Submission No 17

INQUIRY INTO PUBLIC FUNDING OF ELECTION CAMPAIGNS

Organisation: Liberal Party of Australia (NSW Division)

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LIBERAL
NEW SOUTH WALES

22 January 2010

Mr Robert Furolo MP
Chairperson
Joint Standing Committee on Electoral Matters
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Furolo

Please find attached the submission of the Liberal Party of Australia (NSW Division) to the NSW Parliamentary Joint Standing Committee on Electoral Matters into the public funding of election campaigns in NSW.

If you have any queries please do not hesitate to contact me on 8356 0300.

Yours sincerely

Mark Neeham
State Director

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Liberal Party of Australia

(NSW Division)

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Joint Standing Committee on Electoral Matters

Public Funding of Election Campaigns Inquiry

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INTRODUCTORY REMARKS

1.1 The Liberal Party of Australia (NSW Division) is committed to comprehensive reform of election finance in New South Wales. The Leader of the Opposition, Mr Barry O'Farrell MP, has been a consistent supporter of comprehensive reform since his election in April 2007.

1.2 In the first week of the New South Wales Parliament in early May 2007, Mr O'Farrell announced that the Opposition would push for an inquiry into the State's system of political donations and election funding. He proposed that the inquiry should look at political donations and whether some or all categories should be banned or subject to limitations. He proposed that the inquiry should also examine limits on electorate and state wide political expenditure. It is a matter of record that this Government voted down the inquiry in the Legislative Assembly.

1.3 Instead, as we know, the Select Committee on Electoral and Political Party Funding was established by a resolution of the Legislative Council, moved by the Liberal Party's Whip, Hon. Don Harwin MLC, on 27 June 2007. It received 189 submissions and heard from 32 witnesses during five days of public hearings. One of those was Mr O'Farrell, who made a detailed submission. There were three main principles supported in his submission:

> *That the New South Wales Government seek national reforms relating to political donations to allow donations to be restricted to individual Australian citizens,*
>
> *That the New South Wales Government immediately legislate to impose limits on the campaign expenditure of political parties, candidates and third parties in State and local elections, and*
>
> *That the New South Wales Government should immediately legislate to give the Auditor General a role in reviewing and approving government advertising.*

1.4 The Select Committee endorsed all three principles, making a total of 47 recommendations on how to implement them.

1.5 Premier Iemma tried to manage the political fallout from the Wollongong corruption scandal by introducing some changes, announced in the middle of the Select Committee's inquiry. The Election Funding Amendment (Political Donations and

Expenditure) Bill 2008 was rushed through in June 2008 for the local government elections. At that time the Opposition continued to press for meaningful campaign finance reforms, seeking limits on how much could be spent by candidates and parties, and a cap on annual donations, in its response to the bill.

1.6 The 2008 legislation was the first of two piecemeal attempts by the current Government to reform the Election Funding Act. This approach is in fact making the problem worse. In evidence to this Inquiry and to previous Committee inquiries, the Electoral Commissioner, Mr Colin Barry has expressed concerns about the workability of these changes.

1.7 The NSW Government's only response to the Select Committee's report was to commission a paper from Dr Anne Twomey, Associate Professor of Law at the University of Sydney. In the interim, a new Premier initially seemed to have a different approach. Shortly after Premier Rees took over, he made a handshake deal with the Leader of the Opposition at a politics-in-the-pub debate at the Sackville Hotel in Rozelle. They agreed to adopt the Legislative Council's inquiry's recommendations to limit donations and cap spending during campaigns.

1.8 Dr Twomey's paper entitled *'The reform of political donations, expenditure and funding,'* was delivered to the Department of Premier and Cabinet in November 2008. It concludes by expressing a preference for "a comprehensive scheme to be achieved co-operatively at the Commonwealth, State and local government level, both for constitutional reasons and to minimise loopholes and avoidance". Within a month, the Commonwealth Government released an Electoral Reform Green Paper entitled *'Donations, Funding and Expenditure'*. These two developments apparently led Premier Rees to reconsider his support for the implementation of the Select Committee's recommendations. His stated reasons for delay and inaction were legal and constitutional concerns about New South Wales acting independently of Commonwealth reform.

1.9 The NSW Liberals were not surprised that former Premier Rees seized the first opportunity to dump his bipartisan commitment to try to limit the amount of money washing around NSW politics. Based on legal advice obtained from Professor Patrick Keyzer of the Faculty of Law at Bond University and Arthur Moses SC on its constitutionality, Mr O'Farrell affirmed his position in favour of State legislation to impose limits on donations and cap campaign spending.

1.10 In April 2009 the NSW Opposition publicly released a policy document on donations and campaign finance reform entitled *'Reforming Campaign Finance'*. The policy included our commitment to introducing limits on election spending, imposing caps on donations, strengthening the powers of the Independent Commission Against Corruption and effectively regulating lobbyists.

1.11 In August 2009, Mr O'Farrell announced that he would introduce Private Member's legislation to specifically charge the Independent Commission Against Corruption with the power to monitor the issue of political donations and decision-making. On 13 November 2009 Mr O'Farrell introduced the Independent Commission Against Corruption Amendment (Political Donations) Bill 2009 in the Legislative Assembly, demonstrating once again that reform is one of his principal priorities. In his agreement in principle speech he commented:

> *This legislation seeks to ensure that we do not have the corrosive impact upon public administration that has been created by the donations-for-decisions culture. Just as we seek to stamp out the stench of corruption that hangs in the air around this Government, we seek to do so in practical ways.*

1.12 While the Commonwealth Government's announced intention was to introduce legislation addressing campaign finance reform in the Spring Session 2009, the legislation failed to materialise. There is now media speculation that there will be no Commonwealth legislation prior to the general election due in late 2010.

1.13 The NSW Government's second piecemeal attempt at reform - the Election Funding and Disclosures Amendment (Property Developers Prohibition) Bill - was enacted in December 2009. It was widely interpreted as part of a narrative that former Premier Rees was developing to try and resurrect his failing leadership. A number of academics, including Dr Anne Twomey, have questioned its constitutionality. Mr O'Farrell and the Parliamentary Liberal Party reaffirmed their strong support of comprehensive reform in the debate on the legislation.

