



## CRIME AND CORRUPTION COMMISSION

### TRANSCRIPT OF INVESTIGATIVE HEARING

10 CONDUCTED AT LEVEL 2, NORTH TOWER, 515 ST PAULS TERRACE,  
FORTITUDE VALLEY WITH RESPECT TO

File No: CO-16-1664

HEARING NO: 17/0001

DAY 7 – FRIDAY 28 APRIL 2017  
(DURATION: 50MINS)

20

Copies of this transcript must not be made or distributed except in accordance with any order made by the presiding officer concerning publication of these proceedings.

#### LEGEND

30 PO Presiding Officer – ALAN MACSPORRAN QC  
CA Counsel Assisting – GLEN RICE QC  
HRO Hearing Room Orderly – MELISSA LETONDEUR  
W Witness – PROFESSOR GRAEME ORR  
LR Legal Representative – N/A

- CA I call Professor Graeme ORR.
- PO Professor ORR, do you have any objection to taking an oath on the Bible?
- W Affirmation, please.
- PO Affirmation. Thank you.
- 10 W I solemnly affirm and declare that the evidence given by me in these proceedings shall be the truth, the whole truth, and nothing but the truth.
- CA Is your name Graeme ORR?
- W That's me, yes.
- 20 CA You're a professor of law and you occupy that position at the University of Queensland Law School?
- W That's true.
- CA You are appearing today in response to a notice to attend?
- W That's true.
- CA Can I show you this first. Is that a copy of the notice that you received?
- 30 W That is.
- CA I tender that.
- PO Exhibit 93.
- CA Could I just quickly run through your qualifications, professor. You hold a Bachelor of Arts from the University of Queensland?
- W Yes.
- 40 CA A Bachelor of Laws with Honours also from the University of Queensland?
- W Yes.
- CA A Master of Laws from the University College of London?
- W That's right.
- 50 CA A Graduate Certificate in Higher Education from Griffith University?
- W Yes.
- CA And also a Doctor of Philosophy from Griffith University?
- W That's true.

- CA You have responded, have you not, to an invitation to make a submission to this inquiry?
- W Yes.
- CA I'll just show you this and get you to confirm it.
- W Yes.
- 10 CA Is that a copy of your submission?
- W That is.
- CA I tender that.
- PO Exhibit 94.
- 20 CA You describe, I think, your area of special interests as the law of politics.
- W Yes.
- CA Could you explain what you mean by that?
- W The institutions, norms and black-letter law that regulates electoral democracy in particular, everything from parliamentary law in the old sense through to - I've written quite a few books on election law, proper political parties, money in politics. But I'm not an empiricist, as I noted. I'm not a political scientist.
- 30 CA The invitation, I think, perhaps prompted you to review the *Local Government Electoral Act*?
- W Yes.
- CA Or at least some parts of it?
- W Yes. I'm actually also writing a chapter on local government electoral law for a second edition of a book, so I'll put a plug in there. Yes, I had previously read some of the CMC material that led up to changes in the nature of groups, and I refreshed my mind about those things.
- 40 CA One topic of interest, I think you know, of this inquiry is on the operation of the provisions of the Act pertaining to groups. You have looked at the definition, I think, that's provided in the *Local Government Electoral Act*, and do you have a view about it?
- 50 W Yes, one is it's very interesting because it's unique, not just in Australia but I think if you compare the United Kingdom and some other cognate countries. The noble intention, I think, of the previous inquiry and the regulatory change was to address the kinds of contextual issues that I mentioned, that we have these particularly large regional councils where they are in flux, I guess, between traditional mainly independents running them in smaller communities, but they are not the Brisbane City Council, where you have political parties.

The definition is obviously broad and vague, and my submission, the gist of it, is that maybe we could consider focusing on the idea of what is an independent, because obviously running as an independent has a lot of cachet, still, in local government, and then thinking of, I guess, regulating the yin rather than the yang.

10 CA You mention that campaigning as an independent had a certain cachet. I think you used a different expression in your submission, that it was an electoral virtue?

