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JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

Reference: Disclosure of donations to political parties and candidates

TUESDAY, 11 MAY 2004

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JOINT COMMITTEE ON ELECTORAL MATTERS

Tuesday, 11 May 2004

Members: Mr Georgiou *(Chair)*, Mr Danby *(Deputy Chair)*, Senators Brandis, Faulkner, Mason, Murray and Ray and Mr Forrest, Mr Melham and Ms Panopoulos

Senators and members in attendance: Senators Brandis, Faulkner, Mason, Murphy and Ray and Mr Danby, Mr Forrest, Mr Georgiou, Mr Melham and Ms Panopoulos

Terms of reference for the inquiry:

To inquire into and report on:

(a) the matter relating to electoral funding and disclosure, which was adopted by the committee on 15 August 2000, and any amendments to the Commonwealth Electoral Act necessary to improve disclosure of donations to political parties and candidates and the true source of those donations; and

(b) Any submissions and evidence received by the committee in relation to that inquiry of 15 August 2000.

WITNESSES

Committee met at 3.59 p.m.

BECKER, Mr Andy, Electoral Commissioner, Australian Electoral Commission

MITCHELL, Ms Kathy, Director, Funding and Disclosure Section, Australian Electoral Commission

ORR, Mr Doug, Assistant Commissioner Elections, Australian Electoral Commission

CHAIR—Welcome to the Joint Standing Committee on Electoral Matters inquiry into the disclosure of donations to political parties and candidates. This inquiry was referred to the committee by the Senate on 4 March this year. It reopens the committee's electoral funding disclosure inquiry which lapsed at the dissolution of the last parliament in August 2000. The then Special Minister of State, Senator the Hon. Chris Ellison, requested this committee to inquire into those recommendations of the AEC's 1996 and 1998 funding disclosure reports not currently incorporated into legislation or previously examined by the committee. The committee was asked to report on the desirability of incorporating the remaining AEC funding and disclosure recommendations into existing legislation. In the last parliament, the committee received 21 submissions and held three public hearings in Canberra. In the current parliament the committee has received a further 11 submissions to the inquiry, two of which have been authorised by the committee for publication and are available on the committee's web site. We await the authorisations for the others later.

This afternoon we will be hearing from the Australian Electoral Commission. I remind witnesses that although the committee does not require you to give evidence under oath this hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the houses of the parliament itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. The evidence given today will be recorded by Hansard and will attract parliamentary privilege. I welcome the witnesses from the AEC to today's hearing. I would also like to thank you for rescheduling your other commitments at short notice to appear before the committee this afternoon, and I say that quite sincerely. The committee has already received your submission. It has been numbered 11 and has been authorised for publication. Are there any corrections or amendments that you would like to make to the submission?

Ms Mitchell—We have referred some corrections to the committee secretariat.

CHAIR—I understand they are marginal.

Ms Mitchell—Yes, they are. They are typographical.

CHAIR—Do you wish to make a brief statement or summarise your submission before the committee proceeds?

Mr Becker—I will make a brief statement, thank you. At the JSCEM hearing of 25 September 2001, the inquiry into electoral funding and disclosure, I made an opening statement that briefly referred to a perception that the disclosure of political financing in Australia was not yet satisfactory—that is, that attempts to purchase political influence could still be concealed

from public view. The major parts of the AEC's submission to the JSCEM's funding and disclosure inquiry commenced in the previous parliament dealt with detailed comments on perceived shortcomings in the funding disclosure and party registration schemes. At the committee's request, the AEC have consolidated our submission to that inquiry and our submission to this inquiry.

In addition I would like to suggest that the JSCEM consider one further step in this inquiry. The AEC this year celebrated the first 20 years of its existence. Concurrent with that anniversary is also the anniversary of several significant sets of developments in Australia's federal electoral law. One of those was the introduction of schemes for the contribution of public funds towards the cost of election campaigns and the public disclosure of the major elements of election financing. The AEC believes this inquiry, coming on the heels of the 20th anniversary, puts forward an appropriate occasion for the JSCEM to reconsider the goals expressed in the September 1983 report of the Joint Select Committee on Electoral Reform for the election funding and financial disclosure schemes; to confirm whether those are still appropriate goals for the schemes or whether, after 20 years, they should be refined; and to assess whether the current legislative regime sufficiently meets those goals. I realise that is quite an ask, given that we may, unfortunately, be hit by time, depending on the timing of the election. Nevertheless, it would be an appropriate time, I think, if the committee can get around to it, to look at it in the light of what has happened in the past 20 years.

CHAIR—Mr Becker, I will start off with a very straightforward question. There are some 57 recommendations made by the AEC, which is the consolidation of a number of previous recommendations plus four or five new ones. Could you get at some stage for us a list of your priority asks?

Mr Becker—We can. I am not sure that we have done that.

Ms Mitchell—I have not prepared them in any priority, but I can do that.

CHAIR—Without pressing you to rank the 57, could you list the major areas of concern that you really do believe need to be acted on.

Ms Mitchell—We could give you a top 10, if you wanted.

CHAIR—Could you give us a top 3 now?

Ms Mitchell—Off the top of my head, yes. It is problematic in that we would probably say that our main recommendation is our very first recommendation, that the issue needs to be reviewed. On page 16 of our submission we say:

> … that the JSCEM specifies the breadth of coverage of disclosure believed necessary under the Electoral Act, from which the existing legislation can be reviewed and, as necessary, redrafted.

If we had to point to a top recommendation, that would be it. The AEC gets a lot of media commentary, and I would say that the primary concern about that media commentary in relation to funding and disclosure is that people have a perception of what the scheme can achieve that is different from what the scheme can actually achieve. Their expectations may be greater than is

necessarily relevant. The community expectation exceeds the scheme itself. We think that the committee is one of the bodies best placed to inform the AEC and the public—and, for that matter, the parliament—as to what the scheme should achieve. There was a fairly lengthy statement in the 1983 Joint Select Committee on Electoral Reform report about what the scheme should achieve. Are those things still relevant? Now that we have had 20 years of the scheme, should we be rethinking what the scheme is about and what it is meant to achieve? I think that that is why we in the AEC have made our first recommendation in the terms that it is in. That would be our greatest priority at this stage.

In relation to other things, I guess it is not so much a question of what is a priority for the AEC as a question of what the AEC understands as a priority in relation to that public commentary that we are getting. That is that people think that there is not sufficient disclosure of people who make payments to parties. Not all of those people will necessarily fit the definition of a donor under the legislation, but it may well be that, rather than there being a donor disclosure scheme, there should be a payments made disclosure scheme. That payments made scheme should cover both payments to parties and payments to associated entities. The current scheme does not fully achieve that.

CHAIR—Just on that level of generality, I was struck by a couple of your recommendations about the issue of amendments to returns. That definition of properly made returns and amended returns and some of the sanctions that you propose seem, at least to me, to be reasonably draconic. What is the motive for this? Is it so that the system actually works? Or is it so that it is also seen to be sanctioned at a very substantive level, so that the commission can say, 'Perhaps it wasn't complied with, but at the very least people were punished'? I speak as a former apparatchik, so believe me when I say that we never intended to disguise anything but we sometimes made errors. We would get absolutely mortified—you will have to take me at face value—when there was an error or an omission that we had not picked up, with very clean hands. Take for example the sanction relating to a completed annual return—namely, one to which no amendments are possible. It involves deregistration if you fail to achieve that, and that seems to me to be a bit severe.

Ms Mitchell—The AEC are not intending that there would be severe penalties for people that make genuine mistakes. What the AEC are trying to point out is that some of the amendments that we receive and some of the effort that we have to go to to either (1) get a return or (2) get a completed return would not necessarily be required if people were actually putting the effort into their returns that perhaps they should be. The AEC, as I think you know, carry out what we refer to as compliance reviews. That is, we actually go and visit parties and associated entities to check their records to make sure that we can have a degree of confidence in the completeness and correctness of their returns. As a part of that process the AEC get exposed to the systems that parties have in place and the degree of effort that parties put into getting their returns complete. In that process we have experienced not only people who are terribly upset by the fact that they have missed something from their returns but also people who are not necessarily paying the degree of attention to getting their returns right that one might expect given that the disclosure scheme is about the integrity of the electoral process.

Obviously evidentiary processes would have to be gone about, and natural justice would have to be taken into account and those sorts of things. The AEC is not expecting that it will be given powers to punish people that are genuinely trying to meet their disclosure obligations. But the

AEC believes that people are not necessarily taking things as seriously as they should be taking them. If there were appropriate penalties in place then they would take them seriously. Certainly the AEC believes in the potential of deregistration for failing to meet your disclosure obligations, which would mean that you then would not get the benefits that flow from registration. It would not mean that you would have to cease to operate as a party; you just would not get the benefits that go with registration. That would make people take the disclosure scheme seriously.

Mr MELHAM—Are you proposing strict liability provisions, which would make it easier for the Electoral Commission to prosecute some of these matters, and more onerous for those filling out the returns?