1.14 The former Premier claimed the 2009 legislation was supposed to be a first step, with this Inquiry tasked with pursuing a broader agenda of comprehensive reform. While the new Premier has not repudiated her predecessor's comments or the terms of reference he provided to the Committee, she is yet to make any public commitment to further reform prior to the March 2011 general election. There are claims that Premier Rees campaign reform initiatives played a role in his downfall. For example, the Wentworth Courier's December 9, 2009 edition reports at page 5 the following comments from the Labor Member for Coogee, Paul Pearce:

"Nathan Rees was coming to grips with the poisonous, muddy developer-type politics that has been going on since the mid-'60s. There was a view that the reason they moved against Nathan was that he was going after the developers, and that's not to suggest that Kristina played any part in that; she just became the benefactor of their desire to knock off Nathan. The test is how Kristina is going to respond to that."

1.15 Further, at the Committee's first public hearing on December 9, 2009, the Electoral Commissioner also stated that: "I have some concerns about meeting a timeline that would give effect to ... (comprehensive reform)... by the State election."

1.16 **There are real concerns that this Inquiry will only serve to further delay reform.** The reporting date is less than twelve months before the issue of the writs. With the time necessary to draft legislation, including the need for an exposure draft as the Electoral Commissioner suggests, there is a grave risk that comprehensive reform will not be in place by a date where it can effectively regulate and fund the coming State election campaign.

1.17 It may have been better for Premier Rees to have adopted the approach of the former British Prime Minister, Tony Blair. In 2006, he appointed Sir Hayden Phillips to provide independent oversight of negotiations between the political parties. Sir Hayden worked to develop consensus and was close to finalising a set of agreed reforms when, sadly, negotiations broke down over one matter. Nevertheless, having regard for the unanimous recommendations of the Legislative Council's Select Committee on the major areas of reform required, it may have been a more appropriate way to proceed to sort out some of the matters of detail which the Select Committee did not resolve.

1.18 Notwithstanding these concerns, the Liberal Party of Australia (NSW Division) is providing a detailed submission to assist the Committee, outlining the principles that inform its approach, the broad framework of the reforms we seek and detailed suggestions on how this framework should be implemented. We reserve our right to respond with a supplementary submission at a later time.

GOVERNING PRINCIPLES

2.1 The Liberal Party of Australia (NSW Division) supports the Electoral Commissioner's calls for a clear statement from the Committee about the principles that should govern campaign finance. Mr Barry was right when he told the Committee:

> *"In the absence of considering and establishing appropriate principles, the Committee will have no guiding beacon to aim for and, as such, policy options and models that are proposed will only be tested in the public debate over perceived partisan outcomes".*

In his evidence, Mr Barry emphasised that any reforms proposed by the Committee should be measured against four governing principles: integrity, fairness, the viability of the principal actors (the parties) and the need to maintain freedom of political communication.

2.2 The Commonwealth's Electoral Reform Green Paper also outlines principles "informing regulation of electoral funding and disclosure". These ten principles are:

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

- **Fiscal responsibility** – ensuring the public costs involved in democratic processes, including election costs and public funding costs, are not unreasonable.
- **Efficiency and effectiveness** – ensuring that regulation balances these principles against the costs of compliance and administration.

2.3 When benchmarked against these principles, we see the current system of political party and electoral funding as broken in New South Wales. This was explored in some detail in the submission to the Select Committee on Electoral and Political Party Funding (Submission no. 140) lodged by the Leader of the Opposition, Mr Barry O'Farrell MP on behalf of the NSW Parliamentary Liberal Party. Briefly, our concerns are as follows.

2.4 There is a perception that vested interests are using money, given as donations, to buy influence in New South Wales. It is one of the matters that have undermined public confidence in government and public administration in this State. NSW Labor has made an art-form of fundraising from those sections of the business community whose profitability is most affected by State Government regulation. This is reinforced by a structural imbalance in funding of political parties due to the relationship between the trade union movement and Labor.

2.5 The trade union movement is another vested interest whose donations are perceived to have unduly influenced the State Government. The proposed $10 billion power sell off proposed by Premier Iemma was debated at the 2008 NSW Labor State Conference, described by *The Australian* on 5 May 2008 as a 'union-dominated state conference'. When Premier Iemma proceeded in defiance of the outcome of the conference, fifteen Labor MPs defied him and protested with 4000 unionists against their Government's own policies.

2.6 The fate of legislation affecting occupational health and safety in NSW workplaces is a further example. Michael Duffy from the Sydney Morning Herald on 18 November 2006 described it as the *"century long intimacy between powerful unions and the party, which produces results for the unions when Labor is in power."* The occupational health and safety laws, which have been in more or less their current form since 2000, allow trade unions, according to Michael Duffy, *"to prosecute employers for accidents and keep half of any fine imposed by courts, whose judges are often former union*

officials." Reforms proposed by the Iemma Government before the 2007 State election were subsequently abandoned after the election as a result of pressure from the trade unions.

2.7 Public concerns over taxpayer subsidies to trade unions being used to help fund NSW Labor grew after revelations in the *Sydney Morning Herald* on 11 April 2008 when the State Government was revealed as having made a $660,905 grant to the Transport Workers Union (TWU), which in turn then donated $746,288 to the NSW Labor.

2.8 According to www.democracy4sale.com.au, a total of $4,071,211 was donated by various trade unions to NSW Labor between April 2007 and June 2009. Trade unions are yet another vested interest regulated and funded by the State Government who have helped keep NSW Labor in office with their donations.

2.9 Increasing campaign expenditure, based on extracting money from the business sectors regulated by the State Government, coupled with large donations from the trade union movement, has helped bolster NSW Labor's electoral position as its popularity has waned. There is an urgent need for the Parliament to act to restore the integrity of the system. This is the only way to change the perception of undue influence exercised by political donors that has developed.

2.10 The clearest sign of the link between money and politics has been evidence that NSW Labor has been able to increase its campaign expenditure at each subsequent election since the Carr Government's election in 1995. While the CPI increased only 36.7 percent between March 1995 and March 2007, NSW Labor's campaign expenditure increased by 467 percent. The increase was also primarily targeted at negative political advertising, with the proportion of NSW Labor's overall campaign budget devoted to television advertising rising from about one-half to almost three-quarters. This represents a staggering 746 percent increase from the March 1995 campaign to the March 2007 campaign.