20 W Again, I am not an empiricist, but in 20-odd years of studying the law and 30 years of watching elections, and hearing from the media a lot, yes, there is this sense that in local government, in particular, to be demarked as an independent has a cachet. That comes, I think, from the history of local government being the smaller bodies closer to the people. But there's also political parties being on the nose. There has always been cynicism about that, but I think in the last decade or so there has been a rise in that kind of cynicism. But counterweighted to that, as I say in my submission, is the fact that these are very large, complex bodies and it's almost unreasonable to imagine that they would ever be run without some kind of factions, groups, and it may be that we are in a transition phase where these councils one day will end up like the Brisbane City Council, with mature political parties, and I don't think that is a bad thing necessarily, because political parties provide a certain amount of stability. They're a heuristic that voters can kind of rely on. And political parties have an ongoing interest in their reputation. So particularly when it comes to campaign finance and things like that, it's useful to have the political party as a buffer between donors and candidates and representatives.

30

CA Just coming back to the content of the *Electoral Act*, so far as groups are concerned, you used the expression, I think, concerning the definition of a group of candidates in the Act that it was "inherently fuzzy". Can you just explain what you meant by that?

40 W Okay. I guess the noble intention of the unique reforms that we have in Queensland was to capture this intermediate kind of body. It's not a registered political party. It doesn't have a written constitution, membership. It's not an unincorporated association with all the virtues of an ongoing entity status. Nor is it a true independent, who is like a lone wolf on their own.

50 We could have gone down the New South Welsh path, I guess, in which you would have a special local government political parties register, but I'm not sure the New South Welsh system addresses the problem that we are talking about here, because it still seems to assume that there is a paradigm of parties and independents, and clearly the Commission is dealing with this in-between status of people who are wanting the cachet of being an independent but are, behind the scenes, running as a coordinated group.

CA You touch on some incentives that might be available for groups to identify themselves?

W I was thinking about the carrots-and-stick question in regulation. That

led me to think, well, if the real attraction is to run as an independent, then one incentive would be to have, as many systems do, a ballot label for independents and that you would have to earn that ballot label by meeting a potentially clear list of things that independents cannot do.

The gist of my submission was the possibility of, if you like, inverting the paradigm where, in parliamentary electoral law, an independent is a residual category. You don't normally win a seat by being an independent at parliamentary level, and political parties rule the domain.

10

Local government is a bit different, and so my suggestion was if you think about - can I put this as a metaphor? If you think yin and yang: instead of trying to define what a group is, maybe if we try to define what an independent is, which includes certain things independents cannot do - sharing money, resources, coordinating campaigning - and try to attract people who want to run as independents because of the value of the ballot label "independent", then that might be one way to think about regulation.

20

CA The classification "independent" is one that is not actually used in the *Local Government Act*. Do you think that there should be some classification, with attributes that people could identify with, expressed within the legislation?

W Right. Well, it's quite common. In England and Wales, you can have a ballot label "independent". New South Wales. National elections.

CA So you are saying other jurisdictions-

30

W Other jurisdictions.

CA -do use that classification in a formal sense?

W Yes, the Act says that you can nominate yourself as an independent. Those other jurisdictions are not completely comparable, though, because in England and Wales local government has long been partisan. You would have to, say, take evidence from a retired Commissioner, like Colin BARRY in New South Wales, to say whether they have had similar issues arising in New South Wales.

40

I guess what I'm saying is that the incentive would be that you nominate as an independent and you get the virtue of the ballot label, which is a significant thing, especially in local government politics in larger jurisdictions where people may not have the same kinds of connections to candidates as they will have in smaller towns. So people may rely on the idea of the independent as being this mark of courage or independence. But those people should have to earn that.

50

Unlike in the countries I have mentioned, the Act might then set out a series of things that, if independents do, they would be committing an offence and would possibly be ousted by the Court of Disputed Returns if they were elected. I'm not saying that this is an easy thing to craft, and there might be a significant - there might be a period of difficult enforcement, but it might be one way of providing that carrot and stick to address the issue that the Commission has grappled with

here and earlier.