Ms Mitchell—We have not necessarily thought through whether it would be a strict liability provision. I guess we would be keen to hear the committee's opinion on that sort of thing.

Mr MELHAM—I am keen to hear yours. The reason I say that is that I want the commission to make out a case. I am not interested in wish lists for matters of convenience or whatever. What I am interested in is the commission saying to us, and being able to put evidence before this committee that demonstrates, 'There is a problem here, this is the best way to solve the problem and this is our recommendation because of (a), (b) and (c).' Because there is a difference, as you know, with strict liability as against having to prove the necessary intent.

Ms Mitchell—I would propose strict liability for failure to lodge but not for incorrect returns. That is the way it currently is in the legislation, and I would not propose any change in that. I do not think Mr Becker would disagree with me on that point. If the committee wants, we can give you statistics—and I would prefer not to name parties, because I do not think that is appropriate—of parties and how often they get it wrong, like the numbers of amendments and all those sorts of things, and whether it is the same parties from year to year. We are experiencing that year after year. Despite the fact that we go and compliance review parties, despite the fact that we go through and say, 'You're getting this wrong, you need to do these things, it would be better if you did it this way,' and despite the fact that there are now very cheap computer hardware and software facilities for parties to use as tools to help them get their returns right, they are still not getting them right. The AEC believe that a degree of that, from our experience, is due to a lack of appropriate effort on the parts of parties.

CHAIR—On the face of it, you seem to be proposing strict liability for incomplete returns. I appreciate your sensitivity about naming parties. The committee probably shares that. Is there any systemic difference with the parties that put in less effort? Are we talking about large parties as against small parties, or the larger bits of the larger parties—or are all political parties much of a muchness? Treat it with a level of generality.

Ms Mitchell—In terms of the result, all political parties are probably much of a muchness. I would say there is probably more capacity in larger parties to have a greater ability to get it right. But I think the reality is that every party at some point in time has had an incomplete return.

CHAIR—I would like to pursue the issue of party resources because, as I said, this is interesting to me. One of the issues that confronts political parties a lot of the time—whether it us, the Labor Party or certainly the Democrats—is that our organisational resources are pretty

thin. Does the commission have a perspective on that or do you think that a bit of paper is just a bit of paper and deal with it at face value?

Ms Mitchell—No. When the AEC does compliance reviews we certainly discuss with parties the systems they have in place to do things. The sort of work we are doing when we are doing compliance review is not standard auditing processes. Unlike a party's accountant—if they have an accountant—we are not sitting there and passing judgment on whether or not the party should be keeping their books in a particular way or using a particular software program or those sorts of things. But it is certainly something we can comment on to parties because if your systems are not as effective as they could be then your chances of having an incomplete or incorrect return are going to be heightened. Certainly the AEC tries to fulfil an educative role as part of those compliance review visits. It is going to be easy for us to do our job if parties are more capable of fulfilling their functions as well. Obviously, to some degree, helping parties to get things right is a bit self-serving.

CHAIR—How do the parties take this? Are they generally responsive or do they tell you to rack off?

Mr Becker—There have been personality clashes in the past, which caused a few problems.

Ms Mitchell—It depends on the personalities. Obviously we walk a fine line between what is party business and what is AEC business. I think parties are sensitive to the issue, as is the AEC. But generally the people we deal with understand that we are trying to do a job and they are trying to do a job and we are working together to try and achieve a particular goal. Whilst there certainly have been issues in relation to contact with parties, by and large I would say it is a fairly cooperative process and input from the AEC is reasonably well received, although not always.

CHAIR—Is there any systemic difference between the level of accountability or responsiveness on the part of central party organisations and things like supporters clubs? Is the same ruler run across both the highly volunteerised groups and the official central secretariats of the various parties?

Ms Mitchell—It has been our experience that the contact we have with volunteers is very helpful and friendly.

CHAIR—Tell me the rest of it!

Ms Mitchell—When you are dealing with the parties themselves, you have a particular machinery in place and they have particular processes. There is a hierarchy within those organisations. Obviously, when the AEC is dealing with the people who are doing the work and we are discussing things with them, they have people that they have to clear things through. So you face a more convoluted process when you are dealing with the party, because of the machinery that is in place, than you might when you go out and visit the small party units in the suburbs or in small country towns. It is a less formal process when you are dealing with volunteers that work for parties and that work for organisations such as associated entities. It is a different thing.

Mr DANBY—How do you handle those difficult circumstances when you have to ask people about associated entities? For instance, say you have noticed very large donations involving the Cormack Foundation or the Greenfields Foundation. How do you handle it when someone says, 'I am not going to disclose to you where the donors have come from'?

CHAIR—Markson Sparks.

Ms Mitchell—Most of the larger associated entities are subject to compliance review, so we have a standard process. They are actually quite used to dealing with us now. The first thing that we do when we want to go and compliance review an organisation is send out a letter notifying them. That letter sets out the legislative power that we have, the sorts of things that we are looking for when we go there and what documentation we want to have a look at.

If there are problems with doing that when we arrive there the idea first of all is to discuss the issue with people. That is what we do. We discuss with the people of the organisation the process and the legislative provisions and tell them compliance reviewing is just a normal part of the work that we do. We tell them exactly what the purpose of conducting a compliance review is. We have a one-page sheet that we can give to people that explains why we do compliance reviews. We can hand that to them and they can have a look. We are now actually attaching that to the letter that we send out as well.

There is first of all a discussion process that happens. If there is still a refusal to provide documentation the staff who go out will then ring me and discuss what the issue is. Then we will consider whether or not we have to issue further formal notification under the legislation to provide specific documentation. Once we get to the stage where there are certain notices that we are serving there are offence provisions for failure to comply with those notices, so they need to be advised in the notice that if they do not provide the information required there are potential prosecution consequences that might result from that. Then it would potentially carry on from there.

Senator FAULKNER—Does that sheet include an outline of your powers under section 316?

Ms Mitchell—It does it in fairly broad terms, I would say. Because there are a variety of powers under section 316 in relation to different matters it does not go into the detail of what each subsection specifically says.

Senator FAULKNER—Has that sheet been provided? It may well have been provided previously to the committee.

Ms Mitchell—I do not think it has been provided to the committee. It has been provided previously to parties but I do not think it has been provided to the committee.

Senator FAULKNER—That might be useful, if we could have it. In relation to section 316, when did the AEC last use its powers under that section?

Ms Mitchell—You mean to actually get to a prosecution stage? We exercise our powers full stop when we are doing compliance reviews. Compliance reviews are conducted under subsection 316(2A), so every officer of the AEC who goes out to carry out a compliance review

is in fact exercising an authority given to them by the commission under section 316 of the act. We have the standard auditing powers in section 316.

Senator FAULKNER—Yes, but there are prosecution powers, too, aren't there, effectively?

Ms Mitchell—Yes, there are. There are the standard auditing powers, then the specific information gathering powers, then the prosecution powers that result from the specific information gathering powers.

Senator FAULKNER—So in relation to perhaps those last two categories—because I understand the distinction that you properly draw—would you be able to inform the committee when those—

Ms Mitchell—To the point of prosecution? Not in my time in funding and disclosure but I have only been there for three years. I would have to check back through our records.

Senator FAULKNER—What about the middle range for the use of the powers—the second leg of the trifecta?

Ms Mitchell—We have used the information gathering powers during my time in the Funding and Disclosure Section of the AEC over the last three years. We have used them in relation to a variety of matters. We have used them in relation to specific matters that we are looking at and we have also used them in instances where we have been declined access to documentation as part of our standard compliance reviews.

Senator FAULKNER—When did you last use your section 316 powers for that purpose?

Ms Mitchell—As part of a standard compliance review?

Senator FAULKNER—No.

Ms Mitchell—In relation to special matters, I think the last letters that we would have sent out were in January.

Senator FAULKNER—Can you say for what purpose?

Ms Mitchell—I would prefer only to say in relation to some of those special matters that we are looking at at the moment.

Senator FAULKNER—Is there an issue here in relation to how these powers operate? There has been a bit of a question about this. Have you sought any advice on the operation of the powers?

Ms Mitchell—Yes, we have.

Senator FAULKNER—It might be useful for the committee to understand a little more about that.

Ms Mitchell—One of the issues that we have to look at when we are exercising our powers is whether there is a concept of reasonable grounds there. One of the things that the AEC needs to be mindful of when it is exercising its powers is that, as an agency of the Commonwealth, it does not have the right to go barging in and demanding anything at any time, anywhere. It actually has to have reasons for doing what it is doing. As part of that process, one of the disciplines that we have had to adopt, particularly given the amount of attention that has been paid in recent times, is to make sure that before we exercise our powers under section 316 we are actually in a defensible position. So if somebody asked us—say, a court—why we did what we did, we could say, 'Here are our grounds for acting the way that we did.' In recent times—certainly more recently for me than when I first joined the funding and disclosure section—we have had to seriously turn our minds to the issue of making sure that we are clear about what our grounds are when we are acting under—

Mr MELHAM—Do you have guidelines in that regard that you follow?

