COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Reference: Community education and information programme

TUESDAY, 18 MAY 1999

CANBERRA

BY AUTHORITY OF THE PARLIAMENT

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **http://www.aph.gov.au/hansard**

JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Tuesday, 18 May 1999

Members: Mr Charles *(Chair)*, Mr Cox *(Deputy Chair)*, Senators Coonan, Faulkner, Gibson, Hogg, Murray and Watson and Mr Andrews, Mr Brough, Mr Georgiou, Ms Gillard, Mr Griffin, Ms Plibersek, Mr St Clair and Mr Somlyay

Senators and members in attendance: Senator Faulkner and Mr Andrews, Mr Charles, Mr Cox, Mr Georgiou, Mr Griffin and Mr Somlyay

Terms of reference for the inquiry:

To:

- review government information and advertising arrangements to assist in determining appropriate guidelines for taxpayer funded programs;
- examine whether the legislative provisions of the appropriation Bills governing the use of the Advance to the Minister for Finance and Administration ensure appropriate scrutiny where Parliamentary and general public interest indicate a matter is likely to be contentious;
- review the guidelines for the assessment of requests for copyright of Commonwealth developed material, particularly when such material may be used for party-political purposes during an election period; and
- review related matters raised in the Auditor-General's *Audit Report No. 12, 1998-99, Taxation Reform - Community Education and Information Programme*.

WITNESSES

Committee met at 10.13 a.m.

CHAIR—The Joint Committee of Public Accounts and Audit will now resume taking evidence as provided for by the Public Accounts Committee Act 1951 for its inquiry into the Community Education and Information Program. I welcome everyone to the hearing this morning. This is the second public hearing in the committee's inquiry into the Community Education and Information Program. The first hearing was held in March and centred on the role and mandate of the Auditor-General, the performance of the Treasury in managing the CEIP and the use of the Advance to the Minister for Finance and Administration. The hearing ended with evidence from AusInfo relating to the issuing of copyright for CEIP material.

Today's hearing will commence with evidence from the Attorney-General's Department, which is responsible for providing policy advice regarding copyright issues. The committee understands that the Attorney-General's Department and AusInfo are to begin a review of guidelines for the granting of Commonwealth copyright. The Auditor-General was critical of the breadth of those guidelines, hence this hearing is timely.

The Attorney-General's Department will be followed by representatives from the Australian Labor Party, which has raised concerns about the conduct of the CEIP. Some of those concerns contributed to the Auditor-General's decision to conduct his audit into the program. Arising from his audit, the Auditor-General has suggested a set of principles and guidelines for government advertising. Principles have also been suggested by the Australasian Council of Auditors-General in a submission to the inquiry. The committee notes that, appropriately, the Commonwealth Auditor-General did not contribute to that submission.

The committee welcomes the auditors-general from New South Wales and Queensland to this hearing. They will join the Commonwealth Auditor-General in a round table discussion which will comprise the second and concluding part of this hearing. This will provide the committee with the opportunity to discuss, from the perspective of other jurisdictions, ways to address the potential for controversy when governments meet their obligation to inform the public about policies and programs.

Before swearing in the witnesses, I will refer members of the media who may be present at this hearing to the committee statement about the broadcasting of proceedings. In particular, I draw the media's attention to the need to fairly and accurately report the proceedings of the committee. Copies of the statement are available from the secretariat staff present at the hearing.

[10.17 a.m.]

BARKER, Mr James, Senior Legal Officer, Intellectual Property Branch, Information and Security Law Branch, Commonwealth Attorney-General's Department

DANIELS, Ms Helen Elizabeth, Acting Assistant Secretary, Intellectual Property Branch, Commonwealth Attorney-General's Department

CHAIR—I now welcome representatives of the Attorney-General's Department to today's hearing. Thank you both for coming today. We have received your submission. Would you like to make a brief opening statement?

Ms Daniels—Thank you. Very briefly, I would like to tell you why we put in the sort of submission we did. First of all, the issue of the guidelines, as you would appreciate, has not been looked at for many, many years. So the Auditor-General's report was a prompt, I guess, for us to see the need to look at whether the guidelines are serving the job that they should. In that respect, we decided to contact other jurisdictions that have a similar common law and copyright system to ours, which is why we attached the relevant information on other jurisdictions that may or may not be of some assistance to the committee.

There are two other points I would like to make about the guidelines in their present form. Firstly, one country we did not include is the United States. For the information of the committee, we think it is worth saying that we understand that there is no government copyright as such in the United States. They treat government produced documents as being in the public domain, so they are very different from Canada, the UK, New Zealand and us.

Secondly, we have already had some discussions with AusInfo about possible ways the guidelines could be improved. The issue before the committee is one of them but, as I said in the submission to the committee, there are other things such as disclaimers in appropriate circumstances or other undesirable areas where maybe Commonwealth copyright should not be granted. Lastly, I think for the government to be able to produce good, revised guidelines we would benefit from the committee's findings in this area.

CHAIR—Thank you for that. In paragraph 16, you indicate a number of ways the guidelines could be revised. One of those possibilities was to include a broad discretion to allow denial of permission when it is in the Commonwealth's interest to do so. Could you give us some examples of what you contemplate that might encompass?

Ms Daniels—For example, if the Commonwealth had information that what was being asked to be reproduced was going to be used in a censorship matter or was associated with something that might be in breach of the law—I think they are two examples.

CHAIR—That is about it?

Ms Daniels—Reproduction for party political purposes is also an issue as to whether a discretion should be applied by the Commonwealth. But I think, in that case, it would be better for the guidelines to be more specific on that particular issue. The area we thought of is where something is used in a defamatory or libellous context.

CHAIR—Would there be some difficulty, considering the broad breadth of Commonwealth material that is subject to copyright, in trying to say that the use by a person of any portion of that might then somehow constitute copyright violation?

Ms Daniels—Yes, I think you have picked on a relevant point because, as you know, copyright is very vast in what it protects and the Commonwealth is a very great producer of copyright material. So I agree that would be an issue.

Mr GEORGIOU—Why would you go towards narrowing rather than broadening? What is wrong with the US system? If it is produced by government, it is in the public domain.

Ms Daniels—There is copyright in government materials. If I can use an example that is not in the published material context, the Commonwealth produces computer software and databases that are commercially valuable and one relevant point would be that the Commonwealth might seek to license that commercially when sought by other companies. To give it away to anybody who can use it, means that the Commonwealth would never reap the commercial return for commercially valuable products that are in copyright.

Mr GEORGIOU—But that does not go to things like the tax package?

Ms Daniels—No, that is not an example.

Mr GEORGIOU—I appreciate your point, but it just strikes me that, when these issues are raised, the knee jerks towards restriction rather than liberation, if I can use that old term.

Ms Daniels—I think that is right. In the case of legislative materials, whether strategy or judgments of courts, already there is effectively waiver of copyright, certainly for the Commonwealth, and in many of the states already.

CHAIR—Do you have any idea what sort of revenue we get a year out of copyright?

Ms Daniels—No, I do not have that sort of information. AusInfo may be able to supply that. I know that the Commonwealth is a member of Copyright Agency Ltd, which is the society that collects revenue for photocopying other people's works. The Commonwealth is a member of that and gets revenue on an annual basis from Copyright Agency Ltd. I think information on how much we get from photocopying revenue would be easy to obtain.

CHAIR—I would have thought, just off the top of my head, that the majority of revenue would arise as a result of trying to recover costs for producing documents—big documents generally—that people might want access to, which have just become prohibitively expensive to give out for free. Is that a reasonable assumption?

Ms Daniels—Yes, I think that would be a reasonable assumption for those larger documents.

Mr ANDREWS—There must be hundreds of thousands of documents, if not millions of documents, produced by the Commonwealth that are routinely copied, which is technically, legally, in breach of copyright. I will not speak for the others around this table, but no doubt

I have done it from time to time in terms of documents and I suspect all the others here have as well, which overall is generally in the public interest. Rather than creating, at least technically, a whole group of people who are in breach of copyright laws, shouldn't we take up Mr Georgiou's point and be going the other way and saying that, except where an exception is made out by the Commonwealth, generally material produced by the Commonwealth should be in the public domain? I just think you have got a situation where, technically, people are breaching the law all the time. Nobody is ever going to do anything about it unless some question of defamation or libel or something else in the nature of some scandal arises, but nonetheless that is what the law is.

Mr SOMLYAY—Also, can I add the question, does the law apply to something published on the Internet? Is there a copyright indication of material presented to the public through the net?

Mr GEORGIOU—The budget stuff that is on the net at the moment.

Mr SOMLYAY—Yes, that's right. I think the *TaxPack* was on the net.

Mr ANDREWS—To add to that, with the ability to link sites on the net, one does not have to obtain copyright necessarily, in the first place, to actually direct people to material which, in the old days of having to have a booklet or a piece of paper, you would have had to. So, in a sense, technology has overtaken some of the constraints that existed in protecting copyright.

Ms Daniels—Yes, I think you have raised some relevant points, especially for published Commonwealth materials as opposed to, maybe, films, software, databases and other things in which copyright subsists. In relation to the Internet, the point is that there is still copyright in those materials. But I agree that enforcement of copyright is, obviously, even more futile there than it is for a lot of other Commonwealth publications that are reproduced.

I think there are other angles to Commonwealth copyright that would need to be considered in taking that approach. One is that the Commonwealth needs to be sure that what is reproduced is reproduced accurately, so that the integrity of the document, in terms of what the Commonwealth has put out, remains. I guess that copyright can play that role to some extent. If there is still a permissions process and the Commonwealth finds out that somebody has altered a document to such an extent—they are still calling it Commonwealth copyright but it is not the document that the Commonwealth put out—copyright does play a role in that sense. So the integrity of the document is important.

Mr SOMLYAY—What would trigger the Commonwealth to prosecute somebody for copyright breach? Does it happen often?

Ms Daniels—I am not aware of it happening, certainly not in the published material context. I think I have heard, for example—I am not sure it was the Commonwealth—that one of the states may have sued for reproduction of software.

Mr GEORGIOU—The Electoral Office tried to protect the copyright of the postal vote applications in 1995-96, I think, and they had copyright.

Ms Daniels—That is right. I understand the court held there was copyright in the form.

Mr GEORGIOU—The Electoral Commission was not able to enforce it because of prior arrangements.

Senator FAULKNER—I am interested, Ms Daniels, in your opening statement to the committee that it was the Auditor-General's inquiry into CEIP that, to use your words, prompted the Attorney-General's Department to review the scope and operation of the present guidelines. I wonder if you could give us a little more detail about why that decision was made in the Attorney-General's Department, when it was made and perhaps if the only motivating factor in it was the Auditor-General's report?

Ms Daniels—I should probably give fuller background to help you. As you know, the department was contacted at the end of August about the licence that was sought from the political parties to reproduce the tax package materials. When we saw the licence, and it had been a while since we had given advice on the government's licence, we realised that it was fairly broad in its terms and there was not really a leg to say that the Commonwealth could not grant this licence. We gave the advice on the terms of the licence and then, about a month or two later, I think sometime in October, AusInfo and ourselves agreed that we should meet to talk about a number of copyright issues, such as notices on the Internet and these guidelines. We had preliminary discussions and there was also the context of the Auditor-General's report.