CA Are you able to assist with how other jurisdictions that recognise the classification "independent" give that term content?

W Well, they don't. It is seen as residual content in systems that are otherwise dominated by parties, and I guess I'm saying-

CA Then how does an individual earn that appellation?

10

W Well, they don't earn it. They're kind of just given it, and that's why, I guess, New South Wales would be a place to look to as to what goes on on the ground there. Tasmania, the Upper House, which was traditionally run by independents but also has partisan politics, might be another place to look at. But I don't know of any of the *Electoral Acts* I have studied where there is a clear definition of an independent other than it is something that you self-nominate, and if the party nominates you, if you are a member of the party, then your nomination as independent effectively overrides the party's nomination of you as a non-independent. So this would be new territory to think about what are a list of things that would define an independent, in particular, what things make you not independent.

20

CA You would approach it from an exclusory perspective, that is to say, rather than try to identify positive attributes, you would identify those things which exclude you from being an independent?

W Yes, I guess it's light/shadow. If you can have some relatively clear bright-line rules, it doesn't matter how you conceive it, but traditionally an independent is someone who is defined by the absence of connections to some political movement or party.

30

CA One view that has been expressed is that candidates could be required to compile a register of interests, which include affiliations, memberships and so forth, and then leave it to the public to judge the person's independence against those declarations of interest. Would you regard that as satisfactory?

W Right, so this would be a kind of statement that then gets published on a web?

40

CA Yes, or perhaps through the Electoral Commission or through some mechanism.

W Yes, okay. In many parts of Australia, in recent years, local governments have moved down that path, which is a bit like in trade union, corporate, even student elections, where there is some information beyond your name that is officially published, and that kind of disclosure might have some use.

50

I'm not sure if it gets at the heart of the problem that the Commission has been grappling with about these fuzzy entities of electoral groups, undeclared electoral groups, though, because I'm not sure what you would be required to do on this form. It's a bit like if you need a visa to get into the United States, you have to list every school you have ever gone to, every organisation you have ever donated money to.

CA And declare you are not a terrorist, among other things?

W Amongst other things, whether you've been involved in nuclear weapons, and so on. I have to declare that my brother is a nuclear physicist in France, and all these things. Really, that is not for gathering information. That procedure is designed that if you forget to put something in that list, they will be able to kick you out of the country on a technicality if they think you're a risk.

10

So it may be a good thing to give voters extra information, especially in some of these larger councils where they're not run by parties, but they're not word-of-mouth small towns; it may be quite useful to have that kind of extra information for voters to deliberate or at least consider, but I'm not sure whether any list of associations or affiliations is going to get at the question of "groupness".

CA Past affiliations by way of party membership or support, is that something that you would see as important for electors to know before casting their vote, whether for an independent or otherwise?

20

W With respect, these are great questions. I've been thinking about this in work I've been doing on some South African cases and Indian cases, where they have said the constitutional obligation to disclose - they tend to be looking at criminal backgrounds or donations, because they don't even have a donation disclosure law in South Africa.

30

I guess as long as you're not forcing people like - I don't know - you know, a Billy Gordon, if you're not crossing the boundaries of rehabilitation of offenders and saying you have to declare certain things about your education, those sorts of things that it would seem to me we don't want to deter people who have had a chequered past that are putting themselves forward to serve the community, because the media can be quite ferocious and will dig this dirt up. If you're just saying a statement where you would be required to declare certain positive affiliations, positive in the sense of things that you've been involved in that are seen as political and social in nature, then that's an idea worth considering.

40

I don't know how you get around the fact that people will pad out their CVs, just as my students do, to make it look like they have been involved in every Boy Scout organisation because they know this will go on an official website, the media will go to it and-

CA That is an incentive for accuracy, isn't it, or for not gilding the lily, the scrutiny from media and perhaps from rivals also?