Ms Mitchell—The commission has issued some guidelines on some aspects, and the funding and disclosure section has its own guidelines in relation to others. Most of it has been informed by legal advice, either recent or in the past, and also by a court case back in the late 1980s.

Senator MASON—Does that allow for random audits?

Ms Mitchell—Subsection (2A) allows for random audits.

Senator MASON—So you could still do that?

Ms Mitchell—Yes. It is when we are actually looking for specific things that we start to get into the whole 'reasonable grounds' test. Subsection (2A) has different wording. Subsection (2A) is for the purpose of finding out whether a person has met their obligation under the act, whereas when you start to get into subsections (3) and (3A), they talk about an authorised officer having reasonable grounds to believe certain things. It is a different process and a higher test that we have to pass when we start using those parts of the section.

Senator FAULKNER—In relation to the advices that you have sought, I was interested in whether those advices were in relation to the broad operation of the act as opposed to advices about the application or about how the powers might operate in relation to a specific instance.

Ms Mitchell—They have been about that broadly, but they are about subsections. Because the subsections of section 316 have different concepts in them, the advices that we have received have been about a specific subsection.

Senator FAULKNER—Is it about a specific subsection but how it applies to a specific matter that is before you—

Ms Mitchell—Yes.

Senator FAULKNER—or is it in the broad—about broader application of that subsection?

Ms Mitchell—They have first of all addressed the broad application of that subsection and then gone on to address the specific matter that we were looking into at the time that we asked for the advice.

Senator FAULKNER—So your motivation for seeking these advices is basically that you have a difficult matter of law or whatever before you?

Ms Mitchell—Yes.

Senator FAULKNER—That is the motivator; that is the reason for you seeking these advices?

Ms Mitchell—Yes, it is.

Senator FAULKNER—Let me come back to my earlier question: are you able to tell us what the difficult issues were that forced you to go and seek legal advice?

Ms Mitchell—It is probably easy enough to tell from the various subsections. Subsection (3A), for instance, is about associated entities and we have had advice on that matter. I think the committee is aware of some issues in relation to associated entities that we are looking at. So I would probably prefer to leave the description at that if that is okay.

Senator FAULKNER—I am happy to use the forum of Senate estimates to go into these things in greater detail, where we do. We are not quite so—

CHAIR—I think you are trying to say 'polite'!

Senator FAULKNER—I take extreme exception to that; we are very polite at Senate estimates.

CHAIR—Yes, I noticed!

Senator FAULKNER—Reasonable questions are asked, and frank answers are adduced.

Ms Mitchell—It is on record at Senate estimates. So I guess I can say that, based on the record of Senate estimates, the particular issues we are looking into at the moment are to do with the associated entities Australians for Honest Politics and Fair Go Alliance, and issues have been raised about some organisations relating to The Nationals.

Mr MELHAM—Can I just say and declare, as you have mentioned Fair Go Alliance, that I was a recipient of funding from Fair Go Alliance which I properly disclosed and I am a trustee of the New South Wales branch. I am also aware that an amended return was put in, but it was not required to be amended as a result of anything that my office or I did.

Senator FAULKNER—It sounds like you are in the clear then, Daryl!

Mr MELHAM—I am absolutely in the clear.

CHAIR—Thank God for that, otherwise we would be in deep trouble! Can you tell us what the general issues were that had to be resolved through legal advice? I am not as interested in the specific organisations as other people might be.

Ms Mitchell—It is an issue of interpretation of the subsections, the extent of our powers under those subsections and the sorts of things that we have to take into consideration when we are exercising those powers. So, when we want to be able to establish that we did have reasonable grounds at law, what is the concept of reasonable grounds? And what is it that we need to have those reasonable grounds for? They are those sorts of issues.

Mr Becker—I think that is where 'reasonable grounds' has to apply.

CHAIR—Given your experience with this—I have read the submission, but it is easier to understand face to face—have you actually identified some fundamental issues that prevent the commission from behaving in ways that you would like to behave, that you think would be in the interests of the intentions of the act, that are quite clear-cut and that do not give you, not ethical problems but rather reasonable grounds problems? Is there anything that sticks out which, if it were not there or if something else were there, would mean you could do your job better?

Ms Mitchell—The issue for us in the matters we have just been discussing has been the difference between the public expectation of what we can do and what the legislation gives us the power to do. It is an issue that we are still thinking through. But I am not necessarily convinced that the public expectation of what we should be able to do—which is to go on the fishing expedition that the commissioner just mentioned—is in fact appropriate for any agency of the Commonwealth to do, including the AEC. So we are still thinking that one through and I do not believe that I can give you a definitive answer to that at this stage.

In relation to other aspects, there are certainly definitional issues regarding things like 'gift'. When you are talking about what a gift is and the whole concept of whether you got your money's worth and were given adequate consideration, those sorts of things can be problematic because it is very much in the mind of the giver as to whether or not they have got their money's worth for what they gave. While there are certainly some evidentiary steps that one can go through in trying to establish with a court that a person must have intended X if they did Y, they are not necessarily easy things to prove. If you are at a stage where you do not believe that you could defend yourself in court then perhaps it is not appropriate for you to act that way, anyway.

There are also, I believe, issues in relation to the definition of associated entity, which we have mentioned in our submission, which perhaps could be clarified if particular organisations are meant to be captured. Again, that is about the public expectation that certain things will be captured and an understanding by the AEC of what can be captured and whether those two things need to parallel one another.

CHAIR—I will pursue one point about expectation and fishing expeditions. Could you flesh that out a bit?

Ms Mitchell—The issue that seems to come up time and again, particularly in the media commentary but also from members of the public who complain to us, is that they seem to expect that if a complaint is made to the AEC then the AEC automatically has the power to go

and investigate that complaint. That may not necessarily be the case because there is this concept of having reasonable grounds to believe something. The AEC has to believe there is an issue there that needs to be pursued; it is not that the person complaining to us believes that there is an issue that needs to be pursued.

In particular, one of the things that public commentary seems to cover off is that the AEC is expected to pass some sort of moral or ethical judgment on what is happening, and that is not one of our powers under the legislation. What we are about is achieving disclosure in term of the provisions of the legislation. Whether or not the money should have been given or should have been received and the rightness of the purpose for which it was given are not the sorts of things the AEC assesses or comments on. There is, I believe, from my experience in dealing with the media and with the complaints that we get from members of the public, an expectation that the AEC will have a function in doing that. There is also some expectation that the AEC will resolve internal party disputes. That is not our function, either.

Senator FAULKNER—That is a very good point that you make, I must say. I am sure the other committee members understand this. But what I wonder, having looked at your submission, is whether—and this might be a question best directed to you, Mr Becker—we are really at the point now where it boils down to the fact that you really want to see section 20 of the act rewritten, as opposed to tweaked. You have made a lot of useful recommendations, in my view, in this submission. I suppose that is the fundamental point: are we at the point of a major rewrite to clearly set out the principles for disclosure and the AEC's role in enforcement?

Mr Becker—We are at that point. The question is whether we have the time to do it at the moment. I mentioned in the opening statement that for the committee to consider all these things is a big ask. The 20-year review is pretty much what we are talking about.

Senator FAULKNER—Let us for a moment put aside time constraints. That is a valid thing to raise, but are we at the point of needing it? I accept that there are always constraints. There have to be. More important than time are political will and so on. There are all those other elements or imperatives that come into play. But the bottom line is: are we at that point? That is what I want to ask. And it is the last thing I can ask you because I have now been informed that I have to go to the Senate chamber to make yet another brilliant speech.

CHAIR—Go forth and be brilliant. That is of fundamental interest. What are we actually looking at here? The point about leaving time aside is a different issue.

Mr Becker—Obviously, this is not unmanageable. We are managing it. It is a very difficult area to manage, but nevertheless it is being managed. But it does need some clarification. Section 306B needs to be clarified because of its constitutional implications. It is the time when we really need to sit down and revisit the whole of part XX.

Senator FAULKNER—Apart from how we deal with this current inquiry, there are a lot of useful recommendations here. There are 57 recommendations; a lot of them are very useful. I certainly support the vast majority of them myself. But the key thing is this: is that tweaking going to help us or do we need a rewrite? Before I leave, I would be interested in hearing your view.

Mr Becker—Obviously, ideally, a rewrite. But I think tweaking might have to suffice.

Senator FAULKNER—Thank you. I do not think I can come back because of what is happening downstairs. I am sorry about that.

ACTING CHAIR (Mr Danby)—It is resolved that submissions numbers 3 to 11 be accepted as evidence for the committee's inquiry into the disclosure of donations for political parties and candidates and that they be authorised for publication. Mr Melham, do you want to pursue Senator Faulkner's line of questioning?

Mr MELHAM—I am happy to pursue my own line of questioning, but I will hand over to Senator Murray first.

