



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

Reference: Conduct of the 2007 federal election and matters related thereto

WEDNESDAY, 14 OCTOBER 2009

SYDNEY

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JOINT STANDING
COMMITTEE ON ELECTORAL MATTERS

Wednesday, 14 October 2009

Members: Mr Melham (*Chair*), Mr Morrison (*Deputy Chair*), Senators Birmingham, Bob Brown, Carol Brown, Feeney and Ryan and Mr Danby, Mr Bruce Scott and Mr Sullivan

Members in attendance: Senator Feeney and Mr Melham, Mr Morrison and Mr Sullivan

Terms of reference for the inquiry:

To inquire into and report on:

The conduct of the 2007 federal election and matters related thereto, including the Commonwealth Electoral (Above-the-Line Voting) Amendment Bill 2008, with particular reference to:

- a. the level of donations, income and expenditure received by political parties, associated entities and third parties at recent local, state and federal elections;
- b. the extent to which political fundraising and expenditure by third parties is conducted in concert with registered political parties;
- c. the take up, by whom and by what groups, of current provisions for tax deductibility for political donations as well as other groups with tax deductibility that involve themselves in the political process without disclosing that tax deductible funds are being used;
- d. the provisions of the Act that relate to disclosure and the activities of associated entities, and third parties not covered by the disclosure provisions;
- e. the appropriateness of current levels of public funding provided for political parties and candidates contesting federal elections;
- f. the availability and efficacy of 'free time' provided to political parties in relation to federal elections in print and electronic media at local, state and national levels;
- g. the public funding of candidates whose eligibility is questionable before, during and after an election with the view to ensuring public confidence in the public funding system;
- h. the relationship between public funding and campaign expenditure; and
- i. the harmonisation of state and federal laws that relate to political donations, gifts and expenditure.

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Committee met at 9.38 am

CHAIR (Mr Melham)—I declare open this public hearing of the Joint Standing Committee on Electoral Matters. The committee is inquiring into the events in the division of Lindsay during the conduct of the 2007 election. In June 2009 the committee tabled its report on the conduct of the 2007 federal election and matters related thereto, noting the events surrounding the distribution of unauthorised material in the division of Lindsay. The committee noted that it would examine these events in more detail once proceedings were concluded. In its report, the committee recommended that the penalties imposed under section 328 of the Commonwealth Electoral Act 1918—\$1,000 for a natural person and \$5,000 for a body corporate—be revised to ensure that they provide a greater deterrent. The committee will now examine the events in the division of Lindsay for the key purpose of giving more guidance to government about the revisions needed to the penalty provisions that currently exist under section 328 of the Commonwealth Electoral Act. In addition, the hearing also provides an opportunity to examine the penalty framework in the Commonwealth Electoral Act more generally. At this public hearing, the committee will hear from the Australian Electoral Commission, the Lindsay federal electorate council, Senator Steve Hutchins and the Assistant General Secretary of the ALP in New South Wales, Luke Foley. Before introducing the witnesses, I refer members of the media who may be present at this hearing to the need to fairly and accurately report the proceedings of the committee.

[9.39 am]

PIRANI, Mr Paul Gordon, Chief Legal Officer, Australian Electoral Commission

CHAIR—Welcome. The Electoral Commission made a submission to the inquiry into the 2007 election—in relation to penalty provisions, I think. Indeed, in a supplementary submission it went on to further detail a regime called the Braithwaite enforcement pyramid, which was developed in the 1980s.

Mr Pirani—That is correct. At paragraphs 5.1 and 5.2 of its first submission, No. 169, which was submitted on 20 June 2008, the Electoral Commission made various submissions about some of the investigation and enforcement issues for alleged breaches of the Commonwealth Electoral Act and some of the issues we had to deal with in the lead-up to the 2007 general election. This particular incident was one of three incidents that the Australian Electoral Commission referred to the Australian Federal Police. Each incident involved anonymous pamphlets. In each incident there were issues about trying to identify the persons who were involved in issuing those documents. In this particular incident in Lindsay, we were sent photographs of the persons involved in the publication and distribution of the documents. That made it rather easier to refer it to the Australian Federal Police.

In the two other matters we had extreme difficulties, as did the Australian Federal Police, in attempting to identify the persons involved in the publication of those pamphlets. One of those was the matter in Wentworth, where it was alleged that a particular religious group had been involved with issuing an anonymous pamphlet. That was referred to the AFP. That religious group subsequently issued a press statement saying that they had no involvement with that particular leaflet.

The matter in Tasmania involved an extremely offensive and highly defamatory sticker that was placed on a candidate's election posters around Hobart in particular. The AFP investigated that matter and could not find the persons involved in the distribution and publication of that defamatory material. As far as the Electoral Commission is concerned, this particular pamphlet shows one of the problems that we have with the operation of the legislation—that if we and the Australian Federal Police are unable to identify the person who caused the publication then little action can be taken. But in this particular incident there was evidence provided to us that assisted us in providing the brief to the Australian Federal Police that subsequently led to the prosecutions.