W Yes, and then I guess you'd get another honey pot, in that if there is someone who has fibbed, claimed - and the Americans have laws about false claiming of valour. Yes. Look, I hadn't thought about this idea before today in the way you have put it, and I understand the background of why you might have put it this way. It is an interesting idea very worth considering. Whether it will get at that groupness, though, I'm not sure because you are obviously not going to be drilling into people's mobile phone contact lists and-

50

- CA One of the features of that definition, do you agree, is the width of it, the definition of groups, I mean, and the criteria of a group being either to promote the election of candidates or share in the benefits of fundraising?
- W Okay. As I said, it has this fuzzy boundary, as all normative definitions will have that are trying to get to principle.
- CA Is it capable of real operation?
- 10 W I think it is in a commission-like situation, where you have significant powers to get behind the scenes. I've had plenty of journalists in the past six or nine months ask me, "What is a group?", and I've had to say that simply a preference deal doesn't make you part of a group because in our system of preferential voting, it's the currency of the system, of the game.
- CA It's related, isn't it: the system of preferential voting is capable of impacting on this definition?
- 20 W Oh, yes, but on its own-
- CA Can you explain in what way and how you would agree with that?
- W You would obviously expect, and it's implicit in the definition, that people in a group designed to promote each other's election as a group would be-
- CA That presumes an arrangement between two or more people to promote each other's election?
- 30 W -would be swapping preferences if they are in a kind of ward or district where there are multi members. They would be promoting the same mayoral candidate if there's a mayor. But a preference deal on its own, what I'm saying, is not conclusive evidence, obviously, of a group because there are many reasons why someone might want to be on the coat-tail of a popular mayor who might be recommending, in their literature for their ward, that you support popular Mayor X, but also because in our system, let's say people who are unlikely to be elected, it's through preference deals that they get some currency; they get some leverage in the system. So it would be a problem if you just said that doing a preference deal in itself showed you were part of a group, but it may be a few extra grams on the scale if you have other evidence about fundraising, sharing an agent, using the same printer - coordinating a campaign, as the Americans call it.
- 40 W
- CA Yes, you have given a mini-list there, but would you see any of those aspects as being sufficient to fall within that definition?
- 50 W In American electoral law, there is this long-held idea of coordinated campaigning, because if you coordinate a campaign, you will then be lumped together for the purposes of their caps on donations, for instance. There is a lot of American law on this. It hasn't always been easy to practically and legally define what a coordinated campaign does. But sometimes fuzzy law is not a bad thing. The law of electoral bribery is a bit fuzzy, but as long as you have periodic attention from



the media, from prosecutions, from commissions like this, you send out a signal to political actors to beware, and hopefully most of them will steer well clear of the risk of falling into the fuzzy definition. So you can have regulation that doesn't lead to a lot of prosecutions, but as long as it's in the public eye often enough, critically enough, as being an ethical problem-

CA It can have utility?

10 W -then it can have utility. I don't think this definition has a lack of utility, but I'm saying there might be another way to think about it and say: you want to be an independent; you get the ballot label; you have to earn it by not doing a list of things that we would say an independent should not do. An independent should obviously not be sharing physical resources, should not be coordinating a campaign. Whether you can have an independent who is a member of another political party and be a true independent - we used to have people running as "Independent Labor", you know.

20 CA What is the ballot label that you refer to, Professor ORR? What is the ballot label?

W Just "independent". So, yes, in many parts of the world and even in other parts of Australia, you can just be independent, and that has a certain cachet and I can understand why electors anywhere should reasonably feel completely duded if they find someone who is not a true independent, and we've had problems with parliamentary electoral law with dummy independents running as conduits for preferences.

30 I've looked before at the question of whether there are other electoral laws that would be breached if you ran as an independent, and we do have provisions about misleading an elector in the casting of their vote, which the High Court in a case in the 1980s, in *Evans v Noel Crichton-Browne*, read quite narrowly and said if you mislead someone who wants to vote a certain way, that is an offence, so if you pretend that you are the Labor candidate, that will be an offence, or even if you hand out a How to Vote Card that looks like the Greens' How to Vote Card but has actually been produced by a major party, that is an offence.

40 It's not clear that that law covers the running as an independent when you are actually connected. Unless we assume there are voters out there that say positively, "I am going to vote for any independent", but that has never been tested in a court.