Senator MURRAY—I do not want to go into any depth without other members of the committee here. I must thank the AEC for their submission. It is very useful, very helpful. In terms of progressing what I suppose we could call reform of the funding and disclosure area, your recommendations in the broad have been around for many years and the government has had the option at any time to take them up and put them into legislation. They have not done so. My opinion is that they will not do so without this committee's backing. In other words, this committee has to take the initiative. But you have discourse with them separately from this committee. I want to ask you this: is it the case that it is this committee, and only this committee, which is likely to be able to drive this holistically as opposed to in parts?

Mr Becker—I suspect so. As you know, we have had recommendations around since 1996. We are talking about eight years. It is quite a long while. I would think that if the committee has a definitive report, that would be something that would force the issue. The government would then have to accept or reject it—accept it in principle or whatever. Our relationship with the government on some of this is that because the JSC is here, because the JSC looked at it three years ago and because it has been referred again, we are not belting the government around the ears trying to get these things changed; we are really looking to the JSC as being the vehicle to try to get some change going. Our dealings with the government tend to be about the specific issues that arise in relation to whether or not a particular group is an associated entity or not or whether there is any likelihood of prosecution et cetera. We are not really getting down into the dirt about the actual construction of the legislation. Again, if we were to do that, we would probably want to come back to the committee and say, 'Let's revisit this whole thing. It's been with us since 1918.' We are talking about part XX, which has only been with us for 20 years.

CHAIR—We are having trouble dealing with this, let alone the whole Electoral Act.

Mr Becker—Quite. That is really how we see it.

Senator MURRAY—The important point that I wanted to explore—I think you were absent when I asked my question, Mr Chair—was that this is really not an area where the government will feel comfortable in taking the initiative, because they will look to this committee as the specialist, multiparty committee to advise on it. That has been my impression and I gather you confirm that. Staying with the general area of questions, earlier, Ms Mitchell, you were asked about priorities. One of the matters which is already out there with respect to existing provisions is recommendations from the committee—in two, perhaps three, reports that I can think of—to

increase penalties: in other words to make enforcement more rigorous. If nothing else was to be done, would you put the increase of penalties high on your priority list of things to be done or don't penalties matter that much in terms of making those who have to put in returns do what they should do?

Ms Mitchell—I think penalties do matter in terms of trying to achieve compliance. Certainly when I listen to the commentary from the media when they ask me what are the offence provisions and what are the penalties, the feedback is that they are hardly going to motivate somebody to do the right thing. The whole concept of penalties in any legislation is about motivating people to comply. The greater the penalty, the greater the motivating factor, I suppose. Obviously, given the types of offences they are, there would need to be consultation with the Attorney-General's Department, because there are policies in relation to what is an appropriate degree of penalty for a particular style of offence. If the AEC was going to make recommendations about penalty levels, we would need to go through that consultation process.

Senator MURRAY—I ask the question deliberately because the chair has asked you to come back to us with a prioritisation of your 57 recommendations. That was the number of things in Heinz, wasn't it—57 Heinz varieties? We want you to come back with that. But to my mind there are adjoining recommendations from the committee which are already out there and which have not been implemented. If you could indicate which of those—and penalties is one I nominate—you think are of high priority, that would assist. It would help the committee in reconfirming those areas in this report. Still in the area of questions that have already been covered, I want to talk to you about reconciliation and what occurs there. I am referring to donor returns which are reconciled with donee returns. You do that in most, or many, cases, don't you?

Ms Mitchell—Yes, we do.

Senator MURRAY—What happens when you find an error in one? Do you have to go back to the other and do the reconciliation? Do you then get into argy-bargy with a third party? What physically happens when a company, union, organisation or individual has made a donation and its return is different from what the party says they returned?

Ms Mitchell—There will of necessity be a difference between donor returns and party returns, because there are different disclosure requirements. In any checking process, you always have to keep in mind the fact that once donors get to a total of $1,500 during the year, what they are disclosing is all of the components of the $1,500, whether it is multiple lots of $10 or one $1,500 payment. With the party, all they are actually disclosing is anything that hit the threshold of $1,500 or more. There will be, by the nature of the disclosure requirements, a discrepancy between returns. First and foremost, you have to keep that in mind when you are looking at the issue.

As part of our standard compliance review, what we do is follow up with the party first any differences between what is in their return and what is in a donor return to the party. If that is not conclusive, we will also go back to the donor to clarify the information that is in their return. If we still have a discrepancy after that process, we continue with the whole 'Let's work out who's right here' approach and actually look at the relevant records so that the AEC can come to a conclusion about what we think should appear in the two different returns. Then we would state

that to the relevant people: 'We require an amendment from you to your return because it needs to say X.'

Senator MURRAY—It is true, isn't it, that you have much greater powers of enforcement of compliance with those who are registered under your act than with corporations, unions or individuals outside that? You can take administrative action if you like and engage in administrative compliance, which you cannot do with a company, a union or anybody else.

Ms Mitchell—I do not know that I would say that the powers differ based on who you are except insofar as there is a difference between somebody who we already know has a disclosure obligation and how we can deal with them and somebody we are not sure has a disclosure obligation and how we can deal with them. That is the whole difference between the fact that, under subsection (2A), we can look at anybody that we already know has a disclosure obligation to find out whether they have complied whereas, with anybody who we do not yet know definitely has a disclosure obligation, we have to pass the reasonable grounds test in terms of pursuing them.

Senator MURRAY—I turn to my last area in this round of questioning. I have had two propositions put to me with respect to the returns of donors and donees. One is that the law should be harmonised so that the nature of the returns from both are the same—there are the same forms and concepts—and there can be as little error as possible. The other is that the donor return should be scrapped altogether and there should simply be a donee return. The latter is more radical, I guess, but I saw a lot of nodding on the harmonisation area. Do your recommendations deal with that?

Ms Mitchell—No, none of the recommendations that we have made deal with harmonisation of the disclosure requirements. It would certainly make it clearer for people who are looking at the returns if the disclosure requirements were the same. There is confusion now. My staff and I spend a fair bit of time in dealing with public inquiries where people say, 'Look, there's a problem here,' when in fact the issue is that there are different disclosure requirements for donors and donees. I can understand that the concept of harmonising the disclosure requirements would lead to a greater deal of understanding by the public when they are looking at the returns as to the information that is contained in the returns. Whether that would enhance disclosure is an issue. One of the advantages that people find in the donor returns at the moment is that you potentially get a greater level of disclosure in donor returns because you may see the smaller amounts—under $1,500—in a donor return. The other thing is that you will see in a donor return a date on which the donation was given. That is additional information than what you would currently get out of party returns. The other thing is that, if there was harmonisation between requirements of donors and requirements of donees, the donor and the donee would perhaps be clearer about the degree to which their returns correlate. The AEC already gets phone calls from donors saying, 'Why did the party say this in their return?' We have to refer the donor back to the party. That is really something you need to take up with the party because it is not appropriate for us to deal with it.

Senator MURRAY—With my tongue in my cheek, I can say that harmonisation could be towards the donor requirements, not the donee requirements. We should not automatically think it is the other way round. As a last question, I wonder if the AEC could give some thought to any areas of harmonisation that you might think appropriate to minimise confusion and maximise

transparency. As a watcher of these things, for me there is a real difficulty in analysing both sets of data.

Mr Becker—To some extent we have covered that. We have tried to get the amounts—the limits—synchronised.

Senator MURRAY—Yes, but if you have any other thoughts, I would appreciate it.

Ms PANOPOULOS—There is a recommendation to further clarify the definition of associated entities. Currently, what check list, factors or process do you use to determine whether a particular organisation is an associated entity?

Ms Mitchell—It is very much on a case-by-case basis, because different organisations operate in different ways and because the concept of benefit is a fairly broad one. The first thing that you are going to have to do is look at the organisation and see how it is set up.

Ms PANOPOULOS—What do you mean by that?

Ms Mitchell—What purpose was it established for? What does it do? How does it operate?

Ms PANOPOULOS—Its aims and objectives?

Ms Mitchell—Aims and objectives, but also how it actually functions. That is because the term in the legislation is 'operates', which is a present tense sort of term. You need to look at what was intended when the organisation was set up and how it actually functions. In looking at that, you can ask whether one can see that benefit flows from that to one or more registered political parties. In terms of looking at financial information, usually that is fairly easy, because you can look at the standard sorts of things that you do when you are auditing—financial records and those sorts of things.

Ms PANOPOULOS—Do you determine the function by the allocation of funding?

Ms Mitchell—No. It will not necessarily be just based on that. Sometimes the benefit to the party will be a purely financial one, but there can be other benefits that may well flow.

Ms PANOPOULOS—In the recommendations, one of the proposed changes to the definition is that 'associated entity' should be clarified, and the second dot point in recommendation 33 refers to more than 50 per cent of distributed funds, entitlements, benefits et cetera. Do you currently use that sort of concept as a defining characteristic?