In relation to why we had not done anything about the guidelines for so long: this was the problem that had arisen and a problem had not arisen before. It was not that the guidelines probably did not deserve to be looked at, but that there was just no problem to trigger consideration of the guidelines again.

Senator FAULKNER—But the decision to review the guidelines was generated at a departmental and agency level?

Ms Daniels—Between AusInfo and us, we thought that we needed to have a look at whether these were in the right form.

Senator FAULKNER—What would you do in this case? You obviously cannot speak for AusInfo, but what does the Attorney-General's Department do? Do you indicate to the Attorney-General that you are undertaking this activity? Can you explain to me how it works?

Ms Daniels—We had discussions with AusInfo on a number of copyright issues in October. Following that meeting, we agreed to do a bit of research on how other jurisdictions deal with this issue. We then agreed to meet again in December. It was at a departmental executive level only.

Senator FAULKNER—So the Attorney-General would not be aware that this was happening internally in the department?

Ms Daniels—Not from my point of view.

Senator FAULKNER—The guidelines are not really yours, are they? Which department is primarily responsible for the guidelines? I assume it is the Department of Finance and Administration via AusInfo. I think it might be useful, from the committee's perspective, to understand whether that is the case or not and to have you provide that information to us formally.

Ms Daniels—The Attorney-General's Department has responsibility for providing legal and policy advice on the Copyright Act. There are a number of other portfolios that we deal very closely with, the main one being the Department of Communications, Information Technology and the Arts, on most copyright reform issues. In relation to Crown copyright, the agency we liaise most closely with on policy matters is AusInfo.

I do not know the full history of why they administer the guidelines, but I understand there was a joint ministerial decision some time in the 1980s that AusInfo, as the Commonwealth's publisher, should be the one-stop shop for Commonwealth permissions to administer Commonwealth copyright. So they are AusInfo's guidelines, but they would liaise with us in deciding what are the appropriate guidelines. I would imagine, as it is about the operation of crown copyright, that relevant ministers would need to approve any changes to the guidelines.

Senator FAULKNER—Thank you for that. That was how I understood the situation. We talk about the guidelines. The guidelines, as we describe them, are not actually appended in any sense to your submission before us at the moment, are they?

Ms Daniels—No, Senator.

Senator FAULKNER—Mr Chairman, I know we have dealt with this. I do not have my papers with me at the moment in terms of the AusInfo submission.

CHAIR—They are in your book—in front of you.

Senator FAULKNER—Are they? But they are not appended to this submission, are they?

CHAIR—No, they are appended to the papers.

Senator FAULKNER—This general issue was obviously a matter of some controversy with the CEIP and the matter had obviously been referred to the Attorney-General's Department when it became a public issue during the election campaign. I am interested in understanding why it seemed to take so long, if you like, at a departmental level for a decision to be made to review this. Or do you see that as a pretty reasonable response in these circumstances?

This was a matter of some controversy. Did the department see it as a reasonable thing to wait until the Auditor-General reported and acted as a consequence of that report? I am trying to understand the internal processes that led to and motivated the review, which I must say is a good idea. I think the department and AusInfo ought to be congratulated for

taking that initiative, so I am not critical in any sense about it. I am trying to understand a little more about the processes that led up to it.

Ms Daniels—As I explained following the issuing of the licence to the political parties, we in the department had started to think that this issue, along with other issues related to crown copyright, should be raised with AusInfo. As I said, we met in October after doing some initial research on this and a few other issues. Given the context of other copyright issues before the government, I did not regard it as being particularly slow in any way.

Senator FAULKNER—As I understand it, we had a situation when AusInfo came before the committee. Some material, which included some material that I had appended to one of my many communications to the Auditor-General, had been sent to AusInfo after a recent hearing of this committee. AusInfo informs us that that matter has now been referred to the Attorney-General's Department. Could you provide us with an update of any outcome in relation to that material and say whether there was a breach of Commonwealth copyright? This related to some advertisements in the federal electorate of Parramatta in the *Parramatta Advertiser* on Wednesday, 19 August 1998.

Ms Daniels—I recall that, after AusInfo appeared before the committee, they faxed us over some pages, which were the flyers from that electorate. They asked us whether there was any copyright issue in relation to the title on the relevant pages, which was the same as the government's tax package information, and how it was set out. I gave advice over the phone that copyright protection does not usually extend to titles and slogans. For copyright to subsist in a literary work, it usually has to be of a more substantive and original nature.

Senator FAULKNER—So at this stage only telephonic advice has been given to AusInfo on that?

Ms Daniels—I do not recall giving written legal advice. Have we?

Mr Barker—No.

Ms Daniels—I had a look at what they sent over. It basically related to the title and the layout. From my point of view, I did not think there was any copyright issue in relation to reproducing titles of documents.

Mr COX—What about logos?

Ms Daniels—On the material I had, unless it was a bad fax, I could not see the logo that was being referred to. If a logo is an original artistic work, copyright would normally subsist in it. Are you referring to logos or to the coat of arms?

Mr COX—Generically to logos.

Ms Daniels—They can have copyright protection as artistic works. In some circumstances they may also be registered trademarks.

Mr COX—Are you aware of any instances where logos have been misused?

Ms Daniels—In the Commonwealth context?

Mr COX—Yes.

Ms Daniels—Going back a few years, there have been examples of where there might have been an attempt by companies to use departmental or agency logos in a misleading context. I do not recall the year, but in the early 1990s we might have given advice on particularly creative artwork being used or modified in some way and whether that was misleading or deceptive to the recipient.

Mr COX—Are you aware of any instances where logos might have been misused for political purposes?

Ms Daniels—No, I am not.

Mr SOMLYAY—Adding to the question from Mr Cox, when the Commonwealth crest is on the letterhead of a member of parliament and that letterhead is used for a political argument perhaps conflicting with government policy, couldn't that possibly give the impression, because the letterhead has the Commonwealth logo on it, that that is government policy? Is that a misuse of the copyright of the government crest?

Ms Daniels—I am not sure exactly what the copyright status of the Commonwealth coat of arms is. My colleague James Barker might be a little more forthcoming on that issue. I know that the use of the Commonwealth logo is certainly subject to approval from a relevant area—the Awards and Symbols Branch of the Department of Prime Minister and Cabinet—but, as to copyright of the Australian coat of arms per se, I do not think that would be seen as an infringement of copyright, if there still is any copyright in the coat of arms. As I said, Mr Barker might be able to be a bit more forthcoming about that.

Mr Barker—The copyright, if it does subsist in the coat of arms, would have probably expired by now because it was created in 1912, I think, and granted under royal warrant to the Commonwealth. This is something that the Awards and National Symbols Branch could probably comment on better than we could. But copyright in Commonwealth material typically lasts for fifty years from the time it is published. Given that, it would probably have expired by now, unless there is some sort of lingering royal prerogative over the use of that.

Mr GEORGIOU—Could I pursue another point. You have included here some approaches taken by other governments and under the heading 'Queensland' on page 5 you say:

> The Queensland Department of Communication and Information, Local Government and Planning informed us that the Queensland Government does not have any guidelines which relate to the use of Crown copyright material. However, they have provided us with a copy of a Government Advertising Code of Conduct which governs the spending of public money on advertising campaigns.

You have appended a copy. Is this a government policy? This is a government code of conduct that says 'Queensland Labor' and 'Queensland Labor interactive'. What is that? It

looks like it is taken from the Internet. Is that a government policy or a Queensland Labor state assertion? I just want to establish the status of it.

Ms Daniels—Can I take that on notice, please? We would have to get back to them on that. I think that actually the Queensland Department of Communications and Information, Local Government and Planning sent that to us as a fax.

Mr GEORGIOU—Yes. I would like to know, firstly, whether that is actually a policy of the current Queensland government. Secondly, I would like to confirm that point 4 is the current Queensland government's policy position. It reads:

There should be no advertising within nine months of the scheduled date for an election unless there is an urgent emerging issue.

Thirdly, I would like to know how they police that. Fourthly, given that there is no scheduled election time in Queensland, because they do not run for fixed terms and elections can be called at any time, how can the notion of 'scheduled' election time work? Fifthly, I would like to know particularly—since, apparently, the Labor Party has just called for nominations for preselection—how that would operate and impact on the Queensland government in the event that they were to go to an election soon. Thank you.

Ms Daniels—We will follow up those things.

Senator FAULKNER—With due respect, Mr Chairman, the preselections of the Labor Party in Queensland have absolutely nothing to do with the Attorney-General's Department and, while the other questions might be perfectly reasonable, the last question is a nonsense. And, if I were the Attorney-General's Department, I would just tell Mr Georgiou that it was none of their business—and none of his business either, for that matter.

Mr GEORGIOU—Wrong. Maybe the Attorney-General's Department heard a little more clearly than you did. What I said was that I am particularly interested to know, given that they have called for nominations for preselection.

Senator FAULKNER—If that is the case, why don't you ask the Queensland Labor Party—as opposed to the federal Attorney-General's Department?

Mr GEORGIOU—No. If you want to respond, listen to the question.

Senator FAULKNER—I did listen to the question, and it is a nonsense.

Mr GRIFFIN—I do not think the question of when the preselection is called relates much to when an election is called. Look at the Victorian Liberals.

Mr GEORGIOU—I think that makes the point in a different way.

CHAIR—We are getting off the topic.

Senator FAULKNER—There is no point to be made.

Mr GEORGIOU—I want to know whether that is Queensland government policy or just something ripped off the Internet. It looks like something put out by Queensland Labor as an election flyer, and I would like to know whether that was formal Queensland government policy.

Ms Daniels—Mr Chairman, we will follow up the status of the document.

CHAIR—Thank you very much for that.

Senator FAULKNER—It does look like a Labor Party document.

CHAIR—The July 1998 News-sheet No. 3 by AusInfo, on Commonwealth publication production guidelines, says:

AusInfo is responsible for the administration and protection of copyright in Commonwealth publications. The function was allocated to AusInfo . . . under the Commonwealth Charter of Printing and Publishing Responsibilities, tabled in Parliament on 5 March 1984 after its approval by the Government.

The role was extended in 1985. It says further:

On 19 December 1992 the former Prices Surveillance Authority (PSA) presented to Government its report, No 47.

. . . . . .

Following a review of the report recommendations by an Inter-departmental committee (IDC) on 18 January 1995 the Minister responsible for AusInfo and the Minister assisting the Treasurer made a joint press release statement. The statement announced that AusInfo would continue to administer Commonwealth copyright in printed and electronic forms . . .

Has anything happened to the guidelines since then?

Ms Daniels—No, Mr Chairman.

Mr GEORGIOU—I would like to follow up with one more point. Can we confirm whether the Queensland department is sending out things with Labor Party headings and logos on them as official government policy? I want to know in the context of our discussion of logos and their appropriate use.

Senator FAULKNER—Why don't you ask them?

Mr GEORGIOU—Not a problem. I have here a formal communication from the Commonwealth Attorney-General's Department that they received this from a department as a government advertising code of conduct. I would like to confirm what the facts are.

CHAIR—Could you try to find out for us?

Ms Daniels—Yes. I will follow up that status.

CHAIR—Thank you very much for that.

Senator FAULKNER—To get onto a sensible question, when is your review likely to be concluded?

Ms Daniels—I cannot give a date for that at the moment. From both the AusInfo and the departmental point of view, we would benefit from the committee process and their view of what the guidelines should say, because that gives further recommendations to consider. So in part the timing might be associated with that. But we will be meeting with AusInfo in the very near future.