CHAIR—As you have said, anonymity obviously creates a problem in taking matters further. You also have rogue elements being responsible, I would have thought, in a number of these instances. We are not talking about conduct by established political parties here.

Mr Pirani—Generally, no. We had a very good regime in the lead-up to the last—

Mr MORRISON—What do you mean by 'Generally, no?'

Mr Pirani—I withdraw the word ‘generally’. The answer is no—with the exception of the events in this particular case and to the extent that they were and authorised, and I will come to that later.

Mr MORRISON—You are not suggesting there was any official involvement or connection with the Liberal Party?

Mr Pirani—Perhaps I could answer that by referring to a letter that was sent to the Electoral Commission by Mr Graham Jaeschke, dated 22 November 2007. In that letter he said: ‘I understand that some members of the Liberal campaign were responsible for this but immediately stopped when challenged by the Labor Party. I am writing to assure you that this flyer was produced and distributed without the knowledge of the state headquarters or the federal campaign headquarters. The Liberal Party condemns unequivocally the distribution of unauthorised material of any kind.’

Mr MORRISON—That is right. The way things work in the Liberal Party is that it requires head office approval and authorisation, so if that does not exist then the Liberal Party is not sanctioning it.

Mr Pirani—That is our understanding. We actually developed a regime in the lead-up to the last general election where we had legal contacts with the major parties. I had a single point of contact to deal with electoral advertising. With the Liberal Party it was Mr Loughnane, with the National Party it was Mr Henderson and with the Labor Party it was either Mr Gartrell or Mr Simon Every. There was a lady from the Greens—I have forgotten her name. We had a single point of contact, which made it very easy, when we became aware of particular concerns over any advertising, for the Electoral Commission to bring it to the attention of the party concerned and for immediate action to be taken. The majority of the issues that we dealt with were technical breaches—issues about whether the full details of the name and street address of the person who authorised it and the business name and contact details of the printer were there as required by section 328.

CHAIR—In submission 169.6 to the committee on the 2007 election, the final sentence of paragraph 4.5 says:

Given the relatively low penalties that exist, the use of scarce law enforcement resources to deal with these matters is a major issue.

I am interested in what we can recommend to the parliament to help deter people from engaging in this sort of behaviour in the future. It seems to me that in some instances civil penalties alone would not be deterrent enough or would not work if you have rogue activists in the major parties. I am just putting this to you as some propositions. The Constitution disqualifies people from holding office if they are convicted of an offence that carries 12 months imprisonment or more. For some sections of the Electoral Act to have a deterrent effect, perhaps we should look at the possibility of imprisonment for 12 months or more as opposed to civil-only penalties, three months or six months.

I have read the magistrate’s judgment in both the Clark case and the Egan case. Clark was convicted, and Egan was acquitted of the charges in this matter because he basically said he did not have the intent of distributing a pamphlet that was unauthorised, so the evidence was not

there to establish that he knew it was an unauthorised pamphlet. The second thing I am interested in is whether we look at a strict liability offence—there already is a strict liability offence within the Electoral Act—so that for lower level offences there is a strict liability which would still allow a defence of mistake of fact. Are they things the parliament can consider that might actually be a bit more effective in deterrence, as opposed to the Braithwaite enforcement? I am not against Braithwaite. I am interested in your views.

Mr Pirani—We made the submission in relation to the Braithwaite enforcement model because of our colleagues' experience in Canada, where they have a similar offence in the Canada Elections Act in relation to requiring electoral material to be authorised. That is in section 320 of the Canada Elections Act 2000. It is a strict liability offence.

CHAIR—So it is strict liability.

Mr Pirani—It is in Section 495(1).

CHAIR—What is the penalty.

Mr Pirani—The penalty is in section 500(1), which is a fine of not more than \$1,000 or imprisonment for a term of not more than three months or both. While I acknowledge the issue about the qualifications of a candidate under section 44 of the Constitution, which says a candidate will not be qualified if they have been convicted of an offence and jailed for 12 months or more, the issue with the particular facts in Lindsay is that there was no proof put forward that I am aware of that the candidates themselves were in any way involved in the matter.

CHAIR—True.

Mr Pirani—Accordingly, having an offence of 12 months or more might add a deterrent, but there is still the issue of having to identify who it is and who actually did it.

CHAIR—What if you have a future situation where a candidate sanctions rogue behaviour by their supporters and there is evidence that the candidate was, in effect, part of this enterprise? That surely would—

Mr MORRISON—Well, hang on!

CHAIR—I am not suggesting it in Lindsay. I qualified it.

Mr MORRISON—Okay.

CHAIR—I am looking to the future; I am not making aspersions.