2.11 By the March 2007 general election, an imbalance in declared electoral expenditure had developed with the party of State Government spending more than three times the amount spent by the largest Opposition party. Moreover, NSW Labor's spending ($16,819,116) was almost double the combined declared electoral expenditure of all

other registered political parties ($8,917,022). Their expenditure on political advertising was almost triple all other registered political parties. How fair is it when the incumbent can leverage the businesses they regulate to vastly out-spend all their opponents? The current arrangements fail the test of fairness.

2.12 Disclosure legislation is the principal means of seeking to promote integrity under current legislation. While this has ensured a degree of transparency, it has not been able to ensure integrity or fairness.

2.13 Attempts by the current Government to amend the Election Funding Act to try to restore the perception of integrity have not only failed, they have undermined the efficiency and effectiveness of the system. This has culminated in the Electoral Commissioner's interim recommendation to the Committee that the Act be scrapped and replaced with a new Act as a platform for a new system of electoral and political party funding and regulation. Some commentators have also warned that the recent bill which will ban donations from property developers and their close associates will in fact increase attempts to conceal donations and thus undermine the system's transparency.

2.14 As the NSW Opposition has repeatedly and consistently advocated, comprehensive reform is warranted.

CONSTITUTIONAL ISSUES

3.1 The thirteenth term of reference asks the Committee to consider: "the compatibility of any measure proposed with the freedom of political communication that is implied under the Commonwealth Constitution". In paragraphs 1.7 to 1.9, we discuss the way concerns about the constitutionality of reforms proposed by the Select Committee have been used to delay reform. The Government's emphasis on these concerns is ironic, given that a number of academic commentators take the view that the recently enacted Election Funding and Disclosures Amendment (Property Developers Prohibition) Bill may well be unconstitutional.

3.2 Both Dr Twomey's paper and the Commonwealth's Electoral Reform Green Paper contain excellent summations of the constitutional position.

3.3 Dr Twomey's summary of the *Lange* test, as elaborated in McHugh J. in *Coleman v. Power* is helpful:

> *"The elements of the test are therefore:*
>
> 1. *whether the law burdens freedom of political communication;*
> 2. *whether the law serves a 'legitimate end';*
> 3. *whether the law is reasonably appropriate and adapted to serving that legitimate end; and*
> 4. *whether the manner in which the law serves that legitimate end is compatible with the system of government prescribed by the Commonwealth Constitution."*

3.4 From decisions of superior courts in Australia, Canada and the United States, it is clear that any law which limits the right of a donor or places limits on expenditure will be seen as burdening freedom of political communication in some way. Equally, a law which sought to cap political donations, limit campaign expenditure by political parties and third parties, and provide for disclosure of donations and spending, in order to promote integrity, fairness and transparency would almost certainly be found to serve a 'legitimate end'. The political advertising ban proposed by the Hawke Government was found to be serving a legitimate end but struck down by the High Court because of the third and fourth elements of the test. The High Court felt that the ban was not appropriate, as there were better alternatives for achieving the same end, and also took issue with the approach taken, viewing the particular scheme as unduly biased towards

incumbents and against new entrants. We note that the fourteenth term of reference is particularly directed towards this consideration:

> *"the impact of any proposed measures on the ability of new candidates including independent candidates and new political groupings, to contest elections."*

3.5 As noted in paragraph 1.9, the Leader of the Opposition, Mr Barry O'Farrell MP, asked Professor Patrick Keyser and Mr Arthur Moses SC to advise on whether his proposals outlined in his submission to the Select Committee on Electoral and Political Party Funding were constitutional following Premier Iemma's rejection of the Committee's recommended State-based reforms on constitutional grounds. A full copy of their advice is attached at Appendix One. We have previously made this advice available to a number of academics and the NSW Greens upon request.

3.6 We believe that it is possible for the NSW Parliament to enact comprehensive reforms that are consistent with the principles enunciated by the High Court.

SUGGESTED APPROACH OF THE LIBERAL PARTY OF AUSTRALIA (NSW DIVISION)

4.1 Political parties have played and continue to play a constructive role in the life of our State and nation. Political parties make democracy work, providing a focus and a defined alternative competing for the support of Australians and as vehicles for participation in electoral politics, parliament and public administration. Any reform needs to ensure that political parties are not so constrained that they cannot continue to perform their current function. Non-party competitors in the election context need to be regulated as well, to ensure that, at a minimum, there is no attempt to escape the regulatory net through the use of third parties.

4.2 Our suggestions have the objective of **putting the community back at the centre of politics**. We believe that the only way to restore integrity to campaign finance is to go back to first principles. In a democracy, **only those who have the right to participate by casting a vote should be able to contribute to elections with their financial support for campaigns.** Unenrolled individuals, organisations, trade unions and corporations do not have votes, so they should not be able to influence the democratic process through donations. Further **by capping donations at a low level similar to the Canadian model, no individual citizen can exercise undue influence.** Tax deductibility broadens the base of potential enrolled individuals who can afford to donate, thus further diluting the possible influence of any individual donor can exercise. Capping political donations from enrolled individuals will substantially restore public confidence in the financing of our political parties and the integrity of decision-making by the elected Government.

4.3 But ensuring that large donors do not exercise undue influence is not enough. The protection of a system of representative government requires political equality of opportunity. There must be a 'level playing field' for the principal players. Elections should be a battle of ideas, policies and principles, not a battle of war-chests. Incumbents should not be able to spend double the combined total of their opponents, using money extracted from the businesses they regulate or from the unions they represent. Moreover, experience has shown that increasing public funding while retaining private donations just leads to an escalation of campaign spending. The

Liberal Party of Australia (NSW Division) **supports expenditure limits for candidates, parties, Legislative Council Groups and third parties** at appropriate levels.

4.4 The ability of political parties to perform their current function and compete in election campaigns is beyond the capacity of their membership bases to finance. At present, the most cost-effective way for parties to finance their activities is soliciting substantial donations from trade unions and corporations. Under our approach, this practice would be at an end. **For parties to continue to perform their current role and remain viable, increased public funding is essential.** The need will be even greater in the short-term as the parties undertake a costly enhancement of their capacity to fundraise from a mass base of small donors. We support a system of funding the ongoing administrative costs of political parties similar to the Canadian model and the continuation of the reimbursement of election expenses.