Senator FAULKNER—What sort of departmental resources are you throwing at this?

Ms Daniels—The Intellectual Property Branch where I work is made up of 10 or 11 people. There is one legal officer who deals with crown copyright, so that person will be doing some work on them.

Senator FAULKNER—Who will the review report to?

Ms Daniels—The review would report, in my case, to the Attorney-General and, in AusInfo's case, to their minister.

Senator FAULKNER—So who has carriage? The Minister for Finance and Administration, or the Attorney-General?

Ms Daniels—I guess it is likely that the agreement of both ministers would be required—which, in a copyright context, is quite a common a way for how reform is agreed.

Senator FAULKNER—But I come back to the point that they are AusInfo guidelines, aren't they? So, at the end of the day, I would have thought they would be the responsibility of the Minister for Finance and Administration.

Ms Daniels—I agree that they have responsibility for guidelines, but we give legal and policy advise on crown copyright matters as part of our responsibility.

Senator FAULKNER—Yes; I appreciate that. But what you are talking about here is a review of guidelines which are the Commonwealth publications production guidelines, which are AusInfo guidelines. I am not suggesting that it is not appropriate for the Attorney-General to have an input, either. It is logical. It makes a bit of sense. But, at the end of the day, they are the primary responsibility of the Department of Finance and Administration—or, as I read it, they are, anyway. Would that be right?

Ms Daniels—Yes. They are AusInfo's guidelines.

CHAIR—As there are no further questions, we thank you very much for coming. We will appreciate your prompt response to the things you have said you will follow up on, as we are trying to get to a report. Thank you very much.

Proceedings suspended from 10.49 a.m. to 11.01 a.m.

BANKS, Mr Simon, Principal Legal Adviser, Senior Adviser to the Shadow Attorney-General, Australian Labor Party

McCLELLAND, Mr Robert Bruce, MP

CHAIR—I now welcome representatives of the Australian Labor Party to today's hearing. Thank you for your submission and for coming to talk to us today. Do you have any additional statement you would like to make before we ask you questions about your submission?

Mr Banks—Perhaps I might just make a brief opening statement. Obviously this is a bit of an unusual situation for Mr McClelland and me because, as his adviser, it is normal that he is the one who does all the talking whereas I will be the one who will be doing most of the talking.

CHAIR—We thought Gary was coming.

Mr Banks—Yes, that was the second point which I wished to address. I wish to apologise on behalf of the national secretary of the Australian Labor Party, Mr Gary Gray, who is overseas at the moment and unfortunately could not be with us today. I know he would have enjoyed the opportunity to present this submission to the committee. I want to make some very brief remarks because I know that the committee will have had a good opportunity to read our first submission. I do not know how much of an opportunity the committee would have had to read the additional submission made by Mr McClelland, but I will get him to speak very briefly on that in a moment.

The principal issue I want to address is the basic point of difference on the issue of the legality of the community education information campaign on the tax reform package. The essential difference in the views that have been put to this committee really surround the issue of whether or not the tax package was government policy or was simply the policy of the Liberal and National parties. It is the view of the Australian Labor Party that it only ever attained the status of a policy of the Liberal and National parties. Our reason for saying that is essentially based on the very conditionality which was attached to the policy when it was announced.

The government, for its own reasons, made it very clear that the policy would not be implemented by it until it had sought a mandate from the Australian people at the last federal election. It was very clear that the government was not going to implement the policy until that had occurred. There was, in that sense, a very fundamental criteria which was attached to it. As I guess has been covered in a number of the submissions to the inquiry, what happens is that usually when a government makes an announcement of policy it is also making a statement which reflects the policy that it as the political party or parties that constitute it also have.

So, for example, when the Prime Minister or the Treasurer make an announcement, it is often assumed that the policy has one and the same character at the same time as being a policy of that particular political party or parties and also a policy of the government. In our view, because of the condition that was attached to this policy and because it was quite deliberately made clear that it would not form the policy of the government until a mandate of the Australian people had been obtained, the policy never obtained the status of government policy and it therefore was never a policy of the Commonwealth government and could not attract Commonwealth government support or funding for the purposes of the education campaign.

In making that opinion, I note that our view is supported by not just the concerns expressed by the Australian Labor Party but also the views and concerns expressed by a number of other eminent legal people such as Mr Geoff Lindell from the University of Melbourne and Professor Noel Preston of the Queensland University of Technology. I would also say that our view of the law is also implicit in the understanding which the Secretary of the Attorney-General's Department, Mr Tony Blunn, and the barrister briefed by the Commonwealth Privacy Commissioner, Mr Stephen Gageler—who, if the committee is unaware, is an expert in constitutional administrative law—also brought to this question when they were considering whether or not the mail-out that accompanied the community education information campaign was a breach of the Social Security Act and the Privacy Act.

As I said, that is in essence the central point which we say goes to the illegality of this policy. I might get Mr McClelland to comment very briefly on the submission he has made, because that also goes to the point of the legality of the government's actions.

CHAIR—Could I just interrupt by saying that I am advised by my secretariat that we have no such submission.

Mr Banks—My understanding was that a copy of the submission was both faxed and e-mailed to the secretariat yesterday afternoon, but I am quite happy to hand up a copy of the submission now if that is convenient.

CHAIR—We can accept it now, but I would remind you that we have not seen it.

Mr McClelland—Speaking briefly to that supplementary submission, let me say this: a minister of the Crown owes a fiduciary obligation to the people of Australia. In that sense he or she is in no different position than an officer of a corporation or indeed a trade union official. In the supplementary submission I refer to a High Court authority to that effect and some other authorities, particularly in the context of elections within trade unions. What all those authorities determine is that, in exercising a fiduciary obligation, a minister or a chief executive, whoever it may be, has to exercise their discretionary power and their responsibilities bona fide in the interests of the people they are representing as opposed to any personal interest or indeed party political interest.

The issue has specifically arisen in the context of trade union elections where officers of a trade union have used the resources of the union to support their own candidature or the policies that their particular electoral group are advocating in an election. That has been

considered in a number of cases now by the former Industrial Court of Australia and also the Federal Court of Australia. Quite clearly, the courts have held that that is a clear breach of a fiduciary obligation owed by those officials. The courts have distinguished and recognised that there is a legitimate need and indeed perhaps an obligation of officers of an organisation to communicate legitimately with members of that organisation. By correlation, there is a legitimate interest for ministers of the Crown to legitimately communicate with members of the Australian public with respect to government policy but not party political policy. That quite clearly is established from the authorities.

So the fundamental point is that, even leaving aside the technical legislation and regulations in this area and whether a minister or a public servant has been in breach of those regulations and legislation such that they themselves might be liable to a penalty and indeed penal servitude under the act, quite clearly ministers of the crown, indeed chief executive officers of departments, owe a fiduciary obligation to the Australian people. The expenditure of taxpayer funds for party political purposes is quite clearly a breach of that obligation and the person who so breached their fiduciary obligation can be held accountable to refund the moneys so misappropriated. That would apply to a minister or a public servant involved in the decision making process which did not bona fide expend moneys in the public interest but rather in personal or party political interests, as clearly occurred with respect to the advertising campaign.

Mr Banks—Perhaps before we conclude our opening statement I should draw the committee's attention to a number of other points. Our concern obviously was the unprecedented way in which the government spent $20 million of taxpayers' funds to promote what we regard as a party political policy on an issue which, both before the election and at the election, was undoubtedly the number one issue which was to be decided by the Australian people. In that context, we regard the attempt to try to influence the vote of the Australian community through the expenditure of these funds as improper and unethical. In both the submission that Mr McClelland has made and the original submission that was put in on behalf of Mr Gary Gray, we have pointed to a number of the consequences that flow from the characterisation of the community education and information campaign as in fact being for party political purposes rather than for government purposes. I do not propose to go into those in any detail.

There is one further issue, though, which I think the committee should consider, and that is to do with the issue of the use of copyright material. As you would be aware from the first submission that we made, copyright material of the Commonwealth was used by members of the Liberal Party of Australia for the purposes of campaigning during the course of the last federal election campaign prior to approval being obtained from AusInfo for that material to be used. That, of course, is technically a breach of the Commonwealth Copyright Act. One of the matters that does raise concern is that I had the opportunity this morning of looking at AusInfo's submission to this inquiry and I note that in its submission AusInfo still states that it is not aware of any evidence to suggest that this copyright material was used in breach of the Copyright Act. The fact that the Australian Labor Party has provided this information in its public submission and to the Auditor-General means that we are very concerned that AusInfo claims not to be aware that this information exists.

Mr McClelland—I make one final point in conclusion. Our submissions are addressed to technical aspects, but there is a very broad public policy issue involved, and the cases which have been referred to in that supplementary submission refer to it. That is the use of resources by incumbents—perhaps incumbents in an organisation like a trade union but certainly a political party that is incumbent in government. The use of the resources available to such incumbents has the potential to massively distort the democratic process. That is self-evident. It must be of real concern to all parliamentarians that that is possible, particularly in the context where parliament has already resolved to support political parties through the funding of election campaigns. For any incumbent political party to use the resources of the nation to support their own incumbency has the real potential to cause tyranny of our system.

CHAIR—Thank you for that. In your submission you talk about legality, you talk about some issues being non-constitutional and you talk about the appropriateness of the CEIP advertising campaign. You know, of course, that this committee is not a court of law in the first place and that we have no mandate to adjudicate on such matters. But let us assume hypothetically that we were a court of law: what outcomes would be possible from our hearing?

Mr Banks—Perhaps I should make an initial point, that I think the parliament and committees of the parliament are beholden to make determinations as to the lawfulness or constitutionality of legislation or conduct of the Commonwealth government. I think that is an important role which committees can and should perform. Obviously they do not have any role in enforcing those in determinations; they are merely expressing an opinion as to the legality or constitutionality of the matters before them. But I think that is an important public role that the parliament generally and committees of the parliament particularly perform.

In relation to courts, this case does highlight one of the difficulties within our legal system. In fact, it is one that is widely acknowledged in administrative law and constitutional circles. It is the ability of people to bring actions to challenge the validity of acts of appropriation or other acts of the government in these sorts of circumstances. I would refer the committee to the advice provided by the Australian Government Solicitor at page S310, volume 2, which makes this very point during the course of its submission. So there is a very real problem with, for example, organisations like the Australian Labor Party having standing to bring these sorts of proceedings before a court and for them to be adjudicated by a court. I think there is a very important role for independent scrutiny agencies such as the Auditor-General's office to take their role very seriously and to assess the bona fides of government expenditure and to try and hold the government accountable for it. What organisations like the Auditor-General can do is make assessments as to the constitutionality and legality of expenditure. As a result of that, it can also refer matters, where appropriate, to relevant bodies for further either civil or criminal action as appropriate.

CHAIR—On the first of several points, I point out to you that there is a separation of powers in this country, and I would have thought that it was the legislature's job to legislate and the courts' job to determine whether or not the issues were in fact constitutional, not this committee's responsibility. I simply make that point. In the last paragraph of your statement,

you seem to question the ethics of the Auditor-General. Is that what you are saying? Are you saying that the Auditor-General's report was wrong?

Mr Banks—We have commented in our submission and publicly that we think that the conclusions reached by the auditor's office were deficient. We think that it did not address itself to the central issue of the constitutionality and legality of the campaign that had been funded by the government, for the reasons which I have previously announced and which are contained in our submission. In that regard, yes, we do believe that the Auditor-General was deficient in carrying out his functions.

