told the ICAC that he believed that Buildev funded the leaflets.\textsuperscript{54} This conduct could potentially contravene the ban on property developer donations, and the ban on indirect campaign contributions of $1,000 or more. There was also a campaign against Ms McKay run by third-party campaigner the Newcastle Alliance, which Mr Tinkler told the ICAC he paid $50,000 to fund.\textsuperscript{55}

Allegations of political donations and Australian Water Holdings

The second ICAC investigation, Operation Credo, is focused on AWH and allegations that it sought to take financial advantage of Sydney Water. During this investigation, the ICAC revealed that AWH paid $180,000 to Eightbyfive in 2009-2011, which Mr Koelma said was for consultancy work and media monitoring.\textsuperscript{56} This was at the same time as senior Liberal Party officials were in leadership positions at AWH including Arthur Sinodinos, then Treasurer of the NSW Liberal Party, who was a Director and then Chairman of AWH\textsuperscript{57} and prominent Liberal figure Nick Di Girolamo, who was the Chief Executive Officer.\textsuperscript{58}
Lessons from Operations Spicer and Credo

An important question raised by the ICAC’s allegations is why neither party intervened at an earlier stage given the nature of the alleged activity in both major parties. The second question is how these irregularities went undetected for so long. We are particularly concerned about the alleged circumvention of the ban on developer donations by ‘washing’ these donations through the Free Enterprise Foundation. These donations were disclosed after the 2011 election. Alarm bells should have been ringing at the NSW Electoral Commission at that time given the enormous amount of money involved ($700,000) and because there was no history of the Foundation being a significant donor. We acknowledge that the behaviour in Newcastle, where a property developer has admitted giving candidates thousands of dollars in cash, is very difficult to uncover unless someone blows the whistle.

On the other hand, Newcastle and surrounding seats were key marginal battlegrounds in the 2011 election. These seats should have been monitored closely for funding irregularities. Schemes like Eightbyfive can also be difficult to detect. We acknowledge that the ICAC investigation into Eightbyfive was prompted by a referral from the NSW Electoral Commission, acting on a report of suspicious activity from a prospective Liberal candidate.

The Panel is concerned by the public statements of some of the MPs under investigation by the ICAC. Mr Baumann described the Act as ‘inherently unfair and bad legislation’ and said that: ‘In my case, I did not receive one cent from banned donors; I made a mistake with one declaration that did not influence or affect the result of the 2007 or 2011 elections’.

Another retiring MP being investigated by the ICAC, Mr Edwards, said in his final speech to Parliament:

... there has been no suggestion or inference that as members of this Parliament, nor indeed as candidates, did any of my colleagues past and present act other than in the best interests of their electorates. They have certainly not acted at any time in any improper way and never dishonestly.

The Panel is concerned about these sentiments. If proven, the allegations investigated in Operations Spicer and Credo cannot be dismissed as minor breaches of a complicated and unwieldy Act. Further, Members of Parliament cannot pick and choose which laws they will comply with simply because they feel that some laws are ‘bad’ or ‘unfair’. The public is entitled to expect its elected Members, its lawmakers, to show respect for the rule of law.

Some individuals, such as Senator John Faulkner, have long advocated for more robust election funding laws to reduce the risk of corruption and undue influence. Senator Faulkner has said of his lack of success at the federal level:

I have argued long and hard about the need for reform of our electoral funding laws at the federal level. Unfortunately, I was not persuasive enough... My attempts to make our system more transparent and freer from corruption and improper influence failed.

Senator Faulkner’s frustration at his inability to achieve change in this area is palpable. The Panel hopes that perhaps the allegations at the ICAC hold the seeds of change. The Panel is strongly of the view that now is the time for meaningful reform to promote compliance with the letter and spirit of election funding law. Based on the allegations aired by the ICAC, this change cannot come a moment too soon.
**Terms of Reference**

Under its terms of reference, the Panel is required to consider and report on options for long term reform of political donations in New South Wales, including:

1. Whether or not it is feasible and in the public interest given all considerations (including legal, constitutional and others), to provide full public funding of State election campaigns.

2. What is the appropriate level to cap the expenditure on State election campaigns and what methodology should be utilised to determine that cap?

3. If full public funding of State election campaigns is to be provided:
   a. What measures can be put in place to ensure the integrity of public funding;
   b. What is the appropriate regulation of third party campaigners (such as peak bodies, companies or industrial organisations) to run political campaigns and the impact of full public funding on them;
   c. What is the impact on minor parties and independent candidates; and
   d. What is the level of public funding that would be required?

4. If full public funding of State election campaigns is not to be provided, what models are recommended, taking into account issues including:
   a. What is the appropriate level of caps on political donations;
   b. What measures can be put in place to ensure that any caps are effective;
   c. What is the appropriate regulation of third party campaigners (such as peak bodies, companies or industrial organisations) to run political campaigns and the impact of any proposed models on them;
   d. What is the impact on minor parties and independent candidates; and
   e. What is the level of public funding that would be required?

5. In considering all reform options, the Panel should consider:
   a. What controls should apply to the making of donations, such as
      i. Whether or not particular entities or groups of donors should be excluded;
      ii. Whether prior approval of a majority of members of a corporate entity or other organisation is required;
      iii. Any limitations or restrictions on such political donations; and
   b. The appropriate frequency and timing of disclosure obligations under election funding laws.

6. Whether the penalties for contravening provisions in the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) are commensurate with the nature of the offence. This should include advice on penalties that could apply to donors, intermediaries or recipients of unlawful donations.

7. Any amendments to ensure that limits on political donations and disclosure requirements cannot be avoided through the use of artificial structures or other means.

8. Any other matters relevant to political donations.
In proposing options for reform in its report, the Panel is to have regard to:

a. international practices, and their applicability to a Westminster system;

b. the compatibility of any proposed changes with democratic principles;

c. the potential for any proposed changes to improve the accountability, integrity and quality of government;

d. any risks or negative consequences of any proposed changes for the accountability, integrity and quality of government; and

e. constitutional constraints, including those identified by the High Court in *Unions NSW v State of New South Wales* [2013] HCA 58.

The Panel is ultimately to consider the best way to remove any corrosive influence of donations in New South Wales.
Chapter 3 – Overview of election funding in New South Wales

- The Act consists of four key components: disclosure of political donations and campaign spending; caps and bans on political donations; caps on election spending; and public (taxpayer) funding for elections and party administration costs.

- The different components of the Act are interrelated and depend on each other for their effectiveness. For example, limits on political donations are more likely to be effective if there are limits on campaign spending that reduce the demand for private funding. Minor changes to one part of the system can have implications for other parts of the system.

- The Panel heard that the current Act is complicated, unwieldy and impedes compliance. We agree and recommend that the legislation be immediately reviewed.

- Election funding laws vary across Australia. The federal structure of some political parties creates opportunities for avoiding NSW restrictions on political donations. We therefore support co-ordinated national reform of election funding laws and recommend that the Premier seek to put the issue on the COAG agenda.

- We also recommend that the Premier report to the NSW Parliament on progress in implementing our recommendations.

Background

The following section provides an overview of the key features of the NSW election funding regime, and compares our system to arrangements internationally and across Australia. The chapter concludes with three overarching recommendations for reform of the Act.

Cost of elections in New South Wales

New South Wales holds fixed term elections every four years. Political parties and candidates receive public funding to cover part of their campaign expenses in the six months leading up to an election. Parties and independent MPs also receive some public funding for administration and ongoing costs each year. New parties can apply for funding to assist with policy development. Parties and candidates rely on private fundraising and donations, membership fees, and other income such as returns on investments and loans to cover the remainder of their costs.

The last State election cost about $90 million to conduct. This amount included about $40 million spent by the NSW Electoral Commission on polling places, ballot papers and the like. The remaining $50 million was spent by political parties and candidates on the election campaign and other electoral expenditure over the four-year period between elections.

Caps and bans on political donations

There are restrictions on who can make political donations and how much money they can donate. Donations from property developers are banned as are donations from tobacco, liquor and gambling businesses. These donor prohibitions are intended to lessen the corruption risks seen to be associated with these industries, given the extent to which these particular industries stand to benefit from government decisions, and the risk that political
donations could be used as an attempt to buy access and favourable treatment. Donations can only be made by voters on an electoral roll or Australian residents, or entities with an Australian Business Number or whose executive officer is an Australian resident.

There are limits on the amount of money that can be donated each year. The donations caps are intended to reduce the risk of corruption and undue influence by lessening the influence that any one donor can exert on a party or candidate. Donations are capped at $5,000 for donations to parties and groups from a single source, and $2,000 for donations to candidates, MPs and third-party campaigners e.g. trade unions, interest groups etc. These amounts are adjusted for inflation.

It is common in an international context to impose restrictions on who can make political donations, for example, by imposing bans on foreign or anonymous donors, as well as limiting the amount of money that can be donated. It is ‘exceptionally rare’ to ban all donations.

Australia does not have a strong history of restricting political donations. The ACT is the only jurisdiction other than New South Wales to set a cap (of $10,000) on donations. Most jurisdictions have only modest restrictions, such as limits on anonymous donations. The Commonwealth bans anonymous donations over $12,800, while Victoria caps donations from casino and gambling licensees at $50,000 each year.

**Caps on spending**

There are limits on the amount of money that can be spent in the period leading up to an election. The caps promote fairness between parties and candidates standing for election. They also reduce the demand for political donations by limiting the so-called ‘arms race’ for campaign funds.

Spending limits apply to ‘electoral communication expenditure’ in the six months before the election, known as the capped expenditure period. ‘Electoral communication expenditure’ is defined to include particular types of campaign spending such as media and internet advertising, election material, campaign staff, market research and campaign travel costs. It does not include the ongoing administration or operating costs of political parties.

The expenditure caps are set at different levels depending on whether the spending is by parties, groups, candidates or third-party campaigners, and whether the spending is for a Legislative Assembly (Lower House) or Legislative Council (Upper House) campaign. Taking into account its own expenditure cap and the expenditure caps of its endorsed candidates, a major party contesting all 93 Legislative Assembly electorates would have a spending cap of $18.6 million. A party focused on contesting a Legislative Council election with less than 10 candidates standing in the Legislative Assembly has a spending cap of $1.05 million. An independent candidate running for either House has a spending cap of $150,000, while spending by an endorsed Legislative Assembly candidate is capped at $100,000.

Around 30 percent of all countries limit the amount of money that political parties may spend on elections, while over 40 percent limit candidate spending. In Australia, the ACT and Tasmania are currently the only jurisdictions other than New South Wales that impose limits on spending during election campaigns. From 2015 South Australia will impose voluntary spending caps as a condition of public funding.
Public funding

Public funding to cover part of the cost of both election campaigns and party administration provides parties and candidates with a clean source of finance. Public funding lessens the likelihood of corruption and undue influence by reducing the demand for private donations and ensures a more even electoral contest.

Parties and candidates receive public funding of their electoral communication expenditure in the six months leading up to an election. To be eligible, candidates for the Legislative Assembly or ungrouped candidates for the Legislative Council must receive at least four percent of first preference votes or be elected. A party that endorses candidates for the Legislative Assembly must receive at least four percent of first preference votes in those districts that they contest. A party or group that does not endorse Legislative Assembly candidates must receive at least four percent of first preference votes in the Legislative Council or have a Member elected.

Parties and candidates are required to pay their election costs up front and are reimbursed after the election. The 2011 State election resulted in about $22 million of payments to parties and candidates as reimbursement of their electoral communication expenditure. This amounted to about 44 percent of total election costs incurred by parties and candidates in the four-year period covering the 2011 State election.64

Political parties with Members elected to Parliament also receive public funding in the four years between elections to cover their ongoing administrative costs. Independent MPs are also eligible for administration funding. Administration funding amounted to around $29 million over the four-year period to June 2013.

New and emerging parties that do not have a Member elected to Parliament receive small payments for policy development expenses. These payments amounted to $45,000 in the four years to June 2013.

New South Wales is not alone in providing public funding of political parties: it is part of a global trend, with two-thirds of countries worldwide now providing some form of direct public funding for political parties.65 This trend is evident across Australia. Most Australian jurisdictions provide some public funding of election campaigns, with South Australia being the latest jurisdiction to introduce an election funding scheme from 2015.

While public funding of election campaigns is commonplace in Australia, it is unusual to fund the ongoing administrative and operating costs of political parties. New South Wales and the ACT are the only jurisdictions to do so in Australia, with the ACT providing modest annual funding.66

New South Wales stands out from other jurisdictions in terms of the amount of public funding provided for both election campaigns and administration costs. Levels of public funding for election campaigns are much higher than in other Australian jurisdictions, and are also high by international standards. The new funding model adopted for the 2015 election increases these levels even further.

Not only does New South Wales provide generous funding for parties and candidates standing for election, it also provides effectively double the amount of administration funding to parties relative to other Australian jurisdictions.
Disclosure

Disclosure has been described as ‘a cornerstone of any political finance regulatory system’. Disclosure of information on the amounts and sources of donations ensures transparency so that voters know who has contributed to a candidate or party’s election campaign before casting their vote. Parties and candidates are also required to disclose election spending to determine whether they have stayed within the spending caps.

Political donations and electoral expenditure must be disclosed each year by parties, groups, candidates, MPs and third-party campaigners. Major donors who make donations of $1,000 or more must also make an annual disclosure. Because disclosures are only lodged on an annual basis, there is a delay between when a donation is made and when that donation is disclosed to the public. To address this deficiency there is a new requirement to lodge a one-off pre-election donations disclosure before the 2015 election so that voters are informed of fundraising activity before casting their votes. This additional disclosure was recommended by the Panel in its Interim Report.

At least 90 percent of countries have some disclosure requirements, although the regularity of disclosure and the amounts to be disclosed vary widely. Some jurisdictions have either continuous or real-time disclosure in the pre-election period, most notably New York and Ontario in Canada. In Australia, too, there are disparate disclosure requirements. At one end of the spectrum is the Commonwealth, where only donations over $12,800 need to be disclosed, and only on an annual basis. The ACT is the most progressive in terms of disclosure – providing for real-time disclosure of donations over $1,000 in the lead-up to an election.

Third-party campaigners

Third-party campaigners can be either individuals or organisations (other than political parties, MPs, candidates or groups). Examples of third-party campaigners are the NRMA, NSW Business Chamber, Unions NSW, the NSW Teachers’ Federation and other trade unions. There are caps on spending by third-party campaigners during election campaigns as well as caps on donations to third parties. Restricting third-party activity during election campaigns ensures that third parties cannot out-spend political parties and drown out the voice of the direct election contestants. It also ensures that third parties cannot be used to avoid the caps on spending and political donations that apply to political parties and candidates.

An individual or organisation must spend more than $2,000 on electoral communication expenditure in the capped expenditure period to be classified as a third-party campaigner. Third-party campaigners have a spending cap of $1.05 million in the six months pre-election and an annual donations cap of $2,000. As with political parties and candidates, third-party campaigners must lodge annual disclosures of donations received and electoral expenditure incurred. Third-party campaigners must be registered in order to accept political donations or pay for electoral communication expenditure over $2,000 during the capped expenditure period.

Most countries do not regulate third party spending during election campaigns. The approach taken in New South Wales to cap donations and spending is similar to that taken in other some comparable Commonwealth jurisdictions; namely the United Kingdom, Canada and New Zealand. There are a variety of different approaches to regulation of third-party spending in Australia. It is unusual to cap spending by, or donations to third-party campaigners, with the ACT being the only jurisdiction other than New South Wales to do so. Most jurisdictions do, however, require some type of third-party disclosure, whether for donations or spending.
Governance

The structure and organisation of political parties is diverse. Some of the smaller parties in New South Wales are incorporated associations, while the major political parties are unincorporated associations similar to some community groups and sporting clubs. This means that it is difficult to prosecute the major parties for breaches of election funding laws and their senior officeholders are not subject to the statutory duties imposed upon company directors.

Political parties, candidates and Members of Parliament must appoint an agent to manage political donations and electoral expenditure, keep financial records and comply with disclosure obligations. The agent is therefore liable for election funding offences. There is a question as to whether responsibility should instead rest directly with parties, candidates and MPs.

Disclosures of electoral expenditure and donations and claims for payment of public funding are required to be audited by a registered company auditor. However, the audit standards required of political parties are below that required of companies and not-for-profit organisations and give limited assurance that parties have complied with the law.

Members of Parliament are responsible for making the laws which determine levels of public funding. There appears to have been little detailed analysis of the costs of running a political party or an election campaign and the extent to which the public should subsidise these costs. Independent oversight has been introduced in other areas where parliamentarians have a direct interest, such as salaries, allowances and electoral boundaries.

Penalties and enforcement

There are various offences for breaking election funding laws. Minor offences can be dealt with by penalty notices with fines ranging from $55 to $2,750. At the other end of the spectrum, successful prosecutions can result in penalties of up to $44,000 or a maximum 10-year prison sentence for the offence of entering into a scheme to circumvent election funding law. Prosecutions must commence within 10 years of an offence being committed. In addition, if a person accepts an illegal payment such as a donation from a prohibited donor, the NSW Electoral Commission can reclaim the payment as a debt due to the State. Double the amount can be claimed if a person knowingly accepted the unlawful payment.

Effective enforcement is the key to compliance. In an international context it has been described as ‘remarkable’ that in nearly 25 percent of countries ‘no institution has a legal mandate to receive financial reports or investigate violations of political finance regulations’. In New South Wales, the NSW Electoral Commission is the agency tasked with investigating suspected breaches and deciding on an appropriate response. Election funding offences are, however, rarely prosecuted due to difficulties in proving knowledge or awareness of the elements of the offence on the part of the accused.

The ICAC can also investigate suspected corrupt conduct if it relates to breaches of election funding laws. The ICAC has extensive statutory powers to compel the production of documents, enter premises to inspect documents, obtain search warrants, use surveillance devices and intercept telephone calls, and compel witnesses to answer questions at compulsory examinations and public hearings.

Education can be a driver of behavioral change within the major parties, and across the NSW political system. The NSW Electoral Commission educates prospective candidates and their campaign teams on their obligations under election funding law. Members of Parliament are provided with an induction and continuing education program by the NSW Parliament. There appears to be a need for both the Electoral Commission and Parliament to revise and strengthen their education programs.
Discussion and conclusions

The key features of the NSW election funding scheme are examined in the coming chapters, and we make detailed findings in relation to each. Here, we make three general recommendations for reform of election funding laws.

As noted previously, election funding is regulated by the Election Funding, Expenditure and Disclosures Act 1981 (NSW). The NSW Electoral Commission’s submission described the Act as complicated, unwieldy, and in need of comprehensive review. The ICAC has also warned against election funding legislation that ‘is so complex that it works against compliance and creates loopholes’. The Panel believes that a series of knee-jerk amendments to parts of the Act over time has lessened its coherence and weakened its efficacy. The Act is now a complex web of inter-dependent defined terms, with both loopholes and duplication. A detailed chronology of the many amendments to the Act is set out in Working Paper No. 5 (Appendix 5).

People must understand their obligations under legislation if they are to comply with them in practice. Candidates and party head offices also need to understand why the rules are there and what purpose they are meant to serve. Rules governing political donations should be simple and easy to understand and their objective should be clear. The Panel believes that there is no need for the Act to be complex. The Government previously committed to undertake a comprehensive review of the Act in its response to the 2012 inquiry of the Joint Standing Committee on Electoral Matters into the State’s electoral legislation. This review should proceed immediately.

As long as the rules governing political donations differ across Australia, there is a risk that any NSW law will be circumvented. The evidence brought to light by the ICAC in Operation Spicer shows how the lack of regulation of political donations at the federal level can be exploited to avoid the bans and caps on political donations that apply in New South Wales.

We note that the Premier has recently introduced a new anti-circumvention provision targeted at those who deliberately seek to avoid the election finance laws, as recommended by the Panel in its Interim Report.

The federal structure of some political parties creates opportunities for avoiding NSW restrictions on political donations. We believe that the Premier should support greater co-ordination of election funding laws across jurisdictions. A co-ordinated approach to disclosure would be a useful start. We recommend that the Premier seek to put the issue on the agenda at COAG.

We also recommend that the Premier report to the NSW Parliament on progress against implementation of our recommendations, to ensure that the current momentum for change is maintained.

**Recommendation 1**

That the Government immediately review the Election Funding, Expenditure and Disclosures 1981 (NSW) so that it is simple, easy to understand and has clear policy objectives.

**Recommendation 2**

That the Premier support co-ordinated national reform of election funding laws, and seek to put the issue on the COAG agenda.
**Recommendation 3**

That the Premier report on the progress made in implementing the Panel’s recommendations in June 2015 and annually thereafter, and that these reports be tabled in the NSW Parliament.
Chapter 4 – Total Ban on Political Donations

- A total ban on political donations in favour of full public funding has gained momentum in New South Wales on the basis that it would reduce corruption risks and result in ‘clean’ elections.

- The Panel could find no evidence that banning political donations and moving to full public funding would prevent those who would act corruptly from doing so. Other measures, such as disclosure, caps on political donations and expenditure, and more rigorous investigation and enforcement, appear to be much more direct and effective ways of dealing with the risk of corruption.

- Further, the practical issues raised by a total ban on political donations are probably insurmountable (for example, whether or not third-party campaigners and new parties would be eligible for full public funding and how much they would be entitled to receive).

- The Panel also considered whether a total ban on political donations would breach the implied freedom of political communication mandated by the Commonwealth Constitution, and concluded that such a ban would not be a proportionate means to achieve a legitimate anti-corruption end. Accordingly, the Panel considers that a total ban on political donations would be unlikely to survive constitutional challenge.

- An ‘opt-in, opt-out’ full public funding model was put forward as an alternative to a total ban on political donations. We find that the anti-corruption benefits of this approach are doubtful, and that it raises the same practical issues as a total ban on political donations.

Introduction

An important requirement in the terms of reference is for the Panel to consider whether or not it is feasible and in the public interest to provide full public funding of State election campaigns.

‘Full public funding’ may describe a regime that includes a total ban on political donations from private sources. As Professor Graeme Orr puts it, ‘true “full” public funding implies a donation limit of $0’. Dr Joo-Cheong Tham commented during the Panel’s discussions, ‘[t]here are no degrees of fullness… It is either full or it is not full. If we are talking about full public funding… then we are talking about a complete ban on political donations’.

Alternatively, ‘full public funding of State election campaigns’ may refer to a system where political donations to parties and candidates are permitted but can only be used for expenses other than election campaigns. Administration expenses and the cost of policy development might be partly or wholly funded by political donations in such a regime. Another alternative is to allow political donations to be used for election campaign expenditure but to ensure that the public funding entitlement of a party or candidate is reduced by the value of political donations they receive. The Panel’s views on these models are set out in Chapter 5 – ‘Other Limits on Political Donations’.

In this chapter, we examine the advantages and disadvantages of a total ban on political donations, where the costs of both election campaigns and other expenses are fully funded by the State.
Background

Over the four-year period from 1 July 2009 to 30 June 2013, political parties and candidates spent about $50 million on election expenses (including both electoral communications expenditure and other electoral expenditure). Given that about $22 million of this spending was reimbursed by public funding, over this four-year period approximately 44 percent of election expenditure was sourced from public funding and the remaining 56 percent from private sources (including donations, fundraising events and loans). The public funding model for the 2015 election (which is discussed in Chapter 7 – ‘Public Funding’) increases the public funding available to parties and candidates for electoral communications expenditure and will therefore significantly reduce the proportion of private funding.

Figure 3 – Overall sources of funding for election campaign-related expenditure

Eligible parties also receive public funding for a significant proportion of their ongoing administration costs. While political parties are not required to publicly report on their total administration expenses, most of the parties provided the Panel with information on their total administration costs over the past four years. While there are limitations to these figures, the Panel estimates that over a four-year period these parties spent about $50 million on their administration. It is estimated that public money covers over half the administration costs of the Liberal and Labor Parties, with private funding making up the balance. Public funding seems to cover over 80 percent of the administrative costs of the other parties, with private funding covering less than 20 percent.

Overall it therefore appears that public funding accounts for about 60 percent of administration expenditure and private funding covers about 40 percent. The amount of administration funding provided to parties has recently increased (as discussed in Chapter 7) which will further reduce the amount of political donations required by political parties to fund their administration.

Figure 4 – Overall sources of funding for administration expenditure

The level of public funding in New South Wales is significantly higher than in other Australian jurisdictions and is generous by international standards. Parties already receive a substantial proportion of their funding from the public and therefore rely less on political donations.

With the exception of Tunisia, which banned all political donations from private sources in 2011, the Panel’s research indicates that no country has banned all political donations and implemented a truly full public funding model. A number of countries, including Canada,
Iceland, and some US states, have taken steps in this direction. These public funding models are discussed in detail in Working Paper 2 – ‘Update on international campaign finance laws and full public funding models’ (Appendix 2).

Public interest considerations

Arguments for a total ban on political donations

A move to ban political donations in favour of full public funding has gained some momentum in New South Wales on the basis that it would restore public trust in the integrity of the political system. Banning all political donations from private sources, it is argued, would result in ‘clean’ elections by reducing the risk of corruption and undue influence.

The leaders of both major parties support full public funding of election campaigns. In a 2008 submission on electoral funding reform, Premier Mike Baird referred to his inaugural speech in which he said:

> The potential remains today to buy legislation and this alone highlights how serious the issue has become. I have formed the view that donations are at a corrosive level in New South Wales… If election campaigns were fully funded by the public purse, we would remove the potential to buy access and legislation.78

Opposition Leader John Robertson also supports full public funding of election campaigns, noting in July 2014: ‘Full public funding of elections is a critical reform for good government in our state … We can make the next election the cleanest ever by the introduction of full public funding of elections’.80

These statements specifically refer to full public funding of election campaigns, implying that political donations would still be permitted to fund the administrative costs of political parties and candidates. It is difficult to see how banning political donations for campaign purposes but allowing them to be made for others would remove the potential to buy access and achieve so-called ‘clean’ elections.

In contrast, a total ban on all political donations has the potential to ‘close the door’ on corruption according to the submission made by The Greens.81 The Greens also argued that a total ban on political donations for any type of expenditure would allow parties and candidates to concentrate on serving their communities rather than raising funds for re-election.

Despite the rhetoric surrounding a total ban on political donations, the Panel’s investigations and consultations did not reveal any evidence that such a ban would be effective in terms of reducing corruption and undue influence. Other measures such as disclosure, caps on political donations, increased penalties and more rigorous investigation and enforcement of existing election funding and anti-corruption laws appear to be more promising measures to combat corruption arising from political donations.

Arguments against a total ban on political donations

Many people who made submissions to the Panel opposed the full public funding of political parties by the State. Health and education expenditure was cited as more worthy of taxpayer support.82 In light of recent events at the ICAC, Professor Anne Twomey considered that full public funding would essentially reward political parties for their bad behaviour, stating that: ‘It is a repugnant proposition that we must appease corruption in our political institutions in this manner’.83
There are others, such as the Independent MP Alex Greenwich, who oppose a total ban on political donations on the basis that the making of modest political donations is a valid and important form of political expression that encourages those seeking political office to be responsive to their constituents.

The practice of raising small donations from a large number of supporters does not, it is argued, give rise to a significant risk of corruption and undue influence. As Bret Walker SC said in his submission:

A lot of people each giving a little money may enable a great voice to be heard. No-one who cares about democracy would regard that as an undesirable occurrence.

Similarly, Professor George Williams’ submission highlighted how the public perception of political donations has been tainted by the allegations of corrupt conduct investigated by the ICAC in recent years:

The focus is now so strongly on the evils of political donations, that we forget that they play an important role in a democracy. Having to raise money to fund a campaign forces politicians to connect with voters. A donation can also be an indication of support for that person’s fitness for office and their policies.

The Greens also canvassed the potential drawbacks of a total ban on political donations. They noted that it could create barriers to entry for new parties, further entrench the two-party system in New South Wales, and shift donations activity and associated corruption risks from political parties to third-party campaigners (similar to the Political Action Committees that operate in the United States).

The cost of a total ban on political donations

As noted above, from mid-2009 to mid-2013 political parties and candidates spent an aggregate of $50 million on electoral expenditure. Approximately $22 million of this amount was met by public funding. The additional cost to the taxpayer of a ban on political donations for the purposes of electoral expenditure would have been $28 million over that four-year period.

The cost of a total ban on political donations, where both election campaign costs and administration costs are fully publicly funded, would be even higher. While the total administration costs of political parties and candidates are not available to the Panel, those parties that did provide cost information to the Panel spent $50 million on their administration over the past four years. As noted above, private funding appears to cover about 40 percent of this amount. If a total ban on political donations had been in place over that four-year period, the cost to the taxpayer would have been at least an additional $20 million.

It is clear that a substantial allocation of public money, an additional $48 million over a four-year electoral cycle, would be required if political donations were to be banned or voluntarily refused in favour of full public funding of election campaigns and administration. In total, full public funding over a four-year period would be about $100 million. This is in addition to the costs associated with running elections, about $40 million, and the ongoing costs of the NSW Electoral Commission.

Constitutional issues

Constitutional experts agree that a total ban on political donations could be struck down by the High Court on the grounds that such a ban would breach the implied freedom of political communication mandated by the Commonwealth Constitution. In *Lange v Australian Broadcasting Corporation*, the High Court set down a test for determining whether a law
breaches the implied freedom of political communication. The elements of the Lange test are:

1. Does the law burden freedom of political communication? (This is known as ‘the first limb’.)
2. Does the law serve a ‘legitimate end’?
3. Is the law reasonably appropriate and adapted to serving that legitimate end?
4. Is the manner in which the law serves that legitimate end compatible with the system of government prescribed by the Commonwealth Constitution? (Questions 2 to 4 are together known as ‘the second limb’.)

In 2013, the High Court struck down the O’Farrell government’s reforms to the Act. Those reforms banned political donations from corporations and entities other than enrolled individuals. The High Court’s decision in Unions NSW v New South Wales confirmed that any law banning political donations is likely to be viewed as a burden on the implied freedom of political communication. The validity of such a ban therefore depends on whether it satisfies the second limb of the Lange test: is the law reasonably appropriate and adapted to serve a legitimate end? Does it serve that legitimate end in a manner that is compatible with the system of representative and responsible government mandated by the Constitution?

The Panel received very helpful submissions on the constitutional issues raised by a total ban on political donations. We also had the benefit of hearing academics discuss their views. The general consensus is that any NSW law that bans political donations is likely to be regarded by the High Court as a burden on the implied freedom of political communication drawn from the Commonwealth Constitution. This is because it could have the effect of limiting communication about Commonwealth political matters. Such a law will only be held valid by the High Court if it satisfies the second limb of the Lange test.

The Panel engaged David Jackson AM QC to provide a legal opinion on whether a total ban on political donations would be constitutionally valid. Mr Jackson advised as follows:

1. Any total ban on political donations, even if compensated for by public funding, will fail the first limb of the Lange test.
2. A total ban on political donations, compensated for by 100 percent public funding to levels determined by the government from time to time as the maximum amounts which may be expended on elections, may pass the second limb of the Lange test. For that to occur, however, good reasons would have to appear as to why the end of limiting expenditure was an appropriate end. Good reasons would also need to appear why the levels so fixed were appropriate.
3. A total ban on political donations, accompanied by lesser levels of public funding would be likely to fail the second limb of the Lange test.

With respect to the second limb of the Lange test, Mr Jackson advised:

That is a difficult test to satisfy unless one can identify the ‘compelling and substantial public interest’ to be protected. Even if one says that the desire to limit expenditure on elections is the end to be achieved, prohibiting all political donations and limiting expenditure to that which the government of the day chooses to enact as the limit of reimbursement may well go beyond what is reasonably necessary.
To assist the Panel with its understanding of the constitutional issues relevant to full public funding, Professor Twomey provided a comprehensive analysis of the constitutional validity of a total ban on political donations as part of a full public funding model. She concludes that, if challenged, 'it would be difficult for the Government to persuade the Court that a complete ban on political donations would serve a legitimate end and be a proportionate response to instances of corruption'.

Professor Twomey's paper also highlights the following jurisdictional issues that would arise if New South Wales were to attempt to ban political donations:

- **Extra-territoriality** – A law of New South Wales concerning political donations might affect actions that take 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 and create a conflict between State laws.

- **Inconsistency of laws** – If a NSW law banned donations that a Commonwealth law expressly allowed, or if the Commonwealth legislated to ‘cover the field’ with respect to donations to political parties and the State law intervened in that field, the Commonwealth law would prevail to the extent of the inconsistency. The Plaintiff in the Unions NSW case argued that the NSW law banning donations from corporations and other entities was inconsistent with section 327 of the Commonwealth Electoral Act 1918 (Cth), but the High Court decided the case on other grounds and left the question of inconsistency unresolved.

- **Implications arising from federalism and representative government** – Any State law that interferes with Commonwealth elections, by banning donations by a State-registered political party that would have been used to support candidates in Commonwealth elections, would also be vulnerable to constitutional challenge.

‘Opt-in, opt-out’ full public funding

As an alternative to a total ban on political donations, the Labor Party suggested an ‘opt-in, opt-out’ public funding scheme where a party could voluntarily give up private donations entirely as a condition of having its election campaign costs and administrative costs fully publicly funded.

Under its proposed model, parliamentary parties that voluntarily give up private donations would, in the short term, be eligible for full public funding up to the level of what they actually spent in the lead up to the 2011 election. In the longer term, the Labor Party suggests that a new method of calculating funding should be formulated based on the principle of equal public funding for the government and the opposition, and adequate funding for minor parliamentary parties and incumbent independents based on their level of electoral support. It is also suggested that: ‘Consideration should be given to extending this to independent candidates who receive a significant portion of the vote or the last excluded candidate in a district despite not being elected’. The submission of the Labor Party does not address whether new parties and third-party campaigners would be eligible to opt-in to full public funding or whether they would continue to rely on political donations and other private sources of income to fund their campaigns and administration.

The true cost of an ‘opt-in’ system of full public funding is difficult to estimate. It depends on a range of assumptions and policy questions including how many parties and candidates would opt-in, who would be eligible for public funding, and how much they would be eligible for. While the Labor Party’s submission suggests that an ‘opt-in’ scheme would cost the
taxpayer an additional $10 million based on 2011 election campaign costs and public funding entitlements, this does not appear to take into account administration costs or the costs of electoral expenditure outside the six-month pre-election period.

Discussion and conclusions

Public interest considerations

Superficially, banning political donations in favour of full public funding may seem an attractive option. It appears to remove opportunities for private money to unduly influence government decisions. This approach assumes that our politicians will engage in corrupt conduct unless their campaigns are completely funded by the State. To accept this premise by introducing a total ban on political donations would reflect poorly on the integrity of politics in this State.

The anti-corruption benefits of full public funding and a total ban on political donations are questionable. The minority of politicians who are corrupt and who have breached existing limits on political donations would be unlikely to comply with a total ban on donations. For this reason, the Panel believes that the focus must be on better disclosure, investigation of breaches and strong enforcement of sanctions.

The Panel also considers that a total ban on political donations could make political parties dependent on public funds in a manner that may be detrimental to representative democracy in the longer term. At present, public funding entitlements can be changed by an Act of Parliament. If donations are banned and political parties stop building their fundraising capacity, any reduction in public funding would have a significant impact on their financial viability. Full public funding therefore involves a high degree of sovereign risk. Events in Canada are enlightening, where certain public funding entitlements in the Canadian federal system are being phased out by the present Government to the detriment of the Opposition.97

The Panel acknowledges the positive role that modest political donations can play in the NSW electoral system, particularly given the rise of social media and internet platforms capable of raising large amounts through small donations. These channels are also a means of communicating and engaging with voters on particular issues. There is no doubt that fundraising creates an incentive for political parties and candidates to engage with their membership base and grassroots supporters and be responsive to community concerns. The Panel found the submission of Bruce Hawker to be of particular interest on this point. He advocated the benefits of small donations supplemented by public funding as a means of reducing the major political parties’ reliance on large donations from institutional donors (in particular, corporations and unions) and steering them toward greater engagement with their individual supporters.98

For these reasons, the Panel does not consider that a total ban on political donations would be in the public interest. Such a ban would come at a very high cost to the taxpayer, and would be completely out of step with other jurisdictions. There is no evidence that a ban on political donations would be effective in terms of reducing corruption. The Panel considers that there are more direct ways of dealing with corruption and undue influence arising from political donations including caps on donations, disclosure of donations, stronger offences and penalties, and better regulation and enforcement of election funding law.

Constitutional considerations

In Unions NSW, the High Court struck down a ban on donations by corporations, unions, entities and persons other than those on the electoral roll, on the ground that it was not
enacted to serve a legitimate end. Any reforms to donations laws in New South Wales should be guided by the High Court’s decision to ensure that the laws are valid.99

The High Court has set clear constitutional boundaries for reform in this area. It would be foolish not to be mindful of those boundaries, particularly given that the Lange test endorsed by the High Court is helpful for evaluating election funding policy. The Lange test forces us to ask: what is the legitimate end that a total ban on political donations seeks to achieve? Is full public funding, including a ban on all political donations, the best way of achieving that end? In this way, questions about whether a ban on political donations is constitutionally valid and whether it is in the public interest are intertwined.