4.5 In changing the way we regulate the financing of political parties and campaign spending, the Committee must take care to **respect the differences in the histories, structures and support base of our political parties.** The Liberal Party has always been a non-sectional party with no affiliated organisations, reliant on the donations of individuals and their enterprises who share our philosophy and support our approach to public policy. Labor has a different tradition with a substantial funding base in affiliated trade unions. The Liberal Party has had a long-term Coalition partner in NSW politics – the Nationals, while NSW Labor has a separately-registered but associated party - Country Labor. None of these entities contest all 93 Lower House seats. The Shooters Party has a tradition of only contesting Upper House seats. We need to craft solutions which are responsive to the particular circumstances of our parties. These considerations have influenced our approach to the issues of capping donations and campaign spending, as well as public funding.

4.6 The Liberal Party of Australia (NSW Division) also believes that any **system we adopt must value the participation of party members and supporters,** and it must ensure that political parties are responsive mediators between the community and the institutions of Parliament and the Executive Government. Any locally-based requirements must not be so complex that they cannot be administered by volunteers, creating a disincentive for grass-roots political activity. We need to guard against rules that disempower grass-roots party units and undermine local autonomy. For these

reasons, a ban on all private donations and having political parties and their election campaigns financed exclusively by the taxpayer is opposed.

4.7 We note the Electoral Commissioner's call for a new Act and for changes to the Election Funding Authority. If a new Act can be ready to ensure the timely implementation of comprehensive reforms before the 2011 State general election, then we would have no objection to that course of action. In relation to the Authority, we take the view that while many have objected to its structure as a matter of principle, none have articulated an actual grievance with the Authority's performance. We think it is important that a regulator should have the confidence of the regulated and we support the retention of nominees of the Premier and the Leader of the Opposition. A compromise might be the addition of a currently serving or retired Supreme Court Justice as the Chair of the Authority, with the Auditor General also serving as a Member. The Electoral Commissioner might appropriately be designated as the Chief Executive Officer of the Authority, making a total of five Members.

4.8 In the next six sections, we outline some of the detailed reforms to implement the approach we suggest.

DONATIONS

5.1 The Liberal Party of Australia (NSW Division)'s approach was outlined earlier in the previous section at paragraph 4.2. We are committed to imposing an annual cap at a low level on how much a person is able to donate to the candidates or political party of their choice. We believe that only enrolled individuals should be able to donate, with donations from corporations, trade unions and other organisations being banned. Our support is contingent on the bans being comprehensive. For example, we would not support banning donations from corporations unless donations from trade unions were also banned.

5.2 Our Campaign Finance Reform policy, released by the Leader of the Opposition, Mr Barry O'Farrell MP, in April 2009, also provides for ongoing review of the cap by an independent arbiter. The policy is based on the submission Mr O'Farrell made to the Legislative Council Select Committee on Electoral and Political Party Funding in February 2008, advocating capped donations with independent oversight of the amount. The Select Committee endorsed this approach and also called for the Premier to:

> *"investigate all relevant legal and constitutional issues arising from such a ban, and liaise with the Federal Government to ensure national consistency on electoral donation and disclosure laws".*

In part, Dr Twomey's report was a response to that recommendation.

5.3 The Liberal and Labor Parties in NSW are divisions or branches of political parties that are federal in structure. Their national organisations are registered under Commonwealth, not State legislation. However, these NSW divisions or branches also contest Federal elections, endorsing candidates and funding expenditure. As Dr Twomey says in her paper:

> *"...any State law that interfered with Commonwealth elections, by banning or regulating the receipt of expenditure of funds by a State-registered political party that would have been used to support candidates in Commonwealth elections, would be vulnerable to constitutional challenge."*

5.4 Intra-party transfers of funds occurs between state divisions or branches and their federal party organisations and, sometimes, between state divisions or branches. Usually, this occurs during federal election campaigns.

5.5 In Mr O'Farrell's submission to the Select Committee, he expressed a view that capping donations would be achieved more successfully as part of a national scheme implemented by Commonwealth legislation. The Liberal Party of Australia (NSW Division) continues to take the view that a referral of powers to the Commonwealth on donations and disclosure would be the optimal solution for achieving our objective of restoring integrity. As the Federal Government has not proceeded in this direction, we believe it is necessary to proceed now with State-based reform in time for the 2011 State general election.

5.6 The best solution would be to **require political parties registered to contest State elections to quarantine various categories of income in separate accounts.** First, they would be required to maintain a separate account(s) for funds donated for the purpose of contesting federal general elections and by-elections (hereafter, Federal Campaign Account). Commonwealth legislation on donations would apply to funds that can be deposited into that account(s). Second, they would be required to maintain a separate account(s) for funds donated for the purpose of contesting State general elections and by-elections (hereafter, State Campaign Account). **State legislation capping donations and banning corporations, trade unions and other organisations from donating would apply to funds that can be deposited into the State Campaign Account(s). Parties would only be able to pay for State electoral expenditure subject to expenditure limits** (see paragraph 6.12 and 6.13) **from this hypothecated State Campaign Account(s).** Third, they would need to have a separate account(s) to fund the non-campaign needs of the Party (hereafter Administration Account). In relation to funds allocated from the proposed Party Administration Fund and the continuing Political Education Fund (see paragraphs 7.2 – 7.11), parties would have to agree to refuse any donations for non-campaign purposes from corporations, trade unions and other organisations as a condition for receiving any allocations from these two funds. Finally, lodging full audited financial statements annually will be a condition of State registration for a political party to ensure compliance. The caps and restrictions on source would be ongoing, not limited to a regulated period.

5.7 Labor's historical relationship with the trade union movement, which continues with affiliated trade unions exercising 50 percent of the vote at Annual Conference upon payment of affiliation fees for each trade unionist, presents some difficulty in working out

the best approach. We advocate the banning of all trade union donations, along with corporations and other organisations. To continue to allow affiliation fees without any constraint would simply invite trade unions to make their donations in the form of significantly increased affiliation fees.

Many Labor figures advocate an end to trade union affiliation to their Party, despite the loss of affiliation fee income. Under the approach we suggest, no donations or affiliation fees from trade unions would be able to be deposited in the hypothecated State Campaign account(s). However, while the constitutional linkage remains, our approach is to respect the different traditions of our parties, and allow affiliation fees to be retained for non-campaign purposes. In paragraph 7.8, we suggest **that any trade union affiliation fees be deducted from Labor's Party Administration Fund allocation** where an affiliated trade union has not sought the written consent of each individual trade unionist for membership by affiliation of the Australian Labor Party. It should also be a relevant factor that the Election Funding Authority takes into account when deciding whether to approve a grant from the limited funds available in the Political Education Fund.