Mr GEORGIOU—It is a bit hard when on the one hand you affirm the significance of what you call independent scrutiny agents and on the other when you do not like their conclusions you attack them. But the basic fact is that the conclusion of ANAO as an independent scrutiny agency is as follows: 'The ANAO concluded that the government acted legally and officials acted ethically.' Leaving that aside, I want to ask this question. Your argument, which does have substance, does lead to the conclusion that, were the government to run the CEIP campaign now, you would not have any objections.

Mr Banks—The answer is that we may have some objections on the basis of what we regard as best practice future conduct—

Mr GEORGIOU—But on the basis of what we have got now.

Mr Banks—If you wish to look at it on a comparative basis with what may have occurred in the past then the answer is yes, I do not think we could object if the government wished to run the CEIP now.

Mr GEORGIOU—So, if the government decided that it wanted to publicise a program of tax reform right now, you would say, 'Fine.' I just want to lock that in.

Mr Banks—There is no question that the current government has a policy in relation to tax reform, that the community is very well aware of what that policy is and that, on that basis and in accordance with precedent, the government could run that campaign.

Mr COX—Mr Banks, it is still not a government policy that would have any legislative backing.

Mr Banks—Our view in relation to best future practice is in fact that these matters should take on some form of legislative backing before the government is in a position to advertise them. We regard that as being best practice in these matters. But I am saying that what is a matter of best practice and what is strictly legal are not necessarily one and the same thing.

CHAIR—We read that in your submission. I want to follow up on that because in your submission you say that additional requirements should be inserted requiring the completion of any legislative changes or other approvals required by law before a matter can be advertised. How on earth then do we advertise a campaign against smoking, an anti-drug campaign or hepatitis C, measles vaccinations or the myriad of other advertisements that go

out of government departments every year about a huge variety of matters that have absolutely nothing to do with legislation?

Mr Banks—You are right to say that there are a large number of advertising campaigns that the government conducts that do not have any strict legislative backing in terms of their substance. However, all of those programs are presumably funded through appropriations passed by the parliament. We would argue that in those cases, they should be appropriated through the normal appropriation bills so that the parliament then has a chance to scrutinise that appropriation and to approve it. In those circumstances, it is then acceptable for the government to advertise that particular campaign.

CHAIR—I see. So if we have a national disaster in October and the government decides that it must advertise to let the people in the area know what they must do to remain safe and how they can get access to government funds to help them through their period of stress and turmoil—

Senator FAULKNER—Naturally, this would be for GST solace; that is another of your campaigns.

CHAIR—Hang on. If you don't mind, Mr Banks, I will finish the question first. How, in such circumstances, are you going to require an appropriation—which has already been approved—to come before both houses of parliament?

Mr Banks—First of all, I do not pretend to be an expert on the arrangements that the Commonwealth government has in place for issues such as national disasters. But I understand the Commonwealth does in fact have a national disaster relief fund that I presume would cover the authorisation of expenditure to communicate to the community about matters relating to that national disaster. Even if that were not the case, I would also assume that that would very clearly fall within the circumstances and the guidelines for the advance to the Minister for Finance of urgent and unforeseen expenditure which would be required by the parliament and by the government. I do not think the Australian community, the parliament or any political party would have any difficulty with that sort of expenditure being incurred in accordance with those guidelines and principles.

Mr ANDREWS—Is it appropriate for officials—officers of Commonwealth departments—to work on the development of policies prior to their formal adoption as policy?

Mr Banks—The short answer to that is yes, that occurs every day. Government departments and agencies formulate and develop policy which may or may not, at the end of the day, become government policy. They do that for reasons of helping and informing government in the making of its decisions. But that process is very different from then going out and advertising a policy which may be adopted by a political party as being the policy of the government when it has not achieved that status.

Mr ANDREWS—Whose policy is it at that stage?

Mr Banks—At that stage, in fact, it is technically no-one's policy, it is merely a developed idea which may or may not be implemented by the Commonwealth government—or by any other party for that matter.

Mr ANDREWS—But you would accept that there is the use by the Commonwealth of resources in that process of policy development.

Mr Banks—I think that process of general policy development is one of community benefit to government, parliament and the Australian people.

Mr ANDREWS—If you allow that that can occur properly and legally, and does at the present time, and that it is not government policy at that stage, then doesn't your argument, your formulation of principle, that there is a distinction to be drawn between policy becoming government policy on some magic date—that is, after an election has occurred or, as you are suggesting, in the future after it has gained legislative approval—fall apart?

Mr Banks—I see the point you are trying to make, but I think the answer is no. The critical test here is really whether or not the purpose that is being achieved is for the purpose of the Commonwealth. One of the purposes of the Commonwealth is clearly whether or not it is government policy; another one is whether or not it is for the purposes of developing government policy. I think they are both legitimate purposes that the Commonwealth in a general sense engages in. But I do not think that it is a legitimate purpose for the Commonwealth to advertise a policy which is, in fact, a policy of a political party and which is not a policy of the party in government.

Mr COX—For instance, there is an important distinction. A government can and indeed should legitimately issue white papers with respect to important policy development issues. Those white papers are circulated for discussion, indeed, it is advertised that they have been circulated for discussion and submissions are called for from the public and interested parties to express their point of view. That was not the case in this advertising campaign. It was putting forward, in salesmanlike terms, a fait accompli. It was not a white paper calling for input and refinement, it was clearly a promotional campaign.

Mr ANDREWS—If the government issues a green paper, does that become government policy?

Mr Banks—I would say that the issuing of a discussion paper, for example, by a department or agency—or a green paper, if you want to call it that—means that the government therefore has a policy to discuss the particular issue, but it has not yet reached a concluded view as to the final form that the policy will take. That is essentially the decision that the government makes at that point in time.

Mr ANDREWS—Didn't Mr McClelland just say that you can issue a white paper which is in the nature of a discussion paper upon which members of the public can make submissions, and that is quite an appropriate use of government funding? How can you line up the statement you have just made with what Mr McClelland has said?

Mr Banks—I do not see that there is any inconsistency. Whether you are talking about a green paper or a white paper, they are still papers which have some form of lack of finality in their position as government policy.

Mr ANDREWS—Isn't the difference, in simple terms, between a white paper and a green paper—at least in the Westminster system—that the white paper is a discussion paper calling for comment and that governments then issue a green paper which is the concluded position drawn from that public comment?

Mr COX—I think it is the other way around. The green paper is the discussion paper and the white paper is the final position paper.

Mr Banks—I was working more off the analysis which Mr Cox just gave.

Mr ANDREWS—Nonetheless, I take it that, from your point of view, the issue of either paper is an appropriate function of government?

Mr Banks—Yes; I believe the issue of both of those types of paper is an appropriate role for government to play.

Mr ANDREWS—So in this instance, if the government had merely put green paper on the front of its tax package, that would not be appropriate?

Mr Banks—Since the government circulated this at a cost of some $20 million to households—

Mr ANDREWS—I am not talking about $20 million now; I am talking about the principle here. I am simply talking about your proposition to the committee which, it seems to me, has some flaws.

Mr Banks—The central difference is the point you are trying to make that what we are saying is really just a matter of form as to the manner in which the document is presented to the Australian community when our argument, in fact, goes well beyond that. We say that it is a fundamental matter of substance about the way in which the document was presented and the way in which this particular document was presented to the Australian people. If the Howard government in August 1998 had announced the GST package as a policy of the government which it was going to implement, then in accordance with past precedent, it would have been lawful for the government to have advertised that policy and to have issued that paper. But what we say, as I said in our initial submission and in my opening remarks, is that because the government made it very clear that it regarded itself as having no authority to make that policy the policy of the government until it had obtained a mandate from the Australian people, the policy could never obtain that status until after the 1998 federal election.

Mr ANDREWS—Is it appropriate for the government to expend funds on the issue of a green paper with a term contained in it that this issue is for discussion by members of the Australian public and its final determination will be conditional upon there being support for it from members of the public? Is that an appropriate use of government funds?

Mr Banks—I am not aware of a single green paper which has made itself conditional on having the support of the Australian people expressed at an election.

Mr ANDREWS—Isn't the nature of a green paper implicitly conditional?

Mr Banks—No. Isn't it a statement by the government of the policy that it is proposing to adopt?

Mr ANDREWS—And if it is calling for submissions, there is an implicit note of it being conditional, is there not?

Mr Banks—It may be conditional in one sense in that it is possible that the government may be saying that it is prepared to vary or modify the final form of the policy that it takes. What the government is saying by making that statement is that this is the policy that we propose to adopt and, unless good reason can be shown why it should be changed, then that is the policy that we will implement.

Mr GEORGIOU—How do you feel about a paper which was put up for discussion, advertised and then dropped entirely?

Mr Banks—In that case what has occurred is that the government has subsequently made a decision not to proceed with that policy.

Mr GEORGIOU—So it was a policy and then it became a non-policy, but in between the government was entitled to advertise, despite the fact that it eventually dropped it. So whether or not a policy is implemented is not to the point.

Mr Banks—The question is whether or not the policy ever attains the status of being government policy, which is the critical issue in the first place. You need to understand that that government policy acts as a continuum. Even over an election period when there may be a change in government, the policy of the government continues to remain in place even if the stated policy of the party which forms the new government is different from the policy of the previous government. Until such time as the new government actually makes a decision to vary government policy, government policy does not actually change. As a bureaucrat, if you are administering government policy, you continue to administer the policy of the government which continues, regardless of whichever political party is in power, until a decision by the government of the day to change or vary that policy. Our submission has always been that the tax package never even attained the status of government policy because of the conditionality that was placed upon its implementation.

Mr ANDREWS—So it was inappropriate to expend public resources on the circulation of and discussion of options C, B and A for that matter.

Mr Banks—No. In fact what occurred in that particular instance was that the then Keating government had made a policy decision to engage in a debate about tax reform, and it genuinely presented to the Australian people a range of options for consideration for tax reform.

Mr GEORGIOU—So the policy was to have a discussion.

Mr Banks—Exactly.

Senator FAULKNER—Mr Banks, in relation to the advertising surrounding the tax summit, which is what Mr Georgiou and Mr Andrews questioning goes to, are you aware of the interrelationship and interface with that particular advertising and the timing of the subsequent election?

Mr Banks—My recollection was that the tax summit was held in 1985 and the subsequent federal election was held in 1987.

Senator FAULKNER—That is true. Are you also aware of the difference in quantum between the CEIP advertising campaign and what occurred at that time?

Mr Banks—I could not give the committee a dollar figure, but I think it would be fair to say that there were considerable orders of magnitude of difference between the level of publicity that the publication of the 1985 tax options paper received and the approximately $20 million that has been appropriated for the purposes of the CEIP.

Senator FAULKNER—Are you aware, Mr Banks or Mr McClelland, of what is described as figure 1, campaign advertising expenditure over time, on page 29 of the Auditor-General's report? Prior to the 1996 election, there was quite a significant reduction in advertising to under $2 million. Prior to the 1993 election it was around $6 million, and it was a little over $4 million prior to the 1990 election. But prior to the 1998 election, courtesy of the CEIP program, which is what this committee is looking at and guidelines for advertising as a consequence of that abuse, it was an unprecedented and massive amount of money in excess of $12 million.