Ms Mitchell—Yes, it is one of the guiding principles: does the majority of what they do—more than 50 per cent is usually considered to be a majority—benefit one or more particular parties? That is reasonably easy to work out when you are talking about finances. When you start to talk about other benefits, you can start to get into arguments with the organisation about the degree to which something benefits and those sorts of things. It is not an easy concept to establish yourself and it is not easy to negotiate with the particular organisation and necessarily get agreement. Certainly there are organisations that we have determined are associated entities and, whilst they comply, they do it only because we have told them that they have to do it.

Ms PANOPOULOS—Just to recap, you will go through, look at the aims and objectives and look at how the organisation actually functions.

Ms Mitchell—Yes.

Ms PANOPOULOS—By that, do you mean whether it is independent of the political party?

Ms Mitchell—No. Some organisations are independent; some have a direct link to the party in terms of how they operate. Some of them might simply have party members on the board of directors or something like that. There may be a variety of potential links between the organisation and the party. That is why it is done very much on a case-by-case basis. It may well be that the benefit that the organisation gives to the party is about doing campaigning on its behalf and that there is no direct financial benefit there. Or they might be established to assist the party to attract members or something like that. The benefit may not necessarily be about money. There may be benefits that are more intangible or philosophical. You have to take those sorts of things into consideration, although they are the harder aspects of the definition to establish.

CHAIR—So this funding disclosure is not about disclosure of funding but the disclosure of intangible benefits. I am a bit confused at this stage.

Ms Mitchell—No, it is not what they are disclosing. When you are looking at whether an organisation is an associated entity, you have to look at whether there is a benefit that flows to the party and what that benefit is. 'Benefit' is an issue—

CHAIR—It is very general.

Ms Mitchell—Yes, it is a very general term, but it is a term that has been discussed in a range of cases, mainly in tax law cases. There is a concept of benefit, and benefit is not purely financial. You look at whether or not an organisation is an independent entity and then has financial disclosure obligations. If it does you have to look at how the organisation benefits one or more registered political parties.

Ms PANOPOULOS—Another area that I was particularly interested in was on page 32, under the heading 'Political party groupings'. There are various concepts and supposed recommendations that come out of those paragraphs, leading to recommendation 10. I am unclear regarding paragraphs 5.3.5 and 5.3.6. Are you saying that the aggregation of funding by a political party does not necessarily show the benefit going to particular individual members? Is that what that section is saying?

Ms Mitchell—No, what we are actually saying is that there are potentially aspects of party fundraising that are not being covered in the party returns because a particular grouping is not seen to be covered by the process.

Ms PANOPOULOS—I do not understand.

Ms Mitchell—There is an associated entity called the Parliamentary Liberal Party Communication Fund, and it was determined to be an associated entity by the AEC. It is a fund that was set up by the parliamentary members of the party in Victoria, and there are financial

arrangements that go with that. One might possibly have expected that, because it was the parliamentary members of the party, they were a part of the party and that those funds should be shown through the party return. In this case, the AEC has determined that it is an associated entity and that the funds are being disclosed, but that may not always be happening in all cases where things like that exist. There have been examples in the past, and it is probably not as obvious now, but those sorts of groupings of the party may be operating separately to the party and may not be being captured by the party's returns. It needs to be clarified that they need to either be disclosed in party returns or be an associated entity.

Ms PANOPOULOS—Are you at all concerned about greater transparency as to where donated funds to a political party are directed in terms of individual members?

Ms Mitchell—I do not think that the AEC has thought of that as an issue. That is not to say that we have not had commentary from the public that that is an issue. There are certainly questions that we often get, particularly when an issue hits the media, like, 'Where can I see that money going to that campaign fund in the party's return?', and you cannot. I do not necessarily know that that is the particular issue. What would still be seen in the return, if the amount were $1,500 or more, is who the party got it from. The fact that it went through a particular campaign fund is not necessarily the main issue there; it is who gave it and what party received it.

Ms PANOPOULOS—Without opening up a hornet's nest and adding extra complexity, do you think it would be a desirable objective to create that transparency on that level in an attempt to satisfy the broader objective of greater transparency? I will give you an example going to why I ask. You may have a particular ethnic group in a particular electorate that gives money to the state division of a party. That may have something to do with, for example, factional issues to do with a preselection. That would be a concern for people.

Ms Mitchell—I guess it would be a concern for the public. Why parties are receiving money has never been an issue for the AEC to be looking at.

Ms PANOPOULOS—No.

Ms Mitchell—It has never been a concept that—

Ms PANOPOULOS—I am not talking about why. If we are looking at transparency of donations to political parties, there are some who believe that political transparency should go to the next level—although there would be many ways to get around that. Are you saying that has not been raised as an issue of concern to people?

Ms Mitchell—It is not something that the AEC has raised. If a group is giving money to a party, regardless of which campaign committee or which endorsed candidate they are giving it to, it should show up in the party's return if it is an amount of $1,500 or more. If X, Y, Z group were attempting to sponsor a particular preselection ballot, that should show up.

CHAIR—There may be a disjunction between the notion of a group and the notion of an association. People can be members of a group without being members of an association. I regard myself as being part of the parliamentary group, but it is not an organised association that

actually aggregates what he gives and what I give. Is that what you are getting at, Sophie, or are you talking about a formal association?

Ms PANOPOULOS—No—informal associations.

CHAIR—I am a member of an ethnic group. Does that mean that, if Greeks of Australian citizenship give in aggregate $1 million—which is unlikely—we should aggregate that and say, 'The Greek group gave to X and Y'?

Ms PANOPOULOS—No.

CHAIR—My apologies.

Ms PANOPOULOS—I was talking about particular organisations—whether they be an ethnic group or a trade union branch—in a particular electorate. That is all I was saying.

CHAIR—So long as they are a formal organisation.

Ms PANOPOULOS—Correct.

Mr Orr—The difficulty there would be whether the money comes from a group identified as a group or identified as an individual donor. Acknowledging or identifying that can be quite difficult if you want to track the donation through to see if it flowed through to preference for a particular candidate or something like that. You could donate funds on behalf of, say, a group—which is what I think you were referring to—or yourself as an individual. Then it would be up to someone else to try and interpret whether you were doing that on behalf of somebody else. That is the part I see as quite difficult.

Senator MASON—Ms Mitchell, how do you prioritise your investigations?

Ms Mitchell—Do you mean the routine stuff that we do or the special stuff that we do?

Senator MASON—The special stuff.

Ms Mitchell—By and large by order of receipt.

Senator MASON—You don't have any guidelines that are something like what the DPP has in terms of prioritising investigations based on seriousness or the public interest?

Ms Mitchell—I would not necessarily say there is a public interest test. In terms of priority, if we are still within time to potentially prosecute then obviously we try and get matters finalised in case a prosecution might result. Some of the issues that get raised with us as special matters are past their potential prosecution time. So there is an aspect of looking at whether or not there is potential for prosecution and at whether we are still within the time for a prosecution and whether that should be an appropriate result of our consideration of an issue.

Senator MASON—You do not seek to divine the public interest, like the DPP does?

Ms Mitchell—No, that is not a test that we currently apply. It seems the public is interested in everything we do.

Mr Orr—Our aim is to try and progress, as much as we can, all matters—

Ms Mitchell—Concurrently.

Mr Orr—and keep all things in the air, as opposed to devoting our resources to one specific thing. Of course, that does vary.

Senator MASON—How many prosecutions did you launch under the act in the last 12 months?

Ms Mitchell—None.

Senator MASON—That is why I am not so sure you were right in your discussion with Senator Murray about penalties. I think that increasing penalties to deter illegal activity is not nearly as important as detecting the criminal activity. Criminology 101 is not about penalties; it is about detecting criminal activity—and I think that is much more important.

Mr FORREST—The submission seems to be about a whole stack of things that could possibly go wrong, or community expectations. I am trying to convince myself that there is something broken that dramatically needs fixing, but I am interested in paragraph 5.41 on page 23 of your submission, where you talk about the imbalance between receipts and donations. You say that the parties—I assume that means all of the political parties—have declared an income of $88.8 million for 2002-03. But you then say that, so far, donors have only declared around $19.1 million. Why is there a time lag? What does the qualification 'so far' mean?

Ms Mitchell—Annual returns are received in October, after the end of the financial year. The AEC spends the time between October and February—which is when the returns become publicly available—entering returns on our database, and following up outstanding returns, so that we can make them publicly available. After February, we spend the rest of the year carrying out compliance reviews. As part of the compliance review process, we follow up any donor returns that we should have received but have not received. So the reason for the qualification 'so far' is that additional donor returns may be received as a result of our compliance review activities.

Mr FORREST—Therefore, if it is a serious issue, what do the figures for the previous year look like? How close together do those two figures ultimately end up?

Mr Becker—They cannot come together. All receipts are included in the $88 million.

Mr FORREST—All what?

Mr Becker—All receipts—party fees—from everywhere.