5.8 On the issue of intra-party transfers of funds, the approach we suggest follows logically from our requirement for separate State and Federal Campaign accounts. It would be unlawful to deposit intra-party transfers of funds from the national party organisations, other State Divisions or Branches in a State Campaign account(s) and to use them to pay for State electoral expenditure subject to campaign limits. We suggest they could be deposited in the Federal Campaign account(s) or the Administration Account(s). However, if they were to be deposited in the Administration Account(s), we would advocate that the same approach be taken as for trade union affiliation fees: deduction of an equivalent amount from the Party Administration Fund allocation and potential loss of Political Education Fund grants. Transfers between State parties and their local party units need not be limited, with the proviso that funds raised under Commonwealth legislation may only be transferred among hypothecated Federal Campaign accounts, while any funds deposited in the State Campaign Account(s) must comply with the donation cap and restrictions on their source.

5.9 "Held assets" provisions have been just introduced in Nova Scotia, ensuring that funds or assets held in trust for a recognised party, including income earned on those funds

or assets, cannot be used for electoral expenditure but can be used to fund their non-campaign operations. **Held assets provisions should be introduced in NSW which prohibit registered parties or their associated entities from depositing any income from held funds or assets in their State Campaign Account(s) and, thus, from funding their electoral expenditure.** However, parties should not be discouraged from becoming more self-sufficient, as long as there is no potential for undue influence. An equivalent amount to any income deposited in the Administration Account(s) from the held assets of State-registered party should be deducted from their allocation from the Party Administration Fund and should be a relevant factor in deciding whether any allocation should be made from the continuing Political Education Fund.

5.10 We believe the cap should apply to the candidate, limiting what he or she can donate to his or her own election campaign from his or her own resources. Also, with a low donation cap in place, we see no need for any sector-specific prohibitions on individual enrolled individuals. In any case, they are probably unconstitutional.

5.11 We think **membership fees should be used to fund the administrative costs of the Party** over and above whatever allocation is received from the Party Administration Fund, provided the member consents in writing to joining the party. No penalty should result from having a mass membership base, provided that the membership fee is the same as, or below the cap on donations for enrolled individuals. Members should also be free to make a donation to the Party's State Campaign Account(s).

5.12 It would be preferable if the regulation of disclosure of donations were referred to the Commonwealth along with the regulation of donations, with double disclosure avoided entirely. Presuming this will not be the case in the short term, the question is what disclosure would still be required at a State level once a low-level cap on donations is adopted. We note that no Australian jurisdiction currently requires disclosure of donations of $1000 or less. We do not think it is necessary to vary this. Thus, **if a donation cap is chosen that is higher than $1000, then donations of $1000 or more per annum would need to be disclosed.**

5.13 Bearing in mind the recommendations we make in paragraph 5.6, we suggest that donations to the Federal Campaign Account should only have to be disclosed in the registered party's annual disclosure to the AEC.

Donations deposited in the State Campaign Account and other accounts of a registered party exceeding $1000 per annum would have to be disclosed to the Election Funding Authority (presuming a higher cap was chosen). It would be preferable to align the disclosure period with the cap. The current system is cumbersome and confusing.

EXPENDITURE

6.1 Capping election spending is also a key plank of the Campaign Finance Reform policy released by the Leader of the Opposition, Mr Barry O'Farrell MP, in April 2009. Our policy is based on the submission Mr O'Farrell made to the Select Committee on Electoral and Political Party Funding in February 2008, advocating caps and independent oversight of the caps. The Select Committee endorsed those recommendations.

6.2 We believe that NSW Labor's level of spending in the 2007 State general election was grossly excessive (see paragraphs 2.5 and 2.6). The combined total declared electoral expenditure for the Coalition Parties was almost $10 million less at $7,003,675. We feel a state wide limit closer to the spending of the Coalition Parties is a more appropriate starting point.

6.3 In our view, **an independent arbiter should set the actual campaign limits** within the framework adopted in the legislation. The three non-party members of the Election Funding Authority (see paragraph 4.7) could play this role.

6.4 The Liberal Party of Australia (NSW Division) believes **there should be a uniform spending limit for each registered party and any independent candidates in each electoral district. There should also be an overall cap on how much a registered party can spend on their entire state wide election campaign based on the number of Legislative Assembly seats it contests.** The limit should be calculated by multiplying the spending limit in an individual electoral district by the number of seats being contested.

6.5 Depending upon the level chosen for the electoral district limit, it may be necessary to make provision for an additional amount for central campaigning costs such as television, radio, cinema, internet and newspaper advertising. The reality is that most parties will only spend to the local limit where they have a higher level of discomfort about the likely result (i.e. the marginal seats). If the local limit chosen is high, then parties may well then have a sufficient number of seats where they under-spend to fund their central campaigning costs. This would not be the case if a lower local limit is chosen.

6.6 For example, if a local spending limit of $100,000 was adopted for each seat, then the overall spending limit for a party contesting all 93 seats in the Legislative Assembly would be $9.3 million. The local limit would in fact represent a considerable reduction in the average campaign spend in a typical marginal seat. But it would be considerably more than the amount spent by a major party in a so-called safe seat at a general election. This would ensure a party would also have enough to fund central campaigning costs.

6.7 For parties contesting only the Legislative Council, we think the expenditure limit should be the same as the individual limit in each electoral district, multiplied by twenty-one (which is the number of seats to be elected at each periodic Legislative Council election). For example, if the local limit were $100,000, then the spending limit would be $2.1 million for a registered party only contesting Legislative Council seats.

6.8 We feel that it is appropriate to make this distinction for parties focussed only on the Upper House for two reasons. First, there is a qualitative difference between the spending requirements of those parties that are seeking to win government by winning a majority of seats in the Lower House and those who just seek to share the balance of power in the Legislative Council. Second, there needs to be a different approach for Legislative Council Groups who are not registered parties. We need to ensure that third parties (ie non-registered players seeking to influence the election result) do not try and flout any third party expenditure limits by nominating candidates for the Legislative Council. For this reason, the Committee should examine whether it would be more appropriate for Legislative Council Groups (other than registered political parties) to have the same expenditure limits as third parties.

6.9 A crucial consideration is the period during which the expenditure limit will apply (the regulated period). The Liberal Party of Australia (NSW Division) believes that to only regulate spending after the issue of the writs, as is the case in several jurisdictions and leave the preceding months and years unregulated would be totally wrong and defeat the purpose of having an expenditure limit. This is doubly so in New South Wales, where the writs are generally issued around four weeks before an election. With a fixed four year term, the election date is fixed. Therefore, it is possible to have a fixed regulated period entrenched in legislation as well.