Mr Banks—I am certainly aware of the graph that you refer to. I have a copy of it in front of me at the moment. As you quite rightly say, even if you look at the highest point of expenditure on government advertising prior to expenditure on the CEIP, that highest point is of the order of about $6 million. Whereas, if you look at the period immediately prior to the last federal election, which incorporated expenditure not just on the CEIP but on some other matters as well, you will see that it is of the order of in excess of $12 million as stated in that graph. As we are now aware, based on further appropriations by the government, the amount of money is now of the order of $20 million.

Senator FAULKNER—Is it significant to the Labor Party that we have a situation where a party's policy for an election campaign is being advertised, as opposed to options for a tax summit or the promotion of an operating program of government? That is the first element. The quantum that we are speaking about is in excess of $12 million of a $20 million program, expended on the eve of a federal election—absolutely unprecedented in the history of Australian politics. Some of that advertising was actually running on the electronic media and in the print media after the writs for the election had been issued. Aren't these the sorts of issues that have motivated the Labor Party to try to do all it can to ensure this corruption of the political process by the Howard government and this misuse of government

moneys never occurs again? Why wouldn't that be something that the Labor Party would do all in its power to ensure never occurs again in the political process in this country?

Mr SOMLYAY—Have you got any doubt for your press release, John?

Senator FAULKNER—No. I have said all this before. Don't worry about it. It is nothing new. Nevertheless, it is true and it is serious. We know that the government does not give a damn about it.

Mr SOMLYAY—I point out to Senator Faulkner that it was this government that introduced the charter of budget honesty.

Senator FAULKNER—What a joke that was. What you ought to do is introduce a charter of advertising honesty. That might be a good start for you. Mr Banks, can you respond to my question?

Mr Banks—That is precisely the concern that has motivated the Australian Labor Party in making this submission. We believe that there is a very real public interest in elections being conducted on a fair and even basis. We don't believe that processes of government should be used to advantage the incumbent government to the disadvantage of other parties participating in that political process. If that occurs, it would subvert the very democracy that we have and the quality of the democracy we have. It would also lower the opinion of politics and politicians in the general community. I think if anyone has gone through a number of the submissions that were made to the Auditor-General at the time this matter was a matter of live public debate and seen the very deep level of concern in the Australian community about this—

Mr GEORGIOU—Is this the correspondence to the Auditor-General?

Mr Banks—Yes.

Mr GEORGIOU—The 12 letters?

Mr Banks—Yes. If you also look at the great volume of talkback radio and print comment at the time in relation to this matter, this was a matter of very real concern to the Australian people, that their government was inappropriately and unlawfully using funds to try to keep itself in office and to promote a policy that was an active part of a party political campaign.

Senator FAULKNER—Let me go to the substantive issue that the Auditor-General raises from the point of view of the opposition. I know the substantive issue. As I indicated before, obviously I personally have a difference with the Auditor-General and his judgment here. I am not suggesting he has not come to this with due diligence and an open mind—

Mr McClelland—I think the essence of our criticism of the Auditor-General is not that the office has not exercised due diligence but the same as you would question any administrative decision as to whether the decision maker had regard to all relevant considerations or had regard to irrelevant considerations. We say that the Auditor-General

had a primary obligation to consider one very, very relevant consideration—that is, whether the expenditure was in the nature of expenditure for party political purposes. We say that, in failing to have regard to that question and determining that question, the Auditor-General erred.

Senator FAULKNER—I appreciate that. That is what I want to draw attention to. The Auditor-General says:

. . . it is not within the Auditor-General's mandate to judge the nature of the advertisements (that is, whether they are political or party political in nature).

Mr McClelland or Mr Banks, is that not quite clearly the substantive point at which there is a difference in this particular instance between the Australian Labor Party and the Auditor-General? I think the point that has been made to us on behalf of the Labor Party is that you believe it is within the Auditor-General's mandate to make this judgment. This also has been a matter for public debate. I have certainly canvassed it with the Auditor-General and others, and it has been canvassed publicly. I want to be absolutely clear for the record. This is where the Australian Labor Party finds that that judgment of the Auditor-General is one that it just cannot embrace. The Labor Party takes the view that that decision by the Auditor-General, judging outside his mandate, is one that the Labor Party does not share.

Mr McClelland—We do not share that. We say that again he erred in not determining that issue. Again, coming back to the point made by Mr Banks, we are looking at a matter of substance, not merely form. Surely it is an obligation of the Auditor-General to characterise the substance of payments. No fair thinking Australian would question the legitimacy of a government, as a matter of substance, canvassing policy development issues by way of white papers or green papers. Any fair minded Australian would have little difficulty in characterising something as a white paper or a green paper or a policy discussion document.

Equally, any fair minded Australian would have no difficultly at all in seeing what was party political propaganda. We say that the Auditor-General had a clear and specific obligation to do what any fair minded Australian would without hesitation do—that is, judge the material that was circulated as part of the taxation campaign as party political propaganda. The Auditor-General unquestionably erred in not making that fundamental determination.

Senator FAULKNER—Given that there was obviously a lot of political debate and debate in the public arena about this and putting aside the issue of his mandate—there were obviously strongly divergent views on that—is it the view of the Labor Party that the Auditor-General's decision to hold the limited scope performance audit on the CEIP was an appropriate one in the circumstances?

Mr Banks—Our view is that there should have been an inquiry. Our view is that it should not have been limited in scope. The Auditor should have made a consideration at the earliest possible opportunity of all of the information available to him as to the appropriateness of the government's expenditure and to have made that determination as quickly as possible.

Mr McClelland—In many senses, having a less than complete inquiry is more damaging than not having an inquiry. I say that in the sense that there is perhaps no issue which is more fundamental to the democratic process of this nation that there be a fair electoral process. It is an issue of such significance that it required a complete detailed and comprehensive inquiry with no issues being left unresolved.

Senator FAULKNER—But at the end of the day do you think you have this unprecedented advertising campaign in terms of its quantum, its timing and the nature of the material—that is, it is not in any sense anything other than an election policy being promoted? So you have this totally unprecedented type of advertising campaign. Some might say, 'The Labor Party has never behaved in that way. You have never done that.'

Mr GEORGIOU—Can we call them as witnesses?

Senator FAULKNER—Most objective observers and reasonable observers did say that, because it is totally unprecedented in the three elements that I have mentioned. Would it be a reasonable thing for the Labor Party to say, 'If the Liberal Party operates that way in government, maybe this is going to change the whole nature of the political process'? Why is the Labor Party determined to try to see that guidelines are in place, improve standards and, if you like, to try to ensure that this abuse does not occur again? Why has the Labor Party determined that course of action as opposed perhaps to the more opportunistic one of saying, 'Well, we have never done it in the past. It is an option in the future'?

Mr Banks—I think an unprincipled political party would take the very approach that you have suggested, Senator Faulkner. An unprincipled political party would seek to take advantage of this loophole.

Mr GEORGIOU—Have a look at where it peaks. Have a look at the March 1983 federal election.

Senator FAULKNER—That is exactly right. Have a look at it.

Mr GEORGIOU—Can you tell us how much was spent on Working Nation?

Senator FAULKNER—Which is an operating program of government and its quantum is incomparable. That is exactly the point I am making. Have a look at the table. See what a shonky, corrupt operation we are talking about.

Mr GEORGIOU—March 1983 federal election.

CHAIR—If we are going to get to the auditors, then we had best wind this up. Are you finished that statement?

Mr Banks—Perhaps I might briefly finish answering Senator Faulkner's questions and then I will make a brief comment in relation to Mr Georgiou's comments. As I said, I think a party with principle looks at where there may be potential for subversion of the democratic process and seeks to change that system to make it fair, because in the long run it wishes to act in the interests of the Australian people, and the interests of the Australian people are

best served by a public democratic system that they have confidence in. In respect of Mr Georgiou's comment, you may well point to various points in time when you argue that the Labor Party expended funds and you may wish to put an argument as to whether or not it was appropriate that the Labor Party in government expended those funds.

Mr GEORGIOU—No. I actually asked: how much was expended on Working Nation?

Mr Banks—I did not work for the Labor government at the time of Working Nation.

Mr GEORGIOU—I am not saying you are not innocent of that. What I am saying is that you have made a lot of comments about expenditure. I would like to know how much you spent on Working Nation?

Mr Banks—I do not know. I can also state that there was no question made at the time as to the legality of that expenditure.

CHAIR—Can I ask you one last question and then we will call it quits. When you were trying to answer my question about having to legislate all changes before advertising was appropriate and Mr Andrews was trying to asking a series of questions you got into a very complicated and I thought convoluted regime about what would be and what wouldn't be legally and ethically and morally defensible in terms of advertising. Do you think it would be ethical for a government to legislate tax changes, to the public's benefit supposedly, then advertise those tax changes, then have an election and then refuse to promulgate the tax changes? Would that be ethical?

Mr Banks—Would it be ethical for a government to change policy?

CHAIR—Would it be ethical to do that—to promise advantage to the public and then take it away following the election, having used public funds to advertise for those changes?

Senator FAULKNER—To promise changes and advertise its policy. That's your hypothetical question.

Mr SOMLYAY—Of course it's not ethical.

Mr Banks—I take the view that governments choose to change policy in a whole range of different areas at various different points in time. Previous Labor governments have done that but so too has the present government. If you wish me to make a list of the number of promises that the current government has taken to various elections that it has broken I will do so, but I don't believe that's a particularly valuable exercise for this committee.

Mr ANDREWS—Mr Banks, the question, as I recall, was laws which had been enacted by the parliament but not promulgated.

Mr Banks—Laws enacted by the parliament but not promulgated? A government can make a legitimate decision not to promulgate a law and on the basis of that can change its policy. It is not unlawful for a government to do that.

CHAIR—If we are going to talk to the auditors then we had probably best wind this up, unless somebody has a major disagreement. Thank you very much, Mr Banks and Mr McClelland, for coming to talk to us today.

[11.54 a.m.]

CHAIR—Before resuming, I advise witnesses that the committee has adopted a round table format for this part of the hearing. In order to ensure that the events constitute formal proceedings of parliament and therefore attract parliamentary privilege, a number of procedures need to be followed. First, only members of the committee can put questions to witnesses. Secondly, if witnesses wish to raise issues for discussion I would ask them to direct their comments to me and the committee will decide if it wishes to pursue the matter. Finally, it will not be possible for participants directly to respond to each other. These comments should as far as possible be brief and succinct so that all the issues can be covered in the time available.

BARRETT, Mr Patrick Joseph, Auditor-General, Australian National Audit Office

COCHRANE, Mr Warren John, Group Executive Director, Performance Audit Services, Australian National Audit Office

HARRIS, Mr Anthony Clement, Auditor-General, New South Wales

LEWIS, Mr Michael Kenneth, Executive Director, Performance Audit Services, Australian National Audit Office

McPHEE, Mr Ian, Deputy Auditor-General, Australian National Audit Office

SCANLAN, Mr Leonard John, Auditor-General, Queensland Audit Office

CHAIR—I welcome representatives of the Australasian Council of Auditors-General to today's hearing. We have received, and we thank you for, your submission into these issues. Would any of you like to make brief opening statements to the paper or do you wish us to go straight to questions?

Mr Scanlan—I seek the committee's indulgence, Mr Chairman, to table an extract of a report which I tabled at the Queensland parliament this morning and which deals with this whole issue of government advertising.