Mr Pirani—There is another sanction that the act already has, and that sanction was shown by the recent Court of Disputed Returns matter in the case of *Mr Scott-Irving v Oakeshott* after the by-election in Lyne where he went to the Federal Court, as the Court of Disputed Returns, in relation to advertising that was on the ABC website. And in that matter he claimed that because the advertising on the ABC website was in his view in breach of section 328, that that was an unlawful act and accordingly, in terms of the Court of Disputed Returns, that the Court of Disputed Returns should have voided the election for an illegal practice under section 362 of the

Commonwealth Electoral Act. So if one is able to show that as a result of the illegal practice—in that the result of the election was likely to be affected—then that has the ultimate sanction which is that the particular candidate, if they were successful, would potentially lose being declared the winner and a new election could be called by the Court of Disputed Returns. So there is another potential sanction that is there in relation to illegal practice which includes a breach of section 328.

CHAIR—Okay, and that involves candidates. But it is the submission of the AEC that given the relatively low penalties that exist, the use of scarce law-enforcement resources to deal with these matters is a major issue. So what I am saying to you is that we have not been given recommendations other than this Braithwaite law-enforcement method. I am just wondering as to whether penal provisions for some, though not all, sections of the act might act as a deterrent, whether someone is a candidate involved in this conduct or whether they are rogue elements of the community.

Mr Pirani—The penal sanctions in the act and the levels were set in 1983. They have not been changed since the major amendments that were done to the act in 1983. So the \$1,000 has not changed. I note in a discussion earlier there was mention about why the offence in section 328A is punishable by penalty units. That reflects, again, the age of the penalties that are here. The 328 provision dealing with electoral advertising on the internet was only put in to the act in 2006. So that is why the reference there is the modern reference to penalty units while the remainder of the provisions in part 21 of the act are expressed in fixed dollar amounts. So, yes, the AEC would support a view and recommendations that the level of the penalties should be reviewed and should be increased to make them up to date and to reflect modern circumstances.

CHAIR—Is there any current exercise within the electoral commission to that effect—to make recommendations to government along the lines that certain offences within the act should carry higher penalties?

Mr Pirani—Certainly. We have been undertaking that work and we have already consulted with the Attorney-General's Department which is responsible for setting the penalties.

CHAIR—And in relation to the suggestion that some of these offences might become strict liability offences, has that been looked at within the commission or the Attorney -General's Department?

Mr Pirani—Not at this stage; not for section 328.

CHAIR—You have cited a similar provision under the Canadian legislation.

Mr Pirani—That is correct.

CHAIR—It has a strict liability, financial penalty and imprisonment of three months. So there is a similar provision. Are there any other provisions from other jurisdictions that you can place before the committee to assist us as to what level of penalty we could look at?

Mr Pirani—The only one that I have been able to find is in the New Zealand legislation where they have a general provision which contains a range of interfering or influencing voters,

and there are various advertising offences in relation to that. That is section 197 of the New Zealand Electoral Act 1993, and there it is a summary conviction of a fine not exceeding \$20,000. That is the only one I have been able to find. In the United Kingdom there was a review on political advertising in June 2004 with a report and recommendations, and there is current legislation before the House of Commons dealing with their funding and disclosure offences for political parties where they are introducing civil penalties. So the move internationally appears to be towards imposing civil penalties for what is regarded as the less serious offences, again because of difficulties with the criminal standard of proof, and leaving the more serious criminal sanctions et cetera for the more serious offences.

CHAIR—As I said, there are a number of offences within the current act that carry imprisonment.

Mr Pirani—Indeed; for example, the bribery offence is probably the most serious one of the electoral offences in part 21. I think that is five years jail.

CHAIR—And I think the former Langer provisions carried a period of imprisonment as well, where people faced the sanction of imprisonment if they sought to subvert the method of voting in federal elections.

Mr Pirani—That is correct.

CHAIR—That was regarded as something that was serious enough to carry a period of imprisonment if you were found guilty.

Mr Pirani—Indeed. If I could just correct my evidence: section 326—the offence is \$5,000 or imprisonment for two years, or both.

CHAIR—So would you concede that the Braithwaite enforcement pyramid is not sufficient to overcome the problem that we have?

Mr Pirani—It would assist us in addressing some of the lesser breaches of section 328, but I concede in relation to the more serious breaches of 328, the totally anonymous advertising, that Braithwaite alone would not succeed—again because the issue is that we need to be able to identify the person.

CHAIR—Yes.

Mr MORRISON—Is the commission aware of how many complaints they received after the last election day of the placement of unauthorised signs at polling booths and at various places around the country?

Mr Pirani—We have an escalation process so that most of the complaints would have been dealt with by the polling staff themselves and the officers in charge of the polling booths. If there was something that was more serious I was the person the complaints were sent to, and my recollection is that I probably had about 10 matters on polling day that were referred to me. They involved a range of things. There was one in Queensland of a church group handing out leaflets saying ‘Heaven 07’. There was a matter in Isaacs where there was a leaflet distributed. Our main concern on polling day, though, was we were looking at the how-to-vote cards.

Mr MORRISON—Could I ask the commission to take on notice then that I would like to know how many complaints were made at polling stations around the country.

Mr Pirani—I am not sure that I will be able to get that information for you. I can certainly give you the details of the ones that were escalated to me and to my unit of lawyers.