6.10 We submit that **the regulated period should be the beginning of the financial year in which the general election is held.** We would oppose having a longer regulated period. Our opposition arises because we believe that third parties must also have expenditure limits during the regulated period. Our concerns are explored further in paragraph 9.5 in our discussion of third parties.

6.11 Perhaps the most difficult issue is the type of expenditure to which the expenditure limit should apply. Some have argued that all expenditure by registered political parties should be limited and disclosed on an annual basis. For example, in his review of the funding of political parties in Britain, Sir Hayden Phillips said campaigning was at the core of all expenditure of political parties and limiting and disclosing all expenditure would be simpler and easier to enforce. However, Australia's federal system may present some difficulties in this respect. As noted in paragraph 5.2, Dr Twomey's paper notes that a law which limits the expenditure of the State division or branch of a Party that might otherwise have been spent to support the election of a candidate for a federal election may well be unconstitutional.

6.12 In the absence of Federal legislation covering the field, **the State should legislate in relation to certain types of electoral expenditure during the regulated period.** This would mean adopting expenditure limits similar to those applying in Britain and New Zealand. In Britain, the Political Parties, Elections and Referendums Act 2000 (PPERA) regulates campaign expenditure, which includes any expenditure incurred by a party in connection with party political broadcasts, advertising, unsolicited material to electors, manifesto or other policy documents, market research and canvassing, public relations and other media management costs, transport, rallies and public meetings. Under PPERA, all value-in-kind donations must also be included as notional expenditure. In New Zealand, the limits focus more on advertising and campaign literature, with the candidate's deposit, food, travel, hall hire, surveys or opinion polls and volunteer labour all exempted. We support the retention of recent changes in relation to value-in-kind donations, including those related to paid staff and campaign offices.

6.13 The test applied to determine whether or not the spending is "campaign expenditure" is similar in both countries. The PPERA test is whether the expenditure incurred is for the purpose of enhancing the standing of, or promoting electoral success for a party at a forthcoming or future election. This includes issuing disparaging material relating to

another party or its candidates. In New Zealand, the test is whether the expenditure incurred can reasonably be regarded as either encouraging voters to vote for a candidate or discouraging voters from voting for another candidate, or both.

PUBLIC FUNDING

7.1 The Select Committee on Electoral and Political Party Funding recommended the establishment of a Party Administration Fund to subsidise administrative costs. This was based on the Canadian model, as were many of their recommendations. The Select Committee took the view that the fund should be open to all registered parties that have candidates elected to either the Legislative Council or the Legislative Assembly. It rejected payments to Independent MPs because they "do not have the ongoing administration costs of political parties."

7.2 The Liberal Party of Australia (NSW Division) supports **the establishment of a Party Administration Fund.** We believe that performance at the previous general election is the appropriate benchmark for calculating entitlements, but with some modifications to take account of the vicissitudes of the electoral cycle. **Parties have ongoing needs and fixed costs regardless of whether they form a Government and funding needs to take this into account. It is also important to cater for the differences in the histories, structures and support bases of our political parties to be respected in the arrangements made.** An annual allocation should be determined for each eligible registered party after the return of the writs with payments from the fund made quarterly.

7.3 We feel determining the eligibility for payments is best achieved by having a four-tiered approach. The eligibility for each tier would be based on Members elected to <u>both</u> Houses:

Tier One	Parties with 25 Members of Parliament or more
Tier Two	Parties with 10 - 24 Members of Parliament
Tier Three	Parties with 5 - 9 Members of Parliament
Tier Four	Parties with 1 - 4 Members of Parliament

7.4 To be fair to new entrants, there might be an argument for availability of funding from the Party Administration Fund for newly registered political parties with a viable level of support in the lead-up to an election. After the deadline for registration of parties 12 months prior to the general election, the Election Funding Authority could conduct opinion poll research to determine whether any of the parties without existing parliamentary representation is attracting, say, 5 percent of those polled. If such a party

was identified, they could be eligible for *pro rata* Tier Four funding during the regulated period. There is a precedent for this type of funding in New Zealand legislation.

7.5 The actual level of funding should be indexed and adjusted annually from an initial base that should be established when the enabling legislation is proclaimed. We would suggest the following initial annual amounts:

Tier One	$2,000,000
Tier Two	$750,000
Tier Three	$500,000
Tier Four	$250,000

7.6 We believe that Tier One should be structured to enable the party that forms government and the largest Opposition party to have stable ongoing support for their administrative and other needs at a level that enables them to replace all funding from corporations, trade unions and other organisations. Further, this funding must continue to ensure that the two principal competitors remain viable during periods of electoral downturn. Moreover, it must not be too high a threshold to preclude a new entrant winning eligibility at this level.

7.7 Some will argue that this would enable the Liberal and National Parties to secure a larger allocation than Labor, with two separate allocations. This is a classic example of the need to respect different traditions. While in Coalition for the purposes of campaigns, in Parliament and having previously formed Government together, in fact the Liberal and National Parties are two separate organisations. Inevitably, there is duplication of administrative functions, with entirely separate offices, staff, party forums and party units. Therefore, each must receive a separate allocation from the Party Administration Fund. However, in our suggestions for campaign spending limits (paragraph 6.4) and for the reimbursement of election expenses (paragraph 7.12), we have made recommendations that ensure there is a level playing field for election campaigns. A safeguard would need to be built into the legislation to remove any perverse incentive for parties to artificially split to secure higher funding.

7.8 In paragraph 5.7, we discuss the treatment of trade union affiliation fees. Where an affiliated trade union has not sought the consent of each individual trade unionist for membership by affiliation of the Australian Labor Party, we believe that the affiliation fee paid by the trade union may be retained by Labor but an equivalent amount should be

deducted from the allocation paid each year from the Party Administration Fund. This is essential to ensure there is a 'level playing field'.

7.9 Tiers two, three and four accommodate the different types of other parties currently represented in the Parliament. By adopting four tiers, we ensure that it is possible for these other parties to be able to achieve a higher level of funding as their support grows, but without a severe funding loss affecting their viability should they fall just below their existing level of eligibility at one election, as long as they secure one parliamentary representative. We note that our approach deals with the criticisms of the Political Education Fund by the Shooters Party to the Select Committee on Electoral and Political Party Funding. Our approach puts parties who only contest seats in the Legislative Council on the same basis.