CHAIR—Fine. We would be happy to accept that paper.

Mr Harris—We are here in our individual capacity, but collectively we were very pleased to see that the Auditor-General of the Commonwealth reported on this matter. We saw it as a very important issue and we knew that Pat Barrett's team would make a significant contribution towards it that would help the states as well, because it is not only an issue that affects the Commonwealth; it is an issue that affects each of us in the states. We are also very pleased to see the JCPAA looking at the issue because that will enable us more happily to see results which we can apply in our own jobs and which will help the state governments in their deliberations on this issue. So we are quite grateful for that.

CHAIR—We thank you for your paper. I suppose each of us will have questions about the kinds of things you think we might consider. Your underlying principle seems to state

that it is legitimate for governments to persuade members of the public to adopt action which in the government's view is in their interests and which falls within the responsibility of the government. But your definition of what does and does not constitute advertising by the government defines political advertising as being designed to influence public support for a political party. So your definition seems to equate political advertising with party political advertising and seems to conflict with the underlying principles. Can you comment on that?

Mr Scanlan—Perhaps I should reflect on the document that I have tabled where I have outlined some principles or options, or in fact guidelines, for the Queensland parliament's consideration. The words that we are putting forward from the Queensland perspective may be different from those that, in part, have been put forward by the ACAG and by the Commonwealth Auditor-General or may in fact be at variance to Mr Harris' views. Essentially, overall we are saying pretty much the same thing: notwithstanding that this is a grey area—a judgmental area to some extent—we feel that there is still value in having some parameters in place to deal with what has perennially a very difficult issue.

CHAIR—When we deliberate on these matters, the committee's concern will have to be to make a judgment about whether guidelines or regulations become so definitive and so prescriptive that they prevent governments from acting or that because they are so prescriptive there is a constant question called into account about whether a particular program is in fact legitimate according to the rules, regulations and guidelines. At the moment, as the Auditor-General has stated, we have this undefined area of what is political and what is party political. In a sense, you are trying to define what is party political, and I already sense in what you have written that there are conflicts. I wonder whether you have thought very hard about these issues and how we might resolve them.

Mr Scanlan—I do not believe that the proposals that have been put forward are all that prescriptive. There is a degree of discretion that goes with the proposals that have been advanced. I acknowledge there are some particular areas which we would regard as necessarily to be defined. For example, in the lead-up to an election period, there is an issue of timing. In terms of being able to regulate or define parameters for this area, it does seem to me that we are trying to put out some expectations, some wide parameters which will be useful in terms of encouraging a spirit of compliance with what we regard as being acceptable behaviour.

CHAIR—All of us understand, in the peculiar form of democracy that we have where executive government is drawn from members of both houses of this parliament and executive government is necessarily political or they would not be here in the first place, I suspect we are not ever going to have a parliament that is made up of 100 per cent independents, or if it were, they would certainly become political very quickly.

Mr GRIFFIN—If your term had run a bit longer last time, there would have been a chance of that.

CHAIR—In a sense, almost everything that government does has political overtones, regardless of political flavour.

Mr Harris—If I could help to understand where I am coming from, as a matter of law, for expenditure to be lawful it must be authorised by parliament and must be done for the right purpose. Done for the right purpose is an issue about motivation which most of us as observers will not have close understanding of in the sense that we were not participants in the decision, but as a matter of law we are obliged from time to time to look at the circumstances of government expenditure to determine whether the evidence available suggests it was done for a private benefit and that private benefit includes political party benefits. So what we are trying to do is to establish some rules or guidelines that help us examine these inferences to come to a view as to whether the expenditure was for a public or a private purpose.

CHAIR—But while governments make decisions and promulgate legislation to the benefit, they believe, of the nation, wouldn't they always take into account in the background the benefit to their political party or parties in staying in government?

Mr Harris—Yes, and the law recognises that and says: what is the substantial purpose of the expenditure? The law does not say that because there are incidental benefits of a private nature, whatever they are, that that renders the expenditure valid or invalid. The substantial purpose of the expenditure is that which we have to judge.

CHAIR—Can I get back to this issue again. The underlying principles say that it is legitimate to persuade members of the public to adopt action which in the government's view is in their interest and falls within the responsibility of government, but then you go on and say that political advertising is designed to influence public support for a political party. How on earth do you segregate? It is a practical matter. This is the issue which Mr Barrett addressed in his audit report on the CEIP, which is why we are here.

Mr Harris—For example, it is public knowledge that during the last general election in New South Wales the opposition advanced a policy about privatisation of electricity. As part of that policy, it offered $1,100 cash on the sale of the electricity industry. It is a matter of public record that the government, at government expense, obtained a tax opinion on the taxable nature of that grant and inserted that in the public arena. The writs had been issued. It was a caretaker government.

One could look at those circumstances to determine whether that expenditure, as measly as it was, was done for a public purpose, for governmental public purposes, or was done for the purposes of the Australian Labor Party. If someone complains about that matter, and someone did—I do not think that is a secret—if there is suspicion that it might be invalid, then I have an obligation to look at it and come to a judgment.

Mr GRIFFIN—On those points, when you are looking at the question of how you implement guidelines around these things, there is an element of case by case about it as to what you are saying, but there is also a question of those underlying principles. When you are talking about the question of things like what something is designed to do on a party-political basis, then obviously the context of when elections are likely to be or when elections occur are a key determinant in that.

Mr Harris—Yes.

Mr GRIFFIN—If the expenditure occurs in a timing in the cycle that is right on top of when an election is due, or alternatively if it happens to coincide with the government that controls that expenditure calling an election, then that is a legitimate issue to look at on the question of whether that has been done.

Mr Harris—Yes.

Mr GRIFFIN—Another one is—and I made the throwaway comment in line with the *Godzilla* movie; some members of the government thought I was talking about something else—that size does matter in the context of this sort of expenditure. Part of the problem is that we are talking about this particular issue with respect to the need for guidelines in the context of an example of what occurred, which we would maintain is an outrageous example. If we were considering these things outside that example, if we looked at principles and said that expenditure which is—depending on what figure you use—two, three or even four times the record previously, is excessive and therefore an issue that is worthy of consideration under any set of guidelines about the question of whether it is actually influencing things, then the other issue is the question of policy: what is a policy in the context of government policy, in the context of implementation versus government policy with respect to garnering support versus propaganda?

I am not drawing a line on that; I am just saying that those are the sorts of things that I got out of what you have been saying and what is in here around the sorts of issues that ought to be defined. I think it is a difficult thing to interpret sometimes, but there needs to be a situation and there can be a situation where guidelines are simple and address those issues. You will always have a situation with governments where attempts are made to maximise advantage but there is also a question about how far you go.

Mr Barrett—We are not suggesting that these were the definitive guidelines, but I seriously suggest that sections 2 and 3 do give at least some guidance and help in answering the question that you pose—that is, our suggested guidelines. I liken it to the fact that, at the moment, there are some administrative guidelines for advertising. You might say that there is no paddock; there is virtually a green field. What we are trying to do is to say, 'What is the size of the paddock and what is the size of the gates that we are opening or shutting that go into the paddock?' The guidelines are not meant to do anything more than to know that there is a paddock, that it has these fences around it, and the size of the gate is X. I think that what the Auditor-General's, as a consensus, would say is that whatever we can do to define that paddock and the size of the gates is very helpful in the circumstances and nature of this inquiry.

Mr GRIFFIN—We would say that there was a paddock and it operated informally. There was a paddock until 1998.

Mr Barrett—You are making the point there of the size of the program. I don't see that there was anything that actually defined what the paddock looked like in all of that period. Essentially, so long as the expenditure was reasonably low, no-one asked the question. That is why it is seriously put to you. The fact is that people are asking the questions now and they are looking around for what are the defined areas and there is no defined area—or a very limited defined area. Reading from the third dot point:

The recipient of the information should always be able to distinguish clearly and easily between facts on the one hand, and comment, opinion and analysis on the other.

If we looked at various advertising campaigns—I am not suggesting this one in particular—we might find that a number fail that test. As I have said to you on previous occasions, combining all those points of 2 and 3, if people of good mind sat down and looked at it in that way, I think that seven or eight times out of 10—and this is no more than a guess—they would reach an agreement that the particular campaign would fulfil most, if not all, of these points. There would be two or three about which there would be conjecture. The question we are posing—and the point I have made to you on a previous occasion—in essence, is that there is a second gate and that is a small gate which simply says, 'Is there a group of eminent people', as suggested by ACAG—I have suggested that it be a joint committee of parliament, for your consideration—'that simply makes the decision as to whether this should be funded publicly or not?'

The other cost-benefit decisions have already been made—whether the appropriate media are being used and to what effect, whether the message is getting across, and all those kinds of issues. At the end of the day, such a group—in the case of the UK, the secretary of the cabinet—would have this information in front of it. In essence, they would then decide, I suggest to you, in those two or three cases where there is clearly a difficulty—that is, the problems inherent in those particular campaigns—to raise the question of whether they should be publicly funded or not.

Senator FAULKNER—I do think that the suggested principles and guidelines which are appendixed to your report are useful. I do think that is a very helpful contribution to what will, hopefully, be some useful work that this committee has undertaken. It is a most helpful starting point for us. For the purposes of what we are doing here, I understand what you mean by 'paddock'. I am not entirely sure what you mean by 'gate'.

Mr Barrett—The gate is the people who are, in the first instance, deciding the nature of the campaign, whether it should go ahead and on what basis. The second gate I was talking about is the eminent persons, a joint committee of both houses or the secretary of the cabinet, or equivalent, simply making the decision as to whether this gate says 'publicly funded' or not.

Mr GEORGIOU—There is a proposal that there should be a quarantine nine months out from a certain election date. If you know what the election date is, there should be an agreed quarantine period. In New South Wales, you have a time certain election. What are the procedures that have been put in place about quarantines in New South Wales?

Mr Harris—The government announced, I think late last year, that there would be no advertising for two months prior to the election unless the advertising met certain criteria.

Mr GEORGIOU—Who determines that?

Mr Harris—The criteria were specified in the Premier's memorandum.

Mr GEORGIOU—And who determines whether or not the criteria are met?

Mr Harris—In New South Wales the agency will judge their proposed advertising against the criteria.

Mr GEORGIOU—So an agency can determine that this meets the criteria. There is no political intervention in that process.

Mr Harris—I hope not.

Mr GEORGIOU—It is not your anticipation that politicians get involved.

Mr Harris—The type and degree of involvement is one of the signs that the advertising would not be bona fide. I am not saying that the minister cannot get involved. I am just saying it is one of the issues we would look at to see whether the advertising is bona fide.

Mr GEORGIOU—Do we have a copy of the criteria?

Mr Harris—Yes, I can send the Premier's memorandum to you. It is basically related to issues of safety and commercial matters—like Tourism New South Wales, 'Catch a bus', 'Catch a train', 'Maybe you should have your inoculation for—

Mr GEORGIOU—We would like to see that. What happens if the election is not time certain?

Mr Harris—If the election is not time certain you would be giving public servants and governments of the day a signal that it is in everyone's interests to distance the election from advertising. It may be that one or two people have something in their mind that others don't. They could use the admonition that advertising should be distanced by not approving advertising that might come before them. Obviously, it is harder with a floating election. I suppose in the Commonwealth arena your election has been out of time 40 per cent or 50 per cent on occasions. It would work for 50 per cent of occasions.