Mr MORRISON—You said before that you were interested in getting greater support to deal with what you would call minor offences. Around this table we have all been around elections on plenty of occasions. It is not uncommon for rogue signs to appear at polling stations on polling day. I had that experience in my own electorate of Cook at a number of polling stations where there were materials displayed. I even raised it with the Labor candidate at the time, whether he would take action to have those removed. He knew full well the person who had put them there but nothing happened. Nevertheless, I am wondering whether it would be helpful to returning officers at the various booths if they had the ability to impose on-the-spot fines, because they know who they are because they have seen them put them up and they have asked them to take them down. And they have. Nevertheless, if they had the authority to impose on-the-spot fines for the display of unauthorised material at polling stations do you think that would assist?

Mr Pirani—My personal view is that it may assist. The only reservation I have is that polling staff officials have a number of other things that they are doing on polling day and one of the instructions that we issue to them is that if there are significant concerns they are to have already made arrangements with the local police to get their assistance to make sure that polling goes smoothly. To the extent that there is an issue about an actual sign not being authorised on polling day then, yes, they could take action and ask for it to be withdrawn.

I had barristers and lawyers right around Australia ready to go in court to get injunctions if action occurred and people refused to take warnings from us to cease immediately and to remove it. I did not have any cause to instruct counsel to take action in any matter around Australia. I am told that in 2004 there was one how-to-vote card in Western Australia in particular, where if we in Canberra had been aware of the colour of that how-to-vote card we probably would have gone to court to seek an injunction to prevent it being issued.

Mr MORRISON—That is appropriate, and that is fine. My concern though is on polling day itself. As you say, they do have many other things to do. But when they have to come out and out and ask the same people to take down the same sign, if they had the ability to impose an on-the-spot fine there and then I think that may provide the returning officers with greater assistance on the day. The case I am referring to happened in the Miranda central booth in Cook. There was a poster on one of the worker's cars which said that I was going to build a nuclear power plant at Kurnell, which was absolute rubbish. It was not authorised, it was a homemade sign, and these signs appeared at numerous places around the Cook electorate on that day.

The returning officers did the right thing and asked them to take them down, but they went back up again. It is one thing for a sign not to be authorised, but then it is another thing for a sign—as it is for the material we are looking at today, and which is the subject of the inquiry—with false claims being made put on polling stations. I hope I could give some support to the Electoral Commission to take action on those things.

Mr Pirani—Certainly, in relation to the unauthorised ones it is clear cut. It would be very appropriate, I think, for an administrative penalty where they are clearly not authorised and do not have printer details. When you start getting into the scope of misleading and deceptive,

though, section 329 has been read down by the High Court so that it is only misleading and deceptive to the extent that it influences the way the person marks the ballot paper. That is why the issue for those, and the issue of my major concern to us, is misleading and deceptive how-to-vote cards. That is clearly from the two High Court decisions in *Webster v Deahm* (1993) 116 ALR 223 and *Evans v Crichton-Browne* (1981) 147 CLR 169. The way the High Court has read section 329, our powers in that area are much more limited.

Mr MORRISON—Do you think they should be broadened?

Mr Pirani—The JSCEM report after the 2007 election did have a minority recommendation in relation to that. The concern the AEC would have is that for us to administer what in essence would be truth in electoral advertising would be extremely difficult and complex, and I would need a large team of staff to attempt to deal with it.

Mr MORRISON—I am not suggesting that. A returning officer on the day can walk outside the booth, as they are constantly required to do, and say, ‘No, that is unauthorised,’ or ‘That’s it within the perimeter.’ This happens at polling booths all around the country. I am just suggesting that perhaps we should give them a little more support so that, largely, the instances do not arise. If someone knows they are going to get a \$50 or \$150 fine on-the-spot on the day, where there is a clear breach, they just will not try it on. I think that is what we want to avoid; we just do not want this stuff appearing at all.

Mr Pirani—That was really the administrative penalty prior to the Braithwaite enforcement model. We want the ability to be able to impose civil penalties in relation to the lesser breaches.

CHAIR—Who do you suggest would impose the on-the-spot fine? The electoral official; the official in charge of the booth, or would the police be called and give the person a caution, then if they do not desist would the police impose an on-the-spot fine?

Mr Pirani—Our suggestion is it would have to be the AEC officer.

Mr MORRISON—That is also what I am suggesting.

Mr Pirani—We would only want to involve the police where there are clear issues about the actual conduct of the election at the polling place being under threat. Normally that is where there are assaults and issues like that. Again, our colleagues in the police have enough work.

CHAIR—How do you propose that, if a person is aggrieved and feels that they were wrongly given an on-the-spot fine, they might be able to challenge the issue of that on-the-spot fine?

Mr Pirani—Presumably it would have to be the same as what occurs in customs and tax with administrative penalties.

Mr MORRISON—Or parking fines!

Mr Pirani—There would have to be a review process. As it is a civil and administrative decision, presumably it would have to be a body such as the Administrative Appeals Tribunal or something of that ilk.