7.10 Obviously there is a budgetary impact. At present, registered parties are allocated $2,026,063 from the Political Education Fund each year. On the basis of current parliamentary representation, the initial allocation to currently registered parties from a new Party Administration Fund would be $5,500,000 per annum.

7.11 In relation to the Political Education Fund, we have no objection to the suggestion made by the Select Committee that the fund be retained but be administered by the NSW Electoral Commission for the purposes of political education, to which the registered political parties should be able to apply for funding.

7.12 We recommend few changes to our current system of **reimbursement of election expenses.** We support the **retention of the 4 percent threshold,** which has not been regarded by the Courts as a barrier to new entrants. We support the **linkage of funding to the number of seats contested and the percentage of first preference votes cast.** Reimbursement must continue to be for actual expenses.

7.13 We recommend the retention of the recent changes to the reimbursement of expenses. For registered parties, this must be paid to the registered party agent rather than their candidates or local party units. We support some minor changes to facilitate the timely processing of payments as currently provided for in Commonwealth legislation.

7.14 The 1981 legislation established a pool split into two funds, one for each House. The Constituency Fund, based on the Lower House vote, was payable to individual local

candidates. Subsequently, amendments have enabled this entitlement to be paid to the registered parties directly. The Central Fund, based on the Upper House vote, has always been payable to registered parties directly.

7.15 **We recommend the retention of the existing approach of a pool established according to an indexed benchmark, divided into two funds.** With the 2008 legislative changes requiring payment to the central registered party agent, it is now more appropriate to reverse the proportion payable to each fund, reflecting the role the Legislative Assembly plays in forming the government. The retention of the two funds also allows us to retain a uniform approach to funding party and non-party candidates for Legislative Assembly seats.

7.16 The size of the overall pool should be calculated based on a dollar figure multiplied by the number of enrolled electors at the commencement of the regulated period, with one-third allocated to the Legislative Council Fund and two-thirds to the Legislative Assembly Fund. With the withdrawal of donations from corporations, trade unions and other organisations, we recommend that the overall pool of public funding will need to be significantly increased to ensure that the existing parties represented in the Parliament and their viable competitors should be able to have a significant proportion of their campaign costs reimbursed through public funding.

7.17 However, it is essential that the level of reimbursement continue to be tied to the amount of support achieved at an election with the existing threshold continuing to apply. It follows, as noted in paragraph 4.6, that we are opposed to 100 percent of campaign costs being funded by the taxpayer. We do not believe that any registered party whether a major player or a frivolous new entrant, is entitled to a full taxpayer subsidy for their campaign spending.

7.18 We do not think it necessary to further subdivide the Legislative Assembly Fund into funds for individual electoral districts. The fund would simply be allocated according to each party's share of the first preference votes. The method of calculation can be the same for Independent candidates. Likewise, the Legislative Council Fund could also be allocated to registered parties according to their share of the vote.

LOCAL GOVERNMENT

8.1 In his evidence to the Committee's first hearing in December 2009, the Electoral Commissioner, Mr Barry, expressed grave doubts about trying to include local government in any reform bill introduced during 2010. There is certainly good reason to be sceptical after the experience with the rushed introduction of the 2008 changes literally weeks before the last periodic local government elections.

8.2 Our preliminary view is that the key features of what we suggest for State general elections and by-elections can be applied to local government.

8.3 With regard to donations, the same requirement that capped donations from enrolled individuals (no corporations, trade unions or other organisations) could be deposited in a hypothecated Local Government Campaign Account(s). This would facilitate a lower cap if desired. Similar prohibitions would apply to intra-party transfers of funds.

8.4 An expenditure limit for an undivided council or a ward could be struck based on a dollar amount per elector. The same types of expenditure would be caught under the expenditure limit as those discussed in paragraph 6.12. The regulated period could be 6 months.

8.5 Public Funding would require a different approach. We do not think it necessary to establish a Party Administration Fund for parties registered for the purpose of a local government election only. We are unaware of any that have the same administrative requirement for funds as those with State parliamentary representation. Reimbursement for electoral expenditure could be introduced, with a 4 percent threshold, based on electoral performance up to a ceiling of say 50 or 75 percent of actual expenditure. Alternatively, a very low expenditure cap could be set with no public funding. This may be preferable given the very large number of separate contested elections.

8.6 The most difficult decision would be what to do about third party electoral expenditure. It may well be that the Electoral Commissioner's suggestion of delay may well be advisable in this area of new regulation. A decision could be made based on a judgement of the efficiency and effectiveness of the operation of the third party provisions (see paragraphs 9.3 and 9.4) during the 2011 State general election.

THIRD PARTIES

9.1 Third parties are any individual or organisation that incurs campaign expenditure but are not seeking election themselves. In our 'Reforming Campaign Finance' policy, released in April 2009, we state that:

> *"Spending limits will also apply to groups other than political parties who seek to influence voters during a campaign, whether union, business or community-based. Without this provision, candidates or parties could use special interest groups or other "third parties" to circumvent campaign spending limits."*

9.2 We advocate the Canadian approach, which requires third parties intending to spend more than $5,000, to register, disclose their source of funds and their actual expenditure. Canadian legislation imposes three limits on their expenditure:

- a limit that can be spent promoting or opposing an individual candidate;
- an overall limit that can be spent promoting or opposing a registered political party, including issues advertising; and
- a limit appropriate for promoting or opposing multiple candidates in multiple seats but capped at the same overall limit multiplied by the number of seats affected but capped at the overall limit.

9.3 The actual amounts for the third party expenditure limits imposed will obviously depend on those imposed on political parties and we would advocate independent oversight.

9.4 Third parties should have limits on the types of electoral expenditure referred to in Paragraph 6.12.

9.5 There is considerable disquiet with the ongoing third party disclosure requirements in Commonwealth legislation. We draw the Committee's attention to Fairfax Media's submission to the Green Paper on Electoral Reform and the Centre for Independent Studies monograph *'Diminishing Democracy: The Threat posed by Political Expenditure Laws'* dated July 2009 and written by Andrew Norton. They canvass the concern of the media, universities, charities think-tanks and community groups whose staff sometimes comment on political matters who are potentially caught under Commonwealth legislation. For this reason, we believe that third parties should only be subject to the same regulated period as expenditure limits, which we have suggested should be the

beginning of the financial year in which the elections is held. Third party rules must also be carefully drafted to take account of their concerns.