It is generally accepted that the ‘legitimate end’ of a ban on political donations is to reduce the risk of actual and perceived corruption and undue influence. The allegations currently being investigated by the ICAC involve political donations that exceed the legal limits (that is, those over $2,000 to candidates and $5,000 to political parties), political donations from prohibited donors (specifically property developers), and the failure to disclose political donations to the public in accordance with the requirements of the Act. The investigation indicates that the real issue is non-compliance with the law rather than any problem with lawful political donations that are within the applicable laws and are properly disclosed.

The Panel is therefore not convinced that banning modest donations and moving to full public funding would be a proportionate means to achieve a legitimate anti-corruption end. A total ban on political donations would unduly impact on democratic freedoms without directly addressing the underlying causes of the kind of corruption recently exposed by the ICAC. As Professor Twomey notes, and the Panel agrees:

Those who breach current laws regarding bans or caps on donations would most likely also breach other laws banning donations100… There are other ways that are better directed at discouraging parties from engaging in corrupt or illegal conduct, such as more rigorous investigation and enforcement of the existing law, stiffer penalties and longer periods in which to commence prosecutions.101

There is no doubt that money plays a huge part in winning elections. In this context, there will always be strong incentives for political parties and candidates to act outside laws that regulate political donations. While a ban on political donations accompanied by full public funding would reduce some of the demand for private money, it would not address all of these incentives. The Panel believes that a more holistic approach is required, including a focus on raising the standards of behaviour of electoral participants, improving the internal governance of political parties, and rigorously detecting, investigating and punishing those who deliberately breach election funding and anti-corruption laws.

The Panel also agrees with Professor Williams and Professor Orr that the practical problems associated with a total ban on political donations are probably insurmountable. These practical problems have constitutional implications; they must be resolved if any regime involving a total ban on donations is to survive constitutional challenge. Professor Williams asks:

How should, say, $100 million be divided amongst parties and candidates? It could not be distributed according to votes at the prior election. That would give the victors an unfair advantage, and could frustrate a popular mood for change. Opinion polls should also not be used. Polls go up and down, and are subject to significant sampling errors. And how should the money be divided as between the established political players, and new parties and independent candidates? What about organisations that campaign without standing people for public office? Should business, union, environmental and other groups also receive public funding? Or will they be locked out of having a say during election time? There are no adequate answers to these questions.102
Any full public funding model that involves a total ban on political donations and fails to adequately answer all of these practical questions would be unlikely to pass the second limb of the *Lange* test.

On balance, the Panel is of the view that a total ban on political donations would not be likely to survive constitutional challenge.

‘Opt-in, opt-out’ full public funding

While it may avoid the constitutional pitfalls of a total ban on political donations, optional full public funding raises a number of practical difficulties. The most significant is the potential impact on third-party campaigners and new parties and candidates. It is unlikely that taxpayers would support providing full public funding to every third-party interest group or prospective candidate that decides to run a campaign or stand for election. If third-party campaigners and new parties and candidates were not able to opt-in to full public funding, they would need to be able to accept political donations otherwise the scheme would almost certainly be constitutionally invalid.

Allowing political donations to be made to third-party campaigners in particular would merely shift the risk of corruption and give third parties a disproportionate role in election campaigning compared to political parties and candidates. The dominance of Political Action Committees in United States’ election campaigns attests to this. Even if third-party campaigners and new parties and candidates were entitled to opt-in to full public funding, it would be near impossible to fairly determine their eligibility for public funding as the usual threshold of past electoral performance would not be relevant. If the threshold for eligibility were set too low, it would encourage frivolous parties and candidates. If it were set too high, the scheme would be vulnerable to constitutional challenge. The Panel does not see how these practical issues can be satisfactorily resolved.

The Panel is also opposed to an opt-in scheme in principle. It is premised on the same flawed assumption as a total ban on political donations, that is, that our politicians cannot help but engage in corrupt conduct unless their campaigns are fully funded by the taxpayer. The anti-corruption benefits of such a scheme are also doubtful. There is no reason to suppose that candidates who are intent on gaining an advantage by soliciting prohibited donations would be less likely to do so simply because their political party has opted in to a full public funding scheme. For those who opt-out (and we note it is unlikely that any eligible party or candidate would), the corruption risks associated with political donations would still exist. Optional full public funding also raises constitutional issues unless it makes adequate provision for new parties, independent candidates and third-party campaigners to engage in political communication. As noted above, the Panel does not see how these entities could be accommodated within an opt-in full public funding model.

Accordingly, the Panel does not support an ‘opt-in, opt-out’ full public funding scheme as an alternative to a total ban on political donations.

**Recommendation 4**

That the Government not pursue:

a) a total ban on political donations on the grounds that it is not in the public interest, not feasible in practice, and not likely to survive constitutional challenge; or

b) an opt-in, opt-out full public funding scheme as an alternative to a total ban on political donations.
Chapter 5 – Other Limits on Political Donations

- In the previous chapter, the Panel concluded that a total ban on political donations was neither feasible nor in the public interest. This chapter considers other ways of limiting the role and influence of political donations in New South Wales, including bans on certain types of political donations, caps on political donations, and restrictions on membership and affiliations fees.

- Compared to other Australian jurisdictions, political donations in New South Wales are heavily restricted. Anonymous donations of $1,000 or more are banned, as are political donations from property developers, and tobacco, liquor and gambling businesses. Donations from foreign sources are also banned.

- The Panel considers that the current bans on donations from foreign sources and anonymous donations above a certain amount should be retained. The latter needs to be better integrated with the other provisions in the Act, particularly the aggregation provisions. We recommend that the industry-specific bans be retained for the time being, subject to the outcome of the McCloy High Court proceedings and the possible introduction of caps for local government.

- Donations to political parties are capped at $5,000 per year, while donations to candidates, groups, elected Members and third-party campaigners are capped at $2,000 per year. The current caps eliminate large donations and lessen the risk of corruption and undue influence. The Panel supports the current caps on donations. In particular, we think that separate caps should continue to apply to parties and candidates, and that the level of the current caps is appropriate. We do not support exempting transfers of funds between a party and its endorsed candidates from the caps as this would create opportunities for avoidance.

- In-kind donations, such as the provision of offices and equipment for little or no cost, are capped at $1,000. Party subscriptions, including membership and affiliation fees, are allowed, but may not be used to incur electoral expenditure. We think that in-kind donations (currently capped at $1,000) should be subject to the same caps as all other donations in the interests of consistency. We are not inclined to recommend any changes to the current restriction on using party subscriptions for electoral expenditure at this time. The Panel is also opposed to requiring corporations and other entities to obtain shareholder/member approval before making political donations.

- The Panel does not support a ban on political donations for the purposes of electoral expenditure. Any law that bans donations for one purpose but allows them to be made for others would do little to reduce corruption risks.
Bans on certain types of political donations

Background

Bans on political donations for the purposes of electoral expenditure

The terms of reference specifically refer to full public funding of State election campaigns. As noted in Chapter 4, this may refer to a system where non-election campaign costs such as administration and policy development expenses are partly or wholly funded by political donations. In such a system, political donations would be permitted, but only for purposes other than incurring electoral expenditure. Such expenditure is currently defined to include the costs of election advertising, producing and distributing election material, election campaign staff, and other expenditure incurred for the purposes of influencing the voting at an election (section 87). A similar purpose-based restriction currently applies to membership and affiliation fees, which may not be deposited into a party’s campaign account and may therefore only be used for administration and other non-election campaign purposes (section 96(6)).

A ban on political donations for the purposes of electoral expenditure appears to be favoured by both of the major parties on the basis that ‘[i]f election campaigns were fully funded by the public purse, we would remove the potential to buy access and legislation’.103

Full public funding of election campaigns implies that political donations would still be permitted to fund the administration and other costs of parties and candidates. As noted previously in Chapter 4 – ‘A Total Ban on Donations’, it is unclear how banning political donations for campaign purposes but allowing them to be made for others would remove the potential to buy access and achieve so-called ‘clean’ elections.

Another variant of this model is to allow political donations to be used for election campaign expenditure but to ensure that the public funding entitlement of a party or candidate is reduced by the value of political donations they receive. While this would reduce public funding costs and the demand for political donations to fund election campaigns, it would not eliminate political donations and associated corruption risks from the system.

Bans on anonymous donations

Anonymous donations of $1,000 or more are banned in New South Wales. The rationale for banning anonymous donations is that they give rise to the risk of corruption and undermine the transparency aims of the Act.

Section 96F of the Act provides that it is unlawful for a person to accept a political donation of $1,000 or more (a ‘reportable political donation’) unless the person knows the true name and address of the donor. This provision overlaps with section 96C of the Act which provides that it is unlawful for a person to accept a reportable political donation unless the person makes a record of the name and address of the donor.

In practice, the ability of people to make anonymous donations under $1,000 is limited because multiple political donations from the same donor in the same financial year must be aggregated for the purposes of both the disclosure requirements and the caps on political donations (sections 86(2) and 95A(2)). Parties and candidates accepting donations must therefore keep track of each donor’s identity and how much they have donated lest they breach the disclosure rules or caps on political donations by accepting multiple donations from the same donor that exceed the relevant thresholds.
Bans on donations from foreign sources

In practice, donations from foreign entities and individuals that do not reside in Australia are banned in New South Wales. The ban on foreign donations prevents foreign governments and foreign interests from influencing NSW elections. The International Institute for Democracy and Electoral Assistance (IDEA) reports that over 50 percent of countries impose a ban on anonymous political donations, while 63.3 percent of countries ban political donations from foreign interests.\(^\text{104}\)

Until recently, the Act (section 96D) indirectly banned foreign donations by providing that political donations by individuals who were not enrolled for Australian elections and entities without an Australian Business Number were prohibited. As a result, individuals who lived in Australia but who were not eligible to enrol (e.g. permanent residents) and entities that operated in Australia but did not have an ABN were banned from making donations. Doubts about the constitutional validity of section 96D emerged in the wake of the Unions NSW case. In that case, the High Court observed that there are many people in the community who are not enrolled to vote but who are nonetheless affected by decisions of government, and that these people have a ‘legitimate interest’ in seeking to influence electoral outcomes through the making of political donations.\(^\text{105}\)

Following recent amendments to the Act, section 96D now clarifies that unenrolled individuals and entities without an ABN may lawfully donate if they provide acceptable identification to the NSW Electoral Commission showing an Australian residential address. The objects of the amended section 96D are ‘to create certainty about who is making a political donation, by requiring the donor to be properly identified’ and ‘to remove a perception that certain foreign donors could exert influence over the Australian political process, by requiring a donor to have a legitimate link with Australia, either through residence of the donor or its officer or by being registered in Australia’.

Bans on donations from property developers and tobacco, liquor and gambling businesses

In 2012, the O’Farrell Government introduced a ban on political donations from corporations and other entities. This ban was ultimately struck down by the High Court in the Unions NSW case. Professor Twomey has concluded that ‘It is therefore clear that a general ban of that kind is not permissible in New South Wales’.\(^\text{106}\) Bans on corporate donations continue to apply in other jurisdictions such as Canada, which is not bound by the same constitutional constraints that face State legislatures in Australia. As Professor Anne Twomey explains:

…the factors to be taken into account by the Canadian Supreme Court are different to those in Australia and the United States, due to the Canadian Charter of Rights and Freedoms… Instead of giving primacy to First Amendment rights, as in the United States, or an implied freedom of political communication, as in Australia, the Canadian Supreme Court balances freedom of speech against equal participation in the electoral system.\(^\text{107}\)

Part 6, Div 4A of the Act also bans political donations from property developers, tobacco industry business entities, and liquor or gambling industry business entities (together known as ‘prohibited donors’). The ban also extends to any industry representative organisation if the majority of its members are prohibited donors. It is unlawful for a prohibited donor to make a political donation and for a person to make a political donation on a prohibited donor’s behalf. The ban also covers the ‘close associates’ of prohibited donors, including directors or officers of prohibited donors or their spouses, and related bodies corporate.

The ban on property developers was initially introduced by the Labor Government to allay public concern about corruption and undue influence following the ICAC’s 2008 investigation into Wollongong City Council. This investigation involved, among other things, allegations of
political donations being offered to councillors in exchange for favourable treatment of development applications. The ban on developer donations was described by the then Premier as the first step toward greater restrictions on political donations and increased public funding.\textsuperscript{108}

Amendments to the Act introduced by The Greens in 2010 extended the ban to tobacco, liquor and gambling entities. This was justified by John Kaye MLC on the grounds that political donations from these industries had distorted government decisions in New South Wales contrary to the public interest:

Let us be clear: Election Funding Authority data shows that since 1999 more than $30 million from the liquor industry, from the clubs, hotels, from developers, tobacco companies, pharmaceutical companies, and the private health and gaming industries has poured into the coffers of the Liberal Party, The Nationals and the Labor Party. Those industries and groups have given more than $30 million to those political parties not for some altruistic reason, and not because they were perceived as charities, but specifically with the expectation of an outcome.

If one has a good look around New South Wales, one can see that that outcome is writ large. It is writ large in gaming machines, in alcohol outlets, in developments, in tobacco consumption and in the private health industry. It is a $30 million distortion of New South Wales politics and it has undermined the best interests of the people of New South Wales. That $30 million has simply showed that this is a State for sale to the highest bidder.\textsuperscript{109}

The constitutional validity of the prohibited donor provisions will soon be determined by the High Court following a legal challenge brought by former Newcastle Lord Mayor Jeff McCloy.\textsuperscript{110} This case will involve consideration of whether Part 6, Div 4A of the Act breaches the implied freedom of political communication under the Commonwealth Constitution. The High Court may conclude that the prohibited donor provisions have been superseded by caps on political donations and are therefore no longer reasonably appropriate and adapted to serve a legitimate anti-corruption end. On the other hand, it is possible that the High Court may uphold the prohibited donor ban despite the caps on political donations. According to Professor Twomey:

If compelling evidence could be shown that donations made by persons or entities falling within these particular categories are more likely to give rise to corruption or the perception of corruption and undue influence, and that the caps on donations do not remove that risk, then such provisions might survive if regarded as reasonably appropriate and adapted to serve that legitimate end.\textsuperscript{111}

Although our terms of reference do not extend to local government, the Panel notes that if the prohibited donor provisions are struck down by the High Court or repealed, there could be significant implications for local government because there are no caps on political donations at that level. Without the prohibited donor provisions, property developers would again be able to make large political donations to councillors (although any political donations made at the State level would be subject to the caps on political donations contained in Part 6, Div 2A of the Act). This would no doubt enliven corruption risks given the planning and development responsibilities of local government.

**Discussion and conclusions**

**Bans on political donations for the purposes of electoral expenditure**

Most of the submissions received by the Panel, particularly those from academics, discussed full public funding in the context of a total ban on political donations (see Chapter 4 – ‘Total Ban on Political Donations’). Most did not address the question of whether full public funding of election campaigns should be provided, with political donations allowed for
other purposes such as administration. The Panel considers it important to express our views on this option given that the public statements of support from the major parties.

The Panel acknowledges that full public funding of election campaigns would lessen the demand for political donations that would otherwise need to be raised to run a competitive campaign. The question remains, however, as to whether banning political donations for election campaign purposes but allowing them to be made for other purposes would have any benefit in terms of reducing the risk of corruption and undue influence. A similar question arose during the debate on the 1993 amendments to the then Election Funding Act 1981 (NSW). Prior to those amendments, disclosure rules only applied to political donations made for election campaign purposes (as opposed to donations made for party administration purposes). In the context of that debate, the distinction between donations for campaign purposes and administration purposes was described by one speaker as ‘illusory’.112 The Panel agrees. Banning political donations for particular purposes but allowing them to be made for others would do little to reduce the risk of corruption and undue influence. Accordingly, the Panel does not support a ban on political donations made for election campaign purposes.

This option raises the related issue of whether political parties should be entitled to receive public funding up to the maximum they are permitted to spend on election campaigns, while still being permitted to accept political donations for other purposes. This is essentially the kind of system that will operate for the major parties for the 2015 State election following amendments to the Act in October 2014. Assuming that the results of the 2015 election are within the normal range, the major political parties will be eligible to be reimbursed up to the current cap on electoral communication expenditure – yet they are still able to accept political donations. Professor Twomey has been critical of this approach, describing it as ‘full public funding in disguise’.113

The Panel’s views on the amount of public funding that should be provided to political parties are set out in Chapter 7 – ‘Public Funding’.

**Ban on anonymous donations**

The submissions received by the Panel did not specifically focus on bans of anonymous donations of $1,000 or more. The majority of submissions did, however, express general support for measures that shed light on the sources and amounts of political donations. In his submission, Bret Walker SC argued that even small anonymous donations should not be permitted as unscrupulous persons could use this to avoid caps on political donations and disclosure requirements.114

The Panel agrees with Professor Twomey’s view that the policy reasons for banning anonymous donations are sound:

Anonymous donations clearly give rise to the risk of corruption and undermine the transparency otherwise achieved by the disclosure of donations. Hence, there is a clear legitimate interest in banning anonymous donations above a particular amount.115

Limits on anonymous donations are consistent with the approach taken in other jurisdictions, both within Australia and internationally. Banning anonymous donations above $1,000 aligns with the current disclosure threshold prescribed by section 92 of the Act. It also reduces the administrative burden associated with grassroots fundraising events where the party or candidate receives many small donations from individual supporters. To that extent, the $1,000 limit on anonymous donations in section 96F of the Act appears reasonable.

The Panel notes, however, that it is not clear how section 96F is supposed to work alongside the aggregation provisions in sections 86(2) and 95A(2) of the Act. The aggregation provisions reduce the risk of ‘donations splitting’ by ensuring that multiple donations from the
same source are treated as a single donation for the purposes of the caps on donations and the disclosure rules. If the aggregation provisions are to be effective, parties and candidates should be keeping track of who has made a political donation during the relevant financial year and the amount of that donation, otherwise they risk breaching the disclosure requirements or the caps on political donations. This raises the question of whether the anonymous donations limit is actually nil in practice.

The Panel recommends that a ban on anonymous donations above a certain amount should be retained. As part of its review of the Act, however, the Government should consider how to better integrate that policy with the other measures set out in the Act, especially the aggregation provisions. In practice, the aggregation provisions appear to be difficult to comply with and enforce. The Panel is inclined to support the approach taken in Western Australia, where small donations (i.e. those valued at less than one third of the cap on anonymous donations) are exempt from the rules that require multiple donations from a single source to be aggregated.¹¹⁶

Recommendation 5

That:

a) the ban on anonymous political donations above a certain amount be retained; and

b) the provisions that aggregate multiple political donations from the same donor be amended so that small anonymous donations are exempt.

Ban on foreign donations

The Law Society of New South Wales provided a very helpful submission on the constitutional and human rights issues raised by the former section 96D, which indirectly banned foreign donations by preventing unenrolled individuals and entities without an ABN from donating.¹¹⁷ Professor Twomey and Professor George Williams also raised the following concerns about the constitutional validity of the former section 96D during the academic round tables:

Prof Williams: …what [section 96D] does… is it actually locks out people who are not on the electoral roll from actually being able to make a donation. That is exactly what the High Court said you cannot do…

Prof Twomey: …I think they need to go back to section 96D. I think they need to give consideration as to whether permanent residents are able to donate. They can in Canada, the United States and New Zealand. I think that that really is the issue.

The other thing is…for entities, like corporations, unions, whatever, you need to have an ABN or another number recognised by ASIC. My recollection is the reason that that was put in was not to prevent clubs or unincorporated societies from donating, the point of that was about making sure that you had some kind of Australian presence. It was about stopping foreign involvement. I think that in itself is probably constitutionally okay, requiring some kind of Australian basis, that in itself is pretty common in other countries too. But I think they just need to tidy that up a bit so that it does not exclude unincorporated associations.¹¹⁸

As noted above, section 96D has recently been amended so that its scope better aligns with its purpose, which is to create certainty about who is making political donations and to ban political donations from foreign sources. Political donations from unenrolled individuals and entities without an ABN are now permitted if the donor provides the Electoral Commission with an Australian residential address. David Jackson AM QC has advised the Panel that the amended section 96D does not raise any constitutional issues. The Panel therefore recommends that the ban on donations from foreign sources in section 96D be retained.

47
**Recommendation 6**

That the ban on political donations from foreign sources be retained.

**Bans on political donations from certain donors**

This question elicited strong views from those who made submissions to the Panel.

Some people are deeply opposed to a ban on certain donors on the grounds that it unfairly discriminates between people based on their profession. As Bret Walker SC said in his submission to the Panel:

There is something deeply anti-democratic about allowing a school teacher to donate $1,500 to a party but prohibiting his or her neighbour, who happens to be a real estate developer, from the same conduct. Schooling the young and building are not different in their equal command of political attention. Nor should their practitioners or proponents be treated differently.\(^{119}\)

Others focussed on the practical problems associated with the current provisions in Part 6, Div 4A of the Act. As Dr Tham noted in his submission, a ‘property developer’ is defined in section 96GB of the Act as ‘a corporation engaged in a business that regularly involves the making of relevant planning applications by or on behalf of the corporation in connection with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit’. Because this definition turns on the activities of the donor rather than an objective criterion, it can be hard for the person accepting a donation (and in some cases the donor) to know whether or not the donor is prohibited from making donations. This is consistent with the submission of the Australian Cyclists Party, which admitted it ‘has found navigating this part of the legislation difficult. Without a list, it is impossible to tell whether a donor is prohibited until after the list is reviewed by the EFA [now the Electoral Commission]. There is ample room for abuse or even purposeful illegal donations to undermine a party’s reputation’.\(^{120}\) The activities-based approach also creates problems for the Electoral Commission in terms of administering and enforcing the prohibited donor provisions.\(^{121}\)

Dr Tham points out that the current definition of ‘property developer’ is too broad because it bans political donations even when no conflict of interest with planning decisions exists. For example, even where a property developer donating to a party or candidate does not intend to make a planning application he or she is banned. The definition is also too narrow because it does not cover all of the individuals and companies that may have an interest in a particular planning application (e.g. a large company that does not regularly make planning applications but that makes a significant, one-off planning application and donates large sums to local government councillors).\(^{122}\) Similar concerns about the scope of the current ban on property developers were raised by the Urban Taskforce.\(^{123}\)

The definition of ‘liquor or gambling industry business entity’ raises similar issues. These entities are defined in section 96GB as ‘a corporation engaged in a business undertaking that is mainly concerned with the manufacture or sale of liquor products, wagering, betting or other gambling, but only if it is for the ultimate purpose of making a profit’. The National Party of NSW submitted that this definition results in illogical outcomes, noting that ‘[o]ne of the largest poker machine and licenced venue operators in the state (Panthers Group) is entitled to make donations, but the owner of a small country pub with two poker machines would be prohibited’, presumably because the former is a non-profit organisation.\(^{124}\)

The Panel also heard that the prohibited donor provisions are unnecessary now that political donations are capped at relatively modest levels. As Dr Tham put it:

The key justification for these prohibitions is that they address the problem of corruption and undue influence in relation to property developers, gambling, liquor and tobacco companies.
The caps on political donations, however, effectively do so, rendering these prohibitions redundant.125 This view was shared by the Australian Cyclists Party, which noted that, ‘It is simpler to properly police the donation caps. It is difficult to conceive how a property developer could seriously attempt to buy undue influence with a $5,700 donation’.126 Professor Williams discussed the relationship between the prohibited donor provisions and the level at which the caps on political donations are set during the Panel’s academic round table discussions. As the level of the caps goes down, he suggests, so too does the need for specific bans on certain donors:

I think I would be concerned with removing those specific bans if we retained the $5,700 level limit, because I think at that limit there are reasonable perceptions about the level of influence that might be exerted, particularly through multiple donations from associated entities and the like who might be connected to the one development for example.

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

I think that is obviously fortified by the fact that I think there is a very real prospect that the developer ban will be struck down by the High Court... But I think the key is having the caps low enough that that undue influence is negated as a strong possibility.127

On the other hand, the Panel received a number of submissions strongly in favour of the current prohibited donor provisions. For example, the Foundation for Alcohol Research and Education expressed concern that ‘the removal of these bans will compromise the integrity of the NSW Government’s political processes and invite additional sources of corruption that will prioritise the profits of industries above the health and wellbeing of the community’.128 Indeed, a number of submissions argued that the prohibited donor provisions should not only be retained but extended to other industries. The Lock the Gate Alliance submitted that ‘…we are strongly of the view that donations from mining companies and lobbying firms are of the same ilk as donations from tobacco, gambling, liquor and property development and should be prohibited in New South Wales immediately’.129 Similar views were expressed by some of the individuals who made a submission to the Panel130 and The Greens:

If the existing bans on prohibited donors are overturned, donations reform in NSW will be dragged back to the bad old days. Efforts to expand the laws to cover other corruption-risk industries such as mining and government contractors will be much less likely to succeed. Now is the time to broaden and strengthen, not overturn, laws designed to stop the corrosive impact of donations from high corruption risk businesses on policy decision-making.131

History shows us that political donations from those who have an interest in development outcomes can compromise the integrity of government decision-making. There are, however, real problems with the current provisions. First, the ban is triggered by the activities of the donor in question. This is a subjective and non-transparent test which is difficult for all concerned, including donors. Second, the Panel has heard that the current definitions of ‘property developer’ and ‘liquor or gambling industry business entity’ can have unfair and illogical results in practice. Appropriate caps on political donations accompanied by frequent disclosure of donations appear to be a much fairer and simpler way of dealing with the risk of actual and perceived corruption posed by political donations from certain industries.

Ultimately this question will be settled by the High Court when it hands down its decision on the constitutional validity of Part 6, Div 4A in the McCloy case. This case will involve, among other things, consideration of whether the prohibited donor provisions are reasonably appropriate and adapted to serve a legitimate anti-corruption end.
It is important to note that the current caps on political donations are limited to State elections: they do not apply to local government elections or elected members of local councils. As noted earlier lifting the ban on political donations from property developers would mean that they could once again make large political donations to local government councillors, although any political donations for the purposes of State elections would be capped. David Jackson AM QC has advised the Panel that if the High Court finds Part 6, Div 4A invalid, it is possible that its ruling will not affect the operation of the prohibited donor provisions at the local government level. That is, ‘the prohibited donor provisions could be held valid in their application to local government elections even if they were invalid in their application to State elections.’\(^\text{132}\) This is because there is real doubt about whether the implied freedom of political communication should be ‘extended to a level below State legislatures (which are referred to in the Constitution) to local government (which is not)’.\(^\text{133}\)

Given that political donations from property developers are arguably of greatest concern at the local government level, repealing the prohibited donor ban would raise significant corruption risks. In this regard, the Panel notes that the Joint Standing Committee on Electoral Matters has previously recommended that caps on political donations should be introduced at the local government level.\(^\text{134}\) This recommendation has not been implemented.

The question of whether or not ‘prohibited donors’ are to continue to be banned from making political donations will be determined by the High Court shortly. The Panel does not wish to pre-empt the High Court’s decision. The Panel does, however, consider that caps on political donations should be introduced at the local government level in the event that the prohibited donor provisions are struck down or repealed.

**Recommendation 7**

That the ban on political donations from prohibited donors (property developers and liquor, gambling and tobacco industry business entities) be retained for the time being, subject to:

a) the High Court’s decision in *McCloy v New South Wales*; and

b) the introduction of caps on political donations for local government.
Caps and other restrictions on political donations

Background

Political donations in New South Wales are heavily restricted compared to other Australian jurisdictions. In addition to the bans on certain types of political donations discussed above, the Act also imposes caps on political donations and in-kind contributions, and restrictions on membership fees and affiliation fees.

Caps on political donations

Since 2010, the largest donation a single donor can make in a financial year is $5,000 to a political party or group, and $2,000 to a candidate, elected member or third-party campaigner (adjusted for inflation). The applicable NSW donations caps for the 2014–15 financial year would have been $5,700 for donations to parties and groups and $2,400 for donations to candidates, elected members and third-party campaigners. Recent amendments to the Act, however, reduced the caps to the levels that applied in 2011 (before their annual indexation for inflation) for the purposes of the 2015 election.

The purpose of the caps is to reduce both the risk and the perception of corruption and undue influence by removing large donations from NSW politics. The current levels at which the caps are set allow individuals and entities to express their support for a particular party or candidate by making political donations. Because large-scale donations are prohibited, their potential effect on the integrity of government decisions is neutralised.

‘Political donation’ is broadly defined in section 85 of the Act. This means that the caps on political donations cover most income from private sources. For example, the caps apply to money, free or discounted services, entry fees and payments associated with fundraising events, the proceeds from the sale of donated gifts, and uncharged interest on loans.

The caps also apply to transfers of money to a NSW branch of a party from other federal, State or Territory branches of the party, and transfers of money between associated parties (section 85(3A)). These provisions attempt to deal with the avoidance problems that arise due to the federal structure of political parties and the different election funding laws in each jurisdiction. This should prevent unregulated donations in one jurisdiction being channelled to candidates in New South Wales, similar to the alleged use of the Free Enterprise Foundation to ‘wash’ developer donations at the federal level before directing them to New South Wales. Transfers from a party to its endorsed candidates are also subject to the $2,000 candidate cap. Donations by a candidate to his or her own campaign are not ‘political donations’ for the purposes of the Act and are therefore exempt from the cap (section 95A(4)).

The practical impact of the caps on the major parties, which previously relied heavily on large-scale donations from private sources to fund their campaigns, has been offset by a significant increase in public funding. Similarly, the level of the current caps does not appear to have disadvantaged the minor parties in New South Wales. Before the caps were introduced, the minor parties (with the exception of the Shooters and Fishers Party and the Unity Party) obtained the majority of their private funding from annual subscriptions and donations of $1,500 or less.

As noted in the Panel’s Issues Paper, the long-term impact of the caps on the ability of third-party campaigners to fund political campaigns in New South Wales is less certain. Disclosure data published by the NSW Electoral Commission indicates that while a number of third-party campaigners have incurred electoral expenditure and made political donations
themselves, only two have actually received reportable political donations since the disclosure period commencing on 1 July 2010.  

Cap on in-kind contributions

A $1,000 cap on in-kind contributions was first introduced in 2008 on the basis that such contributions ‘create particular problems in terms of transparency’. Concerns about in-kind gifts were initially sparked by allegations that Sydney Lord Mayor Clover Moore had significantly underestimated the value of office accommodation that had been donated to her in the lead up to her 2004 mayoral election campaign.

Under section 96E of the Act, the following in-kind contributions (or ‘indirect campaign contributions’) are capped:

- office accommodation, vehicles, computers or other equipment provided for no consideration or inadequate consideration for use solely or substantially for campaign purposes;
- making payments to cover the electoral expenditure (for advertising or other purposes) of a party, elected member, group or candidate; and
- waiving charges in relation to advertising for a party, elected member, group or candidate.

Importantly, volunteer labour and the incidental use of their vehicles or equipment are excluded from the cap on in-kind contributions. While the provision of professional services or advice for little or no fee does not fall within the definition of ‘indirect campaign contribution’, it falls within the definition of ‘political donation’ and is therefore subject to the higher caps of $2,000 to candidates and $5,000 to parties.

The Act also empowers the NSW Electoral Commission to issue binding guidelines to help volunteers resolve any uncertainty arising from the cap on indirect campaign contributions.

Party subscriptions and party levies

Membership and affiliation fees (together known as ‘party subscriptions’) are partially exempt from the caps on political donations. Section 95D of the Act states that a party subscription is exempt from the cap, ‘except so much of the amount of the subscription as exceeds the relevant maximum subscription’ of $2,000 per member. Where a party subscription exceeds $2,000 per member, the excess over $2,000 is treated as a political donation and the relevant caps apply. Under these provisions, an individual member of a political party can pay an annual membership fee of up to $2,000 as well as make a donation to the same political party up to the $5,000 cap. Entities, for instance trade unions, can also be affiliated to a political party and pay affiliation fees up to $2,000 multiplied by the number of members of the affiliate before the caps will apply. In the 2011-2012 disclosure period, before the O’Farrell Government’s ban on donations from corporations and other entities, the Labor Party reported a total of $1.34 million in party subscriptions, while the Liberal Party reported a total of $994,330. In 2013-2014, the Labor Party reported a total of $1.6 million in party subscriptions while the Liberal Party reported $944,457. It is noted that the ALP’s reported total for 2013-2014 may include the affiliation fees that it would have received in 2012-2013 had the ban on union affiliation fees not been in place at that time.

Parties are not permitted to use party subscriptions to fund electoral expenditure under section 96(6). This provision was introduced to create a more level playing field between the Labor Party, which receives affiliation fees from unions, and other political parties. When introducing this restriction, the then Premier said:

…the Government appreciates that such a source of non-public funding could be seen as unfair, both by smaller parties and by parties with different organisational structures.
However, being fair requires recognition that political parties built on a long tradition of supporting workers’ involvement in our political system, and they must be able to meet their administrative costs. Therefore, the bill proposes that all registered political parties will be prohibited from using membership and affiliation fees to incur electoral expenditure. However, such fees will still be able to be used to meet party administration costs. \(^{141}\)

Some political parties impose compulsory levies on their elected Members of Parliament. These levies can be either a fixed amount or a percentage of the MP’s parliamentary salary. Party levies are exempt from the caps on political donations under section 95D. They do, however, fall within the definition of ‘political donation’ and are therefore required to be disclosed.

**Discussion and conclusions**

**Levels of the caps on political donations**

The submissions received by the Panel show that there is widespread support for caps on the amount of money that a single donor can donate to a political party, group, candidate or third-party campaigner. Opinions differ, however, on the level at which the caps should be set.

The Labor Party supports the current caps of about $5,000 for donations to parties and $2,000 for donations to candidates. Many people argued for a reduction in the current levels. For example, The Accountability Round Table Ltd argued for a reduction in the current caps to $1,000 per annum per donor. \(^{142}\) The Greens suggested that the current caps be reduced to $1,500 and $500 respectively. \(^{143}\) Alex Greenwich MP also supports a reduction on the basis that the total amounts that can be donated to parties and candidates over a four-year term under the current caps could give rise to undue influence:

> Existing caps on donations work well however they could be lowered to reduce the potential for conflicts of interest. If the $2,400 per year cap to a candidate was brought down to $1,000, it would reduce maximum donations in a four year electoral cycle from $9,600 to $4,000 – a significant drop.... Similarly party donation caps should be reduced from $5,700 to $2,500. Currently a party can receive up to $22,800 in funding from one donor in a four year electoral cycle. Such a large amount could be seen to create a sense of debt between the donor and receiving party.

Professor Williams also supported a decrease in the level of the cap commensurate with increases in the amount of public funding paid to political parties and candidates:

> The donations levels are $5,700. I personally would be happy to see that level lowered. It is a somewhat arbitrary question as to what it should be lowered to but I think given the public concern about these issues and the statements made by the Premier and others about the willingness to consider greater levels of public funding, that we could move a bit more along that spectrum of saying let’s lower the cap and recognise that the taxpayer may be prepared to pay a little more in order to reduce the level of influence that people may be having at the higher level of those donations. \(^{144}\)

The Panel agrees that caps are a measured and appropriate way of targeting large donations which clearly pose the greatest risk in terms of corruption and undue influence. To the extent that caps on political donations encourage political parties and candidates to seek modest contributions from a broad base of constituents rather than being beholden to moneyed interests, the Panel believes that caps are consistent with democratic principles. Indeed, they are an essential pillar of the NSW campaign finance regime. Many overseas jurisdictions now impose caps on political donations, including Canada and the United States. In *Buckley v Valeo*, the US Supreme Court acknowledged that donations caps focus ‘precisely on the problem of large campaign contributions while leaving persons free to assist and support candidates and parties with financial resources’. \(^{145}\)
On balance, the Panel believes that the level of caps on political donations ($5,000 for parties and $2,000 for candidates, adjusted for inflation) are about right. The Panel notes that the High Court’s decision in the McCloy case will address the constitutional validity of the current caps and provide guidance as to whether future reductions in the level of the caps might be constitutionally sound. The Panel considers that the caps should be adjusted annually in line with increases in the Consumer Price Index, rounded up to the nearest whole number multiple of $100 in the interests of simplicity.

**Combined cap for parties and their endorsed candidates**

The National Party pointed out while the Act stops a person from donating more than $2,400 per year to candidates endorsed by the same party (section 95A(3)), there is no aggregation of donations to a party and its endorsed candidates. This means that a single donor can give $5,000 to a party and $2,000 to its endorsed candidate or candidates – a total of $7,000 per year. The National Party therefore suggests a combined party/candidate cap of $2,000, which would ‘remove the conception of a candidate as distinct from the party organisation for financial purposes’ and ensure that all political donations for the benefit of a party and any of its endorsed candidates would be made directly to the party.\(^\text{146}\)

The Panel does not consider that this degree of centralisation is necessary to fulfil the anti-corruption aims of the Act. Indeed, while it might suit the centralised structures of some major political parties, there are good arguments that it would increase corruption risks at the candidate level, particularly where the party chooses for strategic reasons not to invest a great deal in a particular candidate’s campaign. Further, it would unduly restrict the freedom of individuals to directly support the campaign of their preferred candidate with a modest political donation. It would also be contrary to the kind of grassroots, localised fundraising activity that should be encouraged in a representative democracy. Accordingly, the Panel recommends that separate caps for political donations to parties and their endorsed candidates should remain in place.