Mr MORRISON—I would also suggest—and I am interested in your view on this, Mr Pirani—that the fine should be imposed on the individual. If there are people seeking to pull

others' strings then I think there would be a great opportunity for those who are sought to be used in these instances to say, 'I'm not doing that; I will personally get fined, full stop.' So I think that would be helpful.

CHAIR—So we are talking about election day offences.

Mr MORRISON—Yes.

Mr SULLIVAN—I want to go back, if I may, to something the chairman raised about eligibility to be a candidate having been convicted of an offence with a sentence of 12 months or more. It seems to me—and, as Mr Morrison said, we have been around for a while—that whenever any activity of this kind happens it is usually, although not always, either a disaffected citizen—somebody who has a personal vendetta against an individual political candidate—or young turks in the party. There is some evidence in recent years—

CHAIR—Or old turks.

Mr SULLIVAN—Yes, people with nothing to lose anymore.

CHAIR—Grumpy old men.

Mr SULLIVAN—There has been evidence from Queensland in the past of a state MP choosing not to recontest his seat based on something that he had done as a 21-year-old or an internal party matter that was an offence against the legislation. It seems to me that people who are around and who are enthusiastic and willing to do more work than anybody else are those who may be considering a future career as an elected official, and to have an offence that is covered by a jail sentence of 12 months or more would be a significant discouragement to misbehave for that group of people. Have you any thoughts about that and about younger people who might want to—

Mr Pirani—Part of the issue that we have at the Electoral Commission is making sure that people are aware of the various legal obligations that are placed on them. Quite often I wonder whether in the heat of the moment people have actually read things like our electoral backgrounders or are aware of the qualifications for a candidate under section 44 of the Constitution, which we have set out in an electoral backgrounder. To the extent that they are aware and that the evidence is that a penal sanction would be an additional deterrent, the Electoral Commission would support that.

CHAIR—Thanks, Mr Pirani. We appreciate your attendance here today. If there is any additional material that the commission wants to place before the committee arising out of some of the questioning today or you want to further flesh out some recommendations that you think we can look at in terms of what we might recommend, please feel free to do so. As always, we appreciate your cooperation.

Mr Pirani—Thank you.

[10.09 am]

THAIN, Mr John Lawson, President, Lindsay Federal Electoral Council of the Australian Labor Party

CHAIR—I welcome Mr Thain. Do you have any comments on the capacity in which you appear?

Mr Thain—I am also a resident of North St Marys, where it occurred.

CHAIR—Okay. Although the committee does not require you to give evidence on oath, I should advise you that these hearings are legal proceedings of the parliament and therefore have the same standing as proceedings of the respective houses. We have received a submission from you, and that submission is now part of the evidence of this inquiry, so you do not need to read out the three and a bit pages of the submission. I would also just indicate to you that what we are looking at is, obviously, those events. We are not reconsidering them as a court of law has already reconsidered them; what we are looking at is what recommendations, if any, we can make to the parliament arising out of those incidents. It is not about rehashing every element of what actually occurred on the occasion in question. If you want to make an opening statement to the committee, please feel free to do so.

Mr Thain—Thank you, Chair. The reason I came this morning is simply that I do not believe that the penalties for what occurred were adequate. Of those that were charged with the offence, not all of them gained the maximum penalty, and I believe that there should be some sort of scale. Specifically, s328 is just for the printing and authorisation of the pamphlet, not what is actually in the pamphlet itself. Our concern is that the pamphlet was a fraudulent pamphlet, indicating that it was from another political party, and it was malicious and it vilified people. I think it was meant to incite racial tensions as well. What we are concerned about is the actual content of the pamphlet.

CHAIR—Okay. I note that in an article by Erik Jensen on 19 May there are some quotes from the magistrate in dealing with the matter of Mr Clark, saying that he regarded the offence as ‘at the higher end’ and:

“In fact, it is difficult to think of a worse case.”

That is what the magistrate thought from his dealings with Mr Clark, and indeed I think he gave him the maximum penalty relation to the matter. It is true that others did not receive the maximum penalty. I do not want to open up these assertions, but you have got no other fresh evidence that you can place before the committee—

Mr Thain—No, I do not.

CHAIR—in relation to who else might have been involved in these matters?

Mr Thain—No, I do not, Chair.

CHAIR—But it is your view that it was something that was pretty damaging in terms of campaign?

Mr Thain—And very hurtful to that particular community in North St Marys as well. There is still some angst there. And I guess in the community they are concerned that what happened did not really fit as far as the fines go.

CHAIR—Are you saying, Mr Thain, that in your view something like this in the future should attract a penalty of imprisonment or should the fine be a heavier one?

Mr Thain—I think there should be, certainly, a heavier fine as a deterrent to stop some rogue element who think they can possibly gain a seat by doing something like that—for all concerned; it does not matter what party it is. I think we really need to stop that from happening again.

CHAIR—Do you have in mind an appropriate level of penalty that you think the courts should be able to impose?