GOVERNMENT ADVERTISING

10.1 Self-evidently, caps on campaign expenditure by political parties and candidates would be meaningless without complementary legislation to stop the misuse or Government Advertising budgets.

10.2 The Leader of the Opposition, Mr Barry O'Farrell MP, introduced the Government Publicity Control Bill on May 29, 2007. The bill's object was to task the Auditor General with the scrutiny of government advertising that appears to have the capacity, or be likely to have the capacity, to be used for a partisan political purpose. The bill was defeated in the Legislative Assembly with Government Members voting against it on October 18, 2007. Mr O'Farrell's submission to the Select Committee on Electoral and Political Party recommended that the New South Wales Government should immediately legislate to give the Auditor General a role in reviewing and approving government advertising.

10.3 The Select Committee accepted Mr O'Farrell's recommendation and chose the Ontario model as the appropriate direction for NSW to take. In Ontario, all government advertising is submitted to the Auditor General for voluntary pre-review or formal review in final form. During a voluntary pre-review, the scope and cost of a proposed advertising campaign is considered, including draft scripts. The pre-review is commonly used for radio and television commercials, prior to incurring significant production costs. At the formal review stage, advertisements must be in final form and include documentation that describes campaign objectives, target audiences, key messages and the 'media-buy'. The Auditor General can delegate his responsibilities to an Advertising Commissioner under the Act. He can issue reports at any time, mirroring his audit powers.

10.4 The Select Committee's recommendation relating to the Ontario model should be adopted.

10.5 Imposing campaign limits in a regulated period would also require a review of the Electorate Mailout Account by the Parliamentary Remuneration Tribunal. While the PRT has laid down particular conditions for use of this entitlement which explicitly excludes its use for expenditure of a "direct electioneering or a political campaigning nature", the

expenditure by an incumbent of such a large amount communicating with constituents during a period when campaign expenditure by an opponent was limited would subvert the spirit of capped expenditure arrangements.

Appendix

Campaign Reform (Integrity in Government) Bill 2008

Advice

1. We have instructions from the Hon Mr Barry O'Farrell M.P., Leader of the Opposition in New South Wales, to advise on a proposal for changes to the *Election Funding Act* 1981 (NSW) to place new maximum amounts on the election expenses of political parties and groups, political interest groups and candidates. The arguments for and against campaign finance reform have been traversed by the *Parliamentary Library Research Centre* in its Briefing Paper No 8/07 and are well known.

2. We attach a document that outlines draft amendments to section 4 of the *Election Funding Act*, and the insertion of a new Part 6AA that contains three new sections: ss 97A, 97B and 97C. It is intended that this document be provided to the Parliamentary Counsel's Office in order to expedite the drafting of legislation in accordance with instructions by the Leader of the Opposition.

3. These sections impose new maximum limits for election expenditure by candidates, parties and interest groups. Political parties may only spend $1,500,000 on election expenses (s 97B). Candidates may only spend $30,000 on election expenses (s 97A) or $40,000 in a by-election.

4. The figures for parties and candidates are distinct, and on this basis a party contesting 93 seats in the Legislative Assembly and 21 seats in the Legislative Council would be able to spend $3,520,000 in total (114 candidates x $30,000 = $3,520,000). This figure includes the $1,500,000 for each party.

5. It is proposed that thresholds for individual donations be raised to $5,000, and this is reflected in the amendments to Part 6 noted in the attached document.

6. Three new terms are proposed for inclusion in s 4, the "definitions" section, to clarify the operation of the new Part 6AA: "interest group", "election activity" and "election expenses".

7. Of course any proposal advanced must satisfy constitutional tests. No State constitutional impediments operate. However the provisions of

the Commonwealth Constitution that contemplate a system of representative government give rise to an implied freedom of communication about political and government affairs. This freedom applies in the States (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571-572).

8. The test to be applied is the test enunciated by Justice Kirby of the High Court of Australia in *Levy v Victoria* (1997) 189 CLR 579, 646. This test was endorsed by a majority of the Court in *Coleman v Power* (2004) 220 CLR 1. The test is this:

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
>
> Second, does the law which is impugned have the effect of preventing or controlling communication upon political and governmental matters in a manner which is inconsistent with the system of representative government for which the Constitution provides?"

9. The proposed amendments to the *Election Funding Act*, if subjected to a constitutional challenge, may well be held to *effectively burden* freedom of communication. It could be argued, with some force, that the amendments would have an effect on the quantum of advertising that can be purchased by political parties and candidates. On this view, the proposal could be seen to place substantive practical limits on the amount and nature of the communicating that can be done by candidates, parties and political interest groups.

10. However the amount limits proposed by the Leader of the Opposition are not inconsistent with the system of representative government for which the Constitution provides and are therefore almost certainly constitutional. Amount limits do not constitute a blanket ban on political advertising, such as that decided to be unconstitutional in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (see, ie. at 144-147). Instead, they prescribe "a balancing of the public interest in freedom of communication and the public interest in the integrity of the political process" (see, ie., the comments of Chief Justice Mason at 145).

11. We are instructed that the Premier, the Hon Morris Iemma MP, advocates a ban on all political donations and a system of (at the time of advising unspecified) public funding for elections. We are further instructed that no draft legislation has been released by the Premier.

12. A blanket ban on political donations may fall foul of the first limb of the test enunciated by the High Court in *Coleman v Power* (2004) 220 CLR

1. Not only does it limit the quantum of advertising that can be paid for by a candidate or a political party, but a political donation, in and of itself, could be characterised as a type of political communication.

13. A ban on political donations would effectively burden political communication (contrast *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 350-351, 402-404, 450-451, 478). However if such a ban was allied to a proposal to ensure fair public funding of all political parties (and in the case of the major parties, if it provided equal public funding), then the Government proposal would be likely to be found constitutional.

14. The real advantage of the amounts limit proposal advocated by the Leader of the Opposition is that it would provide political parties with an equal opportunity to advance their message. It is superior to a pure public funding model which may only serve to reinforce existing inequality (ie. if one of the major parties has a head start in terms of their present funding position – which would only be reinforced by public funding if there are no amount limits set). We look forward to the opportunity of providing further advice on this issue once the Premier has released details of the Government's proposal.

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