CA One subject you touch on in your submission is the experience in other jurisdictions of the use of an agent. Perhaps you could, firstly, explain what you are referring to by reference to an agent and then what utility an agent might have in the electoral process?

50

W Okay. A potted history of all this is in the great war on electoral corruption in Britain and other Commonwealth countries in the 19th century, a significant moment in the late Victorian era was expenditure limits on candidates at local and parliamentary level.

- CA It goes back to the 19th century?
- W Yes, the corrupt practices prevention Acts, and this involved the courts, it involved parliaments, it involved the culture and so on. One thing they did was that every candidate, at whatever level, had to nominate an agent, and that agent was then held to be strictly liable for anything that went wrong legally on the campaign. Now, that led in English law to a very strict and important position known as the electoral agent, which many lawyers, accountants and so on made quite a bit of money out of. I don't think we have that strict agency law in Queensland.
- 10 CA What was the utility of that so far as integrity of electoral process is concerned? Did it have that objective or some other objective?
- W Right. Many candidates in the bad old days in England and Australia would have their runners and minions and supporters and activists, who would get up to all sorts of skulduggery, and then the candidate could say, "Well, I never authorised this. I am not vicariously liable. I told them to not do these things, but they went ahead and did it." But in the British system, they said, well, you have a nominated agent, and the agent attracts a strict liability to the candidate for anything that has happened involving a breach of the law and the agent is responsible for everything from the campaign accounts to coordinating the campaign team. It is a bit like saying - because you don't have a corporate entity to focus on or charge, but you have this guy who is the agent, who is then responsible, and the candidate could be the agent. In fact, if you had this in local government, I imagine that most candidates would have to be their own agents. Whether this would be-
- 20 CA A lot wouldn't have the resources to engage such a person?
- W Yes, and we don't have a business or a consultancy business, really, in Australia for lots of people who could be agents. We have people associated with political parties who could do it to help their political parties and so on, but we don't have that. I raise that as an issue about the way the British have handled some of these issues in the past to try to attract a very strict liability via a system of you nominate an agent, and that agent is responsible for your account, responsible for your campaign.
- 40 CA Responsible for all requirements of the applicable legislation?
- W Yes, yes.
- CA So it is to ensure compliance with legal-
- W Due diligence, if you like.
- CA Okay, due diligence.
- 50 W But then you have to say is that going to work in the Banana Shire Council? It may be perfectly reasonable in a big city council, where there's a lot more at stake, councils get paid quite a bit, and so on, to impose that kind of liability. One answer might be, well, the law doesn't have to be the same between cities.

- CA Does that agency system, though, in effect, delegate responsibility for compliance with requirements on candidates to their agent rather than to the candidate?
- W No, the candidate appoints the agent. The candidate is responsible in the same way - I think I mentioned the English courts have used the idea that, in employment law, if I appoint someone to do a job as an employee, I'm vicariously liable for everything they do within the scope of that employment.
- 10 CA So the candidate would be liable for any breach of regulatory requirements which may have been perpetrated by the agent?
- W Yes, exactly. It is not like a commercial agency where, if they go outside their authority - in other words, you can minimise your liability, as I understand it, in commercial law by saying to the agent, "Thou shall not do X, Y, Z."
- 20 CA Is the agent, then, someone whose function is keeping a weather eye on issues of compliance?
- W Yes.
- CA Whereas perhaps it might be said that candidates are so focused on the objective of being elected that they perhaps may lose sight, even inadvertently, of some regulatory requirements; is that the benefit of the agency?
- 30 W Exactly. In the 19th century, the British were saying, "Look, we are building up these more and more complex electoral laws", and, in those days, many candidates were public school boys who had an interest in politics but didn't understand legal niceties and, as you say, they were busy out on the hustings, so that was part of the thinking.
- CA I suppose ideally, if that system works, then there will be stricter compliance with regulatory requirements?
- W Ideally, yes.
- 40 CA By virtue of the function of an agent?
- W Yes. I guess it's trying to avoid the candidate being able to say, "I'm not responsible for these things that my supporters have done." And remember this was brought in in England at a time when political parties were still much looser than they are today. We're talking local government, about the cities and regions where the parties are not yet openly fully established.
- 50 CA Is that agency system in application at local government level in the UK?
- W Yes.
- CA Still, to your knowledge?
- W To my knowledge. But it's also the case in the UK that local

government is quite partisan, that people will still run - in fact, they have 300-plus registered parties, many of which are local organisations, so they don't seem to have the same cachet of running as an independent.