Ms Mitchell—There will never be a match between the two figures. I can give you the figure on how close they come together for previous years. I do not have the figures with me today but

I can give those figures to the committee for all the years that are on the web site, which is about five years worth of returns.

CHAIR—Minimally and straightforwardly, a lot of donations do not come within the disclosure limits. So you do not start off with the expectation that receipts will equal donations or anything near it, just at the simplest level.

Ms Mitchell—There will never be a match, but there does seem to be a public expectation that there will be a match. I think that is partially a misunderstanding but it is also potentially because some of the donor returns have not been lodged.

Mr DANBY—Do you have any estimate of what percentage of the $88 million on top of the $19 million would be donor returns that have not been lodged yet? Does another $10 million usually come in in the following year to make it up to $30 million of the approximately $90 million so that we could say that about one-third of all political party income were donations?

Ms Mitchell—It is actually impossible to tell, because it is a voluntary code for parties to identify on their returns what is a donation and what is 'other'. Some parties do not do that. Without all parties actually classifying their receipts into donations and 'other', we cannot analyse the returns to fully tell how much we should be getting in donor receipts. And then to some degree there is occasionally a bit of a difference of opinion between the party and the donor as to what was a donation, because of that concept that a gift is about whether you got your money's worth. The party may assume that the donor did not think that they got their money's worth and identified it as a donation; the donor may think, 'I did get my money's worth so I don't think it's a donation.'

CHAIR—Parties always think they give people their money's worth.

Ms Mitchell—It might be the other way then.

Mr Becker—Mr Danby, are you asking to what extent that $19 million is understated?

Mr DANBY—Not that it is understated, but how long it takes to get the rest of it. Say a third of the $90 million income of all political parties that year was donations. How long does it take to get the rest of that in?

Ms Mitchell—To some degree, I probably do not believe that the AEC could ever be in a position to put its hand on its heart and say, 'Every donor return that should have been received has been received.'

Mr DANBY—Because you have already moved on to the next year and got the problem for the next year.

Ms Mitchell—We do.

Mr DANBY—I understand that, but there must be some time by which you have a feeling that you have basically got everything in that you can.

Ms Mitchell—Basically by the time we have finished our compliance reviews for the end of the year, we feel that we have the majority—that we have followed up the majority of the returns that should be outstanding. But to some degree it is problematic to follow up to 100 per cent complete because of this definition of 'gift'. You then have an issue about whether the fact that the donor has not given us a return means that the donor believes that it was not a donation. There are those issues where potentially there might always be that couple of per cent where it is still arguable whether they should have lodged a return or not.

CHAIR—So if I go to a lunch and have $200 worth of grog and feel that I have done well by the lunch, I say, 'I bought lunch.'

Ms Mitchell—Part of the issue is that you will get tangible as well as intangible things from attending those sorts of things. It is the concept that is in there. What do you get for your money? Some of what you get for your money at fundraisers is networking. How do you value networking? It is an important part of those sorts of functions. Yes, it is our experience that parties believe that people get what they pay for when they attend a function.

Mr MELHAM—Can I just ask something quickly about a function. With an average party fundraising function that is a lunch, a dinner or something where people get something tangible, do you generally consider that a donation or is that someone paying for a service?

Ms Mitchell—Most people consider it a service, which is why the AEC has suggested that the concept of donor returns should become payment made returns. If people are expecting to see those things declared in returns, wipe out the idea of whether people have to think about whether they have got their money's worth. All they have to think about is whether they paid money and therefore whether they have to put in a return. It makes it a much simpler concept to deal with.

Mr MELHAM—There are some parts of your submission I would like to take you through, if I could. The first is at paragraph 5.25 and 5.26. I think that is your page 20. You detail a number of amendments that were received to political party annual returns. It is obvious that just following an election year—1998, 2001—was when the most amendments were received. You say:

The largest number of amendments received to one return is eight.

Ms Mitchell—Yes.

Mr MELHAM—Is that a minor player or a major political party and were they technical amendments? What was the nature of them?

Ms Mitchell—You are testing my memory from when I was extracting the stats. As I recall, it was one of the major parties. In relation to the amendments, I cannot recall. I think several of the amendments resulted from AEC compliance review activities. I am not sure of the value of the changes of the amendments. I can get those figures out for you. There was more than one time when eight amendments to a return were received.

Mr MELHAM—At page 22 of your return, recommendation 8, you recommend:

… that the Electoral Act be amended to require that a political party be deregistered for continued failure (two or more years running) to lodge an annual return or a properly completed annual return by the due date.

What is your definition of 'properly completed annual return'? Are we talking about something that does not require subsequent amendment? What I am interested in is this: on that definition, wouldn't a number of existing political parties be deregistered?

Ms Mitchell—Yes. As the recommendation exists at the moment, there is potential for a number of currently registered parties to be deregistered. But in relation to the discussion that we were having earlier about whether it should be a strict liability offence or not, there is obviously an intention in there. I have been discussing the ambiguity of the English language with staff lately, in that different people read things in different ways. But I do not think that the AEC is meaning to be draconian.

Mr MELHAM—I understand that. What I am worried about, as a lawyer, is this. If you read the recommendation strictly, if it becomes law in those particular terms, the law is the law. What I am interested in is a properly completed annual return. It is different if there are systemically fundamentally inadequate returns, but you may have a situation where, for instance with the Labor Party, branches do not put their proper returns in to their head office until it is late even though they get letters or whatever. Then there have to be subsequent amendments or whatever. It could be harsh. I suggest a tightening of some of the language there in terms of what you are saying. I know what you are trying to do, but it seems to me at the moment that, as it is currently phrased, it could, on the face of it, result in very much having to rely on the discretion of the Electoral Commission. I think that is putting you unnecessarily in the frame. In a number of instances, the less discretion you have the better; you just implement the law as it is.

Mr Becker—Mind you, with something like that you would offer every possible opportunity for the person to comply. I do not know whether you know how hard it is to deregister a party. We still have the DLP—

Ms Mitchell—Also, the recommendations have to be read in conjunction with one another. There is a provision in the Electoral Act currently that provides that parties can advise the AEC about their inability to complete a return and of why they cannot complete that return. The AEC has made a recommendation about the fact that that should be tightened to set out some steps that parties need to take to establish that they cannot complete their return. If that were in place in conjunction with a recommendation about them needing to lodge properly completed returns, but the section 318 provision were still operating in relation to there being acceptable excuses that could be provided in certain circumstances, then I think you would automatically in the act have provisions that prevented the AEC from acting in an inappropriate way.

Mr MELHAM—Can I take you to recommendation 13, which is on page 25 of your submission and page 35 of our papers. Can you give me some examples of what would happen if that recommendation were picked up? The recommendation reads:

Recommendation 13: that all payments at fundraising events be deemed by the Electoral Act to be donations or be required to be disclosed anyway ...

What is not picked up at the moment that that would pick up?

Ms Mitchell—They are the sorts of things that we were talking about earlier, where people go to a fundraising event, pay money to attend that fundraising event but do not have to declare that money as a donation because they believe they have gotten their money's worth. There does seem to be an expectation in the community that when one pays money at a fundraising event the payment should be disclosed because the purpose of attending the fundraising event is to benefit the party. Currently, with the definition of 'gift' in the legislation, it would not necessarily be disclosed. It would depend on what was in the mind of the person who made the payment about whether they had gotten their money's worth from attending that function. If you either deemed these payments to be donations or just forgot the concept of 'gift' in the legislation and required that a return of payments made be completed then payments—where they are over the threshold—made at fundraisers would all be captured.

Mr MELHAM—In effect, if you pay $100 for a ticket, you do not disclose; if you pay $250 for a ticket, you disclose because you are over the limit.

Ms Mitchell—Yes.

CHAIR—So, if somebody admires my company so much that they think spending half an hour with me would give them a tangible benefit worth two grand then they would not have to disclose?

Ms Mitchell—That is right. If they actually feel that they have gotten their money's worth—

CHAIR—That would not be a problem!

Mr MELHAM—I am interested in that, and that is why I wanted to flesh it out. Where do they get their defence under the existing legislation that they are not required to disclose? At every function I have ever been associated with, we have declared it through the threshold.

Ms Mitchell—Parties are declaring anyway. When parties are declaring, they are declaring money received. Whether money received is from a donation or whatever, they are declaring money received. But, in relation to donors, what they are declaring is a gift. They only have to declare gifts, so in completing their return they have to look at what they have paid and determine whether or not they think what they have paid is a gift. A gift is a disposition of property made by one person to another without consideration or with inadequate consideration of money or money's worth. If I pay $5,000 to attend a fundraiser but I think I got only $2,500 worth out of that fundraiser then I have made a $2,500 gift. If I think the only value I got out of it was the meal that was placed in front of me, and that was worth $50, then I have made a $4,950 gift.

Mr MELHAM—Correct me if I am wrong. Under the existing law, the person or the party that received that $5,000 would be required to disclose it.

Ms Mitchell—Yes. The party has to disclose it.