Mr Thain—I certainly do not have that legal expertise. I would just ask that the committee come up with something accordingly, that would suit it.

CHAIR—Okay. Are there any other changes to the Electoral Act that you would be interested in that might help act as a deterrent, or is it just an increased fine?

Mr Thain—The other thing that does concern us as well—and I have said this in the submission—is that we believe that the printers, the people who printed it, were as culpable as the people who distributed it. We would ask that they be pursued if something like this occurred again.

CHAIR—The problem one has in relation to that—and bear in mind I was a defence lawyer before I came into parliament—is that one needs evidence before one can go to that level. In terms of the actual distribution, there were eyewitness accounts led to direct evidence as to who was involved. In terms of the printing, the only suggestion in relation to the printing came from one of the letters that was written to Mr Jaeschke, dated 22 November, from Gary Clark, where he said:

Please accept my sincere apology for the damage done by my actions in preparing and distributing a leaflet in St Marys on Tuesday night.

Mr Clark was dealt with by the court, but there is no other evidence—there might be suspicions but that does not equate to evidence—as to who was involved in the pamphlet. This is where you need a whistleblower. Obviously someone had something to say about the distribution, which is how people got there. I hear what you are saying, but it is a matter for the courts, and there is no direct evidence. Frankly, I think it is inappropriate to go out and make allegations. We might have suspicions. If you have any evidence—

Mr Thain—I am talking about the future.

CHAIR—There are penalties there. I hear what you are saying. You are saying, in effect: make sure that there are severe penalties there for anyone who is involved in printing this sort of material as well, not just for the lack of authorisation but for the printing of it.

Mr Thain—That is correct.

Mr MORRISON—How long have you been the president of the FEC? I imagine you have been there for a while.

Mr Thain—About two years.

Mr MORRISON—Had you been involved with elections prior to 2007?

Mr Thain—I had.

Mr MORRISON—Do you have any views on the suggestion made to the previous witness that on-the-spot fines for returning officers might assist a more ruly day?

Mr Thain—I agree with that as a deterrent. I think that might be very helpful.

Mr SULLIVAN—Thank you for coming in. Having been involved in some minor instances of a similar nature from time to time—much more minor—I guess the question is: where does the blame stop? You have made some suggestions about how other people might be pursued as a consequence of this. That is based on a view of what might have happened. No evidence existed to suggest that it did happen, so obviously that is not something that this committee is going to concern itself about. I am interested just to have on the record here—and I may ask a subsequent witness the same question—how the Labor Party campaign in Lindsay became aware of the distribution of this pamphlet.

CHAIR—He is not going to disclose the source.

Mr Thain—I would have not a clue. I was not involved in it.

Mr SULLIVAN—I do not want you to give up anybody's name. It is just interesting to me how that may have happened.

Mr Thain—All I can tell you is what I read in the newspapers.

CHAIR—Can I just point out that section 328(1) does relate to printing and publication:

A person shall not print, publish or distribute or cause, permit or authorize to be printed ...

So your concerns are actually picked up in the legislation. But the penalties should be higher. Then it becomes an evidentiary thing as to whether you can establish who printed it.

Mr Thain—Obviously on a scale for the scope of what is actually printed. If someone leaves off the printing or the authorisation on a how to vote, I think that is much different to what happened at Lindsay.

CHAIR—Thanks very much, Mr Thain, for appearing before the committee. You will get sent a transcript in due course, so you can check the details of that. We appreciate the submission and your courtesy in attending and giving some evidence.

Mr Thain—Thank you, Mr Chair. I appreciate it.

Proceedings suspended from 10.18 am to 10.31 am

HUTCHINS, Senator Stephen Patrick, Senator for New South Wales, Australian Labor Party

CHAIR—Welcome. Although the committee does not require you to give evidence on oath I should advise you that these hearings are legal proceedings of the parliament and therefore have the same standing as proceedings of the respective houses. We have received into evidence your five-and-a-half page submission. There is no need for you to read it but you can certainly refer to it if you want to. Would you like to make an opening statement?

Senator Hutchins—Thank you for the opportunity to appear today before the committee. I want to refer to my submission so I will read from the first page. This is not the first time that the New South Wales Liberals have been caught doing something like this—that is, in Lindsay in 2007—but it is the first time they have been brought properly to justice. In doing so the Commonwealth Electoral Act has proven to be lacking when it comes to ensuring the integrity of election material. In the Greenway campaign during the 2004 election the ALP candidate, Ed Husic, was subjected to a similar spate of letterboxing of fake, unauthorised and misleading material. You will see that in the one that I am holding. It says:

Ed Husic, the Labor candidate for Greenway, is a devout Muslim. Ed is working hard to get a better deal for Islam in Greenway. A fresh approach. ALP.

I think this occurred while you, Mr Morrison, were the Secretary of the Liberal Party in New South Wales.