CA You have referred at the end of your submission to the desirability of education for candidates and politicians. Do you want to elaborate on what you have in mind that that education might consist of and how it might be provided?

10

W Okay. I'm highly conscious that we don't have - you can't just go and hire an election agent. It is not like the US, where there's a lot more literature and consultants out there that you can consult, assuming that you have the money, as a political activist or candidate. I've been working and over 20-odd years writing about it and talking to people, and people ring me up out of the blue wanting some help.

20

Whilst as lawyers and academics we sometimes like there to be more law, because we feel like we're solving problems or it gives us more interesting work to do, we also have to be cognisant of the fact that local government especially involves thousands of people around the state, particularly in councils, that are part time, who you can - not over-regulate - you can create a sticky net in which sometimes the people most likely to be caught will be those who are just inadvertently innocent, whereas those who are well educated or have good lawyers to consult may find ways to avoid the law.

30

So I'm thinking about how positively we would need to ensure, we do need to ensure, I think, that some of these complex rules about campaign finance that have been building up for two decades now in Australia are better put in the public domain. And without criticising Electoral Commissions, because they're not all that highly resourced, I think that generally, in law, in the public service, we don't do a great job of explaining in simple, plain English the gist of the law.

40

I can understand also why Electoral Commissions might feel that they just should be pointing people to the law, because they can't be legal advisors. They don't want to have people saying, "You misled me about what the law was."

CA Are you talking about plain English training?

W Yes, but I think if you look in some instances at - they're not perfect, but what the UK Election Commission has done, and they don't have to run their elections, so they have lots of resources to deal with campaign finance, candidate advice sessions and so on, but I think you can find - I have pulled off some examples here - guidance for candidates and agents that use the sorts of things that we have been saying for years to educators, have break-out boxes, use plain English. And this isn't just about the question of groups or even campaign finance. I think this is an issue where Election Commissions have been very good at getting out voter education, which is their central task, but could be better resourced and better skilled, given it's so cheap with the internet these days, to get more plain English material to ensure that you don't have to ring up Professor X to work out what your democratic rights and obligations are.

50

- CA Disclosure of funding is not something that was within your current submission, but I think it's something you have previously written about. What role do you think timely disclosure of election funding has in the context of a system of private funding of non-endorsed candidates?
- 10 W It's crucial that we have timely disclosure. I've written in current affairs essays to promote that idea, having spent a little time in New York and spent a day at the New York Commission. For 20 years, the Big Apple is a huge electoral council, local government system, and they from the 1990s developed online disclosure in real time.
- CA Could you give us the benefit of that experience? You are familiar with New York being perhaps one of the biggest cities.
- W Yes, and one that had significant issues with corruption. It's not perfect, but they probably have the most highly developed-
- 20 CA What was the New York experience, if you don't mind, if you are able to assist us with that, with disclosure?
- W Yes. Money, in a city like that where - remember, New York City Council helps run universities, hospitals. I mean, it's not like our city councils that are more service providers. So there's a lot at stake, a lot of history of corruption. There's an inability, because of the First Amendment, to outright cap electoral expenditure. New York moved down the path of sticks and carrots, so public funding, you opt in to expenditure limits, but also since the 1990s a system of real-time disclosure, which is significantly enforced, and New York has a very vibrant media.
- 30 W What we're doing in Queensland with real-time disclosure I think has great potential, hopefully, in the local government sphere, particularly given how active local newspapers and radio journalists are. That's the case of we have to wait and see and suck it and see, but I don't think disclosure on its own is a cure for anything.
- 40 CA Just getting back to the New York experience, you mentioned that the real-time disclosure was enforced?
- W They do their very best.
- CA What kind of mechanism is there for enforcement? Is it scrutiny by the media and public or something of a more regulatory kind?
- W A more regulatory kind. In America, electoral and other authorities see themselves more as regulators than administrators. Again, without criticising the Commissions, I think we are coming out of a more traditional model, public service model.
- 50 CA There's a lot of emphasis on trust, it seems?
- W Yes, and particularly outside parliamentary elections, where you have 100 local government areas. New York City has a significantly resourced city election commission, boards, courts - a lot of