**Exemption from cap for transfers of funds from a party to a candidate**

The Greens submitted, and The Nationals agreed, that transfers of money from a party to its endorsed candidates should be exempt from the caps on political donations to candidates. The current rules, it was argued, fail to recognise the common interests of parties and candidates and have forced parties to set up elaborate and unnecessary financial arrangements with their candidates in order to work around the caps:

Currently parties effectively donate much more than $2,400 to its candidates by utilising section 84(7) of the Act and invoicing them for election expenses incurred by the party, but the candidate never pays the invoice, or by making loans to the candidates. Either is a convoluted method for a party to provide essential support to its candidates’ campaigns. Section 84(7) effectively acknowledges that parties will need to finance their candidates, but it is a cumbersome and questionable way to achieve this objective.

The simple solution is that parties and candidates should be exempt from the donations caps when the party makes donations to its endorsed Legislative Assembly candidates. Apart from being more transparent than the current obscure method of parties funding their candidates, it would facilitate more local campaigning autonomy as the funds would end up in the campaign account of a local candidate rather than remain in a party head office bank account.\(^\text{147}\)

The Panel acknowledges The Greens’ suggestion that transfers of money from a party to its endorsed candidates are not a corruption risk and should therefore be exempt from the $2,000 cap on political donations to candidates. The Panel is concerned, however, that such an exemption could undermine the $2,000 cap on donations to candidates. Donors wishing to avoid the lower candidate cap could make a $5,000 political donation to a party which could then be transferred in full to the relevant candidate. The Panel strongly believes that it
is appropriate to maintain a lower cap for political donations to candidates to reduce the risk of undue influence.

The Panel acknowledges that the caps effectively prevent parties from directly funding their candidates, and that this has resulted in parties invoicing their candidates for electoral expenditure incurred on their behalf. The invoice is then ‘paid’ from the candidate’s public funding entitlement (as envisaged by section 84(7)). The Panel does not consider that there is anything inherently wrong with such arrangements, provided there is proper, itemised disclosure of all electoral expenditure incurred by a party for the purposes of influencing the vote in a particular electorate. This is discussed further in Chapter 8 – ‘Disclosure’.

**Recommendation 8**

That the current caps on political donations be retained and adjusted annually for inflation, rounded up to the nearest whole number multiple of $100.

**Cap on in-kind contributions**

The submissions received by the Panel show some confusion as to what is caught by the cap on indirect or in-kind campaign contributions. The Australian Cyclists Party submitted that the current cap of $1,000 is too low for small parties that rely heavily on support from volunteers. This is despite the fact that volunteer labour is specifically exempt from the $1,000 cap under subsection 96E(3) of the Act, and that the provision of legal and other professional advice for little or no fee would be classified as a ‘political donation’ rather than an indirect campaign contribution. According to the Australian Cyclists’ Party submission:

> We do believe that there is need to review the cap on ‘in-kind’ donations. The current cap of $1000 is much too low if it were to include ‘in-kind’ support. It is too easy to inadvertently exceed this figure, especially for small parties who rely on donated time from supporters for professional advice because we can’t afford to employ or engage professional legal, financial, or communications expertise. A fairer and simpler approach would be to cap all donations, whether monetary or in-kind at the indexed rate and/or consider making in-kind donations that are explicitly administrative (legal and accounting support towards party registration for example) as exempt of a fixed cap.148

In the interests of consistency, the Panel considers that indirect campaign contributions (currently capped at $1,000) should be capped at the same levels as other political donations (i.e. $2,000 for donations to candidates and $5,000 for donations to parties. While the current cap is the same as the disclosure threshold of $1,000, there does not appear to be any real benefit in maintaining a lower cap for the specific in-kind donations listed in section 96E as opposed to other forms of in-kind donations (e.g. professional advice for no fee) and monetary donations. The Panel considers that the cap on indirect campaign contributions, which was first introduced in 2008, has been superseded by the general caps on political donations introduced in 2010. There is no evidence that the relationship between these two caps was considered in the debate on the 2010 amendments. The Panel notes that this is precisely the kind of issue that warrants a comprehensive review of the Act (see Recommendation 1).

The Panel also notes that the current definition of ‘indirect campaign contribution’ appears to be creating uncertainty for smaller parties, particularly in relation to whether volunteer labour is caught by the cap. The current section 96E empowers the Electoral Commission to issue guidelines about what falls within the definition of ‘indirect campaign contribution’. The Panel recommends that the Commission publish such guidelines as a matter of urgency.
Recommendation 9

That:

a) the cap on indirect campaign contributions (or in-kind donations) be made consistent with the caps that apply to other political donations (i.e. $2,000 for donations to candidates and $5,000 for donations to parties); and

b) the NSW Electoral Commission issue guidelines to help smaller parties and volunteers better understand their obligations in relation to in-kind donations.

Membership and affiliation fees, and party levies

As noted above, subsection 96(6) of the Act provides that party subscriptions cannot be deposited into a party’s State campaign account. This means that party subscriptions may only be used for party administration purposes, not campaign purposes. The purpose of this restriction was to create a more level playing field between the Labor Party, which receives affiliation fees from unions, and other parties.¹⁴⁹

A number of submissions received by the Panel questioned whether the restriction on using party subscriptions to incur electoral expenditure is necessary. According to The Greens, ‘the prohibition on depositing membership fees into the election account cannot be justified’ because they are ‘a low corruption risk’.¹⁵⁰ The Labor Party agreed, noting that ‘allowing the use of membership fees will help reduce the level of private donations needed for campaign funding’.¹⁵¹

The Opposition moved an amendment to lift restrictions on the use of party subscriptions during the debate on the Election Funding, Expenditure and Disclosures Amendment Act 2014. The amendment was justified on the basis that the current restrictions are ‘not only counterintuitive but frankly perverse’ because ‘the very essence of why one joins a political organisation is to help it electorally’.¹⁵² Similarly, the Shooters and Fishers Party said that their members ‘expect their membership fees to be spent on getting someone elected’.¹⁵³

The amendment was not, however, supported by The Greens on the grounds that ‘there is a grave risk that we will invite backdoor donations from all sorts of sources that we have tried to drive out of the political process’, presumably those from prohibited donors.¹⁵⁴

As noted above, the Panel considers that the distinction between election campaign costs and administration costs is somewhat superficial in the context of a ban on political donations. The Panel acknowledges, however, that the current restriction on the use of party subscriptions for campaign purposes is a way to accommodate the historical link between the union movement and the Labor Party, while maintaining equality of arms between it and the other parties. Accordingly, the Panel is not inclined to recommend any changes to the way party subscriptions are treated under the Act.

The Panel heard that the exemption of compulsory party levies from the caps on political donations is a peculiar feature of the Act. The Nationals said:

Currently, a party levy paid by an MP is exempt from the cap on donations, but a contribution by that same MP to their party outside the levy is a donation that is subject to the cap. Such a distinction is entirely arbitrary and serves to discriminate between the structures and established practices of different parties. Party levies should be treated in exactly the same way as any other contribution by an MP to their own party. Either all should be subject to the same cap or they should all fall outside the cap.¹⁵⁵

At first glance, it appears arbitrary to impose a cap on political donations from elected Members to their parties while party levies remain uncapped. While it is true that a political donation from an MP to his or her own party does not by itself raise corruption risks, it is well-established that caps on donations tend to be more effective if they are universally
applied. Excluding particular types of political donations or donors from the caps creates opportunities for avoidance. Dr Tham has dubbed this ‘the hydraulics problem’ – that imposing limits on political donations in one part of the system will simply cause donations to flow through other, less tightly regulated channels. The Panel is therefore minded to maintain the cap on political donations from MPs to their parties to support the integrity of the scheme as a whole.

The question then arises as to whether compulsory party levies should be capped in the same way as political donations. The Panel considers that compulsory party levies can be distinguished from political donations for the purposes of the caps. Party levies are compulsory fees charged at a prescribed rate to all elected Members under the rules of the party. The transparent, non-discretionary nature of levies means that they cannot be used as a conduit for illegal political donations in the same way that uncapped MP donations could. The Panel is therefore not inclined to recommend any changes to the rules governing party levies.

Shareholder/member authorisation of political donations

A small number of submissions expressed views on whether political donations should be approved by a majority of members of a corporation or other entity – a question that was specifically raised in the Panel’s terms of reference.

Dr Iain McMenamin said, ‘I think even small donations have the potential to corrupt the political systems. In order to restrict such donations, while avoiding constitutional obstacles and not privileging one side of politics, I suggest that business corporations and unions cannot make donations without the consent of an AGM’. Rather than requiring that every political donation be approved by a majority of members, Leong, Hazelton and Tello suggest a less onerous alternative whereby ‘corporations and unions should be permitted to engage in political activity only when such activity is in accordance with a policy ratified by its membership at an annual general meeting. Each policy would have to be renewed every four years’.

Unions NSW disagreed with this approach on the basis that it duplicates the governance requirements already imposed under corporations and industrial law, and is unnecessary if other transparency measures such as real-time disclosure of political donations are in place:

The terms of reference questioned whether prior approval of a majority of members of a corporate entity or organisation was required before making a donation. Unions NSW believes this is unnecessary as such a decision is on par with other business or organisation decisions which are made by the delegated authority of a CEO or equivalent. Governance requirements already exist in corporations and industrial law and should not also be an additional area falling under the purview of electoral funding law. This is particularly so if, as is recommended, proper transparency through a requirement for more frequent ‘real time’ disclosure is introduced.

The Panel is not convinced that there would be any real benefit in requiring corporations and other entities to obtain the approval of a majority of their members before making a political donation. The caps on political donations ensure that the amounts in question are relatively small, while real-time disclosure requirements (as recommended in Chapter 8 – ‘Disclosure’) ensure transparency.
Chapter 6 – Expenditure Caps

- Expenditure on election campaigns is currently capped by law. These caps limit the expenditure ‘arms race’ between the parties who believe that, other things being equal, ‘money wins elections’. They also aim to promote fairness between electoral contestants.

- In the 2011 State election the Labor Party and the Coalition spent around $16.1 million and $18.6 million each on their respective campaigns. This represented about 85 percent of campaign expenditure by all parties and candidates.

- The expenditure cap for parties contesting Legislative Assembly seats is $100,000 per seat, plus an additional $100,000 cap per seat for each endorsed candidate. If a party runs candidates in all 93 seats, as is usual for the Labor Party and the Coalition, the party’s total combined cap for election expenditure is $18.6 million.

- The expenditure cap for parties primarily contesting the Legislative Council is about $1 million.

- The expenditure cap for independent candidates is $150,000.

- Expenditure caps apply to campaign spending in the six month period before an election. We support the recent move to broaden the types of campaign expenditure caught by the caps and our recommendations further extend the types of expenditure which is caught by the caps.

- There is widespread support for caps, including by the Panel. The level of the caps seems to be appropriate and we recommend adjusting the caps for inflation over time. There were some suggestions that the caps should be lower, and to some extent, broadening the definition of what falls under the caps has this effect.

Background

The Panel’s terms of reference require consideration of the appropriate level at which to cap expenditure on state election campaigns and the methodology which should be used to determine the caps.

Expenditure caps are designed to address what Senator John Faulkner has described as ‘the spiralling cost of election campaigns which are creating impetus for… a campaign fundraising arms race’. The expenditure is driven by the fact that relatively more of it provides an electoral advantage. Expenditure caps promote fairness between electoral contestants, including by limiting the electoral advantage enjoyed by wealthy candidates and parties. They reinforce other regulatory measures such as caps on donations by reducing the demand for private funding. Putting limits on expenditure prevents increased public funding from artificially inflating campaign expenditure and reduces the demand for private donations.

Not surprisingly most electoral expenditure happens in the period just before an election. ‘Electoral expenditure’ is defined in section 87(1) of the Act as ‘expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election’. While the major parties have electoral expenditure of between $2 to $4 million between them in non-election years, they spent over $10 million each in the 2011 election...
year. The following graph shows the total ‘electoral expenditure’ for the past four years.\textsuperscript{160} It illustrates the emphasis on spending in the election campaign year.

**Figure 5 – Total Electoral Expenditure by Parties and Candidates**

The electoral expenditure for each party and its endorsed candidates as well as independent candidates is shown in the next graph. It covers the disclosure period for the 2011 election, from 1 July 2010 to 30 June 2011.\textsuperscript{161} The major parties each spent over $16 million on their 2011 election campaigns and the minor parties spent up to $2.5 million.

**Figure 6 – Total Campaign Spending by Parties, their Endorsed Candidates and Independents – 1 July 2010 to 30 June 2011**

The following table shows the total expenditure on NSW State elections from 1999 to 2011. The spending amounts have been converted to 2011 dollars and have been adjusted to reflect an increase in the number of electors. The expenditure amounts only include party expenditure and exclude expenditure by endorsed candidates. The major parties, not surprisingly, dominate the expenditure.

It is clear that in real terms the costs of election campaigns have increased significantly. In 2011 real campaign expenditure was $40.6 million compared to $26.5 million in 1999.
Caps on ‘electoral communications expenditure’

Expenditure caps were introduced for the 2011 State election as part of major changes to the Act. Prior to 2011, parties and candidates were able to spend unlimited amounts on their campaigns. The expenditure caps operate in the six months leading up to an election. They apply to a subset of ‘electoral expenditure’ called ‘electoral communication expenditure’, which is defined as spending on media and internet advertisements, election material, and staff engaged in election campaigns. Legislation was passed in 2014 to extend this definition to include market research and campaign travel costs. The Premier stated in his second reading speech that this expanded definition ‘will more accurately capture the true expenses associated with running an election campaign’.\(^{163}\) Party administration, election fundraising and campaign account auditing costs are excluded from the caps. For the purposes of the caps, expenditure is taken to be incurred when services are actually provided or goods are delivered. Expenditure on advertising is taken to be incurred when the advertising is broadcast or distributed.\(^{164}\)

Expenditure caps in New South Wales are designed to accommodate the voting system for election to the NSW Parliament. For the Legislative Assembly (or Lower House) there are 93 single member electorates, with Members elected under a system known as optional preferential voting. The government is formed by the political party that has the majority of Members in the Assembly. There are 42 Members of the Legislative Council (or Upper House), elected under a voting system known as proportional representation. Members of the Legislative Council are elected by all voters—the whole state is treated as one electorate. One-half of the members of the Council (21) are elected every four years, so that Members have an eight-year term. Some political parties stand for election in either the Legislative Assembly or the Legislative Council, and some parties stand in both Houses. Independent candidates and groups contest both Houses.

The current caps on electoral communication expenditure are set out below in Figure 8. While the caps are adjusted for inflation before each election, one of the interim measures introduced by the Premier for the 2015 election was a slight reduction in the caps by removing this indexation for this election and returning the caps to the levels that applied for the 2011 election.

The caps are intended to accommodate the various ways for contesting an election. The expenditure limit for a party that endorses candidates in all 93 districts is $9.3 million, with a further $100,000 for its candidates in each electorate ($18.6 million in total). There is a further cap of $50,000 for party spending in each electorate within the overall party cap. This cap applies to expenditure by a party in a particular electorate that explicitly mentions the name of a candidate contesting the electorate or the name of the electorate.\(^ {165}\) Parties and

---

\(^{162}\) This table was compiled by Dr Joo-Cheong Tham and Dr Malcolm Anderson.

---

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>ALP</td>
<td>11,269,920</td>
<td>15,293,511</td>
<td>20,142,059</td>
<td>1,605,440</td>
</tr>
<tr>
<td>Coalition</td>
<td>11,121,532</td>
<td>5,852,543</td>
<td>8,387,495</td>
<td>14,370,131</td>
</tr>
<tr>
<td>Greens</td>
<td>267,887</td>
<td>735,923</td>
<td>559,459</td>
<td>1,686,502</td>
</tr>
<tr>
<td>Christian Democrats</td>
<td>544,032</td>
<td>615,458</td>
<td>522,373</td>
<td>308,478</td>
</tr>
<tr>
<td>Shooters Party</td>
<td>326,240</td>
<td>539,843</td>
<td>817,892</td>
<td>895,418</td>
</tr>
<tr>
<td>Total: all contestants (incl. other parties and independents)</td>
<td>26,488,471</td>
<td>24,576,120</td>
<td>30,820,812</td>
<td>40,610,390</td>
</tr>
</tbody>
</table>
groups focused primarily on the Legislative Council can spend up to $1.05 million. Independent candidates in either House can spend $150,000.

**Figure 8 – Expenditure caps for the 2011 and 2015 elections**

<table>
<thead>
<tr>
<th>Electoral communications expenditure incurred by:</th>
<th>Cap</th>
</tr>
</thead>
<tbody>
<tr>
<td>A registered political party endorsing candidates for the Legislative Assembly</td>
<td>$100,000 x number of districts in which a candidate is endorsed. $50,000 in each electorate (additional cap within overall cap)</td>
</tr>
<tr>
<td>A registered political party endorsing candidates for the Legislative Council and between 0 and 10 candidates for the Legislative Assembly</td>
<td>$1,050,000</td>
</tr>
<tr>
<td>A group of unendorsed candidates for the Legislative Council</td>
<td>$1,050,000</td>
</tr>
<tr>
<td>An endorsed candidate for the Legislative Assembly</td>
<td>$100,000</td>
</tr>
<tr>
<td>An unendorsed candidate for the Legislative Assembly</td>
<td>$150,000</td>
</tr>
<tr>
<td>An ungrouped candidate for the Legislative Council</td>
<td>$150,000</td>
</tr>
</tbody>
</table>

**The electoral ‘arms race’ in New South Wales**

It is difficult to know whether the expenditure caps had an impact on spending for the 2011 election. Dr Tham and Dr Anderson sought to analyse the impact of the expenditure caps on the actual spending of the parties by comparing party expenditure on advertising for the 2007 election with the expenditure caps that were in place for the 2011 election. In 2007 the Labor Party spent significantly above the 2011 expenditure caps, while spending by the other parties was significantly below the caps. Dr Tham and Dr Andersons’ findings are illustrated in the following table.

**Figure 9 – 2007 advertising expenditure (in 2011 dollar figures) as a percentage of the caps on ‘electoral communications expenditure’**

<table>
<thead>
<tr>
<th></th>
<th>Caps on spending: 2011 NSW State election ($)</th>
<th>Number of LA candidates (number)</th>
<th>Electoral expenditure: 2007 NSW State election ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALP (including Country Labor)</td>
<td>9,300,000</td>
<td>93</td>
<td>20,142,059</td>
</tr>
<tr>
<td>Coalition</td>
<td>9,300,000</td>
<td>93</td>
<td>8,387,495</td>
</tr>
<tr>
<td>Greens</td>
<td>9,300,000</td>
<td>93</td>
<td>559,459</td>
</tr>
<tr>
<td>Christian Democrats</td>
<td>8,600,000</td>
<td>86</td>
<td>522,373</td>
</tr>
<tr>
<td>Shooters Party</td>
<td>1,050,000</td>
<td>5</td>
<td>817,892</td>
</tr>
</tbody>
</table>

In analysing the spending patterns of the major parties over a number of NSW elections, Dr Tham and Dr Anderson concluded that parties will inevitable direct more money:

…to winnable elections, constrained somewhat, by the necessity to perform well in unwinnable contests in order to maintain support and legitimacy (and probably mutual encouragement within the party), to conserve funds for future elections (or inter-election
‘seed-sowing’) and to avoid any possibility of losing status as the primary party of opposition (and thus the prospect of electoral and historical oblivion if a third party were to rise and steal that mantle).\textsuperscript{167}

In terms of spending in individual seats, the analysis concluded that relatively more spending occurs in winnable campaigns, and that in very tightly balanced seats ‘large amounts of extra ‘windfall’ cash (relative to a competitor) will undoubtedly enable the “purchase” of small proportions of votes needed to tip the balance’.\textsuperscript{168}

**Discussion and conclusions**

The Panel supports expenditure caps. They are an essential component of the election funding regime. We endorse the democratic principles behind the expenditure caps – the idea of a fair contest of ideas, as opposed to a battle of bank-balances.

In general, the Panel supports expenditure caps that:

- provide for a fair contest between parties and between endorsed and independent candidates;
- do not constrain parties and candidates from sufficient engagement with voters in order to communicate their policies;
- limit spending in support of other regulatory measures, such as caps on political donations and ensuring that increased public funding does not artificially inflate campaign expenditure; and
- are enforced by the NSW Electoral Commission, particularly in marginal electorates where there is a significant incentive to breach the caps.

The Panel’s consultations revealed broad support for caps on expenditure. Dr Tham noted that they are ‘crucial in terms of equality of arms between the major parties’.\textsuperscript{169} Marilyn Long, one of the private individuals who made a submission to the Panel, stated:

> There needs to be a cap on amounts spent by Parties on elections and they need to work hard and clever to convey their messages … within spending limits and not just throw money around.\textsuperscript{170}

Expenditure caps are also supported as a means of preventing wealthy individuals from overpowering other electoral participants. As stated by Bret Walker QC:

> … most people resent the notion that a very wealthy industry or pressure group or billionaire, whose views have not persuaded a multitude of ordinary people to contribute financially to their dissemination, can nonetheless equal or outdo such a combination of small voices. In my opinion, speaking historically and sociologically, this is the reason why various legislatures in societies we would care to compare with ourselves have variously imposed expenditure limits as well as contribution limits on election campaigning.\textsuperscript{171}

The International Institute for Democracy and Electoral Assistance (IDEA) provided the following advice for assessing the effectiveness of spending caps:

> [I]t depends both on whether the limit is set at the right level to curb the advantage of those with access to a lot of money without hindering inclusive and engaging campaigning, and (in particular) on whether they are enforced. Other factors that may have a bearing on effectiveness include the definition of spending (eg. staff costs included?) and the time period of any limit (ie. does the limit cover a long enough period of time to achieve its purpose?).\textsuperscript{172}
Level of the expenditure caps

There has been debate about whether the spending caps for the 2011 election were effective in constraining spending.

After the 2011 election, Dr Tham interviewed senior officials from the major political parties. On the basis of these interviews, he stated that ‘none of the parties considered that the caps had hindered their election campaigns’. He found that the major parties seemed to ‘treat the caps not only as ceilings but also as “targets”’. Dr Tham found that this behaviour was ‘consistent with the disclosed figures with these parties coming close to spending up to the maximums permitted under their party caps’.\(^{173}\)

There are differing views on whether the caps are currently set at the right level. The NSW Electoral Commission felt that any reduction in the current caps was unwarranted. The Electoral Commission suggested that the ‘current caps (indexed yearly) are conservative, and it is only the major parties that incur expenses up to the applicable electoral communication expenditure cap’.\(^{174}\)

Bret Walker SC submitted that the current caps are roughly correct. He expressed the view that:

> Current limits on electoral expenditure are not obviously too generous in favour of candidates or parties, and should therefore not be reduced. Neither should they be increased, except in line with inflation.\(^{175}\)

On the other hand, some submissions argued for a reduction in the caps. The Greens recommended that the Legislative Assembly caps be reduced to ‘around half the existing levels’. They acknowledged that caps ‘resulted in a reduction in the massive expenditure that took place in some hotly contested seats in the 2007 election’. Nevertheless, they argued that the current caps are too generous and should be reduced to ‘ease financial pressure on parties and candidates and to help ensure that wealth is not buying an election outcome’.\(^{176}\)

Greg Piper MP argued that the current caps favour those with significant financial resources and ‘more modest caps would help ensure candidates were elected on their merits rather than the size of their bank balances’.\(^{177}\)

The Christian Democratic Party submitted the following model for expenditure caps.

1. A Maximum $50,000 per candidate per Legislative Assembly electorate.
2. Plus a further $500,000 for the Legislative Council provided the Party or Group is standing a minimum of candidates in 50% of Legislative Assembly electorates.
3. The Legislative Council amount drops to a Maximum $50,000 if a single candidate or $100,000 for a Group with at least 5 Candidates, otherwise, the $50,000 limit applies.
4. A Political Party would be able to group the allowable maximum amounts towards a total campaign as it sees best up to a Grand Maximum of $5,150,000.\(^{178}\)

The Labor Party submitted that the caps were not effective in constraining overall political expenditure by the major parties for the 2011 election. They argued that even though the Labor Party and the Coalition spent close to the maximum for party expenditure ‘no political party came close’ to the maximum for endorsed candidates. They noted that party disclosures indicated that, taking into account spending by endorsed candidates, ‘Labor spent $13.02 million and the Coalition spent $12.97 million’.\(^{179}\)

To address this concern, the Labor Party recommended reducing overall spending by combining the caps for parties and endorsed candidates as outlined below.
1. Total aggregate spending by a political party and its candidates is capped at $150,000 per electorate being contested.

2. No more than $150,000 can be spent by a political party (or its candidates) in support of a candidate in any particular seat.\textsuperscript{180}

They submitted that this would lead to a reduction in the cap for a party contesting all seats, from around $18.6 million to $13.95 million.\textsuperscript{181}

The Panel has considered these views and proposals. We have concluded that the current method used to determine the caps adequately accommodates the voting system in New South Wales and the various ways in which parties and independents participate in an election. There are caps for parties that are focussed on contesting Legislative Assembly seats and winning government, and caps that apply to those who are campaigning on particular issues and caps for those seeking to influence the legislative agenda by securing representation in the Legislative Council. The current caps provide for a fair contest in Legislative Assembly electorates, by seeking to provide equal spending for party and independent candidates. We also support the current requirement for the caps to be adjusted in line with increases in the Consumer Price Index, rounded up to the nearest whole number multiple of $100 in the interests of simplicity.

While the structure of the expenditure caps may be sound, it has been difficult to evaluate whether they have been set at the right level. This is due to a number of factors. First the way in which expenditure is disclosed is not conducive to analysis of how party and candidate expenditure compares to the caps. Disclosure is by financial year and there is no requirement to separately disclose the electoral communications expenditure incurred during the capped period. While some parties have voluntarily provided this information to the NSW Electoral Commission, in most cases there is no simple way to tell whether a cap has been breached, outside of laboriously sifting through each disclosure. Second, while there is a cap on party spending of $50,000 per electorate, parties are not required to disclose spending by electorate and there is no way to measure compliance with the caps. These issues are further discussed in Chapter 8 – ‘Disclosure’.

A third issue that prevents any meaningful assessment of the effectiveness of the expenditure caps is that they commenced on 1 January 2011 and therefore did not operate for the whole six-month period up to the March 2011 election. Parties and candidates were able to spend up to the full capped amount from commencement up to the election in March – a capped period of less than three months. Dr Tham’s research indicates that the major parties ‘engaged in substantial spending on `electoral communication expenditure` prior to the three-month period that was capped in the 2011 State election’.\textsuperscript{182}

We heard evidence that the caps did little to restrain overall spending by the major parties for the 2011 election. We suspect that this is correct, given the limited three-month timeframe in which the caps were in place. During consultations we heard anecdotal evidence of the caps being exceeded in marginal seats. There is a substantial incentive to spend more in these electorates, as campaign spending has the capacity to influence the small number of electors that will decide who wins these seats. The Panel considers that strong and proactive enforcement of the expenditure caps, particularly in marginal electorates, is crucial to the effectiveness of the caps. The NSW Electoral Commission should therefore take a proactive approach and prioritise the monitoring of expenditure in these electorates as part of its enforcement strategy.

On balance, the Panel considers that the current level of the caps should be retained. In the context of the 2015 election, where most of the election spending by the major parties will be publicly funded (see Chapter 7 – ‘Public Funding’), there is no case for an increase in the caps. The caps for the 2015 election, which will operate for the whole six-month period, will be a better test of the level of the caps and the timing of the capped expenditure period. The expanded definition of ‘electoral communications expenditure’ to include campaign...
market research and travel means that more expenditure will be captured by the caps and they may have a more constraining effect on communications expenditure.

**Recommendation 10**

That the current caps on electoral expenditure be retained and adjusted before each election for inflation, rounded up to the nearest whole number multiple of $100.

**Combined expenditure caps for parties and their candidates**

There are currently two separate caps for party spending in Legislative Assembly electorates. An endorsed candidate can spend $100,000; the party can spend $50,000. We heard from the Labor Party and The Nationals that these caps should be combined. Dr Tham also recommended that the distinction between party and candidate electorate-based spending be removed, arguing that both parties and candidates are working towards the same purpose and the separate caps create complexity and opportunities for evasion.

The Nationals commented that in practice, ‘most parties have centralised financial functions, and it is the party that is … incurring expenditure’. In order to prevent parties incurring very substantial expenditure within individual electorates, they recommended that ‘the spending cap currently applicable to an endorsed party candidate should be added to the sub-cap of party expenditure in respect of that electorate’ so that ‘a party’s effective spending limit within any electorate is the same as that of any non-party candidates’ (i.e.$150,000).

Dr Tham supported ‘abolishing the sub-cap on political parties and aggregating party spending for a particular electorate to the caps applying to its endorsed candidate’. He stated that there is ‘no reason to distinguish in this context between spending by parties and their endorsed candidates in a particular electorate – they are for all intents and purposes directed at the same goal, the election of the endorsed candidate’. He also said that a combined expenditure cap ‘avoids the opportunities for evasion and compliance costs associated with separate caps’.

While we can see both the logic and simplicity of this approach, we are reluctant to make this recommendation. We consider that there are potential corruption risks associated with centralising more power in parties and by potentially giving parties absolute discretion over how much is spent in each electorate. Concerns about increasing centralisation are discussed in Chapter 7 – ‘Public Funding’ in relation to candidates’ public funding entitlements.

We did not hear from all political parties or indeed candidates about the potential impacts of a combined cap on their campaign strategies and party organisational structure. Under a combined expenditure cap there would need to be very close co-ordination between parties and candidates to ensure that caps were not breached and there could be uncertainty as to who is responsible for any breaches.

**Higher regional expenditure caps**

While stating that the ‘spending caps seem broadly to be set at an appropriate level’, The Nationals argued for increasing the caps in regional areas by establishing two or more tiers of electorate-specific caps. They commented that in regional areas the electorate caps were ‘far more restrictive than is the case in urban and suburban areas due to the increased costs of campaigning’ and because of the expectation that individual candidates will advertise on radio and television. They said that while these mediums were cheaper in regional areas, ‘the presence in some of the larger electorates of multiple TV stations add further to these costs’. They also said that the costs of delivering electoral material was higher in regional electorates, as there are fewer delivery services which leads to reliance on more expensive
Australia Post services. The Panel did not hear this concern from other parties or candidates.

As part of our discussions with academics, the costs of advertising in rural and regional electorates were explored including the proposal by The Nationals for a higher regional expenditure cap. Dr Tham pointed out that because of the lack of transparency around disclosure of expenditure by electorate, it is not possible to tell if the caps for the 2011 election were too low in any electorate. He said that while there might be a case for expenditure caps to be linked to both voter numbers and geographical area, there is not enough data for proper analysis of the issue.

We have thus been unable to form a definite view on this issue. Given our preference for keeping the rules simple, we are inclined to consider that different caps for regional electorates would be unnecessarily complicated. We recognise that the cost of campaigning can vary widely between electorates, based on factors such as geography, demographics and advertising costs. We do not recommend that the expenditure caps be altered for regional electorates.

Minimum expenditure caps

Another consideration was whether there should be a minimum spend in all seats. Rodney Cavalier described how one of the aims of the original election funding legislation in 1981 was to ‘assist every elector, wherever they lived, to make an informed decision’. For example, a ‘Labor voter in Gordon and a Liberal voter in Cessnock was each entitled to a serious campaign locally’.

This approach led to the creation of a constituency fund for each electorate which incentivised parties to conduct localised campaigns regardless of whether they were considered to be safe or unwinnable electorates. There is some merit in this idea, but the Panel does not consider that it is appropriate to dictate the internal spending decisions of parties. Minimum expenditure caps are not supported.

Campaign costs covered by the expenditure caps

The expenditure caps currently only apply to spending captured by the definition of ‘electoral communications expenditure’. We received a number of submissions arguing for an expansion of the definition of electoral communications expenditure to include campaign market research and travel. This concern has been addressed by recent legislative amendments which broadened the definition to include expenditure for these purposes. The Panel supports these amendments.

Dr Stephen Mills suggested that the Panel consider a sub-cap for television advertising within the overall expenditure cap. He explained that most campaign spending is on television advertising and most campaign funds (including public funds) are paid to television broadcasters. Dr Tham disagreed with this view, instead arguing that any attempt to define categories of electoral expenditure for the purposes of the expenditure caps is unnecessary and has the potential to distort campaign spending.

Dr Tham argued that all ‘electoral expenditure’ should be included in the cap, rather than just ‘electoral communications expenditure’. He said that this approach ‘avoids the line-drawing exercises involved in determining whether an item of “electoral expenditure” is “electoral communication expenditure” and “would avert all the compliance efforts that go into such exercises as well as disputes that invariably accompany such complex line-drawing’.
Bret Walker SC expressed a similar sentiment, and submitted that the Panel should ‘strongly prefer laws that restrict as little as possible the free play of whatever modes of persuasion some people think might sway other people to vote in particular ways’.  

The definition of ‘electoral communications expenditure’ is crucial in determining the appropriate levels of the expenditure caps. The Panel supports the recent legislative amendments that expanded the types of election campaign expenditure that are caught by the caps. We agree that this more accurately reflects the costs of a modern election campaign. Polling is now a significant driver of communication strategies and thus a significant election expense. We also agree with Dr Tham that the election funding scheme should not ‘pick winners’ by creating financial incentives for parties and candidates to engage in particular types of campaign activities. The inclusion of these expenditure items for the 2015 election may also mean that the caps are more effective in constraining communications expenditure.

The current definition of ‘electoral communications expenditure’ includes a lengthy list of types of expenditure. The Panel considers that there is a simpler way to approach the expenditure caps – by making all ‘electoral expenditure’ reimbursable. The definition of ‘electoral expenditure’ is ‘expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election’. Removing the categories of expenditure and focussing on the purposes for which the expenditure is incurred would avoid some of the complexities created by the current Act.

We consider that capping costs that fall under this more general definition would have two key advantages. First, as noted at the start of this report, our aim, where we can, is to simplify the election funding scheme. Second, parties and candidates will be able to decide which activities best suit their campaigns, free from financial incentives to shift expenditure between the categories to avoid the caps or choose activities the costs of which can be claimed back through public funding.

**Recommendation 11**

That the caps on electoral expenditure apply to all electoral expenditure incurred for the purpose of influencing the voting at an election.

**Electorate-based party expenditure caps**

Dr Tham’s research outlined concerns with the definition of electorate-based spending – which is defined in section 95F(13) of the Act as advertising that mentions the name of a candidate contesting that electorate or the name of the electorate. He argued that this allows a party to spend large amounts ‘so long as the message is appropriately crafted’, which ‘creates a huge window that can be exploited for parties to throw resources at a particular seat’. As stated by Dr Tham, a ‘focused campaign by a political party in a particular electorate using advertisements that did not mention the name of candidate or name of electorate would not trigger the sub-cap applying to the political party’.

Instead of the current definition of electorate-based spending, Dr Tham recommended that the definition of ‘candidate advertising’ from New Zealand be adopted to define electorate-based party spending, as follows:

> an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to do either or both of the following:
> (a) to vote for a constituency candidate (whether or not the name of the candidate is stated)
> (b) not to vote for a constituency candidate (whether or not the name of the candidate is stated).
The Panel agrees that the current narrow definition of electorate-based party expenditure – which requires that the advertising specifically name the electorate or one of its candidates – could easily allow for a party to flood marginal electorates. We consider that the definition under section 95F(13) should be amended to the definition of ‘candidate advertising’ which has been adopted in New Zealand.

**Recommendation 12**

That the electorate-based caps on expenditure by political parties apply to all expenditure which encourages or tries to persuade electors to vote for or against a candidate in a particular electorate.
Chapter 7 – Public Funding

- Public funding in New South Wales is provided for election campaigns, administration costs and to support new parties. Over the four-year period to June 2013 around $50 million was provided in public funding to parties and candidates. New South Wales provides generous levels of public funding compared to other jurisdictions.

Figure 10 – Public funding July 2009 to 30 June 2013

- The 2015 election will be conducted under a new funding model. Overall, taxpayers will be up for an additional $11.5 million. The total amount of campaign funding is likely to increase from $21.5 million in 2011 to $33 million in 2015. The Panel supports a certain level of public funding for election campaigns, but believes that the level of funding that was in place for the 2011 election should be reinstated.

- The Panel also supports expanding the types of campaign expenditure that can be reimbursed from public funding, in the same way that we support broadening the types of campaign expenditure caught by the spending caps.

- We support retaining the ‘funding linked to electoral expenditure’ model, where parties and candidates are partly reimbursed after the election up to the level of their actual expenditure. The Panel would support linking a portion of public funding to electoral support (for example, allocating a small proportion of public funding on a ‘dollar per vote’ basis) although this is not our preferred option. Whatever public funding model is adopted, the Panel strongly believes that it should not provide for ‘full’ public funding (i.e. where parties and candidates are entitled to be reimbursed for the full amount they are permitted to spend on election campaigns).