Mr MELHAM—Not the actual person—so the Electoral Commission and the world would know because it would be disclosed. What you are basically saying is that you want it tightened

so that both sides have to do a declaration. In other words, if you are a donor or you go along in that capacity, you should fill out the form irrespective.

Ms Mitchell—There seems to be a public expectation that you would see the correlation—

Mr MELHAM—I am testing it because I want to know what extra public purpose is served if, under the existing law, it is actually being disclosed by the recipient.

Ms Mitchell—Most payments to attend fundraisers are in fact under the $1,500 threshold.

Mr MELHAM—But that is the threshold. The truth is that, even with your amendment, under the threshold it will not be disclosed.

Ms Mitchell—It could be by the donor. Depending on how you word this, donors have to disclose where any money they have paid during the year totals $1,500. So if they have made 15 lots of $100, they have to disclose. Then what they are looking at in those 15 lots of $100 is whether or not it was a gift. You may or may not, in a donor return, see all of the payments that they have made to a party because they may not consider all of the payments they have made to a party to be a gift. There is this expectation out there in the public, and if we are going to fulfil this expectation, perhaps donors should be including in their returns not just those things that they consider to be gifts but all the payments that they make to a party.

Mr MELHAM—I suppose the one benefit is that you could then cross-reference that there has not been a wrong declaration by the recipient—that, in effect, both sides being forced to disclose gives you a better—

Ms Mitchell—There is that cross-referencing thing, but I think the particular thing that the public are expecting to see is, because donor returns cover amounts that are less than $1,500, those payments made at fundraisers that are less than $1,500. The only potential way they could see that is in a donor return.

Mr MELHAM—I understand that, but that is a policy question. There is a threshold question. At the same time that you are saying that, there are recommendations in this report that talk about increasing the current thresholds that would actually allow further secrecy. By raising the threshold, more people would be able to avoid disclosing.

Ms Mitchell—The threshold amounts in the report are mainly in relation to candidate—

Mr MELHAM—Yes, I understand that, but it is the principle that I am interested in. I know that one of the reasons that we in the Labor Party have consistently kept the candidates' one low is to force that disclosure. Sorry, Chair, you look puzzled.

CHAIR—I have one question. You made a statement that, for amounts under $1,500, the only place you would see it is in the donor disclosure. But why would you see it in the donor disclosure?

Ms Mitchell—Because their threshold in a year is, "Have I given anything that adds up to $1,500?' In a party return, it is only where a payment is $1,500 or more. So, if parties receive

payments of $100, $500, et cetera, they are not required to be included in a party return. But anything that during the course of a year ultimately totals $1,500 or more has to be set out in the donor return.

CHAIR—And you really think it is a public expectation that they should see aggregates of no more than $1,500? I cannot see that.

Ms Mitchell—All I can tell you is that those are the sorts of questions I am getting: 'Why can't I see payments to X, Y, Z?' Because people know the dates that parties have their fundraisers and, like I said, in donor returns, the donor has to include the date on which they made the particular payment. So they break their $1,500 down into components of when they paid the bits of the $1,500, and we get questions like, 'Why can't I see in Fred Smith's donor return the fact that he paid to attend ABC party's fundraiser on such-and-such a day?'

Mr MELHAM—How often are those questions coming?

Ms Mitchell—Most frequently in February, when the returns become publicly available, but I am getting them on a reasonably regular basis.

Mr FORREST—Do you formally document those kinds of complaints or inquiries? Do you keep a register?

Ms Mitchell—I keep a register of the conversations I have with the media.

Mr MELHAM—That is smart.

Mr FORREST—Without asking for the details, can I ask what number of inquiries you get?

CHAIR—Are these basically media inquiries?

Ms Mitchell—They are mostly media inquiries.

Mr MELHAM—When the media start to disclose, we can tell who they go out with and who they get their background information from.

Mr DANBY—So they are seeking to get you to disaggregate the $1,500?

Ms Mitchell—Yes.

Mr DANBY—But you are not obliged to disclose that, and neither are the people who are making the donations?

Mr MELHAM—Not only is she not obliged to do that, but the law is pretty specific and says that it is not her function to do so.

Ms Mitchell—Ultimately we have to explain to journalists the disclosure requirements, our role in ensuring compliance and the fact that we can only act within the legislation.

Mr MELHAM—I would like to go to recommendation 14. You say:

… that the cumulative thresholds outlawing the acceptance of anonymous donations apply irrespective of the source of the gift.

Are you saying that, because they are anonymous donations, there should be a higher threshold for disclosure?

Ms Mitchell—At the moment, there is a hard to figure out concept in the legislation which is that, if you get several anonymous donations from the same person, and they achieve a threshold of $1,000, then there is an issue. But, if they are anonymous donations, how do you know they are from the same person? To simplify that—

Mr MELHAM—So what you are saying is that, if there is a threshold of anonymous donations, you would be required to declare them.

Ms Mitchell—Yes.

Mr MELHAM—In other words, if you receive $1,000 in donations, you total them. You can say they were donations of $200, $250 or whatever from anonymous donors.

Ms Mitchell—Yes. At the moment, we can actually say that we think these anonymous donations of $200, $300 and $700—which adds up to more than $1,000—are from different people and therefore not in breach of the provisions.

Mr MELHAM—But you are saying that because they come under the category of 'anonymous', if there were an accumulation of them that went over the threshold it would be safer if you were required to declare them.

Ms Mitchell—Yes. I think that would make it clear for the parties as well.

Mr MELHAM—I would like to go to recommendation 49 at paragraph 6.45 of your submission on page 46. The Constitution talks about disqualification of office where someone is convicted and is under sentence. I might add that that is not restricted to actually serving a sentence. Your recommendation only talks about people who are in custody, not people who are convicted of offences that carry imprisonment of 12 months or more and who have received a bond. Have you deliberately restricted it to people serving a sentence?

Ms Mitchell—That would make it a similar provision to the enrolment provision.

Mr MELHAM—So that is what you have used as the basis?

Ms Mitchell—Yes.

CHAIR—I want to tell you about part of the problem I had with the submission. I turn your attention to recommendation 7. It states:

… that section 318 be amended to strengthen the test for an agent to be allowed to lodge an incomplete disclosure return by specifying certain minimum steps required to have been taken before they can be considered to be unable to obtain all necessary steps.

That does not seem unreasonable. It continues:

These steps should not, however, be considered an exhaustive test.

You want to specify steps, so that things are definite, but then you want to say: 'What the hell. They won't be enough.' If you want to be left on the cusp of judgment all the time that is fine—prove it. But if you want to specify what has to be done, and you say that these will not be enough, that is a bit hard.

Ms Mitchell—I guess it is probably more from the perspective that one has to allow that there is a case-by-case situation. While there may be normal steps that one might take, in particular instances there might be other specific steps that are hard to predict in legislation. Often in legislation you will see the concept that blah, blah, blah includes this but is not the sole test.

Mr Orr—Not limited to.

Ms Mitchell—Yes, it includes but is not limited to these things. So I guess we were more getting to that point. Again, if the committee thinks that it is inappropriate—

CHAIR—No, it was just a personal observation that once you start specifying you cannot say, 'I'll specify three steps but those in themselves won't be sufficient.'

Ms Mitchell—I am not sure that it was so much about sufficiency as the fact that there may well be particular circumstances that require a variation on the theme.

CHAIR—Maybe I have been dealing with antiterrorism legislation a bit too much; I am reading everything very literally. Can you outline the determinants of when you conduct a random audit?

Ms Mitchell—We have an assessment process that we undertake. What we use is a thing called a risk matrix. There is a series of criteria that are in that matrix. We assess each return that we receive against the criteria that are in that matrix. You then work it out numerically. There is a calculation that is done. If you fall above the line in the sand, you get a major compliance review; if you fall above the next line in the sand, you get a minor compliance review; if you fall below both of those lines, then we follow up by mail any issues that might be outstanding.

CHAIR—So it is not a random audit?

Mr Becker—It is not taken out of a hat.

CHAIR—If I asked you to specify why one organisation got a random review at the highest level, would you be able to prove to the person asking the question that this was done on scientific grounds that you could defend in public? Could you definitely rebut any suspicion that

this was not random, or not according to Hoyle, but reflected some sort of interest on the part of someone?

Ms Mitchell—Yes. In fact we have recently gone through reassessing that risk matrix in line with current auditing best practice.

CHAIR—Has anyone ever complained on the grounds of, 'You're picking on me'? As I recollect, the random audits were one thing that excited a lot of interest when the legislation was first introduced. People were concerned that some people would be more randomly selected than others.

Ms Mitchell—Timing has been an issue: 'No, don't visit us now, because we've got our conference on,' or something like that. But there has not usually been a, 'Why are you picking on us?' although there have been the odd occasions. It is not a common theme.