Mr GEORGIOU—If one had a negative attitude one would suspect, from the expenditure, that Labor had intended to go to an election in July 1995. That did not happen. So does one just have a suspicious mind or is it difficult for anyone to tell when an election is going to be?

Mr GRIFFIN—There was no way known we were going to an election in July 1995.

Mr GEORGIOU—So is it proximity to an election that leads to doubts? Let me take July 1991 when Labor expenditure peaked and then declined. The proximity to an election in time uncertain elections is a very hard measure to put on what is the motive behind the expenditure.

Mr Harris—When you have a floating election it is not as useful a guideline as the guideline is when it is a fixed election.

Mr GEORGIOU—I accept that.

Mr GRIFFIN—Because there is a floating time and governments, with floating time periods, do not normally go full term, you might say, 'Okay, with a fixed election there might be a two- or three-month period with a floating time and there might be a six- or nine-month period.' That will not pick up all examples but it will still pick up some examples.

Mr Harris—As an auditor, I would look suspiciously at advertising that occurred just before an election. The further away the advertising is from the election the more comfortable I get, for obvious reasons.

Senator FAULKNER—I understand that, Mr Harris. That is very logical. To be specific, my complaints about CEIP in general terms went to its nature in promoting an election policy, its quantum and very much its timing. So, if you boil it all down, they are three major concerns; I had many other complaints also with which I probably drove poor old Mr Barrett mad. Nevertheless, they are three major concerns about the advertising itself. However, if the underlying principles of what the Australasian Council of Auditors-General put to us are in place, if these underlying principles do guide government advertising, I suppose you become more relaxed, do you, in relation to this timing issue?

Mr Scanlan—I think the answer to that is: yes, there is in existence then a reference point, a basis upon which we can make judgments. In the absence of any guidelines, the fact is that as Auditors-General we do have to make judgments as to whether government expenditure has been appropriate and so forth.

My objective, not only with ACAG and my colleagues but in tabling this document this morning, is to put in place what I believe to be the best that we have at a particular point in time. I do this in the absence of anything else, and there is nothing there. We have been through a long history, 10 years of review of government advertising in Queensland emanating from the Fitzgerald inquiry, a very thorough review process by the Electoral and Administrative Review Commission with comprehensive guidelines being produced but never adopted. Putting forward what I believe to be the best that we have at a particular point in time will constitute a tone of expectation and appropriateness in terms of future behaviour.

To a large extent, there is probably not a lot of advantage in our looking back and raking over the hot coals in relation to other elections but instead we should be looking to the future to put in place something that will be worthwhile. I might add that in relation to the Queensland guidelines I did consult widely outside government sources—with my colleagues from audit offices in other jurisdictions, with the Public Relations Institute of Australia, with a school of ethics from one of the universities and with members of parliament in Queensland.

Senator FAULKNER—Thank you for that. I think that background is helpful to the committee and I appreciate it. I would come back to where the Chairman started in terms of your submission the underlying principle that 'the dissemination of information using public funds should not be directed at promoting party political interests'. I do not want to open up this debate now because I have had it previously with Mr Barrett. He argued in his report on the CEIP that it was not within the mandate of the Commonwealth Auditors-General to judge the nature of the advertisements—that is, whether they are political or party political in

nature. Does Mr Barrett or any of the other Auditors-General see this as a fundamental problem?

I should say that I have form on this. I do not necessarily accept Mr Barrett's view, and I think he knows that. But regardless of that, even taking it in the hypothetical, here we have an underlying principle but with the Commonwealth Auditor-General saying that this judgment is not within his mandate to make. These are pretty fundamental problems when you start to grapple with how to apply the underlying principles to the real world. I am trying to ask that question without any spin at all—and I hope Mr Barrett appreciates that—and acknowledging that I personally have form on this.

Mr Barrett—I am repeating myself but, in the light of what I heard at the end of the last witness's comments, I think I should put this on the record again. I did elucidate on the use of the word 'mandate'. I said that, in retrospect, it probably was not the best word to use. But the mandate issues go to a couple of points which I will raise after I have raised my first point.

My first point is that there were no guidelines of any useful nature that I could use as a basis for the audit—and that is what Mr Harris and Mr Scanlan have just said. If there had been guidelines of that kind, I would have used them just as I do in any other set of approaches, like procurement guidelines. I go to the procurement guidelines and I have a point of reference.

So it is not my judgment, it is not your judgment and it is not the judgment of someone out there who is supposed to be eminent or dispassionate, et cetera. In those circumstances where there is no guidance, no guidelines, et cetera, again I would argue as I argued before: my judgment is no better than anyone else's judgment—and particularly if you are talking about motivation. What motivated people, what was in their minds when they took the decision I think is even more problematical.

Coming back to the mandate issue—and I stress this in so far as the Commonwealth Auditor-General is concerned—firstly, as you know, I am not allowed under the act to comment on government policy. The most I can do is talk about the administrative effectiveness of the implementation of that policy.

I have spoken to this committee before about the second point, and it is made clear in the explanatory memorandum that accompanied the new legislation. That is, my performance audit—and this is the basis on which this report was done—in accordance with the performance audit provisions of the AG act, would not extend to auditing the performance of ministers of state in relation to the exercise of their constitutional duties. Those are the mandate issues. But, as to whether I would have investigated the application of the guidelines if there had been such guidelines as these in place, of course I would have.

However, coming to my final point, the fact of the matter is that, regardless of what my view or otherwise might have been, the clear legal opinion that was gained by more than one source of legal advice was that the expenditure was made for legitimate Commonwealth government purposes. After that, as I would hope you would expect me to do, I have to have

evidence—not my judgment but evidence—of departures from whatever I can get to give me guidance as to the intention of the parliament and the government in these areas.

If we do not come up with any evidence of this being of a party-political inspired nature, then we do not have any alternative but to come out with the conclusion we came out with. That is not a defence of the report; it is simply a statement of fact. In essence, my point is that we support the notion of guidelines, not codification, for the reasons made by the chairman in his opening statement, which reasons I accept, and certainly of guidance, which at least gives some dimension to the whole exercise of investigation or audit in these circumstances, in the same way as we have done in many other areas of financial management.

Over a period of time, almost inevitably, we have improved the guidance. Take the example I mentioned, being one which this committee looked at recently: the purchasing guidelines. We certainly have improved the guidelines in that area. That makes it far easier for auditors then to audit the extent to which those decision makers are taking decisions that conform to those guidelines.

Senator FAULKNER—I think we need to be clear on this point, Mr Barrett. Obviously I have heard a lot of those views expressed previously by you, and I appreciate that you hold them. You say that a very important principle here is having guidelines and underlying principles. I accept that and I appreciate that.

This is what I would like to understand, if you or one of the other auditors could clarify this for us: it seems to me that the underlying principles in ACAG are broader; there are more of them and they are more complete than the ones in appendix 1—and I appreciate that this kicked off the process. From our point of view, I suppose it would be useful to know whether you, Mr Barrett, as Commonwealth Auditor-General, also embrace those underlying principles of ACAG and think that the underlying principles in the ACAG's submission might usefully fill out the underlying principles in the appendix of your CEIP report.

Mr Barrett—Mike Lewis has done a comparison between two, one where there is agreement and the other where agreement is not come to. We can provide that to the secretariat.

Senator FAULKNER—That would be extremely useful.

Mr Barrett—Although, as the letter conveying those guidelines said, I did not have any input into the guidelines prepared by other auditors-general, in broad terms I can support the thrust of those guidelines. I think the problems I have go to the Chairman's opening remarks and to the suggestion of an 'eminent persons' referral panel, if you like. For a number of reasons I am not supportive of that approach.

I would be more supportive perhaps of having some decision maker within the executive, along the lines of the UK. But, for the reasons I have spelt out at a previous hearing of the joint committee, I can see advantage in that being representative of all parties in parliament; basically, that would ensure that, where there were differences of views, it would be debated in the parliament subsequently, whereas, if a decision were taken the basis of which no-one

was aware of, it may or may not get into the parliamentary arena for debate. If a joint committee were to look at the issue and make a decision about it, if there were differences of views—and I do not need to tell you about this—inevitably there would be debate about it.

I come now to the Chairman's point about the grey area. I did raise the illustration in the report of the differences between green and white papers of government; whether they are in Australia or overseas, their nature is broadly similar. I tried to give that as an illustration of the problem I saw. Having a green paper going out testing public opinion and giving alternatives and pros and cons I see as being quite different to having a white paper going out with a single dimensional policy, saying, 'This is what we are going to do.' Quite obviously, where it is a single dimensional view in the circumstances that we have had in this particular case, I think that exaggerates the problem. I would have far less problem—and this is my personal view—with the green paper analogy in a pre-election period than I would with the white paper analogy in a pre-election period.

Senator FAULKNER—With the parliamentary committee, the weakness with all these advertising campaigns is that, once the damn thing has been on the telly, on the radio and in the paper, the horse has bolted. Isn't that so?

Mr Barrett—Yes.

Senator FAULKNER—No matter what extent of navel gazing there is after the event by any group of people, however eminent they may be, I think that just needs to be acknowledged in this particular area. If one finds that an advertising campaign did not conform with the spirit of underlying principles and guidelines, the truth is that the damage is done. That is why in this particular area it is pretty important, if possible, to get in front of the game.

Mr Barrett—I was advocating ex ante, not ex post.

CHAIR—Could you say that again, please?

Mr GEORGIOU—Before rather than after.

Mr Barrett—If it has gone through the processes, I cannot see why it cannot be put to the committee with this small gate, as I intimated to the committee before, as to whether or not this should be publicly funded. Very few advertising campaigns are of such urgency that a reasonable period would not exist, prior their going out into the media environment, for the carrying out of an ex ante review.

But I am not writing off ex post. This is what my colleagues and I were discussing this morning prior to this hearing. For instance, in terms of the analogy with audit reports, the fact is that, if guidelines are in place and particular issues come up with ex post examination, they can impact on that set of guidelines with the following case the next time around. In other words, like my procurement guidelines, there is a process of improvement. So ex post is not a lost cause.

Senator FAULKNER—Yes, but it was not clear whether you meant ex ante or ex post.

Mr Barrett—I meant ex ante.

Senator FAULKNER—I want to be clear on this point. Going back to my original question, with the qualifications that you have just made in your two recent comments, I assume that you are comfortable enough with ACAG's underlying principles. With those qualifying comments you have made and apart from those qualifications, with your being Commonwealth Auditor-General, as far as you are concerned, you do embrace the other elements of the submission.

Mr Barrett—In the broad. If you are asking me to give you detail, I am happy to come back to the committee. I am saying that we are broadly endorsing it, yes.

Senator FAULKNER—It strikes me that ACAG—and it might confirm this—has got your suggested principles and guidelines for the use of government advertising. It appears to me—but I am sitting on the other side of the table and I am not sure—that ACAG has used those as a starting point and has developed these in some areas a little further. Would that be reasonable?

Mr Barrett—Yes, that is correct.

Senator FAULKNER—That is my understanding. It reads that way. I suppose that someone should let us know whether that is the case.