- Advance payments to assist parties with their up-front election costs should be increased to 50 percent of a party’s entitlement at the previous election.

- Total administration funding of about $11 million is available for 2014. The Liberal Party, National Party and Labor Party are able to claim $2.8 million each. The remainder ($2.3 million) can be claimed by minor parties and independent MPs. The Panel supports some public funding of administration costs but thinks it should be scaled back to the levels that applied prior to the most recent increases in 2014.

- We recommend clearer rules about the types of expenses which can be claimed as administration and making payments conditional on governance standards and conditions. The NSW Electoral Commission should actively monitor claims to make sure that they comply with both the letter and the spirit of the law. Such accountability is simply in line with other entities that receive public funds.

- New parties are also eligible for modest payments for policy development expenses, which the Panel supports. The Panel recommends that in an election year, new parties should be able to use these payments on election campaign expenses.
Public Funding – Elections

Background

Public funding is currently paid to eligible parties and candidates to cover a portion of their election campaign expenses in the six months leading up to an election. For the 2011 State election, public funding of campaign expenses amounted to $22 million. To access public funding of election campaign expenditure parties and candidates must reach the eligibility threshold of four percent of first preference votes, or be elected to Parliament.\(^{198}\)

Parties and candidates can only be reimbursed for campaign spending on ‘electoral communication expenditure’. This includes spending on media advertising, election material, campaign staff, market research (e.g. opinion polls) and election travel by candidates and staff. Parties and candidates are required to pay their campaign costs up front and are reimbursed after the election from the Election Campaigns Fund, if they can provide records (vouching) as evidence of their spending. Claims for reimbursement must be signed by a registered company auditor. Once a claim is submitted, the NSW Electoral Commission conducts its own audit before approving payment (although parties are required to receive a pre-payment equal to 70 percent of their claim within 14 days of their claim being submitted).

Under the model in place for the 2011 election, public funding entitlements were linked to how much a party or candidate spent on electoral communication expenditure within the election expenditure cap. Rates of reimbursement were set according to a diminishing sliding scale, which meant that public funding decreased as spending approached the expenditure cap. Parties that spent up to their maximum spending entitlement were reimbursed for around 75 percent of their electoral communication expenditure. Candidates endorsed by a party and those who ran as independents were reimbursed at a lower rate of between 30 and 45 percent. The rates of reimbursement under the ‘funding linked to electoral expenditure’ model are set out in Appendix 15.

Changes to the Act in 2014 that apply only for the 2015 State election changed the public funding model from a ‘funding linked to expenditure’ model to a ‘dollar per vote’ model. The major parties and those parties that endorse 10 or more candidates in the Legislative Assembly will be reimbursed at a set rate of $4 for each first preference vote in the Legislative Assembly and $3 in the Legislative Council. Parties that reach the four percent threshold in the Legislative Council but endorse less than 10 candidates in the Assembly will be reimbursed $4.50 for each Council vote. Independent candidates will be reimbursed $4 or $4.50 for each first preference vote, depending on whether they run in the Legislative Assembly or the Legislative Council. Another change only for the 2015 election is to extend the period over which parties and candidates can claim reimbursement for election campaign expenses: while this period is usually six months, for the 2015 election parties and candidates can be reimbursed for electoral communication expenditure incurred in the nine-month period from 1 July 2014 to the election.

The new ‘dollar per vote’ model is expected to increase public funding for parties and candidates. For example, the Coalition received just under $9 million in public funding to cover the cost of their 2011 electoral communications expenditure under the ‘funding linked to electoral expenditure’ model. If the ‘dollar per vote’ model had applied at the time of the 2011 election, they would have received over $14 million. Admittedly, the 2011 election was a landslide victory, so the Coalition’s funding entitlements were unusually high. Nevertheless other parties would also have benefited significantly: The Greens would have received approximately $1 million in additional funding (an increase of 50 percent) and the Christian Democratic Party an additional $600,000 (an increase of 200 percent). Based on the 2011 election results, the following graph shows the actual payments to each party represented in
the NSW Parliament under the ‘funding linked to electoral expenditure’ model, and what the payments would have been had the ‘dollar per vote’ model applied at the 2011 election.

**Figure 11 – Payments ($) actual ‘funding linked to electoral expenditure’ model vs projected ‘dollar per vote’ model – 2011 first preference votes assumed**

Overall, the total amount of public funding provided to parties and candidates is expected to increase substantially under the new model. The NSW Electoral Commission has budgeted for a total funding increase of $11.5 million, up from $21.5 million in 2011 to $33 million in 2015.\(^{199}\)

The following graph shows how the new model would have affected the total amount of election funding provided to the six parties represented in the NSW Parliament. Under the ‘dollar per vote’ model their share of public funding would have increased from around $20.5 million to just over $26 million (an increase of 27 percent).

**Figure 12 – Total election campaign funding to parties represented in NSW Parliament calculated on 2011 first preference votes**
The Panel compared the cost of elections in New South Wales with other Australian jurisdictions in Working Paper No. 4 – ‘The Cost of Elections in New South Wales’ (see Appendix 4). New South Wales currently provides generous levels of public funding for election campaigns. The move to the ‘dollar per vote’ model will make New South Wales more generous in terms of public funding of elections – even without taking into account the significant amounts of public funding provided for party administration, as examined later in this Chapter.

Parties can apply for an advance payment to assist them with their campaign costs in the six months leading up to an election. Advance payments are equal to 30 percent of a party’s public funding entitlement at the previous election.

For the 2015 election payments from the Elections Campaigns Fund to endorsed candidates must be paid directly to the party that endorsed the candidate. A party may direct in writing that part of this public funding be paid to the candidate instead.

It is common practice internationally to provide public funding for political parties. IDEA has identified a significant global trend toward the provision of public funding, noting that ‘today, around two-thirds of the world’s countries provide direct public funding … Such support also corresponds to the perception of parties as essential pillars of democracy that need to be invested in to allow the system to function’.200

The models for providing public funding vary greatly. Funding can be direct or indirect, and there can be significant differences in funding levels, eligibility requirements, and the models for calculating entitlements. Working Paper No. 2 – ‘Update on International Campaign Finance Laws and Full Public Funding Models’ discusses election finance laws in an international context (see Appendix 2).

In Australia, most jurisdictions provide public funding of election campaigns although funding levels vary significantly.201 Like New South Wales, most jurisdictions set an eligibility threshold of four percent of first preference votes before parties or candidates can access public funding.202 Several jurisdictions operate under a reimbursement model, as in New South Wales, while there are direct entitlement schemes in two others.203 Three other jurisdictions provide funding according to a set dollar per vote rate, as will New South Wales for the 2015 election.204 Working Paper No. 1 – ‘Overview of Australian Election Funding and Donations Disclosure Laws’ and Working Paper No. 5 – ‘Reconsidering the reform of political donations, expenditure and funding in New South Wales’ describe the public funding schemes in other Australian jurisdictions (see Appendix 5).

Discussion and conclusions

Should political parties receive public funding?

The Panel’s consideration of how best to reform the NSW election finance scheme led us to consider these fundamental questions: should public funding be provided to political parties? If so, what should the public funding be for?

Dr Simon Longstaff of the St James Ethics Centre supported public funding of the election system. Dr Longstaff listed the costs to the State of not doing so, including ‘corruption, falling levels of trust, the rise of “money politics”’. He concluded that: ‘If public funding of elections (and a portion of the cost of maintaining private political structures between elections) can reduce these costs – and improve the quality of democracy in the State – then it would seem to be justified’.205

Stakeholders agree that parties perform key functions in our political system. This sentiment was captured by Premier Neville Wran when he spoke on the legislation to introduce
Australia’s first public funding and disclosure scheme in 1981: ‘The strength and stability of the Westminster system lies in the strength of the party system. The political parties are the unacknowledged pillars of parliamentary democracy’. More recently, the NSW Electoral Commission described political parties as ‘central to our system of representative democracy’ and noted that ‘in moving forward they will remain as such well into the future’. On this basis the Electoral Commission argued that parties should receive appropriate levels of public funding to support them to perform their key functions. Dr Joo-Cheong Tham has described the four key functions as:

1. Representation – representing the diverse opinions in New South Wales.
2. Agenda setting – raising issues for debate and presenting ideas for consideration.
3. Participation – being a vehicle for members of the public to become involved in the political process, debate and agenda setting.
4. Governance – when members of a party are elected to Parliament and potentially form government.

While there was broad support of public funding for political parties, some people questioned the basis for providing any taxpayer-funded support. The Liberal Democratic Party advised that it ‘strongly prefers to raise and spend its own funds without restriction, and recommends an end to all public funding of political activities’.

The Panel agrees that political parties perform functions central to our system of representative democracy. We support some public funding of election campaigns. It is evident that one of a party’s key functions (indeed, perhaps the primary function) is to contest elections and secure parliamentary representation. Public funding should support not just the major parties, but should go some way to level the playing field by enabling smaller parties or independent candidates to contest elections. The merits of public funding and its effectiveness in achieving its aims are considered in detail in Working Paper No. 3 – The Merits of Full Public Funding and our Issues Paper (see Appendix 3 and 6).

In expressing our support for public funding of election campaigns, we draw attention to the Electoral Commission’s stipulation that parties should be funded for those activities considered central to our system of representative democracy, ‘not just on what the parties themselves consider is necessary’. The Panel agrees with this sentiment. We support public funding of election campaigns to enable parties (and independent candidates) to run good but not excessively expensive campaigns. We do not believe this funding should be unlimited.

**Eligibility threshold**

There was some discussion among stakeholders of whether four percent is an appropriate threshold for access to election funding. Professor Anne Twomey noted the eligibility threshold is necessary to prevent large numbers of frivolous parties and candidates standing for election:

There would be a significant risk that voters would not only be confused by the vast array of candidates and parties, but become more cynical and disengaged if elections were treated as an opportunity for every opinionated person or interest group to publicise their views at the taxpayer’s expense, despite having no public support and no chance of election. The difficulty, however, lies in finding a reliable and fair means of determining the threshold at which public funding should apply.

There is broad acceptance that the four percent threshold is fair as it requires parties and candidates to demonstrate a reasonable level of electoral support before accessing public funding.
The Christian Democratic Party did have a different view, believing that the current threshold is ‘unjust and discourages candidates from standing’. They instead proposed that the candidate nomination fee be increased to $500 to discourage frivolous candidacies, and that all candidates be entitled to receive public funding calculated on the number of first preference votes received.

The Panel supports the retention of the current eligibility threshold of four percent of first preference votes. This is the common threshold across Australia and has widespread acceptance. We consider that it strikes an appropriate balance between the need to demonstrate sufficient electoral support before being eligible for public funding, and not setting so high a threshold as to lock out newer parties or independent candidates.

**Reimbursement and entitlement schemes**

The Panel’s consultations considered the merits of the reimbursement scheme in New South Wales as opposed to an entitlement scheme, which is in place for Commonwealth and ACT elections. The distinct advantage of a reimbursement scheme is that parties and candidates only receive public funding up to the level of their actual campaign expenditure and cannot profit by standing for election. We were reminded of a well-publicised example showing the pitfalls of the Commonwealth Government’s entitlement scheme. Pauline Hanson spent $35,000 on her unsuccessful Senate campaign in 2004 and was entitled to $200,000 in public funding as she reached the four percent threshold, a windfall gain of $165,000 at the taxpayer’s expense.

On the other hand the Panel was told that the advantage of entitlement schemes is that they reduce administration. Parties and candidates are not required to provide receipts and other evidence as proof of their campaign expenses. The Panel heard speculation that the Commonwealth shift from a reimbursement to an entitlement scheme in 1995 was due to the difficulties experienced by minor parties in complying with the requirements of the reimbursement scheme. According to Professor Rodney Smith ‘the Australian Democrats in particular had trouble getting their accounts right and therefore being reimbursed. I think probably these days with the level of funding that most parties have, they would be able to employ a decent accountant to do their books’.

While many people supported the reimbursement model, the Panel heard complaints about the resource-intensive nature of the reimbursement scheme in New South Wales. A claim for payment must be lodged with the NSW Electoral Commission within 120 days after the return of writs. The claim must be accompanied by an invoice and/or receipt for each item of expenditure, no matter how small the amount. The claim must include copies of all advertising material including radio, television, internet, newspapers, brochures and how-to-vote cards.

The Panel supports the retention of the current reimbursement model. While this model is more administratively demanding than the entitlement model in place in the Commonwealth and ACT, it prevents parties and candidates from profiting at taxpayers’ expense. We believe that the significant levels of administration funding provided to parties and independent MPs should have enabled them to develop sufficient infrastructure to comply with the vouching requirements of the reimbursement model. The Panel is, however, mindful of the need to lessen the administrative requirements by streamlining audit practices for claims for payment from the Elections Campaign Fund. Our conclusions on the audit requirements can be found in Chapter 10 – ‘Governance’.
Campaign costs covered by public funding

Another question raised during our consultations was whether the definition of ‘election communication expenditure’ should be expended to include more types of campaign spending, in particular, market research and election-related travel. This issue was discussed in Chapter 6 – ‘Expenditure Caps’.

A number of political parties, including both the major parties, supported expanding the types of campaign spending that are covered by public funding.215 In particular, the Liberals argued that it does not make sense not to provide public funding for market research, which is a significant driver of campaign expenditure.216 The Christian Democratic Party objected to the exclusion of room hire for public meetings, which they said can be a significant expense for smaller parties.217 The Nationals objected to the current rules which they said resulted in ‘some being disadvantaged because of the mix of their spending’.218

We support the expansion of the types of election campaign expenditure that can be reimbursed from public funding to include costs such as market research and election-related travel. We note that this will not increase the maximum entitlement of parties and candidates, because there is no change to the cap on election expenditure.

We agree that an expanded definition more accurately reflects the costs of a modern election campaign. Polling is now a significant driver of communication strategies and thus a significant election expense. We also agree with Dr Tham that the election funding scheme should not ‘pick winners’ by creating financial incentives for parties and candidates to engage in particular types of campaign activities. We support retaining the six-month pre-election period in which campaign costs can be reimbursed from public funding, as this did not appear to create any cause for concern.

The 2014 amendments to the Act made additional types of campaign expenditure reimbursable by amending the definition of ‘electoral communication expenditure’. The Panel considers that there is a simpler way to achieve this end – by making all ‘electoral expenditure’ reimbursable. This would avoid some of the complexities created by the current Act. At present the Act specifies at length the types of expenditure that are ‘electoral communication expenditure’ and those that fall under ‘electoral expenditure’. In contrast, ‘electoral expenditure’ is defined more generally as ‘expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election’.

We consider that moving to reimburse campaign costs that fall under this more general definition would have two key advantages. First, as noted at the start of this report, our aim, where possible, is to simplify the election funding scheme. Second, parties and candidates will be able to decide which election activities best suit their campaigns, free from financial incentives to choose activities which can be claimed back through public funding.

We acknowledge that the broad definition of ‘electoral expenditure’ could raise concerns that parties and candidates may claim reimbursement for just about any expense, no matter how tangentially related to the election. This could be addressed by empowering the Electoral Commission to issue guidelines on the type of costs that can be claimed as ‘electoral expenditure’. These guidelines would not impose strict limits on the activities that may or may not be claimed, but could provide general guidance. These guidelines could be updated as needed to reflect changes in campaign practices, e.g. use of social media.

Recommendation 13

That:

a) all expenditure incurred for the purpose of influencing the voting at an election be reimbursable from the Election Campaigns Fund; and
b) the NSW Electoral Commission issue guidelines on the costs that can be reimbursed as electoral expenditure.

**Model for calculating public funding**

Stakeholders were particularly interested in the most appropriate model for calculating election funding payments. The Electoral Commission advised that as a general principle, public funding schemes should be designed to promote fairness in politics. Public funding should encourage a variety of voices in public debate, so that in turn, voters are able to exercise a meaningful choice at elections. In relation to public funding of elections, the Electoral Commission noted that ‘the political finance scheme should have as an objective to promote “fair rivalry” between the main parties. It should act as a stopper to serious imbalance in campaign funding’.

The two main models considered by the Panel were the ‘dollar per vote’ model in place for the 2015 election, and the ‘funding linked to electoral expenditure’ model for the previous election. Unfortunately, the Panel had limited opportunity to consult stakeholders on the ‘dollar per vote’ model because the Election Funding, Expenditure and Disclosures Amendment Bill was introduced after most of our consultations had taken place.

In debate on the Bill the Premier said that in moving to a ‘dollar per vote’ model the Bill ‘adopts the approach applied in various other Australian jurisdictions’ (i.e. the Commonwealth, ACT and Queensland). He noted that ‘this is considered a fairer funding model as the amount of funding that candidates or parties are entitled to receive is more directly related to their electoral results. Candidates and parties will be required to make more responsible expenditure decisions which are based on an assessment of their prospects at the election’. That is, a party or candidate’s public funding would no longer be calculated according to the amount that they spent. The Nationals supported a stronger link between votes received and the amount of public funding provided, noting that ‘public support (as measured by electoral performance) ought to play some part in the quantum of funding a party is eligible to receive’.

However, others questioned the reasons for the shift to a ‘dollar per vote’ model. The Shooters and Fishers Party claimed that the move was designed to give the Government a ‘massive cash injection’ because donations had ‘dried up’. Independent MP Alex Greenwich made a similar comment, stating that: ‘fundraising has been tough for the Liberal Party following the revelations at the ICAC about fundraising practices’. Similarly, The Greens claimed that it would provide the Liberal/National Coalition with an ‘enormous gift to their coffers’. There has also been media commentary on the fundraising difficulties being experienced by the parties.

Professor Twomey described the new model as full public funding ‘by stealth’. Using the first preference votes at the 2007 State election (rather than the 2011 figures, which resulted in a landslide election victory for the Coalition), she calculated that the new formula would have provided both major parties with public funding above the level of the party spending cap, effectively making them fully publicly funded — as opposed to the ‘funding linked to electoral expenditure’ model where parties were reimbursed for around 75 percent of their campaign spending. In noting that the new model would result in significantly higher levels of public funding, Professor Twomey concluded that: ‘All of this money comes from taxpayers, who might well prefer the money to be spent instead on better health services, public transport, roads or schools’.

Questions were also asked about how the ‘dollar per vote’ model would impact on minor parties and independent candidates. The Panel notes that the debate on the legislation to introduce Australia’s newest public funding scheme, that of South Australia, referred to the
‘significant financial advantage afforded to major parties in circumstances where one blanket figure is applied to a primary vote’. 229

Alex Greenwich MP believed that incumbent independents such as himself would receive a similar amount of public funding under the new model as under the previous model, but he expressed concerns about new independent candidates. He cautioned that they would find it very hard to estimate how many votes they may receive above the four percent threshold, which would determine how much public funding they could receive. Mr Greenwich asserted that this may deter new independents from running. 230

The Panel heard differing views on whether the ‘funding linked to electoral expenditure’ model that applied previously offered more or less certainty about the level of funding available. The Nationals observed that the model introduced too much uncertainty regarding how much a candidate would be entitled to claim. 231 The Labor Party, however, informed the Panel that tying public funding to campaign spending ‘provides certainty for political parties and eliminates the need to over fundraise to avoid a shortfall in the case of a low first preference vote count’. 232

A key criticism of the ‘funding linked to electoral expenditure’ model is that it rewards spending, not votes received. However, as noted above, parties know how much they will spend, so this has the benefit of certainty. As Professor Graeme Orr noted in his submission: ‘The downside of the reimbursement model is the possibility that it may encourage overspending up to the limit, especially among smaller parties … It may also … encourage well-targeted spending’. 233

The Panel objects to the introduction of full public funding ‘by stealth’ as provided by the ‘dollar per vote’ model. The ‘dollar per vote’ model is a one-off measure in place for the 2015 election only. The Panel notes that during the parliamentary debate there was speculation that the ‘dollar per vote’ model was introduced to deal with the fundraising crisis faced by the major parties following the ICAC investigations. We strongly support reverting to a more measured funding model after 2015, in which parties and candidates will endeavour to raise private finance and not rely fully on the public purse.

In expressing support for the ‘funding linked to electoral expenditure’ model, the Panel has given weight to the Electoral Commission’s view that it should promote ‘fair rivalry’ between the parties and prevent ‘serious imbalance’ in public funding. This model, while not perfect, promotes a fairer contest than the set ‘dollar per vote’ model which will advantage the party that wins the election. We consider that the ‘dollar per vote’ model is akin to a ‘winner takes all’ approach which entrenches incumbents because the Government can take its advantage into the next election. As Professor Twomey pointed out, the ‘dollar per vote’ model would have given the Coalition a significant advantage had it been in place for their 2011 landslide victory, as it would have entitled them to substantially more public funding than the other parties.

The Panel believes that to starve the opposition parties of funds could create a climate conducive to corruption, as they may feel pressure to raise large sums of money through political donations in order to wage a competitive election campaign. We instead support the ‘funding linked to electoral expenditure’ model because it achieves a more level playing field by providing the same rates of public funding for all parties and candidates once the four percent eligibility threshold is reached. This model therefore promotes the objects of the Act which are to establish a fair and transparent scheme for regulating election funding, expenditure and disclosure, and to help prevent corruption and undue influence.

Another advantage of the ‘funding linked to electoral expenditure’ model is that it provides consistent and predictable funding, as reimbursement is linked to spending and not votes received. On the other hand, the ‘dollar per vote’ model leads to uncertainty because parties and candidates would be unsure of how much funding they could claim until after the votes
were counted on election day. We were told on many occasions that unpredictability is a driver of the fundraising arms race, because parties feel compelled to over-fundraise in order to avoid a potential funding shortfall.

The Panel acknowledges the argument that this model rewards spending, not votes received, and that it takes a ‘one-size-fits-all’ approach to public funding regardless of public support beyond the four percent threshold. Accordingly, although it is not our preferred option, the Panel would support linking a portion of public funding to electoral support. For example, allocating a small proportion of public funding on a ‘dollar per vote’ basis. This would reward electoral success without undermining the fairness of the public funding model.

**Recommendation 14**

That:

a) the ‘funding linked to electoral expenditure’ model that operated for the 2011 State election for calculating entitlements from the Election Campaigns Fund be reinstated following the 2015 election;

b) if the Government decides to pursue a ‘dollar per vote’ model, it should only be used to allocate a small proportion of public funding, with the remainder to be allocated on a ‘funding linked to electoral expenditure’ basis; and

c) whatever public funding model is adopted, it should not provide for ‘full’ public funding (i.e. where parties and candidates are entitled to be reimbursed for the total amount they are permitted to spend on election campaigns).

**Rates of reimbursement under ‘funding linked to electoral expenditure’ model**

The Panel was also interested in stakeholders’ views on the rates of reimbursement under the ‘funding linked to electoral expenditure’ model. In 2011, parties were reimbursed at a rate of approximately 75 percent. The Greens recommended that in conjunction with decreasing spending caps, the rate of reimbursement should remain at 100 percent for spending up to the first 10 percent of the expenditure limit, and be set at 85 percent thereafter.234

We believe that the rates of reimbursement for party spending under the ‘funding linked to electoral expenditure’ model were ‘about right’, and indeed, could be considered generous. Under this model a political party that spent up to its expenditure limit of $9.3 million would receive almost $7 million in public funding, leaving a gap of $2.3 million – a gap which could be filled by securing 465 donations of $5,000 (being the maximum amount that can be donated to a party).235

At the 2011 election candidates endorsed by a party were eligible for reimbursement of around 30 percent of their campaign costs. Independent candidates could claim around 45 percent. While these rates are much lower than the party reimbursement rate of 75 percent, we did not receive comments from stakeholders on this point.

The Panel is undecided on whether to increase the rate of reimbursement for election spending by candidates. As we did not receive detailed information on this point, we are unable to form a view on whether there is merit in having lower rates of reimbursement for candidates as opposed to parties.
‘Matching funds’ model

Some stakeholders suggested alternative funding models, in particular the ‘matching funds’ model in New York City. Candidates in New York can choose to forgo corporate donations in exchange for public funding that ‘matches’ any small political donations that they receive. Dr Tham proposed that this model could be implemented for small donations of $50 or less, ‘so the parties have an incentive to actually get big money in small sums’. This would have the advantage of encouraging grassroots engagement between parties and candidates and their supporters. Another submission also recommended the introduction of the ‘matching funds’ model on the grounds that it is an equitable means to distribute public funding.

However, the NSW Electoral Commission cautioned against implementing the ‘matching funds’ model in New South Wales on the grounds that it ‘may not suit the Australian political environment’. Professor Twomey informed the Panel that the United Kingdom had considered a ‘matching funds’ model and found that the disadvantages ‘include the absence of certainty for parties about how much they are likely to raise, the expense of administering such a scheme and the fact that it is “more vulnerable to fraud”’. The Panel does not support the ‘matching funds’ model as an alternative to either the ‘dollar per vote’ or ‘funding linked to electoral expenditure’ models. The ‘matching funds’ model would be very difficult to implement, and would lead to further complication in an already complicated system. We also note that there is merit in returning to the previous system, rather than changing the rules yet again.

Independent oversight of public funding

Whichever model is ultimately adopted, some stakeholders objected to increasing the already significant levels of public funding provided for election campaigns. For example, Greg Piper MP said that ‘full public funding is an unfair imposition on the public purse which, if introduced, would financially penalise taxpayers for the failure or politicians and candidates to observe electoral funding laws’.

As legislators, parliamentarians are in the privileged position of making the laws that determine their election funding payments. The Panel does not believe that this should be an unfettered power, and calls for independent oversight to determine levels of election funding. This will help ensure that any increases meet the fairness test, rather than merely benefiting the party in Government, or being agreed to behind closed doors between the two major parties. Independent oversight of the public funding scheme is addressed in Chapter 10 – ‘Governance’.

Advance payments

During our consultations it was suggested that the fundraising arms race is fuelled, in part, by the payment of public funding after the election has been held. Parties and candidates must find some way to pay for their up-front election costs, including by seeking donations or taking out loans. Parties can also apply for advance payments equal to 30 percent of their public funding entitlement at the previous election. The NSW Electoral Commission advised the Panel that as of December 2014, all eligible parties had received advance payments for the 2015 election.

There appeared to be general support for advance payments to political parties. For example, Dr Mills described advance payments as ‘an entirely appropriate measure to basically assist parties with their cash flow’ and noted that ‘thirty percent seems reasonable enough’. The Nationals said that advance payments could avoid parties taking out loans...
to fund their election campaigns, which would reduce the impetus for parties to seek donations to cover the interest on these loans.\textsuperscript{243}

The Panel supports advance payment of election funding as a sensible means to assist parties with their up-front costs. On balance, we support the following increase – from 30 percent of a party’s public funding entitlement at the previous election to 50 percent.

**Recommendation 15**

That advance payments to parties from the Election Campaigns Fund be increased from 30 percent to 50 percent of a party’s entitlement at the previous election.

**Payments to candidates or parties?**

As a result of the 2014 changes to the Act, a payment to reimburse an endorsed candidate for electoral communication expenditure must be paid directly to the candidate’s party (although a party can direct the Electoral Commission to instead make the payment to the candidate). This change applies only for the 2015 election. Previously, the payment was made to the candidate, and it was the candidate who had the option to direct the Electoral Commission to make the payment to the party. This change was introduced at the tail-end of the Panel’s consultations and views were expressed in the parliamentary debate.

The Labor Party criticised this change on the basis that it would create ‘a new and unacceptable corruption risk’.\textsuperscript{244} Adam Searle MLC noted that ‘as we saw in the recent Operation Spicer issue at the ICAC, party candidates who are not closely linked with head offices may not be preferred by them and can therefore be pressured to seek funds elsewhere – in that case there were some fairly disastrous consequences’.\textsuperscript{245}

Another Labor Party representative, Lynda Voltz MLC observed that banks would be reluctant to lend money to candidates to fund their campaigns, because there would be no guarantee that the party’s head office would re-direct public funding to them. She was concerned that this would pressure candidates to raise more donations:

\begin{quote}
So what will candidates do? Instead of getting that $30,000 loan as they did in the past – which was subsequently repaid – they will have to go out and raise more money … This process will result in more fundraising being hidden and more funds being funnelled away. That is hugely problematic.\textsuperscript{246}
\end{quote}

The Greens expressed concerns about the increasing centralisation of power within political parties. John Kaye MLC asserted that: ‘New South Wales does not need political parties that are increasingly centralised and controlled’.\textsuperscript{247} David Shoebridge MLC agreed, arguing that funding should be directed to candidates so that they ‘have not only notional autonomy but real fiscal autonomy’.\textsuperscript{248}

The Panel acknowledges the argument in favour of centralisation which is that candidates should be kept as far away from fundraising efforts as possible. This is based on the premise that it is the individual candidate level where there is the greatest corruption risk. However, the counter argument is that there is extreme pressure on candidates to win their seats, not only for the sake of the party, but because their own careers and futures may depend on it. This pressure can drive candidates to ‘win at all costs’, thus creating a strong incentive to fund their campaign in any way possible if the party decides not to provide the funds the candidate believes they need to win the seat.

On balance, we do not see any merit in the move to strip endorsed candidates of their public funding entitlements and further centralise public funding in head office. We agree that this creates a significant corruption risk. We support a return to the previous model where payments to reimburse a candidate for their campaign spending were made directly to the candidate, not the party.
Recommendation 16

That a candidate’s entitlement from the Election Campaigns Fund be paid directly to the candidate, unless the candidate directs otherwise.
Public Funding – Administration

Background

Public funding has been provided for political party administration in New South Wales since 1993. Between 1993 and 2010, eligible parties were provided with public funding from the ‘Political Education Fund’. These annual payments were able to be used to inform the public about the history and policies of a party, newsletters, seminars, staff salaries and office costs. The amount available was determined by reference to the cost of a postage stamp, multiplied by the total number of first preference Legislative Assembly votes. The two major parties were reimbursed approximately $500,000 to $700,000 each year and the minor parties about $30,000 to $200,000. Independents and parties that failed to get a Member elected to Parliament were excluded from the scheme.

In 2010 the then Labor government introduced legislation to replace the Political Education Fund with an Administration Fund. The Administration Fund significantly increased funding for the administration and management of the NSW-based activities of a party. It also changed the funding formula and categories of eligible expenses. Payments from the Administration Fund were calculated at $80,000 for each Member of Parliament, up to a maximum of 25. This provided the major parties with up to $2 million each year, minor parties with between $160,000 and $480,000 each year, and independents with $80,000 each year.

The following graph shows the increase in funding from the Political Education Fund to the Administration Fund. The 2009 and 2011 annual payments provide the most accurate comparison, as both funds operated in part in 2010.

Figure 13 – Increase in funding – the Administration Fund replaces the Political Education Fund ($ million)

The reason given by the then Premier for the establishment of the Administration Fund was to offset the loss of revenue to parties caused by the introduction of caps on donations.249 While historically party administration was largely funded by membership fees, the widespread decline in the membership base of the major parties250, coupled with increased costs and the ‘professionalisation’ of political parties, meant that parties were increasingly reliant on donations to fund their administration costs.

In 2013, the Coalition introduced legislation to alter the funding formula to increase administration funding and introduced a diminishing sliding scale.251 The rationale for the increase was to compensate parties for the record-keeping and compliance burden of the
2010 reforms, and to offset the lost revenue caused by the ban on donations from sources other than individuals, such as unions and corporations (since repealed). The diminishing sliding scale aims to provide proportionately more funding per Member to minor parties and independents to reflect the economies of scale enjoyed by major parties with more MPs. There are a number of fixed costs associated with running a political party and complying with the funding regulation, regardless of the size of a party. Quarterly reimbursements were also introduced in response to concerns about cash-flow difficulties and short-term borrowing.

Administration Fund payments have recently been further increased, with the extra funding from 2014. The second reading speech introducing the amendments was largely silent on the policy reasons for this increase, simply stating 'This amendment is designed to better reflect the administrative and operational costs of political parties.' As noted earlier, it has been suggested that there has been a decrease in donations to the major parties due to recent events at the ICAC. The amendments also introduced the capacity to apply for a 50 percent advance payment of the quarterly instalments.

Figure 14 shows the maximum amount of funding available to each party and the independents under the new funding formula, based on the current composition of the Parliament.

**Figure 14 – Maximum reimbursement under the Administration Fund (2014)**

<table>
<thead>
<tr>
<th>Party</th>
<th>Number of Members</th>
<th>Maximum Reimbursement (1 year)</th>
<th>Maximum Reimbursement (4 year election cycle)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Liberals</td>
<td>54</td>
<td>$2,800,000</td>
<td>$11,200,000</td>
</tr>
<tr>
<td>Nationals</td>
<td>26</td>
<td>$2,800,000</td>
<td>$11,200,000</td>
</tr>
<tr>
<td>Labor</td>
<td>37</td>
<td>$2,800,000</td>
<td>$11,200,000</td>
</tr>
<tr>
<td>Greens</td>
<td>6</td>
<td>$900,000</td>
<td>$3,600,000</td>
</tr>
<tr>
<td>Country Labor</td>
<td>3</td>
<td>$600,000</td>
<td>$2,400,000</td>
</tr>
<tr>
<td>CDP</td>
<td>2</td>
<td>$450,000</td>
<td>$1,800,000</td>
</tr>
<tr>
<td>Shooters &amp; Fishers</td>
<td>2</td>
<td>$450,000</td>
<td>$1,800,000</td>
</tr>
<tr>
<td>Independents</td>
<td>2</td>
<td>$250,800 each</td>
<td>$1,003,200 each</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>$11,301,600</td>
<td>$45,206,400</td>
</tr>
</tbody>
</table>

The following graph shows the total amount of public funding paid from the Political Education Fund and the Administration Fund from 2006 to 2013. The graph illustrates how the introduction of the Administration Fund in 2010 saw a significant increase in the amount of public funding to parties; changes to the formula in 2013 and 2014 have increased this amount further. By 2015 over $10 million in public money will be provided to parties each year, up from $2 million less than a decade ago.
Figure 15 - Annual funding to parties from the Administration Fund (after 2010) and the Political Education Fund (to 2010)

*Projected amounts based on maximum reimbursements.

The following charts show the annual payments to each party from 2006 to 2015.

Figure 16 – Payments from the Political Education Fund and the Administration Fund – Liberals and Nationals

*Projected amounts based on maximum reimbursements.
As these figures demonstrate, the establishment of the Administration Fund in 2010 under Labor, and subsequent increases in payments under the Coalition, has more than quadrupled the amount that parties can claim. The Nationals, in particular, have benefitted. Their funding has shifted from the level of a minor party to be on equal footing with the two major parties – from around $200,000 per year to $2.8 million per year.

The types of expenditure permitted under the Administration Fund are very broad. They cover spending for the administration and management of the NSW activities of a party, including the following costs.

- Staffing costs.
- Equipment and vehicles.
• Office accommodation, including rent, water and electricity bills.

• Office expenses such as IT systems, bank account fees, office supplies and telephone charges.

• Interest payments on loans.

• Conferences and seminars to discuss policy.

• Providing information to the public, including website costs, postage, brochures, business cards.

• Audit expenses.

The largest item of reimbursement claimed by the major political parties is staffing costs. Other significant expenditure includes office rent, IT systems and services, travel (to conferences and meetings) and postage. Some parties claim reimbursement for the interest on loans. The costs of auditing claims for payment vary significantly, from $550 to around $9,000 each year.

Parties are reimbursed for NSW administration expenditure. They cannot claim for staff time and other resources used for federal elections or administration, or the proportion of staff time and other resources which relate to NSW election campaigns.

Most of the parties informed the Panel of their total administration costs for New South Wales over the past four years. It would seem that public money covers over half the administration costs of the Liberal and Labor Parties, and over 80 percent of the administrative costs of the other parties.

As noted earlier, the Administration Fund operates under a reimbursement model. Parties are paid for actual expenditure and they are required to submit a detailed claim with accompanying invoices and a statement from a registered company auditor. Reimbursement is conditional on lodging all required disclosure documentation.

In addition to public funding for administration, MPs receive public support and funds to perform their parliamentary duties and to communicate with their constituents. They are provided with electorate and parliamentary offices and can access a number of allowances. For instance, each member receives a Logistic Support Allowance of between $24,000 and $54,000 each year for transport, communications and office supplies. Each Legislative Assembly Member can also access an Electorate Communication Allowance of between $60,000 and $80,000 each year to distribute paper and electronic communications to constituents.

The public funding available for party administration in New South Wales far exceeds the funding available in other jurisdictions. The ACT provides funding at a rate of $20,000 per member. From 1 July 2015, South Australia will provide ‘special assistance funding’ of $14,000 per year for parties with five or less MPs and $24,000 per year for parties with six or more MPs. No other Australian jurisdictions provide public funding for administration.

Discussion and conclusions

Should there be public funding for party administration?