enforcement going on.

CA Including prosecutions?

W Yes. Oh, yes, including during campaigns, of high-profile figures and their associates. Personally, that cat-and-mouse game of disclosure/enforcement only gets you so far.

CA Why do you say that?

10

W My submission I think might touch on this. I think there are other issues about - when we are thinking about campaign finance, we can't just think about an ideal integrity model. It's important, but free and fair elections involve questions of relative equality of arms, and that's why in other jurisdictions they focus on expenditure limits, and that has been the history in Britain for a long time, or capping donations.

20

So it is a smorgasbord. I might have used that metaphor. Yes, disclosure integrity is very important, but, on its own, disclosure can do bad things or have unintended consequences. Business X donates to Candidate Y. That is disclosed in real time. Rivals of Candidate Y go along to that business and say, "Come on, come on, you know, we might win." It can also create cynicism if the media taints all politicians with the same brush. That's obviously why, in New South Wales, they went down the path of banning property developer donations. They thought disclosure on its own wasn't enough. And the High Court has said in McCloy's case, "We agree, it's not enough."

30

CA You have told us that capping on funding in fact goes back to the 19th century-

W Yes.

CA -and is still applied in other jurisdictions around the world?

W Yes.

40

CA The justification, I suppose, is reduction or - levelling the playing field, is that one justification?

W Yes, one justification is the political equality one. Another one, at least initially, was to take some of the heat out of campaigns because of all the bribery and so on that was going on in the 19th century.

CA Do you have a feel, then, for how successful capping is to achieve those objectives?

50

W Even that involves two questions. One is what do you include in expenditure? How well do you enforce it? So there are practical questions. But at the moment, we see there are a dozen or more conservative politicians who are being caught up in the net of not fully disclosing, going over the limits of their expenditure, their agents making mistakes in the law and so on. The degree to which it translates into local politics - I would have thought if the ideal of local politics is encouraging all sorts of citizens to be able to stand, then there is a very good argument to say expenditure limits.

- CA In Queensland, there was a brief lifetime of limits on expenditure and donations at state level. Are you familiar with that?
- W Quite recently.
- CA Could you remind us what the content of that and the duration of it was?
- 10 W Well, it was only one term. I mean, the Labor Party knew it was going to lose and having not done anything for some time, many years, brought in a fairly comprehensive system.
- CA That was 2011, I think.
- W Yes. And then fitting with the ideology of small "I" liberalism, the NEWMAN and BRAY administration got rid of that. Many of us have been expecting, with the Labor government, especially given the interests of minor parties and independents in state parliament, that we might have re-introduced something, given that there has been a lot of attention in New South Wales, not just through ICAC but through the New South Wales Electoral Commission, to take this whole area of campaign finance much more seriously and to more comprehensively regulate.
- 20 CA You have written in favour, have you not, of capping of expenditure and donations - or at least in favour of the Queensland laws before they were repealed?
- 30 W Of the intent behind them.
- CA The intent, okay.
- W The devil is always in the detail. At what level do you appoint these limits? I have also written critically about public funding. That can become a bit of an incumbency rort, obviously. I particularly think expenditure limits have a value that capping donations doesn't have, at least in terms of enforcement. Donations happen in private. If not, we wouldn't need disclosure laws. Donations - money is very fluid. There is a bit of a waterbed effect.
- 40 CA Could not expenditure also be not - not disclosed?
- W But to be effective in a political campaigning sense, your expenditure largely has to be public. Some of it is private, private in the sense that you might be commissioning someone to run an opinion poll that is valuable information. But to the extent you are focusing on public advertising, campaigning and so on, rival parties, candidates and the media can keep some track of that.
- 50 CA Do you think there is a utility in exploring, for the sake of reducing corruption levels or the perception of it and levelling the playing field, at least exploring the idea of caps at local government level?
- W Yes, because for a variety of reasons, political equality may be taking some of the heat out of the system. We have heard various Mayors