Mr Scanlan—I will endeavour to answer that question. It is probably fair to say that we all have our own minds on this particular subject when it comes down to the precise wording used with the guidelines. For instance, with the Queensland ones, you will know that I have stuck pretty much to the foundation wording that was proposed by the Electoral and Administrative Review Commission, because I believe that is more akin to the jurisdiction of Queensland; whereas in terms of ACAG, I think it has been somewhat more of a measure of consensus in relation to some broad agreement of general principles. With the issue of the mechanism as to whether it is ex ante or ex post, perhaps there is some division amongst us in relation to what precisely is the best mechanism. But I would suggest that that is probably a matter for parliaments.

Senator FAULKNER—Yes, but obviously ACAG had this report before it developed this one. It had the advantage of Mr Barrett having run over the target first on this issue. That is a point, isn't it?

Mr Scanlan—Yes, although—

Mr GEORGIOU—Mr Chairman, can I pursue one issue?

CHAIR—Can I clear something up so that we have got it, because I have been wondering about this: did all the Auditors-General sign off on this? Is this submission signed off on by all the Auditors-General?

Mr Barrett—You know that I said I was not involved at all.

CHAIR—Yes.

Mr Barrett—For obvious reasons.

CHAIR—What about the other four?

Mr Harris—The other eight. The way that it works is that—

CHAIR—How do you get another eight?

Mr Harris—The territories. The way that it works is that each Auditor-General reserves the right to hold their own views, but they are happy to see a consensus view advanced indicating that they are broadly happy with it.

Mr GEORGIOU—In regard to which they could differ!

Mr Harris—Yes.

CHAIR—Did everybody have a look at this?

Mr Harris—Yes. This would have gone through every office.

CHAIR—Did they all comment?

Mr Harris—Yes. All the offices would have been involved and all the offices would have commented on it. But you should not hold each Auditor-General down to each word in it.

Mr GEORGIOU—Mr Chairman, I have let Senator Faulkner run on for well over half an hour. I would like some degree of balance. I have no problems with something arbitrary like a fixed period; my real dilemma is with regard to the juxtaposition between governments being entitled to, and should, advertise things that advise people, and the exclusion of partisan political advertising. My difficulty is with knowing why you regarded the tax campaign as anything that looked even vaguely like a partisan political campaign, because I do know what a partisan political campaign looks like, and you are never under any illusions when you have seen one.

It is the issue of how you differentiate between an appropriate depiction of a government's policies which, incidentally, benefit a government's position, and something that is not acceptable. You have to take into account that there is a total dichotomy with regard to a partisan campaign; as I said, it bites you fairly significantly when it is a partisan political campaign. They usually create devil figures on the other side and hero figures on your side. That is not what we are talking about. The issue is about something that is non-provocative but that does communicate—and does, incidentally, benefit the government. How do you differentiate?

Mr Harris—It was under Commonwealth law, I think, that the NRMA demutualisation was struck down, because it was regarded as being unfair. You might not characterise that as being party political in that context, but the court said, in the absence of information on the contrary position, that the demutualisation must not go ahead. The High Court in the Gambotto case, which has just led to a $21 million suit against three legal firms and advisers, said the same thing—that, in its context, advertising must canvass other acceptable views. One might argue that a green paper which advocated one view would not pass those tests that you applied to others.

Mr GEORGIOU—My difficulty is that, for example, with the immunisation ads, in which we have run a very heavy mass immunisation campaign, there are significant other perspectives. With regard to people who resist immunisation quite strongly, where we do not reflect their views on the issue, does that mean this is an unacceptable ad? I am not trying to create extreme examples—

Mr GRIFFIN—The other matter is the issue of advertising services that are available to the public in the context of that. I would argue that things like immunisation or advertising particular benefits—

Mr GEORGIOU—We were pressing for this—to have children immunised. We were saying that the consequences of their not doing so were detrimental to their health. It was quite a strong line.

Mr GRIFFIN—We as a government also provide a lot of immunisation support.

Mr GEORGIOU—So it is bipartisanship that is the key to an apolitical—

Mr GRIFFIN—No, I think the issue in this context is more a question of when you have actually got services being provided, services being offered—

Mr GEORGIOU—I would like an answer on the immunisation example: if there are significant counterpoints, should you put them in the ad?

Mr Harris—I think that if the government believes there is more than a minuscule risk relating to people who are being immunised, then it should disclose that in the advertisement; otherwise you are inducing people to make decisions with a lack of adequate information.

CHAIR—You said 'if the government believes'. Obviously, the government does not believe that, but as Petro said, there are divergent views, and they are highly vocal.

Mr GEORGIOU—If you think that the risk is substantial; whereas the government's view is that it is not substantial.

Mr Harris—I understand that people hold that view. The issue is: is that view a scientific view or is that view a personal view that people have come to? If there is in the community a scientific consensus that there is a risk that is not imperceptibly small, then the government should disclose it. If the scientific community believes—and I think it does—

that the risks associated with immunisation are imperceptible, are very small or trivial, then to mention it in the ad is to mention something that is trivial.

CHAIR—If an opposition believes that a government's policies are just wrong, all of them, does that then mean that the government should not advertise?

Mr GRIFFIN—We don't. We agree with immunisation, for a start.

Mr Harris—I have grave difficulties with advertisements that are about approbation, admiration, gratitude and appreciation. I have difficulty with an advertising campaign that the government puts up trying to persuade people to one view when there is a legitimate other view available, a la the NRMA case, the AMP case or referenda. Even when you have government and opposition agreed on referenda, as occurred in the 1960s regarding Aboriginals, there was an obligation on the government to put the other side, even when everybody in the government agreed to the one proposition.

Mr COX—My recollection of government advertising was that there had been a convention that governments did not advertise programs for which they did not have some kind of legislative cover. I think it is probably unfortunate that it was never written down as a guideline because it was a convention. I think this government has taken advantage of that fact.

I have circulated a bit of paper which proposes an objective test: that the government either has to get legislative cover—that is, pass the necessary enabling legislation for, for example, the tax package before it can go out and spend public money on telling everybody how terrific it is, or otherwise—or, alternatively, for those things that governments have traditionally spent quite large amounts of money on, such as anti-drug campaigns, they should go to the trouble of getting a specific appropriation through the parliament for those advertising campaigns, so that there has been a degree of parliamentary scrutiny of those kinds of advertising programs.

Do you see a suitable role for an objective test like that as one of the gates that stops there being a debauchery of our democracy by spending large amounts of money on political propaganda?

Mr Harris—There is nothing wrong with parliament requiring of the government that it itemise its proposed expenditure on advertising so that parliament can subject it to individual scrutiny. That is why we have a parliament—to monitor and oversight the activities of government. And if parliament is concerned about this matter, there is nothing wrong with that. And there is nothing wrong with the view that parliament would not wish the Advance to the Minister for Finance and Administration to be used for advertising unless there is some other fail-safe process. The parliament may impose on legislation such restrictions that it feels comfortable with.

Mr ANDREWS—What about the notion of an objective test?

Mr Harris—I do not think anything in life is objective. And the more important it is, the less it is objective. But you can make decisions ex ante as a parliament about particular

expenditures that the government is seeking provisions for on the basis of what the government intends to achieve from them. And, using these guidelines or others about quantum timing and nature, you can come to some judgments.

Everybody comes to judgments about advertising. I know that my colleague said he did not. He is lucky that he did not, because the people who are authorising the expenditure have to come to judgments about whether it is lawful expenditure or not. The people who are committing it have to come to those judgments, and some of us believe that in our assessing of it we have to come to that judgment as well. So these things are part and parcel of our life.

Mr Barrett—I would just like to say quickly, though, that we did come to a judgment on the basis of legal advice that it was lawful.

Mr ANDREWS—Can I just seek to tease out two things. The first relates to the distinction between green and white papers. I understood certainly what Mr Harris was saying. I think Mr Barrett—but correct me if I am wrong—was saying that it would be legitimate for a government to issue a green paper in which a range of proposals or a number of options for dealing with some subject matter could be canvassed, but a white paper, which usually follows the green paper, would be in a different category. Am I correct in that understanding of what you were saying?

Mr Barrett—I was using that like a broad guideline. I was using that as an analogy and saying that where a campaign went out and showed pros and cons and gave options and was meant to educate and to inform and get a reaction back from the general public, then I would view that somewhat differently from one that went out with a unilateral position and said, 'This is it,' and did not have any pros or cons, did not have options, et cetera, and virtually, almost, did not invite a response, other than from someone who was disgruntled—in other words, 'Here it is,' and 'This is what is going to happen.'

Mr ANDREWS—Presumably, on that line of thinking a white paper which came to a concluded position, which could be said in other terminology to represent a government's policy position, which followed a green paper which had canvassed a series of options would be appropriate.

Mr Barrett—Yes, in that case, because you have gone through a whole process. I was just using the analogy, rather, to illustrate two situations. I said to you on a previous occasion that in my opinion the advertising campaign had more of the attributes of a white paper than of a green paper.

Mr ANDREWS—My other question is to Mr Harris. Can I just tease this out for the sake of trying to understand the practical application of these sorts of guidelines, if you are willing to do that. You gave the example at the outset of 'if somebody had complained about the obtaining of legal advice about the privatisation issue in the recent New South Wales election'. Are you able to venture an opinion as to whether the obtaining of that advice would have been appropriate under these guidelines?

Mr Harris—You could come to the view, depending on the circumstance, that the power the person held was not executed bona fide and, therefore, was void. In other words, the power was void, therefore the expenditure was unlawful. You could come to that view.

Mr ANDREWS—Can I press you, Mr Harris? When you say, 'You could come to that view,' is that the view to which you are inclined? Is that what you are saying?

Mr Harris—I have to be very careful, because I actually report to parliament on this tomorrow.

Mr ANDREWS—I see. I do not want to create a problem for you.

Mr Harris—But it is not hard to read this about advertising and apply it to getting a tax advice. The timing was relevant. There is the fact that after the writs were called, the government was a caretaker. Why did it want advice on the matter? Why did it want advice on the tax issue, because it had no power to make policies? You could see that the advice was received within an hour or two of its request. There seems to be some urgency about it. Why was it urgent in the middle of an election campaign? You could see that it was a four-paragraph advice which did not even mention the Commonwealth Income Tax Assessment Act. What kind of advice on tax does not talk about the law, or at least the paragraph of the law that is relevant or cases that are relevant? You could come to the view that the information was put into the public domain moments after it was received, so you might come to the view that its purpose was to play a role in the campaign.

Mr ANDREWS—If the advice had been a 50-page memorandum from Tom Hughes QC or David Jackson QC or one of the other leading lights of New South Wales Bar which had taken some days to work up—although silks often have to work up at short notice—and then had been considered by the Attorney-General and then released, would that change the nature of it?

Mr Harris—The three-legged table still stands. You do not need four legs.

CHAIR—We have come to the end of our time. If there are no objections, would someone please move that the additional submission by Mr Robert McClelland MP for the ALP dated 17 May be accepted as evidence and authorised by publication as submission No. 24?

Senator FAULKNER—I move that.

CHAIR—There being no objection, it is so ordered. Is there any objection to the *Draft guidelines for Queensland government communications strategy and plans/programs*, as presented by Mr Len Scanlan, Queensland Auditor-General, being taken as evidence and included in the committee's records as exhibit No. 21? There being no objection, it is so ordered.

Resolved (on motion by **Mr Cox**):

That this committee authorises publication, including publication on the parliamentary database, of the proof transcript of the evidence given before it at public hearing this day.

CHAIR—I declare this public hearing closed. Thank you, one and all.

Committee adjourned at 12.57 p.m.