When members of the public contemplate public funding of political parties, they usually think about funding of election campaigns, rather than party administration. Apart from those submissions from academics and some of the political parties, the Panel received very few submissions that commented on public funding for party administration.
There appear to be two opposing views about public funding of party administration. There is one view that objects to public money subsidising the ongoing existence of political parties. This view argues that public funding removes parties and party officials from the need to engage with party members, and encourages the centralisation of power and undemocratic behaviour. On this view, funding of party administration is the responsibility of the party and its members, rather than taxpayers.

Former Member of Parliament Rodney Cavalier, one of the architects of the original scheme for public funding in New South Wales expressed a view that ‘parties have no right to public funds for its administration’ and that the Administration and Policy Development Funds should be abolished. Former Member of Parliament Rodney Cavalier, one of the architects of the original scheme for public funding in New South Wales expressed a view that ‘parties have no right to public funds for its administration’ and that the Administration and Policy Development Funds should be abolished.259 He outlined how the Parliamentary Committee which proposed the original 1981 scheme expressly excluded funding for party administration as ‘there was and there remains no democratic principle that warrants taxpayer support for party administration’.260

Bret Walker SC argued that the ‘very notion that Consolidated Revenue should pay for the administration of political parties is obnoxious’. He suggested that while most people ‘do not like any of the parties’ there is ‘something particularly nasty about contributing by way of tax to the partisan activities of those with political opinions at odds with the individual taxpayer’. Mr Walker also objected to funding for party administration on the basis that a ‘party that cannot persuade enough of its devotees to contribute the very modest sums typically required for membership subscriptions, so as to fund its own administration and political machinations, should simply not be allowed to freeload on the rest of us’.262

There is a contrary view that political parties are central to parliamentary democracy and our system of government. It is in the public interest that they are funded to develop policies, communicate with the community and compete for parliamentary representation. On this view, public money for party administration is justified, given the erosion of private funding and declining party membership.

The NSW Electoral Commission submitted that parties should be financed to ‘do the things that are considered important to the health of our representative democratic system’ such as development of their party platform, raising issues for debate and ideas for consideration, and acting as a ‘vehicle for citizens to become involved in the political process’. The Commissioner described the importance of parties as follows:

At the federal and State level 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.

The Panel believes that some public funding for administration costs is reasonable. First we accept the importance of parties to our democratic system of government and second we note and support certain restrictions on private fundraising. On the other hand the Panel considers that the current situation, where parties are given large amounts of public money subject to very few conditions, is entirely unacceptable. It is difficult to think of any other circumstance where taxpayer money is distributed so freely. The public are entitled to expect that the payment of administration funding by taxpayers should be contingent on compliance with the law, good governance practices, transparency and accountability. Public funding should be fair and equitable and based on proportionate and reasonable administration costs. The types of expenditure which can be claimed must be clear. For example, the Panel supports administration funding for auditing, governance, IT and financial systems. The Panel is concerned that at present the criteria are so loosely drafted that they allow parties to claim an incredibly broad range of expenses. The distinction between campaign and administration expenditure is not clear enough.
What conditions should be attached to payments from the Administration Fund?

Administration funding is currently provided to parties and independents with few conditions. As a minimum, parties must be subject to the same standards and conditions required of other organisations which receive substantial funding from the government, such not-for-profit and other community organisations.

Payments from the Administration Fund are not transparent. Unlike election funding and expenditure, there are no disclosure requirements attached to how the payments from the Administration Fund are spent. Disclosure and external scrutiny are an important anti-corruption tool – ‘sunlight is the best disinfectant’. Disclosure would also provide a level of public accountability which is currently missing. The Panel strongly believes that taxpayers should know how their money is being spent.

In its Interim Report the Panel made clear that in return for significant levels of administration funding the community is entitled to expect higher governance standards, accountability and transparency from parties. During the roundtable discussions academics were asked about conditions which could be attached to the receipt of administrative funding.

Dr Anika Gauja outlined two ways of approaching the funding of political parties. One view is that parties should be funded simply by virtue of their importance to the democratic system of government. The other view is that public funding should be conditional.

Dr Tham argued for administration funding to be linked to compliance policies. These policies would make public funding conditional on a party being able to demonstrate to the satisfaction of the NSW Electoral Commission that they have sufficient internal compliance systems to ensure that funds are spent according to the law. Dr Tham explained that this arrangement would provide probity while also respecting the diversity of party structures, and placing the onus for compliance on the parties.

266 The Panel supports the introduction of standards and conditions attached to the receipt of administration funding. The aim is to promote good governance, accountability and transparency. These conditions are discussed in Chapter 10 – ‘Governance’.

Beyond the requirements of governance, accountability and transparency, there have been various arguments that public funding should be conditional on parties operating according to democratic principles.

Senator John Faulkner has argued that public funding should be contingent on the rules and decisions of all political parties being justiciable:

The stench of corruption which has come to characterise the NSW Labor Party must be eliminated. Failing to act is not an option. The Party which gave you Eddie Obeid, Ian Macdonald and Craig Thomson, and promoted Michael Williamson as its National President must now be open to scrutiny and its processes subject to the rule of law. In fact, I believe that the rules and decisions of all political parties should be justiciable, and that State and Federal Governments should consider making a party’s eligibility for public funding contingent upon it.

While acknowledging that he is ‘probably in a minority of one’ within his party, Luke Foley MLC also expressed a view that administration funding should be conditional on parties operating democratically and treating their members fairly. In parliamentary debate on the recent amendments to NSW election funding law, he said:

I make the point that it is possible for the Parliament, when it passes a law that involves the passage of very large sums of public money to our registered political parties, to accompany that with requirements that go to ensure that our political parties, which have an important role in our political system today, actually operate in accordance with the rule of law and afford their members due process – because, frankly, I do not have confidence in a system, that
saying our political parties can be laws to themselves; that they are private clubs and they can decide whatever they like.\textsuperscript{268}

Professor George Williams suggested that one of the democratic safeguards attached to the receipt of administrative funding should be 'membership control being demonstrated through appropriate rules' including 'all positions of power being referrable to the members in some way, members having some form of enforceable independent complaints mechanism to actually challenge decisions to ensure they are in accordance with the rules of the organisation and also providing an appropriate level of transparency'.\textsuperscript{269}

These are powerful arguments and the Panel does see the benefits of this approach. The behaviour within parties which has been alleged by the ICAC is after all what has led to the establishment of this Panel. We have concluded that the recent ICAC inquiries justify government intervention to ensure that there are strong governance and anti-corruption systems within parties. However we are wary of intervening too far into the internal workings of the parties. For that reason we stop short of mandating specific internal party democracy requirements.

What model of administration funding is appropriate?

The Labor Party argued that administrative funding should be based on membership numbers rather than parliamentary representation. They justified this position on the basis that the Parliament already provides individual MPs with a budget and staff, and additional funding for MPs with parliamentary roles such as party whips. They contended that a rate of $350 per financial member would 'provide fairer funding between the major parties and keep roughly in line with current public funding levels'.\textsuperscript{270} The Labor Party submitted that this model could be extended to include funding for parties that did not have a Member in Parliament at the same or a lower rate.

The Nationals did not agree with the Labor Party proposal to link public funding to membership fees, believing ‘that any such scheme would be liable to manipulation’. They objected to the figures provided by Labor in their submission as they ‘massively understate’ The Nationals’ membership, as most members are couples who are covered by a single membership payment, and many have paid for life membership rather than making annual payments.\textsuperscript{271} The Nationals also said that it would encourage parties to offer free or very low membership rates.

The Christian Democratic Party also submitted that funding should never be linked to membership, as membership numbers are ‘open to manipulation’.\textsuperscript{272}

The Greens contended that a system for calculating entitlements based on the number of first preference votes would be fairer than the current system. They argued that the ‘single member electorate system in the Legislative Assembly results in a substantially larger proportion of MPs for major parties than their proportion of the primary vote’, and that the current funding system therefore is ‘grossly disproportionate to a party’s vote’ and does not reflect the ‘reasonable costs of administering parties capable of genuinely contesting elections state wide’.\textsuperscript{273} The Panel has some sympathy for The Greens position and thinks that the current model should be reviewed with a view to striking a better balance between parties with similar levels of electoral support.

Dr Tham put forward a hybrid model, based on both the number of first preference votes received and party membership numbers.\textsuperscript{274} He recommended that the eligibility threshold for administrative funding be shifted to four percent of the first preference votes for candidates, and two percent of the first preference votes for parties. When questioned about the potential for branch-stacking under a system based on membership numbers, he stated that there would need to be ‘probity measures to ensure that the membership list is a genuine membership list’.\textsuperscript{275}
In considering an appropriate model for the eligibility and calculation of administration funding, the Panel supports a model which:

- provides broad equality between parties with similar levels of support;
- does not advantage the major parties at the expense of minor parties, independents and emerging political parties and candidates;
- does not unfairly advantage and entrench incumbents; and
- provides sufficient funds to the main opposition party to perform its role as the alternate government.

The current threshold for access to the Administration Fund is election to Parliament. The Panel considers that this is appropriate. Securing representation in Parliament signals a sufficient level of public support to warrant some annual administration funding. While this does mean that emerging parties are excluded from the scheme, this can be off-set by the Policy Development Fund if the changes recommended to this Fund are adopted (discussed later in this Chapter).

The Panel supports administrative funding being provided according to a diminishing sliding scale, in line with the current model. This provides more funding per member for minor parties and independents, in recognition of the economies of scale available to the larger parties and high up-front costs. It also appears to strike a fair balance between major and minor parties and independents. While the major parties are provided with more funding to reflect voter support and their more expensive and established party structures, the smaller parties still get a fair share.

The Panel believes that a healthy and competitive opposition is vital to democracy. Under the current model the maximum entitlement is reached on the election of 25 MPs. Three parties reached this maximum for the 2011 election – Labor Party (34 MPs), Liberals (63 MPs) and The Nationals (26 MPs). This election result was atypical – an unprecedented number of seats for the Liberal/National coalition and the lowest number for Labor Party since 1898. However, even this historically low representation was sufficient for the Labor Party, the main opposition party, to reach the maximum entitlement. We support this model over one which provides funding solely in proportion to total number of MPs or votes. Such a model would have provided the Coalition with almost three times the funding of Labor Party and given it a substantial advantage in subsequent elections.

A risk with the current model is the incentive for a party to artificially split to secure higher funding. We support separate administration funding for coalition parties where there is a genuinely separate party structure, with separate administrative functions, offices, staff and party units. The Panel view is that the Electoral Commission has a responsibility to monitor the integrity of the Administration Fund to guard against such behaviour.

There appears to have been a lack of transparency and detailed policy consideration by various governments in setting the entitlements under the Administration Fund. This is perhaps not surprising given that the major government and opposition parties of the day can collude to vote themselves more resources with few checks and balances. We are not aware of any analysis by legislators of the actual spending by parties, the reasonable costs of running a political party or the appropriate levels at which the taxpayer could be reasonably asked to subsidise these costs. The Administration Fund was introduced and payments have been increased with little justification or public comment.

The Panel notes that independent oversight has been introduced in other areas where parliamentarians were responsible for matters where they have a direct financial interest. We support the establishment of an independent authority to oversee the Administration Fund in a similar way. Independent oversight is outlined further in Chapter 10 – ‘Governance’.
Recommendation 17
That there be clear rules, and that the NSW Electoral Commission issue guidelines, for the costs that can be reimbursed from the Administration Fund.

Recommendation 18
That the model for calculating entitlements from the Administration Fund which operated immediately prior to the 2014 amendments to the Act be reinstated.

What types of expenditure should be funded?
Our public consultations elicited few comments on the types of administration expenditure parties and independents should be able to claim. The current broad definitions cover just about any party expense, outside federal expenditure and state campaign expenditure. This latter exclusion is open to interpretation and abuse. It is expected that the percentage of salaries and other expenses claimed by the parties would reflect the exclusion of federal and election campaign costs. This should be closely monitored by the Electoral Commission. There are currently rules around the payment of money into separate campaign accounts, which should prevent ‘leakage’ of administration funds to campaigning. This also needs to be closely monitored.

The Panel would like to see a significant portion of the Administration Fund devoted to governance, accountability, transparency, and candidate education. We also expect that the NSW Electoral Commission will play an active role in monitoring to ensure that Administration Funds are spent according to both the letter and spirit of the rules. For instance, the Panel have identified how the reimbursement from the Administration Fund of the interest on loans to political parties could be used to circumvent the cap on donations. While parties are required to disclose the amount and source of loans as part of the general disclosure requirements, they are not required to disclose the loan terms and conditions. This means that a party could take out a substantial loan (for example, $1 million) from an entity or individual to finance their election campaign. They could then claim interest on the loan from the Administration Fund, with no incentive or obligation to repay the loan. In effect, the loan would be akin to a donation to the party and the donor derives an ongoing return — all at the taxpayers’ expense. This is but one example of a potential loophole in the donation laws that requires attention and close monitoring by the NSW Electoral Commission.

Recommendation 19
That the NSW Electoral Commission focus on:

a) strategic oversight of the Administration Fund to ensure the integrity and proper use of the Fund; and

b) monitoring and enforcing the rules to prevent the use of administration funds for electoral expenditure.
Public Funding – Policy Development

Background

The Policy Development Fund provides financial support to newer parties that do not otherwise receive any ongoing public funding. About $45,000 was provided to new or smaller parties over the four years to 30 June 2013. The Policy Development Fund was established in 2010 ‘in response to concerns that capping donations may have an adverse impact on the development of new parties…’. It is intended to add fairness to the system.

The Policy Development Fund provides funding to parties that are not represented in the Parliament and therefore do not qualify for administration funding. Parties can apply for an annual payment as reimbursement for policy development expenses. To be eligible a party must have been registered for at least 12 months. The NSW Electoral Commission must be satisfied that the party is genuine.

The 2014 changes to the Act doubled payments from the Policy Development Fund. For the first eight years after registration, a party is eligible for funding of $0.56 for each first preference vote received by the party’s endorsed candidates at the previous election or a minimum of $11,200, whichever is greater. After the eighth year of registration, a party’s funding entitlement is calculated solely based on the number of first preference votes received by its endorsed candidates (i.e. there is no longer a minimum payment).

Campaign costs cannot be reimbursed from the Policy Development Fund. The costs that are covered are extensive and are the same as those covered under the Administration Fund. A claim for payment must be signed by a registered company auditor and be accompanied by invoices or receipts as proof of the expenses claimed.

Discussion and conclusions

The Greens acknowledged the importance of the Fund in providing start-up support for new parties. Jamie Parker MP told the Panel that while the funding available to emerging parties was sufficient to put basic party structures in place, it could be more generous. The Greens therefore welcomed the doubling of funding under the new Bill, with Mr Parker observing: ‘That is very important and we support that very strongly’. Dr Tham observed that the Policy Development Fund ‘pretty much functions as a start-up fund for new and upcoming parties’. Like The Greens, he concluded that it is ‘a very important equitable measure in terms of New South Wales regime’.

While not commenting directly on the Policy Development Fund, many people emphasised the importance of making efforts to level the playing field so that new parties (and independent candidates) can emerge and become electorally competitive. The election funding scheme should be designed to ensure that the most well-funded voice does not drown out all others, such as providing support through the Policy Development Fund.

The Panel considers that the criteria for accessing the Policy Development Fund are appropriate. New parties must meet a high eligibility threshold. First, a party must have been registered for 12 months. Registration requires a party to have at least 750 members, a registered officer and a written constitution, and to pay a $2,000 registration fee. Second, a party must also satisfy the Electoral Commission that they are a genuine party. These eligibility criteria seem appropriate as they avoid public funding being directed to parties with little electoral support or to parties that may quickly disappear.
Our deliberations have led us to question the apparent mismatch between the Policy Development Fund’s purpose to assist new parties, and the types of expenses that it covers. At present, new parties can be reimbursed for the same costs as can be paid for through the Administration Fund. This seems odd, given that new parties might be expected to have very different costs to the established parties who spend their administration funding largely on staffing costs, office rent and IT systems. We recommend that the Fund be renamed the ‘New Parties Fund’ to better reflect its aims.

We support the 2014 amendments that doubled annual payments to about $11,000. This is a modest amount compared to the large amounts of public funding flowing to the established parties, but it goes at least some way to assisting new parties.

The submission from the Voluntary Euthanasia Party made a suggestion on how to best assist new parties, nominating the production of election material as an area where public funding could be especially helpful:

Considering that NSW has one of the most onerous criteria for registering a state political party, I think it would not be unreasonable to allocate each political party a set amount to assist in the production of election material such as ‘How To Vote’ flyers, corflutes etc. Even $10,000-$20,000 per party would make a huge difference to the new, minor parties.281

The Panel is persuaded by this submission. We believe that in an election year, the types of expenses covered under the Fund should be expanded to assist new parties with their chief concern – that is, contesting elections. If we genuinely want to support new parties, it seems sensible to assist them with their election costs. Given the modest amounts of money involved this would not create any cause for concern about public funding influencing voting trends. Parties would still be able to receive payments from the Fund in non-election years to cover the usual range of administrative or operating-type expenses.

When meeting with stakeholders the Panel heard anecdotally that small parties find it difficult to access the Policy Development Fund. The Panel therefore considers that the claims process should be streamlined. Costs should also be reimbursed in a timely manner. There should be a move away from making annual payments in the first six months of the year after the year in which the spending occurred. This can lead to a significant time lag between the expense and reimbursement. In addition, the requirement for a registered company auditor to sign a claim for payment should cease. This is unnecessary given that the Electoral Commission checks each claim before approving a payment, and the amounts of money involved are modest.

**Recommendation 20**

That the Policy Development Fund be renamed the ‘New Parties Fund’ to better reflect its aims.

**Recommendation 21**

That:

a) payments from the ‘New Parties Fund’ be retained at the current levels and adjusted annually for inflation, rounded up to the nearest whole number multiple of $100;

b) electoral expenditure for the purpose of influencing the voting at an election in election years be reimbursable from the 'New Parties Fund'; and

c) that the ability for parties to be reimbursed for administration expenses in non-election years be retained.
Recommendation 22

That the process for making claims for payment from the ‘New Parties Fund’ be streamlined.
Chapter 8 – Disclosure of political donations and expenditure

- The Panel’s terms of reference require it to consider measures to ensure that caps on donations and expenditure are effective. The terms of reference also require us to consider amendments to legislation to ensure that disclosure requirements cannot be avoided though the use of artificial structures and other means.

- Timely and meaningful disclosure is the cornerstone of any effective campaign finance regime. Disclosure enables society (including the media, unions, interest groups and individuals) to scrutinise the potential relationships between political donations and government decisions. Disclosure is also a key tool for ensuring compliance with other regulatory measures such as the caps and bans on donations and limits on electoral expenditure.

- Many jurisdictions have implemented online, real-time disclosure of political donations. New South Wales still operates a paper-based, annual disclosure system. The Panel urges the NSW Electoral Commission to replace paper-based disclosures with an online disclosure system as soon as possible. The Act should be amended to require online, real-time disclosure in the 6 months before each general election.

- The Electoral Commission should also supplement raw disclosure data with explanatory material and analysis to inform the public about donations activity.

- Disclosure should be more detailed. First, political parties should be required to identify any political donations that have been solicited by, or made for the benefit of, a particular candidate. The public can then scrutinise the links between donations and decisions. Second, parties and candidates should be required to disclose the terms and conditions of any loans.

- Parties should be required to identify all electoral expenditure incurred for the purposes of influencing the voting in particular electorates. This will make it easier to assess compliance with the electorate-based expenditure caps. Parties should also disclose details of electoral expenditure incurred in the capped expenditure period so that compliance with the overall cap on electoral expenditure can be assessed.

- Associated entities of political parties should have the same disclosure obligations as parties to reduce opportunities for avoidance.
Disclosure of political donations

Background

The Panel’s terms of reference require it to consider measures to ensure that caps on donations and expenditure are effective. The terms of reference also require us to consider amendments to legislation to ensure that disclosure requirements cannot be avoided through the use of artificial structures and other means.

By ensuring that the voting public is fully informed about donations before an election, donations disclosure requirements motivate political parties to actively avoid perceived and actual corruption. As IDEA has observed, ‘the fear of scandals and of losing public support can serve as a better defence against misbehaviour than any legal sanctions’. Recent reports indicate that almost 90 percent of countries now impose some form of disclosure requirements on political parties and candidates.

Critics of disclosure rules argue that they impose an undue administrative burden. They also argue that disclosure requirements may discourage people from making political donations, if donors refrain due to fear of reprisals from friends, associates and the community at large.

Disclosure requirements also enable the public and the media to monitor compliance with restrictions on political donations. Although non-complying parties and candidates may not disclose that they have received prohibited donations, disclosure and annual financial reporting requirements together support the investigative and prosecutorial functions of the NSW Electoral Commission and integrity bodies such as the ICAC.

In New South Wales, annual disclosure obligations apply to political parties, elected Members, candidates and groups. Third-party campaigners and major political donors are also required to lodge annual declarations with the Electoral Commission.

For donations of $1,000 or more, details including the name and address of the donor must be disclosed and are published in the Electoral Commission’s searchable online database. For donations under $1,000, the total amount of small donations and the total number of persons who made those donations must be disclosed. Donations of less than $1,000 from the same source in the same financial year must be aggregated for the purposes of the disclosure threshold. Given the broad definition of ‘political donation’ under section 85 of the Act, the disclosure rules capture membership and affiliation fees, the proceeds of fundraising ventures and functions, and transfers of money to the NSW branch of a political party from the federal or other State or Territory branches of the party.

Annual disclosures must be lodged within 12 weeks of 30 June each year (or within 16 weeks of 30 June each year in the case of major donors). This means there is a delay between the making of a donation, the disclosure of that donation to the Electoral Commission and the release of information about the donation to the public. For example, disclosures (other than disclosure by major donors) covering the period from 1 July 2012 to 30 June 2013 were not due to be lodged until 22 September 2013 and were not available to the public until 25 November 2013. This means that NSW voters had to wait up to seventeen months to find out the sources and amounts of political donations made during the 2012-13 financial year.

In its Interim Report, the Panel was critical of the current NSW disclosure regime and expressed strong support for online, real-time disclosure of political donations. A number of jurisdictions already require either continuous or real-time disclosure in the lead up to elections, most notably New York, Ontario in Canada, and the ACT.
Discussion and conclusions

Frequency of disclosure

The Panel’s consultations revealed overwhelming support for more frequent and timely disclosure of political donations. This is the case even though donations are capped at relatively modest levels (about $5,000 for donations to parties and $2,000 for donations to candidates and third-party campaigners).

Dr David Solomon, Acting Queensland Integrity Commissioner, pointed out that the transparency aims of disclosure are 'not fully achieved or achievable when the disclosure of political donations does not take place until after voting has occurred'. Accordingly, he supports more frequent disclosure of political donations in an election year, with continuous disclosure in the two months before an election. Dr Solomon cited the New York City Campaign Finance Board’s real-time disclosure system as an ideal model for New South Wales.

Mr Alex Greenwich MP argued for real-time disclosure of political donations of $200 or more. The Greens suggested weekly disclosure of donations of $1,000 or more in non-election periods and 24-hour disclosure in the six months leading up to an election, with electronic lodgement to replace paper-based disclosures. Unions NSW strongly supported more frequent disclosures of donations, including those made to third-party campaigners. While Unions NSW did not advocate specific reporting times, it considered that disclosure should be frequent enough to ensure that voters have up-to-date information about the making of donations both before and after an election – a measure that is also supported by The Greens.

Real-time disclosure is a common theme in the submissions received from academics. Professor Williams, Professor Orr and Dr Tham all support continuous disclosure, with Dr Tham suggesting that continuous disclosure should be required in the three months before an election. A number of individuals also made submissions in favour of more frequent and accessible disclosure of donations before elections.

Two organisations – Funding & Disclosure Inc and The Greens – highlighted how they have sought to overcome the deficiencies of the current disclosure regime by developing their own websites containing political donations information and analysis for the public. On the issue of online disclosure, The Greens stated that:

> The technological feasibility of this level of donations transparency is established by the Greens democracy4sale.org website which has provided this service to the public for the past fifteen years on a minimal budget.

Under the current annual disclosure rules, NSW voters are denied access to the sources and amounts of political donations that fund campaigns until many months after the election. As noted in our Interim Report, this is an unacceptable result in the internet era and undermines the purpose of the disclosure regime. As Professor Orr notes, 'disclosure delayed is disclosure denied'. This lack of transparency also fuels public mistrust and cynicism about the influence of donations on electoral outcomes and government decisions.

The Panel strongly supports online, real-time disclosure of political donations in the interests of transparency. The Electoral Commission should investigate whether the real-time disclosure software used by other jurisdictions can be adapted for NSW elections with a view to replacing paper-based disclosures with an online, real-time disclosure system as soon as possible.
Real-time disclosure should be required in the pre-election period (say, six months before an election) with annual disclosure at all other times. This would probably provide a sufficient level of transparency given that New South Wales operates on fixed four-year terms. That said, if the Electoral Commission were to develop an online system that facilitates real-time disclosure without placing an undue administrative burden on parties and candidates, the Panel sees no reason why real-time disclosure could not be in force at all times.

‘Clearing house’ model

Professor Twomey made an alternative suggestion to improve the speed and accuracy of disclosure and reduce corruption risks: that the NSW Electoral Commission act a ‘clearing house’ for all donations. Donors would complete a form identifying themselves, the party or candidate to whom the donation was being made, and the purpose of the donation (e.g. a State or federal election campaign). The Electoral Commission would then deposit the donation in the State campaign account of the relevant party or candidate. Only money from that account could be spent on the election campaign. According to Professor Twomey, the Electoral Commission could:

...immediately record donations and could then provide real-time and accurate public disclosure. It could also cross check to ensure aggregate limits are not breached and that caps are not breached. Any excess donations could be rejected and returned, avoiding any risk to parties or candidates or accepting illegal donations.294

Professor Twomey acknowledged that this system would increase the administrative burden on the Electoral Commission. She suggested that it would be reasonable to re-direct some Administration Funding from the parties to the Commission on the basis that one of the reasons for providing parties with increased funding was to help them comply with the increased disclosure requirements.

A number of submissions supported Professor Twomey’s proposal or variants of it. For example, Andrew Moran recommended ‘the creation of a political donations clearing house’ to increase openness and transparency around political donations.295 Similarly, Alan Fredericks supported a ‘common Government appointed “front door”’ to ‘avoid political parties endeavouring to camouflage donations’.296 Alexander Reid also insisted that all donations should be managed by a central body but went one step further, arguing that donors should remain anonymous to prevent donations being used to ‘purchase influence’.297

Several others supported Professor Twomey’s proposal and observed that it would assist minor parties. According to Anthony D’Adam, Professor Twomey’s proposal would ‘enable real time disclosure to occur regardless of party size or administrative capacity’.298 The Voluntary Euthanasia Party and the Australian Cyclists Party advised the Panel that the proposal would ‘create a more level playing field for all parties’.299 This is because the established parties have paid staff and funding software to meet the disclosure requirements, whereas minor parties rely heavily on donated time and labour.

The Panel considers that Professor Twomey’s clearing house proposal as a way of achieving real-time disclosure has merit, although as she noted, her proposal would increase the administrative burden on the NSW Electoral Commission. The Panel strongly believes that the Electoral Commission should shift its focus from administration to oversight and enforcement of election funding laws. By making the Electoral Commission a ‘clearing house’ for all political donations, the Electoral Commission would only be inundated with more paperwork. There is also a strong argument that recipients should not be relieved of their legal responsibility for disclosure because they find it tiresome, or worse, because they do not know the rules around political donations.
Threshold for disclosure

While many of the submissions received by the Panel discussed the level at which political donations should be capped, there was relatively little discussion about the threshold for disclosure of political donations.

During the academic round table discussions, Dr Gauja noted the importance of keeping the disclosure threshold at a reasonably low level because in addition to large donations ‘there are also smaller systematic donations that, over time, lead to a particular type of political behaviour and culture and add up as well’. 300

As noted above, Mr Alex Greenwich MP favours a reduction in the current disclosure threshold from $1,000 to $200. 301 The Greens support the current disclosure threshold of $1,000. 302

The Panel considers that the current disclosure threshold of $1,000 provides a reasonable level of transparency without placing an undue administrative burden on parties, candidates and donors.

Form and content of disclosures

Some people expressed frustration with the form in which information about political donations is presented to the public. Dr Gauja commented that at present, only political scientists and academics who are granted research assistance have the time and resources required to properly analyse disclosures in their current form. 303 Professor Williams noted that annual disclosure is not conducive to transparency due to the sheer volume of information provided at the end of each disclosure period: ‘…if you want to hide something, the best way of doing it is dumping it as part of a really big wad of information, which is of course the system at the moment’. 304

Dr Solomon submitted that the Electoral Commission should publish disclosures in a more ‘readily understood and accessible form’ in the interests of transparency. 305 This idea was supported by Dr Tham, who suggested that the Electoral Commission should analyse disclosure data and publish explanatory material that provides the public with an overview of donations activity in New South Wales. 306

The Panel recommends that the raw disclosure data published by the Electoral Commission should be accompanied by explanatory material to help inform the public about the sources and amounts of political donations accepted by political parties, groups, candidates, and third-party campaigners. The post-election reports published by the New York City Campaign Finance Board are an excellent example of this. 307

Another issue that was briefly raised at the Panel’s academic roundtables was the lack of transparency around political donations that are made to a political party but are either solicited by, or intended to benefit, a particular candidate. 308 While the sources of such donations are disclosed by the party, the link (if any) to a particular candidate is not. This is so even where the party keeps a record of all political donations solicited by a candidate for the purposes of monitoring that candidate’s progress toward his or her fundraising target.

During its consultations, the Panel heard that it is common, particularly within the major parties, for all political donations to be directed to the party’s head office. The costs of a candidate’s campaign are then borne by the party, which invoices the candidate for those costs to support the candidate’s claim for public funding. In this scenario, the disclosure lodged by the candidate would not contain any information about the political donations that he or she procured to meet fundraising targets or that were accepted by the party to assist with the candidate’s campaign. This undermines the main purpose of disclosure: to shed
light on who has contributed to a candidate’s election campaign so that electors can cast an informed vote.

In the interests of transparency, the Panel believes that political parties should be required to disclose not only the sources and amounts of all political donations, but whether a particular donation was solicited by or made for the purpose of benefitting a particular candidate. Without this requirement, donors who are clearly seeking to promote the election of a particular candidate can effectively hide behind the party. While this requirement may involve extra administration, the Panel understands that some of the major parties already keep records of all political donations solicited by a candidate for the purposes of monitoring candidates’ progress toward fundraising targets.

Another concern regarding the content of disclosures is the lack of disclosure of the terms and conditions of loans. While parties are required to disclose the amount and source of loans as part of the general disclosure requirements, they are not required to disclose the loan terms and conditions (although they must keep records of these terms and conditions under section 96G). This means that a party could take out a substantial loan from an entity or individual to finance their election campaign. They could then claim interest on the loan from the Administration Fund, with no incentive or obligation to repay the loan. In effect, the loan would be akin to a political donation to the party from which the donor derives an ongoing return at the taxpayers’ expense. The Panel therefore considers that disclosure of the terms and conditions of loans is very important to ensure that all loans are legitimate in the sense that they must be repaid, and that they are not being used to circumvent the caps on political donations.

**Donor disclosure requirements**

Major donors are required to lodge annual declarations with the NSW Electoral Commission containing the details of all reportable political donations (i.e. donations of $1,000 or more) they have made to parties, candidates, groups, elected Members or third-party campaigners during the financial year. Donor disclosures are published in the Electoral Commission’s searchable online database. The Electoral Commission also cross-checks the donor disclosures against the disclosures of recipients to identify any inconsistencies and possible breaches of the relevant caps and bans on political donations.

Donor disclosure was not a focus of the submissions received by the Panel. The ICAC has, however, recently recommended that donor disclosure obligations be abolished to reduce the administrative burden on the Electoral Commission and assist its transition from paper-based administration to more strategic regulatory activities such as forensic analysis of electronic disclosure data, risk assessment and supervision of party governance.

The Panel agrees that the Electoral Commission should shift its regulatory focus to ensure best practice regulation of election funding. We do not, however, agree that it is necessary to abolish donor disclosures to achieve this. The administrative burden currently associated with donor disclosures could be lessened by moving to electronic disclosure (as recommended by the Panel in its interim report and the ICAC) and by the Electoral Commission using more sophisticated data analysis technology to cross-check donor/recipient disclosures and identify inconsistencies. Donor disclosures create an extra incentive for recipients to be honest in their disclosures and should therefore be retained.

**Recommendation 23**

That the NSW Electoral Commission replace paper-based disclosures with an online disclosure system as soon as possible.
**Recommendation 24**

That the NSW Electoral Commission supplement disclosures with explanatory material and analysis to inform the public about the sources and amounts of political donations.

**Recommendation 25**

That online, real-time disclosure of political donations of $1,000 or more be introduced for the six-month period before the election.

**Recommendation 26**

That political parties be required to identify where a political donation has been solicited by, or made for the direct benefit of, an endorsed candidate of the party.

**Recommendation 27**

That parties and candidates be required to disclose the terms and conditions of reportable loans (other than loans from financial institutions).
Disclosure of electoral expenditure

Background

Parties, candidates, and elected Members are required to disclose their electoral expenditure each year, along with disclosure of political donations. Third-party campaigners are not required to disclose electoral expenditure annually but instead must disclose their electoral communication expenditure after each election. The aim of this disclosure is to promote transparency and ensure there is compliance with the caps on electoral communications expenditure, which operate in the 6-month period leading up to a general election.

The NSW Electoral Commission’s disclosure forms require disclosure of electoral expenditure according to the following categories:

- Advertisements in radio, television, internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material.
- Production and distribution of election material.
- Internet, telecommunications, stationery and postage.
- Employing staff engaged in election campaigns.
- Office accommodation for staff and candidates.
- Other electoral expenditure, including travel and travel accommodation, research associated with electoral campaigns, election fundraising and auditing campaign accounts.

The disclosure must be accompanied by invoices and copies of the advertising material, for example, newspaper clippings, pamphlets and recordings of television and radio advertisements. For most categories of electoral expenditure, the disclosure must specify the dates of the expenditure (electoral communication expenditure is taken to be incurred when services are actually provided or goods are actually delivered), the name of the supplier, the product or service being supplied, the amount of the expenditure and the invoice number.

Discussion and conclusions

Party disclosure of electorate-based expenditure

During its consultations, the Panel heard that there is a lack of transparency around how much parties are spending on their campaigns in each electorate. While there is a cap on party spending of $50,000 per electorate during the capped period, parties are not currently required to disclose their spending by electorate. The Greens argued that ‘electorate specific expenditure can be hidden in the state party’s return making it difficult to determine if the party electorate specific expenditure cap of $50,000 per electorate has been observed or breached’. They contended that the ‘resultant uncertainty further taints voter confidence in the fairness of elections and the integrity of parties and candidates’. In response, the Greens recommended that parties should be required to disclose electorate spending details.

Greg Piper MP argued that any expenditure by a ‘central party organisation for locally or regionally based campaign, including for advertising, should be reported on the disclosures
of the candidates who benefit, and counted towards their overall campaign expenditure’. For campaign expenditure that benefits more than one candidate, he said that ‘expenditure should be apportioned pro-rata between all those candidates’.\textsuperscript{311} He noted that quite often disclosures will show ‘very little income or outlay from party candidates who have run high-profile campaigns’.\textsuperscript{312} This concern was echoed by others during our consultations and meetings.

The Panel believes that this lack of transparency undermines the effectiveness of the electorate-based expenditure caps. These caps are important in levelling the playing field between the major political parties that run State-wide campaigns, independent candidates and minor parties. We agree that parties should be required to disclose their expenditure in each electorate to improve transparency and to ensure that compliance with the relevant caps on electorate-based expenditure can be monitored.

The Panel’s views on the definition of electorate-based expenditure are discussed earlier in Chapter 5 – ‘Expenditure Caps’.

**Disclosure of electoral communication expenditure incurred during capped period**

The Panel believes that members of the public should be able to quickly and easily use the NSW Electoral Commission website to check whether parties and candidates have complied with the relevant caps on electoral communication expenditure during the 6-month period leading up to the election. While parties and candidates currently list the date of each item of expenditure they have incurred, there is no requirement to separately disclose expenditure incurred during the capped period or to disclose the total expenditure incurred during the capped period. For the 2011 election, some parties voluntarily provided this information to the Electoral Commission. In most cases, however, there is no simple way to tell whether the cap on electoral communication expenditure has been breached. This creates difficulties in terms of monitoring compliance with the caps, and reduces transparency and confidence in the election funding regime.

The Panel considers that political parties and candidates should be required to separately disclose electoral communication expenditure incurred during the capped period, similar to the obligations that apply to third-party campaigners under subsection 88(1A) of the Act.

**Recommendation 28**

That:

1. political parties be required to identify electoral expenditure aimed at influencing the voting in a specific electorate; and

2. the NSW Electoral Commission issue guidelines to assist parties to comply with this disclosure obligation.