Whilst this cannot be traced to the Liberal Party, they were the direct beneficiary of this material. There are also examples of likely electoral rotting by the Liberal Party in Penrith Council elections in recent years, which I have detailed in my submission. It is a matter of public knowledge that I was amongst a group of individuals who were made aware of the local Liberal Party campaign's intention to distribute false, misleading and unauthorised flyers in North St Marys on the night of 21 November 2007. As a part of this group I actively sought out and apprehended this group of Liberal Party campaigners in the middle of their escapades. I have given evidence in relation to these events in the Local Court of New South Wales and this led to the successful conviction of Mr Gary Clarke, the husband of the former member for Lindsay, Jackie Kelly.

My submission to the committee will address the dirty tricks and electoral skulduggery by the New South Wales Liberals in the Western Sydney region, the events in North St Marys on the night in question and the prosecutions under section 328 of the Commonwealth Electoral Act 1918 arising from these events.

Finally, I provide four recommendations for the committee's consideration to strengthen the offences contained within the Electoral Act and ensure that it remains in line with community standards and expectations. These recommendations are: (1) section 328 of the Commonwealth Electoral Act 1918 should be amended to be a strict liability offence; (2) the maximum fine payable for a breach of section 328 should be raised to \$10,000 for an individual and \$50,000 for a corporate body and a table outlining the various levels of severity should be included to ensure

that more minor breaches are not unduly punished; (3) recommendations (1) and (2) should be implemented with respect to the Commonwealth Electoral Act 1918, sections 328A, 329 and 351; and (4) all election material, including open letters, direct mail and reproductions of newspaper articles, should be required to carry the name of the individual company or organisation that printed the material and the address where the material was printed.

CHAIR—In terms of your submission to increase the penalties under section 328, I noticed that in a media report the magistrate was reported as saying in relation to Mr Clark that the offence was at the higher end:

In fact, it is difficult to think of a worse case.

As it was, he fined him the maximum penalty in relation to the section—I think \$1,100. What you are suggesting, I suppose, is that a tenfold increase would act as a deterrent to people from engaging in this sort of activity in the future.

Senator Hutchins—I think so. I do not know that Mr Clark, whom I know, was the organiser of the operation. I think the organiser of the operation got off lightly, but that is not what the magistrate thought. Mr Clark should have been fined more severely to ensure that people do not distribute that sort of material again. Our international reputation is on the line when this sort of stuff is distributed. We had another incident in Cronulla, where I was brought up—and Mr Morrison is the member for that area. We have had the so-called race riots down there. We have a difficult relationship with India at the moment, particularly in Victoria, because of alleged race matters. We cannot have this sort of material distributed without our citizens and the world knowing that this is unacceptable campaigning. We should increase the fines, and my belief is that people probably should be incarcerated for it. I know that in Queensland people have been incarcerated for falsifying electoral forms. This is, in my opinion, a terrible thing, because it is meant to mislead people. As I said, the Liberal Party were the beneficiaries of a significant swing against us in 2004 because of an unauthorised document, this one on Mr Husic. We got an 11 or 12 per cent swing, I think, in Greenway in that election. The material said Ed was a devout Muslim and wanted to have ‘a better deal for Islam in Greenway’.

CHAIR—In your submission you restrict yourself to a tenfold increase in the financial penalty, but there is not a suggestion that there also be the option of jail. I gather from what you have just said that you would not be opposed to a term of imprisonment also being considered by a magistrate. We have been told today by the Electoral Commission—I do not know that you were here—that in Canada, for instance, there is an option of a three-month period of imprisonment for a similar type of offence.

Senator Hutchins—I was not here for the Electoral Commission, but I frame my recommendations on what I believe we might be able to legislate on. I do firmly believe that incarceration would be a significant deterrent to people putting out these sorts of leaflets again.

CHAIR—Can I also go then to the question of strict liability, because I take it from that that what you are in effect saying is that the way the legislation is currently framed is not sufficient. Mr Egan, for instance, was able to overcome the charges against him on the basis that the defence successfully argued that he did not know that the leaflet was not properly authorised. Is

your recommendation that we consider strict liability as a result of what happened in the Egan case?

Senator Hutchins—Mr Chairman, the magistrate relied on my evidence to convict Gary Clark.

CHAIR—That is right.

Senator Hutchins—I did not see Gary Clark put anything in a letterbox. I did see Jeff Egan and his brother, I think, put material in a letterbox. Jeff Egan is a former deputy mayor of the Blue Mountains council, is a former member of the state executive of the Liberal Party and is, I understand, a very significant figure within the right wing of the Liberal Party. I compare him to Gary Clark, who was a well respected local orthodontist and not, to my knowledge, a significant activist within the Liberal Party.

CHAIR—My reading of the magistrate's judgment in Egan's case was that the prosecution was not able to demonstrate that he had knowledge, and there was an intent question.

Senator Hutchins—Yes.

CHAIR—Let us be clear: strict liability is something that is used in a range of offences. It is also used in a number of offences that carry imprisonment. Indeed, in terror laws, I do not know whether it is 10 or 15 years, but membership of a terrorist organisation carries strict liability. So it is not unheard of, but I am just trying to flesh out your view. Do you think that from a deterrent point of view that to have strict liability in offences like section 328 strengthens the arm?