Mr MELHAM—I take you to your recommendation 48 at page 46 and recommendation 56 at page 49, which is basically a suggestion that the act set out minimum requirements for a party's constitution. Recommendation 56 says:

... the Electoral Act provide the Australian Electoral Commission with the power to set standard, minimum rules which would apply to registered political parties where the party's own constitution is silent or unclear.

What is driving those recommendations? Where do they come from?

Ms Mitchell—The quality of some of the constitutions that we deal with and issues in relation to trying to resolve party registration matters as a result of the quality of those constitutions. Basically, at the moment a constitution can say, 'We are XYZ party and we have an aim of endorsing members for election to either the House of Representatives or the Senate.' That is it. That is the sum total that is required to be in a party's constitution. It can be a paragraph.

So when we are trying to look at who has the authority to act on behalf of a party in relation to certain matters, particularly party registration matters, it is extremely problematic when you have a constitution that does not address those sorts of issues—for example, who are the members they can rely on for registration purposes and are they in fact members of the party and the sorts of issues that were discussed in court cases in Queensland over the last couple of years about voluntary deregistration of a party. It can be done in certain circumstances by the secretary by asking: is this person acting on behalf of the party or is there some issue of spite involved or something like that?

CHAIR—There usually is.

Ms Mitchell—There are consequences for certain actions taken by certain office-bearers of the parties under the act. I think it is important that the AEC know that these people are acting under the auspices of the party and to know that we have to know that they are the duly appointed office-bearers of the party.

Mr MELHAM—All office-bearers of the party or particular office-bearers?

Ms Mitchell—The legislation talks about the executive of the party, yet there is no definition in the act of who the executive is. If there is no definition in the party's constitution as to whom the executive is, we are stumped as to who those people might be.

CHAIR—A bit like cabinet!

Mr MELHAM—I understand where you are coming from and what you are trying to address. I think there is a policy problem here of how far the Electoral Act should go in terms of requirements before people get public funding. Political parties operate very differently. The Labor Party at a state level operates differently all around the country. I used to be an office holder in the New South Wales branch of the minority faction. I am still a trustee of the party. The rules there operate very differently from the way they operate in Queensland or Victoria, and some of us complain loudly about that. A lot of that is an internal struggle, but to turn around and suggest you have to do stuff in a particular way before you get funding—

Ms Mitchell—We are not trying to tell you what the rules should say; just that there should be rules that cover those issues. We are not trying to say that the rules should say that the executive should be appointed in a particular way, just that there should be a rule about those sorts of things.

Mr MELHAM—You said in recommendation 56 that you want the power to set standard minimum rules, which is what alerted me to it.

Ms Mitchell—Only where a party does not cover those issues themselves. If they do not have a rule about how you become a member of the party, how you maintain your membership of the party and how you cease your membership of the party, then the AEC would say, 'This is the rule.' If that is seen as too much power for the AEC then we will take that on board. Those things should be covered. I think the fact that the legislation says, 'The AEC will set the rules for you if you don't do it yourself,' would be sufficient motivation for parties to do it themselves.

Mr MELHAM—If you are going to go back to recommendation 48, for instance, they do not even get in the door, unless they comply with recommendation 48. If it is silent, they do not get in the door. If what you are saying is correct, that the act be amended, that they have to have written constitutions and all those other things, then isn't that the threshold? I am not saying that I support that threshold, though. That is another matter. I am playing devil's advocate here.

Ms Mitchell—The preferable recommendation is No. 48—if not that one then the other one.

Mr MELHAM—They are not put down as alternatives. The other one is saying, 'If they are silent.'

Ms Mitchell—They could work in conjunction or they could work as an either/or.

Mr MELHAM—I can understand certain requirements if you want to be registered as a political party under the act and receive public funding. But it is a policy question as to how far you go in terms of what the requirements are to obtain registration. I have to say, again, playing devil's advocate, that some of this stuff, frankly, should be outside the parameters of the parliament and the Electoral Commission.

Mr Orr—The direction we are looking at, in summary, is for us to be able to make decisions where we have powers to exercise that the constitutions will give us the information to make a clear judgment on whatever that decision that we are looking at might be.

CHAIR—Everybody is in a quest for certainty for themselves at the cost of uncertainty for everyone else. If you want to get embroiled in the requirements to become a member, maintain membership and cease membership, then for us—I will leave the Democrats and the Labor Party aside—you are going to be very busy boys.

Ms Mitchell—We are not looking to tell you how to do that.

CHAIR—I appreciate that but, in the unlikely event that anyone is nuts enough to accept this, you are going to get caught up in interminable jurisdictional disputes within parties.

Mr MELHAM—Let us go to the current law at the moment—

Ms Mitchell—We already are.

Mr MELHAM—in dealing with the major political parties, unless they are breakaways like the West Australian Greens. At one stage I think the Democrats were split in Western Australia and there was an argument about it. In Kernot's time, wasn't there a blue?

Senator MURRAY—To go into that would—

Mr MELHAM—I am trying to use it as an example.

Senator MURRAY—It would involve a fair bit of—

Mr MELHAM—The point I am trying to make is that there is a bit of history here.

Mr DANBY—She was a senator.

Mr MELHAM—That has resulted in funding being allocated to certain political parties. But in relation to the major political parties, for instance, what do you require of them to properly deal with them at the moment?

Ms Mitchell—At the moment they are a completely different issue because they are parliamentary parties. Establishing their eligibility for registration is a much simpler process because it involves finding out who is the member of parliament, be it in the House or the Senate, who is supporting your registration and establishing that they are a member of your party. And that is it. This is a bigger issue in relation to non-parliamentary parties. That is where we are currently having a great deal of difficulty. Despite the fact that the AEC does not arbitrate on internal party matters, there is an expectation that we will be, because there are certain things under the legislation that party office-bearers can do and the AEC then needs to be satisfied that those people are party office-bearers duly appointed, elected or whatever. It is then left for the AEC to resolve the party dispute about who are their duly appointed or elected office-bearers. The AEC needs to know in order to administer the act anyway.

Senator MURRAY—If I may intercede, just for the record we should note that the Democrats' supplementary remarks for the last report support this principle. One of the reasons we do is that many parties are unincorporated associations and do not fall under corporations legislation, which determines what your constitutional elements should be, or the incorporated associations legislation, which determines what elements you need to have. The idea of asking that basic areas be covered in a constitution is highly desirable. It does not affect the majors at all. It is an efficiency mechanism in my view.

Mr Orr—It makes it easier to deal with the minors and the unrepresented.

Mr Becker—It could well be prescribed in the legislation.

Mr MELHAM—You have the power to do it because of public funding. I am being a devil's advocate here. I want to flesh this out because there is not a lot in the submission to support what I think is a radical step forward for the commission.

Ms Mitchell—One of the reasons why we have not gone into a lot of detail in the submission is that it involves internal party affairs that we did not think it was appropriate to comment on in the submission. A lot of the detail is in particular issues that we have been working on.

Mr MELHAM—I accept that, but, as I said earlier in the hearing, I take the view that, if you are arguing for change, the onus is on you to produce evidence to the satisfaction of the committee. Then it becomes a political question, among other things. But I hear what you are saying. That is all I have.

CHAIR—Are there any final questions?

Senator MURRAY—I am particularly interested in recommendations 2 and 3, which are essentially principles based anti-avoidance provisions. I would never claim to be an expert on the act but I would think that this is probably the only principles based kind of recommendation I have seen so far. Everything else is pretty detailed in the act about what can and cannot happen. Part 4A, when introduced in taxation legislation—I do not recall by whom but I suspect it was by the Labor Party—was designed as a last resort, namely where the tax office just could not get at an issue. They were able to explore it and its success has been because it is backed by legal action.

If someone wants to dispute a part 4A determination they go off to the courts. The one thing all the parties are in agreement with—and I suspect so is the AEC—is to stay out of court as much as possible because of the expense. Neither the AEC nor the parties like the expense of legal action. In making this recommendation do you think there need to be any specific safeguards—and, as you know, I am a supporter of this direction, as my supplementary remark says—to ensure that it is a last resort action rather than a first resort provision, if you understand the question?

Ms Mitchell—I think we are intending that such a provision would be informed by the way the provisions had operated in tax legislation and that it would use the experience of those court cases rather than necessarily end up in its own court cases. Based on the experience of the tax legislation, these things would have looked at the appropriateness of the degree of power that the

AEC would be given. The AEC is very much aware of the fact that there are concepts in legislation and in administrative law principles about the reasonableness and behaviour of agencies. It is keen to ensure that those concepts are preserved and that, where there are reasons for people behaving in particular ways, those sorts of things are taken into consideration when the AEC is using any powers that it has under the legislation. I think safeguards that would ensure that the AEC does not act in a manner that is seen as being heavy-handed or inappropriate are quite reasonable things to have in such provisions.

CHAIR—On behalf of the committee, I would like to thank the AEC for what has been an unusually philosophic mode today on all our parts. I do not look forward to the AEC getting the same reputation as the tax office for fairness. I declare the public meeting closed.

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

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

Committee adjourned at 5.59 p.m.