**Recommendation 29**

That for the six months before the election, political parties and candidates be required to specify the details of electoral expenditure incurred and the total electoral expenditure.
Disclosure by associated entities

Background

Unlike other jurisdictions, New South Wales does not impose any specific disclosure obligations on the ‘associated entities’, being entities that are controlled by a political party or that operate for the benefit of a party. Although associated entities are subject to the disclosure requirements that apply to major donors (to the extent that they make reportable political donations) and third-party campaigners (to the extent that they incur electoral communication expenditure), they are not subject to the more detailed disclosure requirements that apply to political parties.

For example, political parties must disclose the total amount of small donations (i.e. those less than $1,000) they receive and the total number of persons who made those donations on an annual basis (subsection 92(3)). Third-party campaigners and major donors are specifically exempt from this provision. Political parties are required to disclose all electoral expenditure annually whereas third-party campaigners are only obliged to disclose electoral communication expenditure incurred during the capped expenditure period (sections 88 and 93). Political parties are also supposed to submit annual financial statements to the NSW Electoral Commission setting out, among other things, their total income and payments during the financial year (section 96N).

Discussion and conclusions

During the academic round table discussions, Dr Tham commented that ‘...this is a big loophole in New South Wales election funding laws – the absence of regulation of associated entities and I suspect it has facilitated some of the behaviour we are seeing ventilated before the ICAC hearings’. Dr Tham was of course referring to allegations that the Free Enterprise Foundation, an associated entity of the Liberals, was used to ‘launder’ political donations from prohibited donors in the lead up to the 2011 election.

The Panel considers that imposing lighter disclosure requirements on associated entities creates an incentive for political parties to use such entities to avoid the more detailed disclosure obligations that apply to parties. Other Australian jurisdictions, including the Commonwealth, have attempted to deal with this risk by subjecting associated entities to the same disclosure obligations as political parties. The Panel believes that New South Wales should take a similar approach.

The Panel’s other views on the regulation of associated entities are set out below in ‘Chapter 8 – Third Parties’.

Recommendation 30

That:

a) specific provisions be introduced regulating ‘associated entities’ (being entities that are controlled by a political party or that operate solely for the benefit of a political party); and

b) that the disclosure obligations of associated entities be the same as those of political parties.
### Chapter 9 – Third-Party Campaigners

- Third-party campaigners are organisations or individuals that are not contesting the election but who finance campaigns on specific policy issues in order to influence policy and the election.

- Third party regulation is a challenge. Third-party campaigners should be free to participate in election campaigns but they should not be able to drown out the voice of parties and candidates who are the direct electoral contestants. There is wide support for third party participation in elections, within limits. These limits include capping donations to and spending by third parties as is the case for parties and candidates.

- The Panel supports this approach. The current third party spending cap of $1 million is too high and we support halving the spending cap to $500,000 to guard against third party Political Action Committees coming to dominate election campaigns.

- We also recommend that a new aggregation provision be introduced to prevent parties from attempting to avoid their own spending caps by establishing front organisations to incur electoral expenditure on their behalf. Third-party campaigners should also be prevented from acting in concert with others to incur electoral expenditure that exceeds their spending caps.

### Caps on Expenditure and Donations

#### Background

Third-party campaigners are organisations or individuals that are not contesting the election themselves but wish to spend money in order to influence the election campaign and specific policy issues.  

To be defined as a third-party campaigner an individual or organisation must spend more than $2,000 on electoral communication expenditure in the six months leading up to an election. Third-party campaigners must register with the NSW Electoral Commission before they can pay for electoral communication expenditure during the capped expenditure period or accept political donations.

There is a spending cap of $1.05 million for third parties that register before the start of the six-month capped expenditure period. This reduces by half to $525,000 for those that register closer to the election. There is an additional cap of $20,000 for third party spending in individual electorates.

Sixteen third-party campaigners registered before the start of the capped expenditure period for the 2011 State election and were therefore entitled to spend over $1 million each. Thirteen of these sixteen third-party campaigners were trade unions. No individual registered as a third-party campaigner.

At the 2011 election the NRMA spent $387,000, the highest amount of any third-party campaigner – less than half of the third party spending cap. The next highest spender was the NSW Business Chamber, with spending of $354,000, followed by Unions NSW on $197,000 and the NSW Teachers’ Federation on $138,000.
The following graph shows the ten highest-spending third-party campaigners at the 2011 election.

**Figure 19 – Third-party campaigner expenditure: 2011 State election**

Donations to third parties are capped at $2,000. This is the same cap that applies to donations to candidates and MPs. Notably it is lower than the $5,000 cap that applies to donations to parties and groups.

Third-party campaigners are required to lodge annual declarations with the Electoral Commission of donations received and electoral communications expenditure incurred.

IDEA has acknowledged the difficulty in regulating third-party campaigning. They note that while the ‘easiest solution’ is to ban third parties from participating in election campaigns “such an approach would be seen as a violation of human rights in most parts of the world”. According to IDEA most countries do not regulate third party spending at all, and if they do, they may impose spending limits or require third parties to submit financial reports.

There are a variety of different approaches to third party regulation in Australian jurisdictions. It is unusual to cap spending by or donations to third parties. The ACT is the only jurisdiction
other than New South Wales to do so: spending is capped at $60,000 and donations at $10,000. Most jurisdictions impose some disclosure requirements on third-party campaigners, whether for donations received or electoral expenditure. The level at which donations must be disclosed varies from $1,000 to $12,800, and the frequency of disclosure also varies widely. Tasmania bans third parties from incurring electoral expenditure for Legislative Council elections, although there are no limits on third party spending in Legislative Assembly elections.

The NSW and ACT approach to regulation of third-party campaigners is similar to that taken in the United Kingdom, Canada and New Zealand. As with the regulation of political parties, this approach imposes caps on donations and election spending. In the United Kingdom, third party spending has been restricted since 1918, with spending initially capped at token levels. The third party spending limit for national elections is now £450,000 with a limit of £9,750 in any one constituency in the 12 months preceding the election. Canada introduced third party spending limits at the national level in 2000. Spending by registered third parties is capped at $200,000 with electorate-specific spending capped at $4,000 during an election period. These limits have been upheld by the Supreme Court on the basis that they are not ‘overly restrictive’ because the limits allow third parties to engage in “modest, national, informational campaigns”. Third party expenditure limits were reintroduced in New Zealand in 2010, capping third party spending at $313,000 during the election period.

A markedly different approach is taken in the United States where courts have rejected attempts at federal and state levels to restrict third-party campaigners. In the prominent Citizens United case of 2010 the Federal Court ruled that corporations, unions and other associations have the right to engage in direct campaigning, rather than restricting them to making donations to Political Action Committees who could campaign on their behalf. The need to channel donations through Political Action Committees arose because corporations and unions are banned from donating directly to parties or candidates.

**Discussion and conclusions**

There is widespread support for the right of third-party campaigners to participate in democratic election campaigns. Professor Anne Twomey described third-party participation as an important constitutional principle. She noted that ‘the High Court has recognised that those who are campaigning goes well beyond political parties or even candidates, to in fact any group who may have something to say to influence the votes that people wish to cast’.

While stakeholders were supportive of the right of third parties to engage in election campaigns, the NSW Electoral Commission and others put forward reasons for regulating third party activities:

> The role of third parties has become complex and the system of political finance should recognise the increasing importance of these players. 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 political parties. Consequently, they need to be regulated and subject to rules.

The Panel considers third-party regulation to be critical in addressing the ‘hydraulics problem’, which arises where changes are made in one area and lead to a need to tighten up in other areas. Otherwise money is directed to other parts of the system that are not regulated. The ‘hydraulics problem’ is demonstrated by the ICAC investigation into donations from the Free Enterprise Foundation to the Liberals, and the allegation that the ban on property developer donations led to the Free Enterprise Foundation being used as a ‘front’ organisation to channel developer donations.
Our consultations revealed a high level of concern about the increase in third-party campaigning. Stakeholders were alarmed by the prospect of New South Wales following the lead of the United States, where Political Action Committees have come to dominate election campaigns. Concern too was expressed by some about the third-party campaign role of unions in elections and the need to promote a balanced public debate in the lead up to elections.

The Panel shares these concerns. Our difficulty is in deciding how to balance the supported participation of third parties in election campaigns with an appropriate level of regulation. In particular, the questions are how to determine the right level for third party spending caps, and whether or not co-ordinated third party spending should be aggregated for the purpose of the spending caps.

**Role of third parties in debate**

The academic experts who gave evidence to the Panel agreed that it would be unconstitutional to prevent third parties from participating in election campaigns. Professor Twomey advised that in 1992 the High Court ruled on the ACTV case and ‘found that provisions banning third parties from advertising their political views on electronic media during an election campaign were invalid’. The High Court again considered the issue of third-party campaigning in the recent Unions NSW case.

Based on the High Court’s findings in these two cases, Professor Twomey concluded that:

> It would therefore appear that banning third-party campaigners from engaging in political communication would be most likely held constitutionally invalid and that while capping such expenditure is likely to be valid, it must be done in an equitable manner and it must allow third-party campaigners to have their voices heard and to participate in the free flow of political debate to a reasonable extent.

Some stakeholders supported the right of third parties to have a voice in election campaigns on the ground that collective action is an important and legitimate part of our democracy. For example, the Australian Manufacturing Workers’ Union (AMWU) argued that:

> …strong, effective and independent unions are a vital part of any functioning pluralist democracy … Involvement in the political process is vital to the ability of unions to deliver real outcomes for their members, providing working people and their families with a strong and organized voice in matters that affect them in their work, their communities and the life of the nation.

As noted above, Australia takes a similar approach to regulation of third party spending as in other comparable democracies including the United Kingdom, Canada and New Zealand. Dr Anika Gauja said that this approach is to ‘basically take them in to the electoral contest; treat them not as equal participants, but as recognised participants’. She argued that imposing lower limits on spending but similar limits for donations and disclosure, as is the case in New South Wales, ‘recognises that third parties have a place in the electoral contest but political parties are in fact the privileged actors’.

There was some discussion about whether third-party campaigning is increasing in Australia. According to recent research by Dr Gauja and Professor Graeme Orr, ‘third party advertising appears to be on the increase, in both the frequency and size of campaigns’. They acknowledged that it is nothing new for interest groups to run campaigns to shape public opinion, but cited a number of prominent (and highly successful) examples of recent third-party campaigns such as action around WorkChoices, the mining tax, plain packaging for cigarettes, and regulation of poker machines, carbon pricing and coal seam gas.

A key feature of the concern about third-party campaigning is the claim by the conservative side of politics that trade union affiliation to the Labor Party tilts the playing field and provides
Labor with a significant fundraising advantage. The issue of union affiliation fees is discussed in Chapter 5 – ‘Other Limits on Political Donations’. Third-party campaigning by unions is of concern to conservative parties at the coming 2015 State election campaign, with disquiet about the potential for unions to run a well-funded and professional campaign against electricity privatisation.

On the other side of the debate, the AMWU rejects concerns about the role of unions in election campaigns:

> By restricting donations to individuals, the O’Farrell election funding legislation removed the ability for low and middle-income people to pool resources to support candidates for electoral office that best reflect their needs and wishes, while continuing to privilege high-wealth individuals, who have a higher capacity to make personal donations. This has been a significant threat to the integrity of NSW’s democratic institutions, effectively providing wealthy people a greater say than those without significant wealth.\(^{334}\)

The Panel strongly agrees that political parties and candidates should have a privileged position in election campaigns. Parties and candidates are directly engaged in the electoral contestant, and are the only ones able to form government and be elected to Parliament to represent the people of New South Wales. That said, we also strongly support the principle that third parties should be treated as recognised participants in the electoral process. Third parties have a right to have a voice and attempt to influence voting at elections, a right that has been upheld by the High Court on the ground that there is an implied freedom of political communication in the Commonwealth Constitution. However, third parties should not be able to drown out the voice of the political parties.

The Panel therefore supports approaching third-party campaigners in much the same way as the regulation of political parties. This is to cap both donations to, and election spending by, third parties. This is in line with the approach taken in other comparable democracies.

**Concern about increasing prominence of third-party campaigns**

There is some concern about the potential for increasingly active third-party campaigners to undermine the role of parties and candidates in election campaigns. This concern is linked to the potential emergence of United States-style Political Action Committees, as noted by the Nationals:

> … the absence of tightening regulation of third party campaigners will likely encourage the rise of third party campaigns as a dominant tactic in future elections, in much the same way the (largely unregulated) “Super PACs” in the United States are coming to overshadow candidates’ and parties’ own (comparatively heavily regulated) campaigns. This is a development we do not believe would be welcome in New South Wales.\(^{335}\)

Stakeholders cautioned that without appropriate restrictions, political parties could use third-party campaigners as fundraising proxies to raise election war-chests, as with PACs. Commenting on the situation in the United States, Professor Twomey informed the Panel that:

> … third-party campaigning has increased significantly at elections in the United States, swamping campaigning by candidates and parties. It has led to the creation of ‘Super PACs’ which are bodies that make no political donations themselves to candidates and parties, but rather campaign directly on political issues. They can therefore accept unlimited donations from individuals, corporations and unions. During the 2012 election cycle, third-party campaign spending tripled from what had been spent in 2008, reaching $1 billion for the first time. In at least 36 House and Senate races in 2012, more money was spent during the general election by third-parties than by the candidates themselves.\(^{336}\)

The potential for third-party campaigners to run well-funded and influential campaigns on niche issues was raised in debate on the 2014 legislation to amend election funding laws.
The Liberals’ Catherine Cusack MLC gave an example of the potential for a single-issue third-party campaign to have a significant impact on a party’s election platform. Ms Cusack said that when she was Shadow Minister for the Environment, she was told that the packaging industry would fund a ‘massive’ third-party campaign, should the Coalition decide to support container deposit legislation. The Australian Beverages Council has been reported as saying that it would campaign against the Government in March 2015 if it introduces a container deposit recycling scheme.

The Greens also expressed concern about third-party campaigns, with Jeremy Buckingham MLC noting that:

I do not want to see a situation in this State whereby we tighten rules that apply to political parties but we allow an expansion of third party campaigns… We recognise that there are people who work for the collective good to whom we wish to give a legitimate and strong voice in campaigns, but there are other people who work for much narrower interests and self-interest. How we delineate those is a real trick for The Greens to consider.

Some stakeholders drew attention to the changing political landscape, in which some third-party campaigners such as GetUp! have become vehicles for expressing the views of those disillusioned with the political parties. Dr Gauja informed the Panel that ‘… GetUp! is an excellent example of a third party that has essentially taken members from political parties … It is a significant spender as well in election campaigns’.

The Christian Democratic Party expressed trepidation about the increasing prominence of GetUp! and other third-party campaigners. The Christian Democrat Party lamented the ‘“privatisation” of the political process via large benefactor organisations and individuals outside the auspices of the Electoral Commission and the Election Funding Authority’. They argued that this opens the door to electoral ‘manipulation’ and called for ‘enhanced controls’ over third-party campaigners.

The Panel is concerned about the potential for wealthy protagonists motivated by a particular issue to run effective single-issue campaigns. The potential for these sort of campaigns can be seen federally in the well-funded campaigns against the mining tax and WorkChoices. In New South Wales, issues such as coal seam gas or electricity privatisation have the potential to unite opposition and motivate wealthy interests. The Panel is concerned that a lack of appropriate third-party regulation would work against reformist governments pursuing difficult and controversial issues in the public interest.

**Level of third party spending caps**

The spending cap for third-party campaigners that register before the start of the capped expenditure period is $1 million, the same as parties that only contest Legislative Council elections. The rationale for setting the spending cap at this level was given serious consideration. The Panel was told by the Labor Party’s Robert Furolo MP, former Chair of the Joint Standing Committee on Electoral Matters:

The figure of $1 million for third party groups was not simply plucked out of the air … in 2009. It was accepted that … to introduce a cap substantially lower than that which is available to the party or candidate contesting the Upper House elections would simply encourage those groups to register for the upper House ballot paper. When we have a substantially lower cap on the participation of third party groups in the democratic process than is the case for political parties that will encourage those groups to put their name on the ballot paper so that they can spend as much as political parties.

As noted earlier, all third-party campaigners that incurred electoral communication expenditure for the 2011 election spent far less than the $1 million allowed under their spending cap. Dr Tham interviewed third-party campaigners regarding the introduction of spending caps and concluded that the ‘…amounts at which the caps are set did not
constrain the election campaigns of political parties and third-party campaigners in the last State election.' 344

A number of stakeholders opposed third party spending limits being set at the same level as those of political parties. They argue that while third parties have an important role to play in election campaigns, it is parties and candidates that should be given primacy, as they are the direct electoral contestants and the only ones with the opportunity to represent voters in Parliament.

Professor Twomey put forward another reason for setting third party spending limits lower than those of candidates and parties. Candidates should have the capacity to respond to third party attacks:

As the Canadian Supreme Court has pointed out, expenditure limits must be lower for third parties than for candidates and political parties “to ensure that a particular candidate who is targeted by a third party has sufficient resources to respond”. 345

Dr Gauja noted that her research over the last 10 years on third-party campaigning in comparable democracies (Australia, United Kingdom, New Zealand and Canada) had shown that ‘third party spending never really comes anywhere near political party spending’ 346 with the exception being the federal campaign against the mining tax. On this basis, she supported lower third party spending caps: ‘The general principle that a third party expenditure cap should be substantially lower than the political party expenditure cap is a sound one’. 347

The Greens recommended that third party spending be limited to $250,000 State-wide or $20,000 per electorate (this lower electorate limit would be implemented in conjunction with halving electorate spending caps for parties/candidates). The Greens stated that:

It is unacceptable that wealth can buy an election outcome through a massive advertising campaign when an election should be won or lost by voters assessing the merit of parties and candidates. Reducing the third party expenditure cap would still allow third party campaigning but weaken the unfair influence that third party wealth could currently buy. 348

The Nationals agreed that the third party spending caps were too high, and supported lowering third party caps to less than the party spending caps. 349

On the other side of the argument, Unions NSW argued that third party spending caps should be increased ‘to align more fairly with the expenditure caps of political parties and candidates’. 350 They recommended that caps be reviewed annually, taking into account the cost of paid media.

The Government’s recent election funding reform package originally included a reduction of the third party spending caps to $250,000. Robert Furolo MP described the proposal as ‘a blatant attempt to reduce the capacity of these groups to have their say and to put their views to the electorate’. 351 He expressed concern that ‘reducing the caps for third party groups so substantially will possibly result in an increase in the number of candidates contesting the Upper House elections’. 352 The Labor Party also said that it was ‘unfair’ to decrease third party caps while maintaining those of parties and candidates. 353 The proposal to reduce the spending cap to $250,000 was ultimately rejected by the Legislative Council, and the cap of $1 million for third-party campaigners remains in place.

The Panel heard limited evidence on the period in which third party spending caps should apply. Some concerns were raised that the caps may limit the ability of third parties to run issues-based advocacy campaigns that are not designed to influence voting at an election, but rather to contribute to and influence public debate on an issue of concern.

Dr Tham told the Panel that it is reasonable for the caps to apply for the six months leading up to an election: ‘I think we can not unreasonably say that campaigning in that period [is]
really seeking to influence the choices of voters when you are engaging in a campaign at that particular time.354

The Panel believes that third-party campaigners should have sufficient scope to run campaigns to influence voting at an election – just not to the same extent as parties or candidates. It is therefore fair for parties and candidates to have higher spending caps than third-party campaigners.

Spending caps should not be set so low as to prevent third parties from having a genuine voice in debate. If the caps are set too low, this may lead to a proliferation of third-party campaigners, as organisations would have an incentive to split into smaller units to maximise their spending under the caps, making it more difficult to identify the particular interests behind any one group. This could be the trigger for the emergence of third-party campaigners modelled on United States-style PACs.

Overly restrictive spending caps could also motivate particular groups to register as political parties and run for election to the Legislative Council, in order to take advantage of the $1 million cap on spending by Legislative Council parties. This could greatly increase the number of groups standing for election, regardless of whether they have a genuine policy agenda, and result in a ‘tablecloth’ ballot paper which would have the potential to undermine public faith in the electoral process.

There is another risk of setting the caps too low, which is that they could inhibit the implied freedom of political association in the Commonwealth Constitution, and therefore be vulnerable to challenge in the High Court.

The Panel supports decreasing third party expenditure caps to half of the current amount to $500,000. This is still well above the approximately $400,000 that the NRMA, the highest spending third party, spent at the 2011 election. While we believe this to be a sufficient amount that strikes the right balance between the rights of third parties and those of parties and candidates, we only have data on third party spending from the last election. It would be appropriate to review the level of the third party spending caps after the 2015 election, if it becomes apparent that they are causing concern.

We believe that third party spending caps should be reduced in conjunction with aggregation provisions. The issue of aggregation is examined in the following section.

We have also considered whether the registration requirements for parties and groups contesting Legislative Council elections are sufficiently rigorous to prevent third parties from registering in order to be eligible for the $1 million spending cap. As noted in Chapter 7 – ‘Public Funding’, a party wishing to register for a NSW State election must register at least 12 months before an election, demonstrate that they have 750 members, adopt a written constitution and pay a $2,000 registration fee. The Panel considers that the requirements for party registration are sufficiently rigorous to deter frivolous third parties from registering as political parties to take advantage of the $1 million spending cap. In relation to groups, two or more unendorsed candidates can request that their names appear together as a group on the Legislative Council ballot paper. To register as a group of unendorsed candidates, each candidate in the group must lodge a request form prior to the close of nominations, i.e. approximately three weeks before polling day. While these requirements are much less onerous than the registration requirements for political parties, we do not anticipate that any group would be able to spend $1 million on campaigning in the three weeks before the election. We consider that the Act should make it clear that up until the point when two or more candidates submit their request to form a group, i.e. at the close of nominations, these candidates are bound by the spending caps for non-grouped candidates for the Legislative Council (i.e. $150,000).
**Recommendation 31**

That the cap on electoral expenditure by third-party campaigners be decreased to $500,000 and adjusted annually for inflation, rounded up to the nearest whole number multiple of $100.

**Caps on donations to third parties**

Unions NSW expressed concern that as the peak body for the union movement in New South Wales, the $2,000 cap on donations prevents it from raising sufficient funds from its member unions to run campaigns on issues that affect the union movement as a whole. This is because the $2,000 cap on donations to third parties also applies to donations from constituent organisations to peak councils such as Unions NSW, NCOSS, and the NSW Business Council.

Unions NSW suggested that there should be a higher cap for contributions from constituent organisations to peak councils, where these contributions are used to fund collective campaigns. For example, if Unions NSW as the peak body wanted to run a campaign on workers’ compensation, Unions NSW argued that they are unable to raise anywhere near the $1 million allowed under their spending cap. According to their submission:

> Consideration should be made for peak councils which are made up of organisations, who pool their funds in order to campaign. The nature of peak councils means that they may pool funds from constituent organisations to campaign collectively. As such, caps placed on peak councils should be higher than those set for other third party campaigners.

> Where a peak council pools funds from its constituent organisations, it should not be regarded that those constituent organisations have made a political donation. 365

We have considered this suggestion and concluded that we do not support an increase in the donations limit, noting that Unions NSW is the only stakeholder that raised this issue. On balance we have concluded that this is a problem best fixed by Unions NSW at a practical level rather than by system redesign. There is nothing to prevent each of Unions NSW’s constituent organisations funding their own advertisements or other aspects of a collective campaign, subject of course to any rules around the aggregation of spending for the purposes of the caps on electoral expenditure (discussed below).
Aggregation

Background

In 2012 former Premier Barry O’Farrell introduced reforms which aggregated ‘electoral communication expenditure’ by political parties and their ‘affiliated organisations’. These reforms were designed to address concerns that third-party campaigns by trade unions provide an unfair advantage to the Labor Party.

The Premier provided the following rationale for the aggregation provisions:

… party expenditure caps are not currently affected by the expenditure of organisations that are affiliated with a political party. This leads to organisations intimately involved in the governance of a political party, sometimes even with office bearers in common, campaigning on behalf of a party with no corresponding offset to the party’s own ability to spend.

The Government believes that this is an unfair loophole that undermines the integrity of the whole scheme. The bill closes this loophole by combining the electoral communication expenditure of affiliates with the expenditure of political parties for the purpose of determining whether a party has exceeded the applicable expenditure cap.

The provisions were challenged in the High Court by Unions NSW and other parties in *Unions NSW v New South Wales*. In 2013 The High Court struck down the O’Farrell government’s reforms. The aggregation provisions were declared invalid because they impermissibly burdened the implied freedom of political communication mandated by the Commonwealth Constitution.

The Court found that the aggregation provision amounted to a burden on the implied freedom of political communication. The Court also found that the provision was invalid because ‘there was nothing in the provision to connect it to the general anti-corruption purposes of the EFED Act’.

Other countries and Australian jurisdictions have been more successful in their efforts to introduce aggregation provisions. Aggregation provisions exist in the United Kingdom and Canada as well as in the ACT. In the ACT the expenditure of parties and their associated entities is aggregated for the purposes of the applicable limits. An ‘associated entity’ is defined as an entity controlled by one or more parties or elected Members or that operates, completely or to a significant extent, for the benefit of one or more parties or elected Members. The purpose of these provisions is to ensure that parties cannot avoid the caps by establishing ‘front’ organisations to incur electoral expenditure on their behalf. The expenditure of non-party elected members and their associated entities is also aggregated under the ACT legislation, while third-party campaigners are prohibited from acting in concert with another person to incur electoral expenditure that exceeds the applicable cap.

Discussion and conclusions

Several of the academic and constitutional experts consulted by the Panel advised on whether it is possible to aggregate spending by third parties in a way that satisfies the *Lange* test. Commenting on the reasons why the NSW aggregation provision was held to be constitutionally invalid, Professor Twomey argued:

… [the provision] did not apply to ‘front’ organisations manufactured to circumvent the caps, but rather to long-standing industrial organisations that existed independently of political parties and had their own constituency and political views. The differentiation of these organisations from others and the fact that they had a legitimate interest in participating in public debate, led to the law being struck down by the High Court.
Dr Tham took a similar view. He also suggested that a range of factors should be taken into account when determining if there was a co-ordinated campaign between a third party and another entity, of which affiliation would not be the only factor.

The academic experts also gave evidence on whether the aggregation provisions in place in other jurisdictions could be adopted in New South Wales. Dr Tham considered that the aggregation provisions in place in Canada and the United Kingdom had 'significant limitations':

[they] deal only with campaigns co-ordinated amongst third parties and do not apply to campaigns co-ordinated between political parties and candidates, and third parties (whether they are individuals or groups). The Canadian provision has other shortcomings: it provides for a prohibition rather than aggregation of spending; it is also too narrow in scope as it is triggered only when there is either collusion or a purpose to circumvent the spending limits rather than when there is a co-ordinated electoral campaign.

Dr Tham considered the aggregation provision contained in section 205H of the Electoral Act 1992 (ACT) a better approach for dealing with co-ordinated election campaigns.

According to Dr Tham, the ACT aggregation provision is not affected by what he described as the three key ‘defects’ of the NSW aggregation provision. This is because the ACT provision:

- relies on coordination in fact rather than the assumption of coordination;
- applies to all co-ordinated campaigns, rather than just co-ordinated campaigns between a political party and its affiliated organisations; and
- applies to all political parties and not just the Labor Party, which is the only party which has affiliated organisations.

Professor George Williams and Professor Twomey also supported modelling an aggregation provision for New South Wales on that of the ACT.

While the academics agreed that New South Wales should introduce an aggregation provision, they acknowledged that it would be very difficult to enforce. Professor Twomey said that ‘it [collusion] is extremely hard to prove. Similarly, Professor Williams said that ‘you do need an aggregation rule, very clearly. You have just got to be realistic about how far it can go. There is no perfection in this area’. Further, he stated that the introduction of an aggregation provision ‘at least will provide some sort of disincentive to acting very clearly in concert’.

After the High Court handed down its decision in the Unions NSW case, the ACT Legislative Assembly established a Select Committee to consider the implications of the recent High Court decision for the operation of the ACT election funding scheme. The report of the ACT Select Committee on Amendments to the Electoral Act 1992 determined that the ACT aggregation provisions are distinguishable from the invalid NSW provisions and should remain unchanged:

In light of the views of Professor Twomey and Professor Williams, both of whom suggested that the ACT provisions might well survive a challenge given their narrower reach compared with the NSW provisions, the Committee considers that there is no need to amend ss 205F, 205G and 205H [the aggregation provisions] at this time.

Professor Twomey told the Panel that while there was not a ‘100 per cent guarantee’ the ACT provision was ‘more likely constitutionally valid than the New South Wales one’.

The Panel supports provisions to aggregate the spending of political parties and their associated entities and believes that they can be introduced in New South Wales without falling foul of the Constitution, as did the earlier attempt at aggregation by the O’Farrell
government. The main purpose of such provisions is to prevent the party spending caps being circumvented by the establishment of front organisations. As noted above, an ‘associated entity’ is defined in the ACT legislation to include an entity that is controlled by a party, or that operates completely or to a significant extent, for the benefit of a party.\textsuperscript{372} The second limb of this definition could create uncertainty for entities such as unions, which have strong links to the Labor Party but are not controlled by that party and have even run campaigns against it in particular districts. It would be a strange result indeed if the spending of a union was to be aggregated with the Labor Party’s spending for the purposes of its expenditure cap, even if the union campaign was critical of a Labor policy or candidate.

In the Panel’s view, any New South Wales definition of ‘associated entity’ should specifically exclude organisations that, in Professor Twomey’s words, exist independently of parties and have their own constituencies and political views. If an organisation is capable of running a campaign that opposes a particular party, then it should be free to do so without its spending being aggregated with the party’s spending for the purposes of the party’s cap on electoral expenditure. For this reason, the Panel supports a narrower definition of ‘associated entity’ than that which applies in the ACT. Only those entities that are controlled by a political party or elected Member, or that operate solely for the benefit of a political party or elected Member, should be treated as ‘associated entities’ of the party or elected Member. This is consistent with the recent report of the ACT Select Committee on Amendments to the Electoral Act 1992.

The Panel also supports the introduction of a provision similar to section 205H of the \textit{Electoral Act 1992 (ACT)}. This section provides that a third-party campaigner must not act in concert with others (including political parties) to incur expenditure in excess of its spending cap. This would prevent a number of third-party campaigners with common interests (e.g. unions, mining companies, packaging companies) from launching a coordinated campaign with a combined expenditure cap that would completely overwhelm parties, candidates and other third parties acting alone. The Panel considers that such a provision is important to maintaining a fair and balanced electoral contest and the integrity of the expenditure caps generally.

In recommending the introduction of aggregation provisions, we draw attention to the report of the ACT Select Committee, which found that unlike the O'Farrell government reforms, the ACT provisions were likely to survive constitutional challenge, due to their narrower reach. We agree that the fatal flaw of the 2012 legislation was that it was not applied equally. We are hopeful that aggregation provisions drafted in a different manner could be introduced in New South Wales.

\textbf{Recommendation 32}

That:

a) the electoral expenditure of a political party and its ‘associated entities’ be aggregated for the purposes of the party’s expenditure cap;

b) the definition of ‘associated entity’ be limited to those entities that are controlled by a party or elected Member, or that operate solely for the benefit of a party or elected Member; and

c) a third-party campaigner be prohibited from acting in concert with others to incur electoral expenditure that exceeds the third-party campaigner’s expenditure cap.
There are currently very few legislated governance standards or requirements imposed upon political parties. The Liberal, National and Labor parties are unincorporated (or voluntary) associations. They are not legal entities and, as such, cannot be prosecuted or fined. The law should be amended so that parties are deemed to be legal entities for the purpose of penalising breaches of the Act.

The senior officeholders in the major parties are not subject to the statutory duties required of company or not-for-profit directors. The common law duties which apply to officeholders in the major parties do not have statutory penalties, and sanctions are rare. These duties should be codified.

Candidates and senior party officials should be legally responsible for compliance, and the scheme of party and officials agents should be abolished.

Political parties represented in the NSW Parliament currently receive significant levels of public funding for on-going administration costs. The Panel believes that public funding should be conditional on good governance practices and assurance that the public funds are expended and accounted for in the same way as other public funds.

The Panel has concerns about the level of financial reporting and auditing by the political parties that receive administration funding, especially given the amounts of public money involved. We have concluded that these parties should prepare financial statements in accordance with Australian Accounting Standards and that these financial statements, along with disclosures and claims for payment of public funding, should be audited by the NSW Auditor-General. The NSW Auditor-General should then report the audit results to the NSW Electoral Commission, which should publish a summary of these financial statements on its website.

Independent oversight of election funding laws is required. Without it, there is likely to be agreement between the parties to increase public funding at the expense of taxpayers. There is also a possibility that the party in government could amend the rules for its own electoral advantage.
Governance of Political Parties

Background

The Panel’s terms of reference require it to consider measures to ensure the integrity of public funding for parties and candidates and the caps on political donations. The Panel is to have regard to the potential for any proposed changes to improve the accountability, integrity and quality of government.

Political party registration and constitutions

There are 19 political parties registered for the 2015 State election. Some of these parties are currently represented in the New South Wales Parliament: the Liberal Party and National Party coalition; the Labor Party and Country Labor Party coalition; The Greens; the Christian Democratic Party (Fred Nile Group); and the Shooters and Fishers Party. The registered parties that do not have members elected to the Parliament are the: Animal Justice Party; Australian Cyclists Party, Australian Democrats; Australian Motorists Party; Building Australia Party; No Land Tax Campaign; No Parking Meters Party; Outdoor Recreation Party; Socialist Alliance; The Fishing Party; Unity Party; and the Voluntary Euthanasia Party.

To register with the NSW Electoral Commission, a party must have at least 750 members, appoint a registered officer, provide a party constitution, and pay a $2,000 registration fee. Registration as a party allows recognition of the party on the ballot paper (party affiliation is printed below the name of endorsed candidates), access to the electoral roll for campaign purposes, and eligibility for public funding (if other eligibility requirements are also met).

A party constitution sets out the party objectives and platform and is typically aspirational and steeped in history. It also covers how the party is structured and how it functions. For the larger and more established parties, a constitution will generally include complex rules about matters such as: election of officeholders; pre-selection of candidates; campaigning and preferences; management of internal conflicts; party membership; and governance and finances. The rules are generally amended over time, usually in response to internal or external challenges. For example, changes in legal requirements and electoral law, shifts in party policy or strategy, and managing conflict within the party, can trigger changes to the constitution. While early legal cases indicated that the courts would not enforce party rules, more recent cases suggest that parties that receive public funding are subject to judicial review for breaches of internal party rules or a denial of natural justice.

Legal status and structures of parties

The Labor Party, Liberal Party and National Party are unincorporated (or voluntary) associations. They are not legal entities and their governance is not subject to the rigorous statutory duties required of company directors or the less onerous statutory duties imposed under the Associations Incorporation Act 2009 (NSW). The NSW Greens, Christian Democratic Party and the Shooters and Fishers Party are incorporated associations under the Associations Incorporation Act 2009 (NSW) and are legal entities with legal rights and obligations.

All the parties represented in the Parliament have central state offices and intra-party units. These go by various names such as branches, local groups, conferences or councils. The number and types of these units varies significantly, with each party having between 30 and 800 units.
Each of the major parties has a parliamentary arm comprised of its elected representatives and parliamentary leaders and officeholders. They also have an administrative arm, which has separate structures and positions. Each has clearly defined roles, though there is cross-over between them.

The administrative arms of the major parties are headed by elected officeholders, including a President and Deputies, a chief administrator (equivalent to a Chief Executive Officer), or similar. Most also have complicated local, state and federal structures and responsibilities. The administrative arm is generally responsible for co-ordination of party activities, organising meetings and maintaining party records, designing and directing election campaigns, managing the financial affairs of the party, and pre-selection processes.

All parties rely heavily on volunteer labor and contributions from party members. The parties represented in Parliament, which are more established and have access to greater resources (including public funding of administration expenditure), also own or rent office space and have paid employees.

The Liberals, Nationals and Greens, Christian Democrats and Shooters and Fishers restrict their membership to individuals, while the Labor Party allows for membership by affiliated unions. The membership of affiliated unions is embedded in the Labor Party’s organisational structure - unions control 50 percent of delegates at State Labor conferences, affiliation fees are a significant source of revenue, and they provide staff and other resources for campaigns. There is also cross-over between office-holders in affiliated unions and office-holders in the party.

The processes and financial management practices which the parties have put in place for election fundraising, campaigning and ensuring compliance with electoral funding laws vary between the parties; ‘some have highly centralised their decision-making [ie. decision-making by head office] while others have maintained decentralised structures [ie. decision-making by candidates and branches].’

Factions exist in most political parties. Parties are made up of members with diverse interests, ideas and political motivations. Factions within parties can be a positive force. They promote debate about policy and competition between factions may prevent a concentration of power within the party. At their worst, factions can also control party positions, pre-selections and Ministries, and act mainly to serve vested or personal interests.

The influence and operation of factions within both the major parties appear to have been a significant factor in recent ICAC investigations into conduct by Members of Parliament. As part of its investigation into political donations on the central coast, the ICAC is considering whether or not Mr Hartcher devised a scheme to solicit illegal donations in order win seats for his favoured candidates, thereby bolstering his factional power as a leader of the right wing. The ICAC investigations into the conduct of Mr Obeid involved allegations that he used his public office for private gain, and his ability to do so was in part based on his factional power.