saying, look, this is - it's a bit like poachers and gamekeepers. People are saying, look, I don't want to necessarily be part of this, many, many hundreds of thousands of dollars on campaigns. Also there is a lot of cynicism about excessive advertising and so on. People crave more creative forms of campaigning that might at least appear to be more direct. You can do things on the internet and social media now that cost less, that engage people possibly more.

10

Certainly doorknocking and traditional campaigning is something that studies have shown the average voter values, and I think we particularly value at local government level, given the old saying that local government is meant to be closer to the people. So I think for a variety of reasons, yes, expenditure limits need to be considered, but whether an integrity corruption commission is the best place to cover some of these broader questions of political fairness, liberty and so on is another matter.

20

CA One of the rationales behind it, though - correct me if I'm wrong - is that, for example, caps on donations can serve to limit the potential for corruption?

W Yes. For a century in the United States, that has been the rationale. You cap donations or you exclude certain bodies directly donating to politicians. Again, you have the waterbed effect of money being fluid and finding conduits and the bad man in law, but, yes, without doubt, there is an important integrity aspect to caps on expenditure and donations.

30

CA Thanks, professor.

W You're welcome.

PO Professor, just one matter. You have said that expenditure caps are more useful, in your view, than caps on donations for the reasons you have advanced.

40

W I think there's - and this would explain the British history of focusing on caps on expenditure rather than donations. Expenditure being more public, it's more easy to enforce. Caps on donations also run into the problem that was dealt with in the High Court in the Unions NSW case, that a lot of people like the idea that maybe only citizens should be able to donate. That creates issues because politics is collective. Permanent residents should be able to have a say even if they don't get to vote. So there are some questions about the design of caps on donations.

50

But I see no problem in saying, look, is there a level, \$5,000, \$10,000, at which we think no-one, no donor, should be able to go above that level. Whether we think that that level buys influence or whether we think it's just unfair that a wealthy person should be able to magnify their political voice, let them spend that money directly in their own name and campaign if they are driven to do so. So I have no problem with the idea of having a cap at some reasonably high level, but enforcement of caps is not easy without the kinds of powers you have.

PO I suppose real-time disclosure at least assists in that process?



W That's the ideal, but it depends on enforcement because real-time disclosure creates incentives to find conduits, to get the friend of a wife of a developer to make the donation, and the Electoral Commission, in the frenzy of a campaign, isn't going to be able to go behind that. In fact, they say on their website, "We do not vouch for this information. We just republish it."

10 PO I wonder whether one of the methods by which that might be assisted, the enforcement aspect, would be to ban entities of all sorts being donors; it would need to be an individual donor, to allow tracking of the donation and, if necessary, investigation of the source?

W I'm not sure that's necessarily more enforceable because if the organisation donor wants to get around the law, they will provide a conduit of a conduit to do that.

20 I also think that you've got to be concerned about inflexibility in politics. Politics has to be a fluid system. We have to understand that politics is inherently a collective activity, which is why I say the appearance of political parties in these bigger regional cities maybe should be welcomed to a certain extent. And we always had that. Even in days when the Brisbane City Council was largely Labor versus citizens action groups, the citizens action groups behind the scenes were connected to conservative forces, and ratepayer associations were set up to give a voice to a certain platform.

30 PO I understand. Thank you, professor. You have been very helpful. Thanks for coming. You are excused.

W Thanks for the invitation.

CA Might I suggest the morning break, Commissioner?

PO Certainly, Mr RICE. We will adjourn and resume at 20 to 12.

HRO This hearing is adjourned.

40

50