Senator John Faulkner has described the ‘Russian doll of nested factions’ within the Labor Party. He noted the capacity of these factions to influence caucus votes was undemocratic.
and open to manipulation. He described current factional practices in the Labor party allowing ‘a group with 51% of a subfaction, which then makes up 51% of a faction, which in turn has 51% of the Caucus numbers, to force the entire Caucus to their position’.380

Party agents

Under the Act, political parties, elected members and candidates are required to appoint agents. Agents are responsible for managing political donations and electoral expenditure, keeping financial records and ensuring compliance with disclosure obligations. They are required by law to complete on-line training as a condition of their appointment.

The role of agents is significant because the agent assumes responsibility and liability for compliance with the Act and can incur substantial monetary penalties or imprisonment for breaches of the law.

Auditing and reporting requirements

Disclosure of electoral expenditure and donations and claims for payment from public funds are required to be audited by a registered company auditor before being submitted to the NSW Electoral Commission. They must be accompanied by an audit certificate stating that the auditor:

- was given full and free access at all reasonable times to all relevant accounts and documents;
- examined these accounts and documents;
- received all information and explanations they asked for with respect to the audit (subject to qualifications, if any, set out in the certificate); and
- has no reason to think that any statement is incorrect.

Once a claim for payment or disclosure has been submitted it is audited again, this time by the NSW Electoral Commission, to verify that it complies with the donation, expenditure and public funding rules.381

Agents are required to keep ‘all accounts, records, documents and papers’ relating to claims for public funding and disclosure requirements. Non-compliance results in a potential maximum penalty of $2,200.

Disclosures by registered parties must be accompanied by a copy of an audited annual financial statement in a form approved by the Authority. This statement is required to set out the total amounts received and paid by the party and any debts incurred.

There is also a requirement for parties to keep the following financial records:

- a receipt book
- an acknowledgment book
- a deposit book
- a cash book, or a receipts cash book and payments cash book
- a cheque book
- a journal
- a ledger.382

There are detailed regulations about the way in which these records are maintained (either in computer or in book or loose-leaf form), such as the keeping of duplicate copies, details
which must be recorded, and even how documents must be signed (eg. ink or indelible pencil). These records must be retained for at least three years. Again, the maximum penalty for non-compliance is $2,220.

Discussion and conclusions

Parties receive significant amounts of public funding for both their election campaigns and administration costs and recent legislative changes mean that public funding will increase further. Strict governance standards apply to other organisations that receive public money and political parties are a notable anomaly. While they do have to audit their donations and expenditure there are major gaps in governance. The major parties are not legal entities and are not subject to general financial reporting and auditing requirements outside the limited audits required of disclosures and claims for payment of public funding. There are no statutory duties requiring senior officeholders to exercise due diligence to ensure that the financial affairs of the party are managed responsibly and in accordance with the law. Party agents are legally responsible for compliance with election funding laws and any breaches, but there is no guarantee that they have sufficient authority or control within the party to secure compliance.

There are strong incentives for corrupt and illegal conduct in relation to election funding law. The stakes are high – the ultimate aim is to win seats and secure power. The rules are strict, but there has not been strong enforcement of the rules. The laws aim to limit the amount and sources of money in the system, yet there is a strong incentive to raise as much money as possible in order to win marginal seats and the election.

While the recent ICAC investigations should result in more ethical behaviour in the forthcoming 2015 election, the Panel’s reforms are aimed at long-term improvements in the governance and change in the culture of parties.

Governance conditions linked to public funding

The Panel expressed concern about the governance arrangements of the major parties as part of its consultation process. We produced an Issues Paper that included information and questions about the reform of party governance and the conditions that should be attached to public funding payments. We were disappointed that none of the political parties turned their minds to this issue or suggested options for reform in their submissions. While we were keen to pursue these issues during our consultations and meetings, the focus of the parties was on the funding model for elections.

The recent ICAC investigations revealed an unwillingness by some senior party officials to accept responsibility for compliance with election funding laws, and allegations about the use of federal structures and associated entities to avoid liability. The ICAC Commissioner explained how hard it had been to try to ‘get to the bottom’ of who was responsible within the Liberal Party for compliance with the law. She explained:

… we have called as many relevant people from the Liberal Party as we have been able to find who were in relevant positions at the relevant time to ask each and every one of them how this could have occurred, who was actually paying attention, who was responsible for complying with the law, and to date we haven’t been able to find anybody who says to us that it was Joe Bloggs’ role or it was somebody else’s role or it was a combination of the Finance Committee and the State Executive. We just haven’t been able to get to the bottom of it.

Former parliamentarian Rodney Cavalier pointed to the governance requirements for granting public money in other contexts and called for a similar standard to be applied to political parties. He argued that the government has intervened in other private organisations, such as the National Trust and the Federation of P&C Associations "because
its subsidies entitled the government to ensure propriety and good governance’. Charities 'will also suffer intervention if their practices are below standard'386

A number of academics, including Dr Tham, argued that 'prescribing specific governance requirements for diverse party structures undermines respect for party structures'.387 He recommended that, as an eligibility condition for receipt of public funding, candidates and parties should be required to submit compliance policies to the NSW Electoral Commission. These policies would outline the internal arrangements, processes and practices to ensure compliance with election funding laws. Under Dr Tham’s proposed reforms, eligibility for public funding would be conditional on the NSW Electoral Commission approving these compliance policies.

Dr Gauja also recommended against prescribing the governance requirements for political parties, and focusing instead on strengthening enforcement mechanisms. She argued that increasing the possibility that parties and candidates would be held accountable for their actions would lead parties to develop stronger intra-party oversight of their candidate and members’ activities.388

The Panel supports linking public funding for party administration expenditure to good governance and compliance practices. We agree with the recommendation in the recent ICAC report that there should be a requirement for parties to regularly lodge governance standards and methods of accountability with the NSW Electoral Commission for approval.389 We consider that there are some areas which should be standardised and which must be accommodated by all party structures.

First, the Panel supports statutory duties for senior office holders within parties. Second, parties in receipt of public funding for party administration expenses must be subject to best-practice annual financial reporting and auditing requirements. We also recommend that all parties should be deemed to be legal entities for the purposes of prosecution of breaches of election funding laws, the role of agents should be abolished, and parties must ensure that all candidates, party members and officials are educated about their responsibilities under election funding law and ethical behaviour in general. These recommendations are discussed below.

We heard from some quarters that public funding should be conditional on parties abiding by certain democratic principles or membership rights.390 The Panel does not believe that this level of interference in the internal workings of parties is warranted.

**Recommendation 33**

That:

a) political parties that receive public funding for administration expenses be required to regularly submit details of their governance standards and accountability processes to the NSW Electoral Commission; and

b) the payment of public funding for administration expenses be conditional on NSW Electoral Commission approval of those standards and processes.

**Duties for senior officeholders**

In the course of its consultations, the Panel sought views on whether senior party officeholders should be subject to statutory duties and, if so, whether they should be similar to company directors and directors of charities and not-for-profit organisations.

Company directors have a general duty to govern a company on behalf of its shareholders. They are personally liable under a range of laws, such as competition, occupational health
and safety, environmental and taxation laws. There are four main duties which apply to company directors under the Corporations Act 2001 (Cth):

- **Care and diligence** - to act with the degree of care and diligence that a reasonable person might be expected to show in the role (s 180). The same duty is imposed on directors at common law. The business judgment rule provides a “safe harbour” for a director in relation to a claim at common law or under s 180.

- **Good faith** - to act in good faith in the best interests of the company and for a proper purpose (s 181), including to avoid conflicts of interest, and to reveal and manage conflicts if they arise. This is both a duty of fidelity and trust, known as a ‘fiduciary duty’ imposed by general law and a duty required in legislation.

- **Proper use of position** - to not improperly use their position to gain an advantage for themselves or someone else or to the detriment to the company (s 182).

- **Proper use of information** - to not improperly use the information they gain in the course of their director duties to gain an advantage for themselves or someone else or to the detriment to the company (s 183).391

Similar statutory and common law duties apply to officeholders of Commonwealth registered charities and not-for-profit organisations, and incorporated associations registered in New South Wales, such as the Greens, the Christian Democratic Party and the Shooters and Fishers Party.392

There are no statutory duties for committee members of unincorporated associations like the major parties. There are, however, two common law fiduciary duties, which are similar to the statutory duties outlined in the Corporations Act. First, a ‘duty of loyalty’, which include a duty to act in good faith in the best interests of the party; to act for proper purposes; to give adequate consideration to matters for decision and to keep discretions unfettered; and to avoid conflicts of interest. Second, a ‘duty of care’. Breaches of these common law duties do not attract statutory penalties and civil actions are rare.

Some of the academics argued that the diversity of party structures might present some difficulties in imposing directors’ duties on senior party officeholders. For example, the directors’ duties would apply to officials in the administrative wing of the major parties, but the parliamentary wing also holds important power and responsibilities.393 As a first step, Dr Tham advocated using indirect measures to promote compliance, such as withholding public funding, rather than imposing directors’ duties. Professor Rodney Smith expressed concern that applying duties and personal liability to party officials could have the effect of centralising fundraising at the expense of local branches and party members. He felt that it might create an ‘expectation that everything needs to be cleared through the head office because the party is going to find itself liable for the activities of its operation involving a fairly low level amount of funding’.394 Dr Gauja told the Panel that the parties, particularly smaller parties, might find it difficult to locate people willing to take on the responsibility of directors’ duties. She also argued that parliamentarians, particularly parliamentary leaders, would also need to be part of the arrangements.395

Professor Jennifer Hill told the Panel that directors of corporations owe their duties to the company (with the company widely interpreted as meaning the incorporators as a general body or the members as a whole). She argued that if this principle was transposed onto political parties, ‘it would lead to the consequence that senior officials would owe their responsibilities to the political party itself, rather than to the public as a whole, which is presumably the desired outcome’.396

On the other hand, the NSW Electoral Commissioner recommended that the Panel consider duties for senior party officeholders similar to those that apply to officers and groups under the Corporations Act 2001 (Cth) and the Associations Incorporation Act 2009 (NSW). The Public Relations Institute of Australia (PRIA) also supported corporate style directors’ duties
should be considered for political parties. They stated that ‘changing culture requires rigorous changes in personal behaviour, especially from people in both formal and informal leadership roles within an organisation’. PRIA argued that a ‘culture of evasiveness by “willing ignorance” cannot be accepted or condoned, and cannot be changed instantly’. They noted that Local Councils encourage elected members and senior staff to undertake the Australian Institute of Company Directors’ Course, and that this could be of benefit to parliamentarians and others.

The Panel considers that imposing specific duties on senior officeholders would result in cultural change and improved governance structures and systems for managing political donations and public funds. We acknowledge concerns that personal liability for officeholders could discourage people from taking on these roles and have a chilling effect on party activity and local branch involvement. However, we are only proposing these duties for parties that receive public funding for administration expenditure. This public funding could be used to provide education and training for candidates, elected members and party officials. It could also be used to engage professional assistance in designing and implementing appropriate governance systems. These duties would not apply to smaller parties that would be less equipped to comply with them.

In practice, an officeholder who is actively involved in financial and compliance processes and who behaves ethically and with common sense would be unlikely to breach any duties. They would only fall foul of the duties and the law where they ignore issues or choose not to get involved when problems arise. Other sectors, such as charities and not-for-profit organisations, have had to adapt to a changing regulatory environment and the imposition of duties on officeholders (many of whom are volunteers). In part, these changes have typically occurred as they have received public funding as a subsidy or for services provided. The Panel can see no compelling reason why parties that receive such substantial amounts of public money for their administration costs should not be subject to similar requirements.

The Panel recognises that the parties have various decision-making structures and types of officeholders. We support the ICAC’s recommendation that ‘the roles and responsibilities of senior party officeholders be made public and updated on a regular basis’. Parties should be required to submit these designated senior officeholders to the NSW Electoral Commission for approval to ensure that the nominated officers have sufficient seniority, control and decision-making authority within the party. For example, the Panel would expect that, as a minimum, the NSW Branch of the Labor Party would nominate its President, Deputy Presidents, General Secretary and Assistant Secretaries. Similarly, we would expect the NSW Division of the Liberal Party would, at the very least, nominate its President and Vice-Presidents, Treasurer, and State Director.

In terms of the duties that should apply to these designated officeholders, the Panel recommends that the common law duties that already apply to committee members of unincorporated associations should be codified with any necessary amendments in the Act. Given the large amounts of public money flowing to the parties, it is incumbent on those in positions of authority to ensure this money is used for its proper purpose, to avoid conflicts of interest and to act with care and diligence. The public would expect nothing less.

An important question raised by the allegations before the ICAC regarding the conduct of Members of Parliament is why neither party chose to investigate the matters themselves at an earlier stage. For this reason, we are also recommending that senior officeholders have a duty to inquire and investigate suspected election funding misbehaviour, and report any breaches or suspected breaches to the NSW Electoral Commission.

**Recommendation 34**

That:
a) parties be required to regularly submit a list of senior officeholders to the NSW Electoral Commission for approval as a condition of receiving administration funding. The Panel expects that, at a minimum, the NSW Branch of the Labor Party would nominate its President, Deputy Presidents, General Secretary and Assistant Secretaries, and the NSW Division of the Liberal Party would, at a minimum, nominate its President and Vice-Presidents, Treasurer, and State Director;

b) the Commission only approve the list if it is satisfied that the nominated officers have sufficient seniority, control and decision-making authority to be responsible for the party's compliance with the Act; and

c) the approved officeholders, and a brief description of their roles and responsibilities, be published on the NSW Electoral Commission's website.

Recommendation 35
That:

a) the common law duties that already apply to senior officeholders of both incorporated and unincorporated associations be codified in the Act; and

b) senior officeholders who breach these duties be personally liable for offences and penalties under the Act.

Recommendation 36
That there be a duty for senior officeholders to report any election funding law breaches or suspected breaches to the NSW Electoral Commission.

Auditing and reporting obligations

The NSW Electoral Commission raised an issue regarding the financial documents and records required to accompany disclosures. They informed the Panel that while the Act requires these documents to be provided, in practice this requirement is rarely complied with. They argued that these documents are essential to the NSW Electoral Commission's enforcement role, especially compliance audits and investigations. The NSW Electoral Commission stated that they have little recourse to force compliance, as 'the declaration’s validity, and therefore the participants’ eligibility for both election campaign funding and administration funding, is not dependent on their provision’. Consequently, they asked the Panel to consider recommending that the Act be amended to clarify that a declaration of disclosures is not valid unless it is accompanied by financial documents, records and annual audited financial statements.400

As another means to strengthen parties financial capabilities, the NSW Electoral Commission also suggested that parties could be required to have 'an independent officer responsible for financial reporting'. Under this proposal, 'certain office bearers in the party would be responsible for the provision of information to the independent financial officer and have a duty of care and diligence to be informed on the financial affairs of the party (and this duty is not diminished by delegating responsibility)'.401

We heard from a number of political parties that the current auditing requirements are expensive and onerous. The current system requires double auditing of disclosures and claims for payment – first by the registered company auditor, and then by the NSW Electoral Commission. Everyone we spoke to during the course of our consultations, including the Electoral Commission, agreed that this double-auditing was excessive and a waste of valuable resources which could be better spent on other, more productive, areas of compliance. The Panel agrees that the current requirement for double-auditing should be
removed, and replaced by a single audit in which the NSW Electoral Commission can have absolute confidence (and not feel the need to re-check).

The Panel also heard that registered company auditors are difficult to locate. For example, the Greens submitted that this requirement is ‘impractical and unnecessary’ and that ‘accountants with appropriate professional standing should be able to audit candidate and party returns’. The Panel notes that requirements around appointing a registered company auditor are less robust than the requirements for companies. For instance, for company auditors there are rules preventing their removal except in particular circumstances, and rules to ensure the auditor is appropriately independent of the company.

We have consulted on the appropriate auditing model for parties, elected Members and candidates. We disagree with concerns that were raised during our consultations that the requirement for a registered company auditor is too onerous. We have heard from the Auditor-General and others that registered company auditors provide the appropriate standard of assurance in the political context. Political party auditing is a high risk area, given the incentives and opportunities for misstatement and non-compliance. The Panel heard that Registered Company Auditors are always used where there are likely to be a large number of users of the financial statements or the entity is publically accountable.

There are two options before the Panel – to retain the current requirement for any registered company auditor or transfer the audit function to the Auditor-General. For a number of reasons, we support the Auditor-General being the auditor for the parties which receive public funding for administration expenditure. First, there can be no question about the standards, independence and integrity of the Auditor-General. Second, the NSW Auditor-General is obliged to report corrupt conduct to ICAC and ICAC is able to require the Auditor-General to produce a statement of information. This would ensure the timely notification of matters and enhance the ability of these agencies to undertake strategic investigations where issues of concern arise. There is no doubt that the Auditor-General has the skills, competence and capacity to audit political parties. The fees charged by the Auditor-General are similar to those charged by other registered company auditors, and in any event, audit costs are precisely the kind of expenses that should be covered by a party’s administration funding.

The Panel is concerned that while the current law requires a registered company auditor to audit claims for payments and disclosures, this audit occurs in a vacuum. The auditor is asked to certify that claims are true and accurate but there is no requirement to express an opinion on whether the financial information behind the claims, including the party’s financial records, is correct. By contrast, there is an expectation and legal requirement that both corporations and registered not-for-profit organisations produce and lodge audited annual financial statements or reports which give a clear picture of the organisation’s overall financial position. We can see no reason why political parties should not be subject to similar annual financial reporting requirements, given the large amounts of public money they receive via administration funding which could be used to pay for the preparation and auditing of the statements. This would allow both the NSW Electoral Commission and the auditor to form a true understanding of the financial transactions of parties and to investigate any anomalies. The Panel also considers, that in the interests of transparency, a summary of this information should be publicly available on the NSW Electoral Commission website.

**Recommendation 37**

That:

a) the current requirement for double-auditing of disclosures of political donations and electoral expenditure and claims for payment of public funding be removed; and
b) the NSW Auditor-General be responsible for the auditing of the disclosures and claims for all political parties that receive public funding for administration expenditure.

**Recommendation 38**

That:

a) political parties be required to produce annual financial statements that comply with Australian Accounting Standards, as a condition of receiving public funding for administration expenditure;

b) the NSW Auditor-General be responsible for auditing these statements; and

c) a summary of these statements be published on the NSW Electoral Commission’s website.

**Legal status of political parties**

The major parties operate as voluntary associations with no separate legal status, on the premise that it is consistent with democratic principle that they be free to organise and govern themselves as they see fit. Because the major parties are unincorporated associations, they cannot be prosecuted in their own right, which has contributed to the difficulties experienced by the former EFA in holding the major parties to account for breaches of the law.

The Panel considered whether parties should incorporate under either the Corporations Act 2001 (Cth) or the Incorporated Associations Act (NSW). The Greens, Christian Democrats and the Shooters and Fishers are already incorporated under this Act. The proposal received very little support during our consultations. We also received advice that it would be an ‘organisational mismatch that would potentially result in a range of unintended consequences’. Dr Gauja explained how incorporation would act as a barrier to emerging parties, due to the sophisticated legal knowledge required and their lack of financial and other resources.

Another option, advocated by the Electoral Commissioner, is to ‘deem’ parties to be legal entities for the purposes of the election funding laws. Dr Tham and Dr Gauja also supported the concept of applying legal recognition of parties for the purposes of enforcement.

The Panel considers the potential prosecution of political parties is an important enforcement tool for the NSW Electoral Commission and therefore agrees with this proposal.

**Recommendation 39**

That registered political parties be deemed to be legal entities for the purposes of prosecutions and the imposition of penalties under the Act.

**Party agents**

There is no requirement that a party agent be a senior officeholder within a party, or that they have sufficient authority to control or direct compliance with the Act. Independent candidates and members often nominate a spouse or a close family member as their agent.

The original intent behind the official agent scheme was to ‘provide for a segregation of duties… and ensure that the financial records of groups, candidates and Members of Parliament… are overseen by a properly trained person’. In reality, the introduction of agents in 2008 led to a substantial shift of responsibility and liability away from elected
Members and candidates to agents who do not necessarily have sufficient authority or control within the party. In effect, responsibilities under the Act were contracted out.

Dr Tham has argued that the potential ‘lack of control [by party and official agents over compliance with funding laws] makes the imposition of liability on agents unfair but also ineffective’\textsuperscript{408} He also argued that the approach is inappropriate as it is based on the ‘assumption that those who seek public office and those who hold public office – in some cases, Ministers – are not sufficiently responsible to handle their own campaign funds’.\textsuperscript{409} Instead, he argued, ‘it should be the duty holders or the beneficiaries that are subject to liability’.\textsuperscript{410} The NSW Electoral Commission also recommended the abolition of the role of official agents. They also argue that ‘those who stand for public office and those who are elected to Parliament (or local government) should be responsible and accountable for their expenditure, funding and disclosure obligations’\textsuperscript{411}

The ICAC’s Operation Spicer has revealed significant problems with the current situation. One common theme in the evidence before the ICAC was the claim by candidates and senior officeholders that either their campaign teams or the agent has sole responsibility for compliance with election funding laws. For instance, when questioned about who was responsible for compliance while he was State Treasurer and Chairman of the Finance Committee for the Liberal Party, Mr Sinodinos correctly responded that the party agent, and only the party agent, was legally responsible for compliance and any breaches. When questioned about possible illegal donations to his campaign, Mr Owen told the ICAC that he ‘could see that there was a lot of money … sloshing around in the campaign and I used to wonder where the cash came from and I just sort of kept my nose to myself…’\textsuperscript{412}

The Panel heard from a number of sources that agents are important in keeping candidates separate from fundraising and expenditure and avoiding the perception of corruption. However, the ICAC investigations revealed that in practice there are fundraising targets for individual candidates and elected members. Elected Members and candidates cannot have it both ways. They cannot be involved in sourcing funds from donors for the benefit of the party and themselves, while at the same time deferring responsibility to an agent. The Panel agrees with Dr Tham that the beneficiaries of funding and those with sufficient seniority and standing within a party should be responsible for compliance.

**Recommendation 40**

That the scheme of party and official agents be abolished and that candidates and elected Members be responsible for compliance with the Act.

**Recommendation 41**

That:

a) parties be required to nominate a senior officeholder to lodge disclosures and claims for payment on behalf of the party, for example, the State Director of the Liberal Party or the General Secretary of the Labor Party; and

b) this officeholder be approved by the NSW Electoral Commission as a person of seniority and standing within the party.
Independent Oversight of Election Funding Law

Background

At present the levels of public funding provided through the Election Campaigns Fund, Administration Fund and Policy Development Fund are set by legislation. The Panel has noted its support for independent oversight of the public funding scheme on the basis that parliamentarians should not legislate on an area where they have a direct financial interest without some independent oversight.

Independent bodies have been established to oversee certain areas where parliamentarians would otherwise be making decisions on matters where they have a direct interest. For example, salaries and allowances for Members of Parliament are determined by the Parliamentary Remuneration Tribunal, while redistribution of electoral boundaries are determined by the Electoral Districts Commissioners (State electorates) and the Local Government Boundaries Commission (local government areas and county councils).

The Parliamentary Remuneration Tribunal is an independent body established under the Parliamentary Remuneration Act 1989 (NSW). The Tribunal is required to conduct an annual review of Members' salaries and allowances. The Tribunal can also make determinations of additional entitlements. The Tribunal consists of one person, namely a judicial member of the Industrial Relations Commission appointed by the President of the Commission.

The Electoral Districts Commissioners are appointed by the Governor under the Parliamentary Electorates and Elections Act 1912 (NSW). The Commissioners are responsible for conducting redistributions of electoral districts in New South Wales, and ensuring that there are a similar number of voters in each electorate. Of the three Commissioners, one (the Chairperson) must be or have been a Supreme Court Judge; one must be the current Electoral Commissioner; and one must be the current Surveyor-General.

The Local Government Boundaries Commission is an independent authority established under section 260 of the Local Government Act 1993 (NSW). It examines and reports on any matter referred to it by the Minister for Local Government regarding the boundaries of local government areas and the areas of operation of county councils. The Commission is appointed by the Governor. Of the four Commissioners, one (the Chairperson) is nominated by the Minister for Local Government; one is an officer of the Division of Local Government nominated by the Director General; and two are effectively nominees from the Local Government and Shires Associations of NSW.

Discussion and conclusions

IDEA has acknowledged the dilemma presented by politicians making laws that affect themselves:

… in any democratic society, laws controlling the financial behaviour of politicians must be passed by the politicians themselves. Some of them may not be particularly interested in seriously limiting their own chances of raising and spending enough money to get elected or re-elected.413

This sentiment can be seen in debate on the recent 2014 election funding changes to the election funding scheme. Luke Foley MLC said ‘frankly, I do not have confidence in a system that says our political parties can be laws unto themselves; that they are private clubs and they can decide whatever they like.’414 John Kaye MLC questioned whether the sight of politicians voting themselves more public funding would “… create a sense of despair amongst voters that politicians of all stripes cannot be trusted to run their own political
He concluded that: ‘Maybe there is something in that. Maybe we should not be trusted to run our own political system, but we are.’

The Panel considers that independent oversight is essential given the risk of the major parties agreeing on a funding scheme that advantages them at the expense of other electoral contestants and tax payers. Dr Tham described as ‘the Cartel Thesis where the major parties collude to basically devise a public funding system that is really about ossifying a system’.

An example of the Cartel Thesis was seen at the federal level in 2013. Dr Stephen Mills told the Panel that the two major parties ‘cut a deal in secret’ to introduce $20 million in administration funding to be shared largely amongst themselves. Dr Mills advised that the deal was ‘scuppered’ when it was made public, leading to an outcry by minor parties and the public.

Recent developments in Canada act as a cautionary tale. As part of a funding model which only allows small donations from individuals, political parties in Canada were previously paid generous quarterly allowances calculated on the basis on votes at the previous election. Most parties became reliant on this funding, ‘doing little to raise donations as it is easier to receive money directly from public funds’. However, the Conservative Party chose to expand its fundraising capacity and when it was elected to government announced a gradual phase out of the quarterly allowance and its complete removal by 2015. This move was strongly opposed by the other parties, who were left at a distinct electoral disadvantage by changing circumstances.

Entitlements under the Administration Fund do not appear to be based on any detailed analysis of the costs of running a political party, nor the extent to which taxpayers should be expected to subsidise these costs. Former NSW MP Rodney Cavalier said that the introduction of funding for administration purposes was not preceded by any public policy case. He went on to suggest that all subsequent increases were the product of ‘collusion’:

> The interests of the parties are complementary. They have no cause to be reasonable. The only test is what they can get away with. The result has been a shameless readiness to dip inside the public purse for party administration.

There also appears to have been little consideration of whether the rates of reimbursement from the Election Campaigns Fund represent a reasonable and appropriate use of taxpayers’ money. As noted earlier, this funding has been increased substantially for the 2015 State election. The Panel does not support this increase. Public funding of elections and parties in New South Wales are already roughly double those of any other Australian jurisdiction, and are generous by international standards. The recent increase only strengthens the case for taking levels of public funding out of the hands of politicians.

IDEA has warned that ‘the willingness of political parties and other stakeholders to moderate their use of money in the political process is essential for long-term improvements in political finance’.

The Panel considers that the establishment of the independent statutory authorities noted above provide a sound precedent for oversight of the public funding scheme. We support the establishment of an independent body with responsibility for approving further increases in public funding provided through the Election Campaigns Fund, the Administration Fund and the Policy Development Fund (which we have recommended be renamed the ‘New Parties Fund’) and indeed any other public funding of political parties and candidates. Given the complicated nature of the funding provided through these three Funds, and the opaque nature of parties’ and candidates’ campaign and administrative costs, we consider that the body should be comprised of two people, with suitable expertise, namely, a retired judge and a person with financial or audit skills. We considered whether it would be appropriate to nominate the NSW Electoral Commissioner as part of the body, but concluded that it would
be unsuitable given the potential conflict of interest with his other roles as a regulator and in
the conduct of elections. We consider it appropriate that this body conduct a review of
funding entitlements on application from the Premier, who is the Minister responsible for the
administration of electoral law.

**Recommendation 42**

That:

a) an independent body be established to approve any changes to levels of public
funding for any purpose, including election campaigns and administration, following a
referral by the Premier; and

b) this body consist of a retired judge and a person with financial or audit skills.
Chapter 11 – Penalties, Compliance and Enforcement

The Election Funding, Expenditure and Disclosures Amendment Act 2014, which commenced on 28 October 2014, has significantly increased maximum penalties and extended the time period for commencing prosecutions to 10 years, as recommended in the Panel’s Interim Report. These are improvements but the Panel finds that there are still a number of barriers to compliance and enforcement.

Those offences that require the prosecution to prove knowledge or intent should be retained, but must be simplified to maximise the chances of successful prosecutions by the NSW Electoral Commission. The maximum penalty that can be imposed by the local court should also be increased in light of the recent increases in penalties under the Act.

The Panel also favours retaining the strict liability offences for failing to lodge a disclosure and failing to keep records as these obligations are central to the election funding scheme. We support a new strict liability offence for lodging an incomplete disclosure.

Criminal prosecution should be a last resort in any effective regulatory scheme. The NSW Electoral Commission must have a range of other enforcement options available to it. These should include civil penalties and the power to withhold public funding.

The NSW Electoral Commission should transition from administration tasks to risk-based regulation. It should also conduct a root and branch review to identify gaps between its organisational capabilities and the demands of best-practice electoral regulation.

Education of candidates and Members of Parliament is strongly supported. We urge the NSW Electoral Commission to deliver a thorough and engaging education program before the 2019 election. MPs should be required to attend (mandatorily) the NSW Parliament’s induction program and continuing education program, with financial penalties for failure to attend. The Party Leader and Whips should embrace this measure and encourage compliance.

Background

In the Interim Report, the Panel noted that while the Act sets very strict rules governing election funding, these rules are not matched by sufficient compliance and enforcement measures. The Panel suggested that there should be more severe penalties for serious breaches of the Act, including penalties sufficient to trigger the disqualification of elected Members. In line with the Panel’s Interim Report, the Government recently introduced legislation that doubled the penalties for certain offences and extended the time period for commencing proceedings for an offence from three years to ten years. A new anti-circumvention offence has been created targeting those who engage in schemes to contravene the Act, with a maximum penalty of ten years imprisonment.

The Panel also noted that tougher penalties will be ineffective unless there is a real and material prospect that those who break the law will be investigated, prosecuted and punished. The Electoral Commission must be armed with a suite of offences the elements of which are clear and capable of being proved. The Commission itself must be a strong and
feared regulator. The Commission's current workload in relation to processing claims for public funding and paper-based disclosures has undoubtedly hindered it in this regard. The focus needs to transition to risk-based regulation by the Commission.

In this Chapter, we look at how the current offence provisions in the Act can be clarified to maximise the chances of successful prosecutions. We also examine other enforcement options that should be made available to the NSW Electoral Commission as an alternative to criminal prosecutions. Finally, we consider the role of MP and candidate education in promoting compliance with the Act.

**Offences and penalties**

As discussed in the previous chapters, the current Act sets strict limits on political donations and electoral expenditure. Failure to comply with these limits is declared to be ‘unlawful’ conduct under the Act. For example, it is unlawful for a person to accept a political donation that exceeds the relevant caps on political donations (section 95B), or for a party, candidate, or third-party campaigner to incur electoral expenditure above the relevant caps (section 95I). A detailed list of the acts that constitute unlawful conduct is set out in Working Paper 5 (Appendix 5).

There are a number of offence provisions that determine whether unlawful conduct is a criminal offence and what kinds of penalties will apply. They are:

- **Section 96H(1)**, which deals with offences relating to disclosures including failure to lodge a disclosure, making a false statement in a declaration and withholding information from an official agent knowing that it will result in a false declaration. The maximum penalty for failing to lodge a declaration is a fine of $22,000, while the maximum penalty for other offences under this section is a fine of $44,000 or imprisonment for 2 years, or both.

- **Section 96HA**, which deals with offences relating to the caps on political donations and expenditure. The maximum penalty under this section is a fine of $44,000 or imprisonment for 2 years, or both.

- **Section 96HB**, which provides that a person who enters into or carries out a scheme for the purpose of circumventing the law with respect to political donations or electoral expenditure is guilty of an offence. The maximum penalty on conviction on indictment is imprisonment for 10 years – a term sufficient to trigger disqualification from Parliament under section 13A of the *Constitution Act 1902* (NSW).

- **Section 96I(1)**, which deals with unlawful conduct that does not involve a breach of the caps on political donations or expenditure such as accepting donations from prohibited donors or accepting anonymous donations of $1,000 or more. Again, the maximum penalty under this section is a fine of $44,000 or imprisonment for 2 years, or both.

- **Section 96I(2)**, which deals with the failure to comply with the requirement to keep certain records for three years. The maximum penalty is a fine of $22,000 in the case of a party or $11,000 in any other case.

In addition, section 96J provides that if a person accepts a political donation or other contribution that is unlawful, an amount of equal value (or double that amount if that person knew that it was unlawful) is payable by that person to the State. These amounts may be recovered by the NSWEC as a debt or deducted from public funding entitlements.

The offences under sections 96H(1) (failure to lodge a disclosure) and 96I(2) (failure to keep records) are strict liability offences, meaning that a person will be guilty of an offence if they have failed to comply with the relevant rules regardless of their knowledge or intent to do so.
The regulations provide that these offences may be dealt with by way of penalty notices issued by the NSWEC. The maximum amount payable under a penalty notice is $2,750. In contrast, other offences in the Act require the prosecution to prove that the accused was aware of the facts that result in the act being unlawful. These offences are rarely prosecuted. The NSWEC has cited two main reasons for this. First, that it is difficult to prove knowledge of each element of the current offences. Second, that it is difficult to prove knowledge when the accused is an official agent who is responsible for the acts and omissions of others. The Panel recommends that the official agent regime should be abolished in favour of making candidates and elected Members personally responsible for complying with the requirements of the Act (see Chapter 10 – ‘Governance’).

Education of candidates and Members of Parliament

In the interests of compliance, the NSW Electoral Commission plays a role in educating candidates and their campaign teams about their obligations under election funding law. The Commission provides information through its website, including fact sheets on the rules around donations, campaign spending, disclosure and the responsibilities of agents, and guides on funding and disclosure.

It is mandatory for party and official agents to have completed online training, unless they are exempt. The NSW Electoral Commission also holds information seminars for prospective candidates and agents on their legal obligations and responsibilities under the Act. Seventeen seminars were held at various locations throughout the State in August and September 2014 ahead of the 2015 election. Copies of the presentation are also available on the Commission’s website. Attendance at these seminars is extraordinarily poor: an average of four people attended each session. The highest attendance was 12 and the lowest zero.

The NSW Parliament is responsible for providing education to Members of Parliament. The Parliament delivered a two-day induction program for new Members of Parliament in 2011 and also provides ongoing education. Members’ staff are also provided with induction and ongoing education. Training is delivered through seminars, briefings and online training modules. Topics include parliamentary procedure, Members’ entitlements and the Codes of Conduct for Members and Parliamentary Staff. There is a specific e-learning training course for Members on the Code of Conduct. Almost all new Members attended the 2011 induction, although attendance at follow up sessions was poor. Often less than five Members were present, with the audience made up almost entirely of parliamentary officers.

Discussion and conclusions

Are the current penalties prescribed by the Act appropriate?

Many people who made submissions to the Panel called for tougher penalties for breaches of election funding laws, including the possibility of imprisonment. As noted above, changes to the Act introduced by the Government in October 2014 have significantly increased the penalties for breaches of the Act. For example, before the amendments, the maximum penalty faced by an individual candidate who breached the caps on political donations would have been $11,000. This penalty has increased to $44,000 or imprisonment for 2 years, or both. The Panel strongly endorses the new penalties as foreshadowed in its Interim Report. The penalties prescribed by the Act are now on par with those that apply in other jurisdictions such as Canada and Germany, and reflect the seriousness with which the community views deliberate breaches of election funding laws.
The recent changes to the Act included a new anti-circumvention offence, section 96HB, which carries a maximum penalty of 10 years imprisonment. An elected Member who is convicted of an offence under section 96HB would be automatically be disqualified under section 13A of the Constitution Act 1902 (NSW) regardless of the actual sentence imposed. Section 13A provides that if a Member of either House of Parliament is convicted of an offence punishable by imprisonment for a term of 5 years or more, his or her seat shall become vacant. This is consistent with Professor William’s view that ‘If a person gains an unfair advantage in an election, and so breaches the trust of the people who voted for them, it seems only fair that they lose their seat.’ While the recent amendments to the Act extended the time period for commencing prosecutions from three years to ten years, offences under section 96HB are specifically exempt from this limitation period (section 111(6)).

The NSW Electoral Commission informed the Panel that most electoral funding matters are heard in the local court. Section 111 of the Act provides that the maximum monetary penalty the local court may impose is $4,400. The Electoral Commission said that ‘this amount does not reflect the gravity of the conduct’ and ‘is not a sufficient deterrent’. The Panel agrees, particularly in light of the recent increases to the maximum penalties set out in Div 5, Part 6 of the Act. The Panel therefore recommends that section 111 be amended to increase the maximum monetary penalty that can be imposed by the local court for offences under the Act.

**Recommendation 43**

That the maximum monetary penalty that can be imposed by the local court for offences be increased as the part of the review of the Act.

**Should there be more strict liability offences?**

The Commonwealth Standing Committee on the Scrutiny of Bills has described strict liability as follows:

- An offence is one of strict liability where it provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. In other words, someone is held to be legally liable for their conduct irrespective of their moral responsibility.
- A person charged with a strict liability offence has recourse to a defence of mistake of fact.

Strict liability offences are contrary to the established criminal law principle that a person who acts unlawfully must also have a guilty mind in order to commit an offence. Strict liability is also regarded by some as contrary to the fundamental right of an accused person to be presumed innocent until proved guilty, a right that is codified in Article 14(2) of the International Covenant on Civil and Political Rights. For these reasons, strict liability is usually only applied in areas where there is compelling public interest in compliance, such as the environment or public health and safety.

In its submission to the Panel, the NSWEC argued for more strict liability offences ‘to increase deterrence and support the [NSWEC’s] enforcement function’. It noted that prosecutions under the Act have been abandoned or withdrawn in the past because there has been insufficient evidence to prove knowledge on the part of the accused. The NSWEC argued that strict liability offences for certain breaches of the Act, such as exceeding caps on donations and expenditure, would overcome the current difficulties associated with proving that the accused was aware of the facts that resulted in the act being unlawful.

Dr Tham disagreed with the views of the NSWEC on strict liability. In his submission to the Panel, he noted that ‘pointing to difficulties in obtaining successful prosecutions… says nothing about what conduct should be criminalised. Put differently, it does not provide any argument that breaches of the Act committed without knowledge (or intention) should be
criminalised’. During the academic round tables, Professor Williams stated that he was ‘very wary about strict liability offences’ given that the Act is ‘an extremely complicated piece of legislation’. 432

Dr Tham did, however, suggest that strict liability offences should be maintained for failing to lodge a disclosure (section 96H(1)) and failure to keep records (section 96I(2)) on the basis that ‘these actions gravely undermine the integrity of the laws regulating election funding and spending: without proper disclosures and records, it will be impossible to determine whether these laws are being complied with’. 433 He also suggested that the Act should include a strict liability offence for lodging an incomplete disclosure, similar to the offences that apply in Queensland and the ACT. 434 This is consistent with the views of Professor Twomey, who argued for the use of some strict liability offences ‘so that prosecutions are not rendered ineffective due to technical problems in proving intent in relation to all elements of an offence’. 435 Professor Williams also agreed that there should be strict liability offences for less serious offences, because this ‘puts the onus on all concerned to abide by the law’. 436

The Panel is inclined to agree with this approach. The Panel therefore recommends that strict liability offences be retained for failing to lodge a disclosure and failing to keep records, and that a new strict liability offence be created for lodging an incomplete disclosure using the provisions that apply in Queensland and the ACT as a point of reference.

**Recommendation 44**

That:

a) the strict liability offences for failing to lodge a disclosure and failing to keep records be retained; and

b) a new strict liability offence be created for lodging incomplete disclosures.

**Offences that require proof of knowledge or intent**

As noted above, the general consensus among the academicians is that the prosecution should have to prove knowledge or intent before a person is found guilty of a serious criminal offence under the Act. The Panel acknowledges the NSWEC's view that there are real technical difficulties with the current offences that require the prosecutor to prove beyond reasonable doubt that, at the time of the act, the accused was aware of the facts that resulted in the act being unlawful. This is a requirement of sections 96HA (Offences relating to caps on donations and expenditure) and 96I(1) (Other offences).

For example, in order to establish that a person who has accepted a political donation from a prohibited donor has committed an offence, the NSWEC would arguably be required to prove not only that the accused knew that the donor was a prohibited donor, but that they knew that political donation in question was made for purposes other than a federal election. This is because the offence provisions are subject to section 83, which provides that Part 6 of the Act only applies to State and local government elections and elected Members. It is difficult to see how the NSWEC could obtain evidence of such knowledge without an admission by the defendant. One way of dealing with this issue would be for the Act to state that, for the purposes of the offence provisions, there is a presumption that all political donations are made for the purposes of State or local government elections, with the onus being on the defendant to rebut that presumption and prove that the donation was made for a federal purpose.

Clearly there is scope to simplify the elements of which a person must be aware before they can be found guilty of an offence under the Act. The Panel recommends that this be pursued as part of the comprehensive review of the Act (consistent with Recommendation 44 above).
This should be done in close consultation with the NSWEC and with the benefit of any legal advice it has obtained on problems associated with the current offence provisions.

**Recommendation 45**

That the offences under the Act that require the prosecution to prove knowledge, awareness or intent be simplified to maximise the chances of successful prosecutions.

**Enforcement options for the NSW Electoral Commission**

Presently, prosecution is the only enforcement option available to the NSWEC for offences other than penalty notice offences, regardless of the nature of the unlawful conduct or the amounts involved. The fact that parties and candidates are unlikely to be prosecuted by the NSWEC for transgressions means that there is very little incentive for them to comply with the Act.

The Panel has heard that prosecution action should be reserved for serious breaches of election funding law, and that the NSWEC should be armed with a range of mid-level sanctions as an alternative to formal prosecution. The ICAC’s recent corruption prevention report explains how the lack of enforcement options available to the NSWEC has perpetuated a culture of non-compliance and poor internal governance within political parties:

> The most significant flaw in the NSW system at this time is that almost no mid-level interventions are available to the NSWEC. Currently, issuing directions and stop notices, public naming and shaming or withholding public money are not feasible options for the NSWEC. Also, at the apex of the pyramid, even though prosecution for serious offences is theoretically possible, only a few have ever been successful. The parties have no strong incentive to engage with the NSWEC or to voluntarily improve their internal controls. As a result, the education and assistance currently offered by the NSWEC to the parties is largely shunned, governance remains weak and the culture of non-compliance continues.\(^\text{437}\)

In addition to the mid-level sanctions suggested by the ICAC, Dr Tham has proposed that the Act should prescribe criminal penalties for offences where there is knowledge or intent on the part of the accused, as well as a range of civil penalties that apply to all breaches of the Act regardless of intent or knowledge. This approach recognises that breaches of the Act ‘do not always warrant criminal sanctions: they are not necessarily accompanied by requisite knowledge or intention; they could have involved limited amounts of money; they could have been inadvertently committed by volunteers’. Dr Tham also argues that a civil penalties ‘might be more effective than criminal sanctions: they are easier to invoke with a lower standard of proof; the financial penalties can be tailored to gravity of the breach and the amounts of money involved; and provisions providing for civil penalties can be accompanied by powers on the part of the NSWEC to recover these penalties, in particular, from public funding payments’.\(^\text{438}\)

The Panel strongly supports this approach. The NSWEC should have a ‘tool kit’ of enforcement options that allow it to intervene as soon as instances of minor non-compliance and poor governance within political parties arise. Such intervention may well reduce the risk of the kind of systemic corruption being investigated by the ICAC in Operations Spicer and Credo.

**Recommendation 46**

That a range of mid-level enforcement options be made available to the NSW Electoral Commission, including the ability to withhold public funding entitlements from parties and candidates.
The Election Funding Authority, which used to be the agency responsible for enforcing the Act, was recently abolished and its responsibilities and functions conferred on the NSWEC. The Panel sought the views of academics on whether the NSWEC, which primarily deals with the conduct of NSW elections, is the appropriate agency to enforce election funding laws. In this regard, it was noted that the NSWEC’s role as administrator of elections and as a source of advice for parties and candidates contesting elections may not be compatible with the role of a strong and feared regulator of election funding laws. In particular, the Panel asked whether an appropriately-resourced separate body should be established to detect, investigate and prosecute potential breaches of the Act.

Dr Tham stated that he did not ‘see a conclusive argument why you cannot house different functions in [the] same organisation. They both deal with elections.’ Professor Williams noted, however, that Australian electoral authorities in general tend to lack the regulatory and prosecutorial rigour of other regulators such as the Australian Competition and Consumer Commission that have both administrative and enforcement functions. He said:

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

Professor Williams’ concluded that ‘…I would think the electoral commission is the appropriate body with a separately funded area which is dedicated to this task with resources that are insulated from being removed to other parts of the commission’.

The Panel considers that responsibility for the investigation and enforcement of election funding laws should continue to rest with NSWEC, provided that these functions are performed by a separate division that is adequately resourced for the task and consists of officers with suitable expertise. The Panel also considers that alleviating the NSWEC of the administrative burden associated with paper-based disclosures (as discussed in Chapter 8 – ‘Disclosures’) and double-auditing of claims for public funding (as discussed Chapter 10 – ‘Governance’) is paramount if the NSWEC is to become a strong and effective regulator. To this end, the Panel agrees with the ICAC’s recommendation that ‘the NSWEC conducts a root and branch review to identify the gaps between its organisational capabilities and the demands of best practice electoral regulation’. The Panel also agrees with the ICAC’s view that the NSWEC needs to rebalance its administrative and regulatory functions and take a more strategic, risk-based approach to the regulation of political parties. The Panel therefore agrees that:

- the NSWEC develops risk metrics and conducts a regular risk assessment of political parties to determine potential areas of non-compliance with legislative requirements which would require regulatory action;
- the Act be amended to require the NSWEC to make public the results of the risk assessments of political;
- the Act be amended to empower the NSWEC to conduct comprehensive random audits of low risk parties and targeted audits of high risk parties; and
- the Act be amended to provide that the results of political party audits and the imposition of penalties on parties and their senior party office holders by the NSWEC be made public.
These recommendations are similar to Recommendations 7, 8, 9 and 11 of the ICAC’s recent corruption prevention report.\(^{444}\)

**Recommendation 47**

That measures be introduced to support the NSW Electoral Commission to transition from a focus on administration to risk-based regulation.

**Recommendation 48**

That the NSW Electoral Commission conduct a root and branch review to identify gaps between its organisational capabilities and the demands of best practice electoral regulation.

**Education of candidates and MPs**

The Panel believes that education can be a driver of behavioral change within the major parties, and across the NSW political system.

As noted previously, the ICAC investigations have uncovered poor knowledge of election funding laws among some Members of Parliament and party officials. Some witnesses gave evidence that they were unaware of the rules around donations and disclosure. Candidates also said that they left fundraising to their campaign teams, and that they expected them to know and obey election funding laws.

The joint submission by Dr Anika Gauja and Professor Rodney Smith from The University of Sydney observed that: ‘The current NSW Independent Commission Against Corruption investigations suggest that the key problems lie not in flaws in the legislative framework but in weaknesses in enforcement and education’.\(^{445}\) According to Dr Gauja and Professor Smith, ‘while it [the NSW Electoral Commission] does engage in educational activities, these are very limited’. They recommended that the Electoral Commission be given ‘a specific education function, allowing this body to inform parties, agents, candidates, donors of their responsibilities under the Act. (This would remove the “I didn’t know it was wrong” defence)’.\(^{446}\)

In his 2012 report on the NSW election funding framework, Dr Tham said that education should be made a key function of the Electoral Commission.\(^{447}\) Dr Tham said that there was an important difference between the Commission disseminating information through its website and information sheets, as opposed to the Commission conducting structured education activities to build compliance capability.\(^{448}\)

We have concluded that there needs to be better education of candidates standing for election. We are particularly troubled by the extraordinarily poor levels of attendance at the NSW Electoral Commission’s education seminars for candidates for the 2015 State election, even following the highly publicised revelations at the ICAC around breaches of election funding laws. As noted earlier, an average of four people attended each session, with the highest attendance being 12. At three sessions, no one attended at all.

The Electoral Commission needs to deliver more pre-election education to inform candidates about their obligations under election funding law, and to convince candidates of the importance of conducting fundraising activities in a manner that meets the highest ethical standards. This requires the Commission to be given a specific education function. While we would like to support mandatory pre-election training for candidates, and the withholding of public funds from any candidate unless they attend such training, we acknowledge that it would be impossible to make attendance mandatory. This is because this requirement could interfere with an individual’s right to stand for election under our system of representative government. However, we believe that the Commission should make these seminars as
engaging and informative as possible, and that parties should do everything possible to encourage and monitor attendance by their endorsed candidates.

We believe that education should not be a one-off effort for candidates. In our Interim Report we indicated that we would consult the NSW Parliament on how to implement our proposal for mandatory ongoing education for Members of Parliament. We noted that Member education should cover not only obligations under election funding laws but ethical behaviour in general, including the expectations placed on Members as holders of public office. We suggested that the NSW Parliament could also draw on the expertise of relevant agencies, including the NSW Electoral Commission and the ICAC, to deliver ongoing training.

The joint response from the Clerk of the Legislative Assembly and the Clerk of the Legislative Council remarked that many professions require mandatory continuing education, such as solicitors, who are required to undertake ten hours of continuing legal education each year in order to renew their practicing certificates. Professor Graeme Orr made a similar point when he met with the Panel: he said that a useful comparison could be made to newly appointed judges, who despite holding an esteemed position in our community, are still required to undertake professional development. The Panel agrees. Parliamentarians should not be given special treatment than other esteemed professions, such as judges and lawyers, who are required to attend induction courses and undertake ongoing professional development to maintain and indeed improve their skills.

In their comments on the induction training, the Clerks said that one of the challenges is timing, because the induction cannot occur until the poll is declared which is very close to Parliament’s first sitting day. They observed that ‘many new Members simply wish to obtain the keys to their office, their mobile phone, their computer log-in and to employ staff, and are already facing constituent demands…’, which can lead to ‘information overload’ at the induction program.449

The Clerks suggested that Members could be required to attend an annual seminar on topics such as a refresher on the Code of Conduct, use of entitlements, findings on relevant ICAC investigations and an update on election funding rules. Online training modules cover a broad range of topics, including a module on ethics, the Code of Conduct and pecuniary interest disclosures.

The Clerks of the NSW Parliament acknowledged that if the Panel wished to recommend mandatory ongoing education we would need a ‘point of leverage’ to require attendance. They suggested one option would be to make full payment of some part of a Member’s entitlements, such as the Logistic Support Allocation or Electoral Communication Allowance, contingent on the Member participating in continuing annual education.450 The Parliament noted that ‘this would require a reference (from the Premier) to the Parliamentary Remuneration Tribunal for a special determination’.451 The Clerks also noted that one option considered ahead of the 2011 election, but not implemented, was to make it mandatory for a Member to complete the online module on ethics, the Code of Conduct and pecuniary interest disclosure before they could receive their first pay.452

During our consultations we heard that in the past, Parliamentary training has not been taken as seriously as it should be by some Members of Parliament. This is a great disappointment to the Panel. Political parties should be responsible for educating their members, including candidates and party agents, on their obligations under election funding law. We note that it is the political parties themselves that have most leverage over their Members. If the Parliamentary Leaders and Whips of the two major parties in particular embrace the education imperative, it is far more likely to be taken seriously and respected as an important part of a Member’s duties. The Clerks noted that the very high attendance at the 2011 induction was a direct result of the Parliamentary Leaders and Whips making it
clear that Members were required to attend, and suggested that ‘strong encouragement’ by their parties could increase Member participation in ongoing education programs.  

The Panel supports mandatory education for Members of Parliament and the introduction of financial penalties for MPs who do not participate. These penalties should fall not only on individual MPs but their parties (for endorsed Members), as we believe that it is the Parliamentary Leaders and Whips who are most effective in encouraging their Members to attend. In relation to individual MPs, the Panel supports linking Members’ allowances and pay to participation. In relation to parties, we supporting linking the participation of a party’s endorsed Members to the party’s administration funding.

**Recommendation 49**

That the NSW Electoral Commission be given a specific education function and that the Commission deliver an extensive and engaging education program before the 2019 State election.

**Recommendation 50**

That:

a) Members of Parliament be required to attend a mandatory induction and continuing education program delivered by the NSW Parliament, with non-participation to result in the following penalties:

i. failure to attend annual seminar – withhold a portion of a party’s administration funding (for an endorsed Member) and/or some part of a Member’s entitlements; and

ii. failure to complete the online education module on ethics – withhold a Member’s first salary payment pending completion.

b) the Premier refer this recommendation to the Parliamentary Remuneration Tribunal for a special determination.
Endnotes

Chapter 2


3 ICAC, Media Release, 5 December 2014


5 ICAC, Transcript – Operations Credo/Spicer, 4 September 2014, p 7104-7105.
6 ICAC, Transcript – Operations Credo/Spicer, 4 September 2014, pp 7109-7110.
7 ICAC, Transcript – Operations Credo/Spicer, 4 September 2014, p 7107.
8 ICAC, Transcript – Operations Credo/Spicer, 4 September 2014, p 7107.
9 ICAC, Transcript – Operations Credo/Spicer, 4 September 2014, p 7105.
10 ICAC, Transcript – Operations Credo/Spicer, 3 September 2014, p 6876.
11 ICAC, Transcript – Operations Credo/Spicer, 4 September 2014, p 7141.
12 ICAC, Transcript – Operations Credo/Spicer, 4 September 2014, pp 7137-7138.
19 ICAC, Transcript – Operations Credo/Spicer, 12 September 2014, p 7672.
20 ICAC, Transcript – Operations Credo/Spicer, 12 September 2014, p 7684.
22 ICAC, Transcript – Operations Credo/Spicer, 12 September 2014, p 7677.
34 ICAC, Transcript – Operations Credo/Spicer, 12 August 2014, p 5120 and 5124.
37 ICAC, Transcript – Operations Credo/Spicer, 3 September 2014, pp 6959-6960.
40 ICAC, Transcript – Operations Credo/Spicer, 14 August 2014, p 5301.
41 ICAC, Transcript – Operations Credo/Spicer, 21 August 2014, pp 5748-5749.
Chapter 3


Over the four-year period from 1 July 2009 to 30 June 2013, political parties and candidates spent about $50 million on election expenses (including both electoral communications expenditure and other electoral expenditure), of which about $22 million (or 44%) was reimbursed by public funding.

In the ACT every Member is entitled to administration funding of $20,000 each year. Administrative funding was available in Queensland until 2014 when it was replaced with ‘policy development payments’ for registered parties with at least one Member elected to Parliament. There are no requirements on how the money should be spent. See Professor Anne Twomey, Reconsidering the reform of political donations, expenditure and funding in New South Wales (3 September 2014) p 97, prepared for the Panel of Experts – Political Donations (Working Paper No. 5).

In the ACT every Member is entitled to administration funding of $20,000 each year. Administrative funding was available in Queensland until 2014 when it was replaced with ‘policy development payments’ for registered parties with at least one Member elected to Parliament. There are no requirements on how the money should be spent. See Professor Anne Twomey, Reconsidering the reform of political donations, expenditure and funding in New South Wales (3 September 2014) p 97, prepared for the Panel of Experts – Political Donations (Working Paper No. 5).

IDEA, Funding of Political Parties and Election Campaigns – A Handbook on Political Finance (25 August 2014) p 335.

Donations above $1,000 must be disclosed in the ACT and Northern Territory and $2,100 in Western Australia. The Commonwealth and Queensland require annual disclosure of donations above $12,800 and electoral expenditure. There are no disclosure requirements on either donations or spending in Victoria and Tasmania. South Australia will require disclosure of third party electoral expenditure from 2015.


Colin Barry, NSW Electoral Commission, Submission No. 43.

Chapter 4

75 Professor Graeme Orr, Submission No. 6, p 2.
77 We did not receive administration costs from the Shooters and Fishers Party and the National Party were only able to provide amounts for three financial years, rather than four.
78 International Institute for Democracy and Electoral Assistance, Funding of Political Parties and Election Campaigns: A Handbook on Political Finance (1 September 2014) p 22.
79 Select Committee on Electoral and Political Party Funding in New South Wales, NSW Legislative Council, Inquiry into Electoral and Political Party Funding in New South Wales, June 2008, Submission 165, Mike Baird, p 3.
81 The Greens, Submission No. 40, p 3.
82 Marilyn Long, Submission No. 7, p 2.
83 Professor Anne Twomey, Submission No. 5, p 3.
84 Alex Greenwich MP, Submission No. 43.
85 Bret Walker SC, Submission No. 24, p 3.
86 Professor George Williams, Submission No. 3, p 1.
88 (1997) 189 CLR 520.
93 Professor Twomey, Working Paper No. 5, p 23.
94 Professor Twomey, Working Paper No. 5, p 59.
95 Professor Twomey, Working Paper No. 5, p 60.
96 Australian Labor Party, NSW Branch, Submission No. 18.
97 Professor Twomey, Working Paper No. 5, pp 11-12.
98 Bruce Hawker, Submission No. 23, pp 5-6.
99 Professor Orr, Submission No. 6, p 6.
100 Professor Anne Twomey, Submission No. 5, p 3.
101 Professor Anne Twomey, Working Paper No. 5, p 58.
102 Professor George Williams, Submission No. 3, p 2.

Chapter 5

103 Select Committee on Electoral and Political Party Funding in New South Wales, NSW Legislative Council, Inquiry into Electoral and Political Party Funding in New South Wales, June 2008, Submission 165, Mike Baird, p 3.
105 Unions NSW v New South Wales (2013) 88 ALJR 227, [30] (French CJ, Hayne, Crennan, Kiefel and

109 Professor Twomey, Working Paper No. 5, p 60.

110 Professor Twomey, Working Paper No. 5, p 56.


114 Bret Walker SC, Submission No. 24, p 10.

115 Professor Twomey, Working Paper No. 5, p 60.

116 Electoral Act 1907 (WA), s175N(4).

117 See Ros Everett, The Law Society of New South Wales, Submission No. 55.


120 Australian Cyclists Party, Submission No. 76, p 2.

121 NSW Electoral Commission, Submission No. 44, p 8.


123 Urban Taskforce, Submission No. 48.


125 Dr Joo-Cheong-Tham (November 2012) p 153.

126 Australian Cyclists Party, Submission No. 76, p 2.


128 Michael Thorn, Foundation for Alcohol Research and Education, Submission No. 59, p 1.

129 Lock the Gate Alliance, Submission No. 60, p 3.

130 Narelle Stiles, Submission No. 50; Jane Oakley, Submission No. 21.

131 The Greens, Submission No. 40, p 2.


141 New South Wales, Parliamentary Debates, Legislative Assembly, 28 October 2010, p 27168 (Kristina Keneally, Premier).

142 The Accountability Round Table Ltd, Submission No. 74, p 4.

143 The Greens, Submission No. 40, p 1.
This spending includes both ‘electoral communications expenditure’ (which was capped for the 3 months prior to the election) and ‘other electoral expenditure’ (which was not capped).

These figures include both ‘electoral communications expenditure’ and ‘other electoral expenditure’.


The amounts from the 2011 election have been added to the original table by Dr Tham and Dr Anderson, based on figures supplied by the Election Funding Authority.


Section 95F(13), *Election Funding, Expenditure and Disclosures Act 1981* (NSW).

Dr Joo-Cheong Tham and Dr Malcolm Anderson, *How effective are the New South Wales election spending limits in preventing election ‘arms races’? A preliminary inquiry*, p 38.

Dr Joo-Cheong Tham and Dr Malcolm Anderson, p 28.

Dr Joo-Cheong Tham and Dr Malcolm Anderson, p 28.


Dr Joo-Cheong Tham (November 2012), p 176.


Chapter 7

Legislative Assembly candidates must receive at least four percent of first preference votes or be elected. Ungrouped candidates in a Legislative Council election must receive at least four percent of first preference votes or be elected. Parties that endorse Legislative Assembly candidates must receive at least four percent of first preference votes in those districts in which they endorse candidates. Parties or groups not endorsing Legislative Assembly candidates must receive at least four percent of first preference votes in a Legislative Council election or have a member elected to the Council.

Figures provided by the NSW Electoral Commission.


All jurisdictions provide public funding for election campaigns except the Northern Territory and Tasmania. South Australia’s public funding scheme will come into effect on 1 July 2015.

The Commonwealth, ACT, Western Australia and Victoria have a four percent eligibility threshold, as will South Australia from 2015. Queensland has a six percent eligibility threshold.

Reimbursement schemes are in place in Western Australia, Victoria and Queensland. South Australia will implement a reimbursement scheme in 2015. The Commonwealth and ACT have direct entitlement schemes.

The Commonwealth, ACT and Queensland provide funding at a set ‘dollar per vote’ rate. New South Wales will adopt this model for the 2015 election.

Dr Simon Longstaff, St James Ethics Centre, Submission 70, p 2.


Colin Barry, NSW Electoral Commission, Submission No. 43, Attachment 1, p 7.

Colin Barry, NSW Electoral Commission, Submission No. 43, Attachment 1, pp 7-8.

Liberal Democratic Party, Submission No. 54, p 2.

Colin Barry, NSW Electoral Commission, Submission No. 43, Attachment 1, p 8.

Professor Twomey, Working Paper No. 5, p 110.

Christian Democratic Party, Submission No. 75, p 2.
Professor Graeme Orr, University of Queensland Submission No. 6, p 4.


Professor Twomey, Working Paper No. 5, p 22.


Dr Shane Leong, Dr James Hazelton and Dr Edward Tello, Submission No. 61, p 3.

Colin Barry, NSW Electoral Commission, Submission No. 43, Attachment 1, p 6.

New South Wales, Parliamentary Debates, Legislative Assembly, 15 October 2014, p 1148 (Mike Baird, Premier).

New South Wales, Parliamentary Debates, Legislative Assembly, 15 October 2014, p 1151 (Alex Greenwich MP).

New South Wales, Parliamentary Debates, Legislative Council, 15 October 2014, p 1400 (David Shoebridge).


Anne Twomey, 'NSW is introducing full public funding of major political parties – by stealth', The Conversation, 16 October 2014.


Anne Twomey, 'NSW is introducing full public funding of major political parties – by stealth', The Conversation, 16 October 2014.


South Australia, Parliamentary Debates, House of Assembly, 11 September 2013, p 6835 (J R Rau).

New South Wales, Parliamentary Debates, Legislative Assembly, 15 October 2014, p 1151 (Alex Greenwich MP).


Australian Labor Party, Submission No. 18, p 7.


Dr Shane Leong, Dr James Hazelton and Dr Edward Tello, Submission No. 61, p 3.

Colin Barry, NSW Electoral Commission, Submission No. 43, p 8.


Greg Piper MP, Submission No. 58, p 5.


National Party of Australia (NSW Branch), Submission No. 18, Inquiry into Public Funding of Election Campaigns, 22 January 2010.

*Election Funding, Expenditure and Disclosures Amendment (Administration Funding) Act 2013* (NSW).


JSCEM, Inquiry into Administrative Funding for Minor Parties, November 2012, pp 11-12.

*Election Funding, Expenditure and Disclosures Act 1981* (NSW).

New South Wales, Parliamentary Debates, Legislative Assembly (14 October 2014)p 1023 (Mike Baird, Premier).


Electoral (Funding, Expenditure and Disclosure) Amendment Act 2013 (SA), Division 5 ‘Special assistance funding for political parties’.

Administrative funding was previously available in Queensland. However, in 2014 this was replaced with ‘policy development payments’ for registered parties. However, there is no requirement that the money be spent on policy development and it could be spent on electioneering.


Panel of Experts – Political Donations, Academic Round Table Discussion, ‘Session Three: Public Funding of Election Campaigns’ (25 September 2014) pp 4-5.


Parties and candidates are required to make a record of the terms and conditions, but not to disclose them.

New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 October 2010, p 27170 (Kristina Keneally).
Chapter 8


Election Funding, Expenditure and Disclosures Act 1981 (NSW) s 85.

Dr David Solomon AM, Submission No. 17, p 1.

Mr Alex Greenwich MP, Submission No. 47, p 2.

The Greens NSW, Submission No. 40, p 7.

Unions NSW, Submission No. 46, p 10.

Professor George Williams, Submission No. 3, p 2; Professor Graeme Orr, Submission No. 6, p 5; Dr Joo-Cheong Tham, (November 2012) p 153.


Professor Anne Twomey, Submission No. 5, p 5.

Andrew Moran, Submission No. 1, p 1, emphasis as per original.

Alan Fredericks, Submission No. 9, p 1.

Alexander Reid, Submission No. 49, p 1.

Anthony D’Adam, Submission No. 16, p 1.

Australian Cyclists Party, Submission No. 76, p 3.


Mr Alex Greenwich MP, Submission No. 47, p 2.

The Greens NSW, Submission No. 40, p 7.


Dr David Solomon AM, Submission No. 17, p 2.


See, for example, New York City Campaign Finance Board, ‘By the People: The New York City Campaign Finance Program in the 2013 Elections’ (2013).


Greg Piper, Submission No. 58, p 4.

Greg Piper, Submission No. 58, p 5.


Chapter 9

The definition of a third-party campaigner excludes political parties, Members of Parliament, candidates and groups.


IDEA Funding of Political Parties and Election Campaigns – A Handbook on Political Finance (25 August 2014) p 27.

IDEA Funding of Political Parties and Election Campaigns – A Handbook on Political Finance (25 August 2014) p 27.

Western Australia requires disclosure of donations over $2,100 by associated entities on an annual basis and by third parties post-election, as well as third party spending. The Northern Territory requires annual disclosure of donations above $1,500 to associated entities and above $1,000 to third parties post-election. The Commonwealth requires annual disclosure including donations above $12,800 by associated entities and third parties who incur electoral expenditure. Queensland requires disclosure by associated entities on an annual basis and by third parties post-election including donations over $12,800. South Australia will require disclosure by third parties and associated entities of electoral expenditure and donations from 2015. There are no disclosure requirements on either donations or spending in Victoria and Tasmania.


In 1918 third-party spending was capped at the token level of 50 pence, later increased to £5. Professor Anne Twomey, Reconsidering the reform of political donations, expenditure and funding in New South Wales (3 September 2014) p 73, prepared for the Panel of Experts – Political Donations (Working Paper No. 5).

This spending cap applies across England, Scotland, Wales and Northern Ireland.

Professor Anne Twomey, Reconsidering the reform of political donations, expenditure and funding in New South Wales (3 September 2014) p 83 prepared for the Panel of Experts – Political Donations (Working Paper No. 5).

The election period is from the date the election is announced or three months before the election (whichever is the later). Eleanor Jones, Update on International Campaign Finance Laws and Full Public Funding Models (July 2014) p 20 (Working Paper No. 2).

Professor Anne Twomey, Reconsidering the reform of political donations, expenditure and funding in New South Wales (3 September 2014) p 54 prepared for the Panel of Experts – Political Donations (Working Paper No. 5).

Panel of Experts – Political Donations, Academic Round Table Discussion, ‘Session Four: Constitutional Issues and Reform of Election Funding Laws in the Wake of the Unions NSW Case’ (29 September 2014) p 5.

Colin Barry, NSW Electoral Commission, Submission No. 43, Attachment 1, p 6.

Professor Anne Twomey, Reconsidering the reform of political donations, expenditure and funding in New South Wales (3 September 2014) p 84 prepared for the Panel of Experts – Political Donations (Working Paper No. 5).

Professor Anne Twomey, Reconsidering the reform of political donations, expenditure and funding in New South Wales (3 September 2014) p 85 prepared for the Panel of Experts – Political Donations (Working Paper No. 5).

Australian Manufacturing Workers’ Union, Submission No. 69, p 1.


Australian Manufacturing Workers’ Union, Submission No. 69, p 9.

NSW National Party, Submission No. 44, p 7.
Professor Anne Twomey, Reconsidering the reform of political donations, expenditure and funding in New South Wales (3 September 2014) p 55 prepared for the Panel of Experts – Political Donations (Working Paper No. 5).

New South Wales, Parliamentary Debates, Legislative Council, 15 October 2014, p 1103 (Catherine Cusack).


Christian Democratic Party, Submission No. 75, p 1.


New South Wales, Parliamentary Debates, Legislative Assembly, 15 October 2014 p 1147 (Robert Furolo).

Dr Joo-Cheong Tham, Establishing a sustainable framework for election funding and spending laws in New South Wales: A report prepared for the New South Wales Electoral Commission (November 2012) p 175.

Professor Anne Twomey, Reconsidering the reform of political donations, expenditure and funding in New South Wales (3 September 2014) p 88, prepared for the Panel of Experts – Political Donations (Working Paper No. 5).


The Greens, Submission No. 40, p 5.

The Nationals, Submission No. 44, p 7.

Unions NSW, Submission No. 46, p 6.

New South Wales, Parliamentary Debates, Legislative Assembly, 15 October 2014 p 1147 (Robert Furolo).

New South Wales, Parliamentary Debates, Legislative Assembly, 15 October 2014 p 1147 (Robert Furolo).


Unions NSW, Submission No. 46, p 6.

The reforms were to section 96G(6) of the Election Funding, Expenditure and Disclosures Act 1981 (NSW).

New South Wales, Parliamentary Debates, Legislative Assembly, 12 September 2011, p 5433 (Barry O'Farrell).

Unions NSW v State of New South Wales [2013] HCA 58

Electoral Act 1992 (ACT) Div 14.2B, s 205F.

Professor Anne Twomey, Reconsidering the reform of political donations, expenditure and funding in New South Wales (3 September 2014) p 90, prepared for the Panel of Experts – Political Donations (Working Paper No. 5).

Panel of Experts – Political Donations, Academic Round Table Discussion, ‘Session 3: Public Funding of Election Campaigns’ (25 September 2014) p 27.

Panel of Experts – Political Donations, Academic Round Table Discussion, ‘Session 3: Public Funding of Election Campaigns’ (25 September 2014) p 27.

Dr Joo-Cheong Tham, Supplementary Submission No. 2B, p 2.

Dr Joo-Cheong Tham, Supplementary Submission No. 2B, p 4.

Dr Joo-Cheong Tham, Supplementary Submission No. 2B, p 5.

Panel of Experts – Political Donations, Academic Round Table Discussion, ‘Session Four: Constitutional Issues and Reform of Election Funding Laws in the Wake of the Unions NSW Case’ (29 September 2014) p 18.
Chapter 10


Professor Rodney Smith & Dr Anika Gauja, ‘Understanding party constitutions as responses to specific challenges’, Party Politics 2010, 16, p 758.

Panel of Experts – Political Donations, Academic Round Table Discussion, ‘Session One: The Regulation and Governance of Political Parties and Associated Entities’ (24 September 2014) p 16.


The EFA have produced an Audit Policy which outlines this process – see NSW Election Funding Authority, ‘Audit Policy’, at https://wwwefa.nsw.gov.au/__data/assets/pdf_file/0007/128689/Audit_Policy_Final.pdf

Clause 11, Election Funding, Expenditure and Disclosures Regulation 2009.

Clauses 12-19, Election Funding, Expenditure and Disclosures Regulation 2009.

Clause 20, Election Funding, Expenditure and Disclosures Regulation 2009.


Rodney Cavalier, Submission No. 42, p 11.


Rodney Cavalier, Submission No. 42, p 14; Anthony D’Adam, Submission No. 16, p 1; and Professor George Williams, Submission No. 3, p 2.

Australian Institute of Company Directors, ‘What are the duties of directors?’, p 4.


Letter from Professor Jennifer Hill to Expert Panel on Political Donations, 14 October 2014, p 1.


Dr Joo-Cheong Tham (November 2012) p 212.

Dr Joo-Cheong Tham (November 2012) p 212.

Professor Anne Twomey, *Submission No. 5*, p 4.

Professor George Williams, *Submission No. 3*, p 2.


Dr Joo-Cheong Tham, *Submission No. 2*, p 214.


ICAC, ‘Election Funding, Expenditure and Disclosure in NSW: Strengthening Accountability and Transparency’ (December 2014)

Dr Anika Gauja and Dr Rodney Smith, The University of Sydney, *Submission No. 20*, p 2.

Dr Anika Gauja and Dr Rodney Smith, The University of Sydney, *Submission No. 20*, p 3.

Dr Joo-Cheong Tham (November 2012) p 18.

Dr Joo-Cheong Tham (November 2012) p 199.

Letter from Ronda Miller, Clerk of the Legislative Assembly and David Blunt, Clerk of the Parliaments, to Panel of Experts – Political Donations, 2 December 2014, p 2.

Letter from Ronda Miller, Clerk of the Legislative Assembly and David Blunt, Clerk of the Parliaments, to Panel of Experts – Political Donations, 2 December 2014, p 3.

Letter from Ronda Miller, Clerk of the Legislative Assembly and David Blunt, Clerk of the Parliaments, to Panel of Experts – Political Donations, 2 December 2014, p 3.

Letter from Ronda Miller, Clerk of the Legislative Assembly and David Blunt, Clerk of the Parliaments, to Panel of Experts – Political Donations, 2 December 2014, p 2.

Letter from Ronda Miller, Clerk of the Legislative Assembly and David Blunt, Clerk of the Parliaments, to Panel of Experts – Political Donations, 2 December 2014, p 3.