Senator Hutchins—Can I just go back to the incident on the night. There were four men. Most of them were from Glenmore Park, but the Egans were from the Lower Blue Mountains. They decided to meet at an address in Penrith after 8.30 on a Tuesday night.

CHAIR—It was at Clark's address, wasn't it?

Senator Hutchins—I think so, yes. It was late at night. Then they proceeded to what they regarded as a major working man and woman area to distribute leaflets called 'The Islamic Australia Federation'. I doubt very much, considering modern campaigning, that they did not know what they were doing. With the distribution of these anonymous sorts of leaflets, done in such a surreptitious way as it was on that occasion, in my opinion they knew what they were doing and they should be held accountable for it. There is no way of saying, 'I didn't know, Gov; I didn't know.'

CHAIR—In short, though, if the committee and parliament were to pick up your recommendations, I suppose you would argue that there would then be a greater deterrent if we had strict liability and more severe penalties for people engaging in this activity?

Senator Hutchins—Yes, very much so. If we legislated to make the deterrent stronger, you would not get Liberal or even Labor Party activists putting out, if I can use the term, shit sheets before an election. They would not do it if they knew that they could be fined \$10,000, that they

could be put in jail and that it would not matter whether they said, 'I did not know what I was doing, Governor'—that it would not wash with the local courts. The Libs have been caught on this on a few occasions, but any of the parties could be put in this position. If we made it stronger to make sure that no-one could turn up clandestinely at some address in the middle of the night and say, 'Look, you've got to go and letterbox this place'—a place which they would have had to look up on the map because they would never have been near North St Marys in their lives—then that would be a significant deterrent.

CHAIR—You have basically put sections 328AA, 329 and 351 of the Commonwealth Electoral Act in the same category. Your recommendation 3 says in relation to each of these matters that they really should attract that same penalty.

Senator HUTCHINS—Yes, and as you will see in my submission I refer to the issue in Lindsay in, I think, the 1998 election, where an article by Paul Sheehan was distributed.

CHAIR—Yes. I was going to come to that. That is your recommendation 4. What you are in effect saying is that if there is a reproduction of newspaper articles, that it should also have to carry the name of the individual company or organisation that printed the material and the address where it was printed. In other words, the reproduction of any material, even if it is a newspaper article, because of its potential impact, should also have the name.

Senator Hutchins—Yes. As I said in my submission, it happened in 1998 in the federal election with a Paul Sheehan article which was not authorised and did not have where it was printed on it or anything like that. I think it just brings it more into line that this is election material—

CHAIR—So whatever is distributed should be authorised—

Senator Hutchins—And should say on whose behalf it is being distributed.

CHAIR—Otherwise you see it as a loophole—

Senator Hutchins—Yes, and these things have been exposed over the years, particularly out in Western Sydney.

Mr MORRISON—I assume that you hold the same view for all such breaches of this nature.

Senator Hutchins—Yes.

Mr MORRISON—So if someone had anonymously distributed material around the Kurnell community alleging that a candidate had a particular view on a topic or wanted to build a nuclear power plant in Kurnell, you would have a similar strong view about this matter?

Senator Hutchins—Yes.

Mr MORRISON—Good.

Senator Hutchins—Why do you think I would not?

Mr MORRISON—I am just asking the question, Senator. That is all I am doing.

Senator Hutchins—I have come here because I saw what happened in Western Sydney. I saw, as I referred to you, Mr Morrison—

Mr MORRISON—I have just asked you a question. There is no need to be so defensive.

Senator Hutchins—You were the secretary of the Liberal Party when this one was distributed.

Mr MORRISON—Well, let us go to that. Are you alleging that the Liberal Party had any involvement in that?

Senator Hutchins—I am alleging that the Liberal Party were the beneficiaries of this action.

Mr MORRISON—Jim Killen was the beneficiary of Communist Party preferences in an election. Are you alleging that Jim Killen was a supporter of communism?

Senator Hutchins—You will have to ask Jim Killen, but you will probably have to dig him up.

Mr MORRISON—That is a fairly unhelpful comment, Senator, but probably betrays your attitude today. Nevertheless, are you alleging that the Liberal Party had any involvement, and are you using this inquiry and your position of privilege to make any allegation against the Liberal Party or me personally in relation to the material you have there?

Senator Hutchins—What I have said is that your party was a direct beneficiary of that shit sheet—

Mr MORRISON—That is not the question I asked you, Senator. Are you making an allegation—

Senator Hutchins—and you were the secretary of the Liberal Party—

Mr MORRISON—against me or are you happy to come in here and seek to smear? You have come in here—

Senator Hutchins—Excuse me! You smeared a man—

Mr MORRISON—I ask that the witness actually answer the question. I smeared a man?

Senator Hutchins—Your party smeared a man.

Mr MORRISON—I smeared a man? I do not think so, Chair. I have smeared no-one.

Senator Hutchins—You have smeared and you tried to smeared our candidate in Lindsay—

Mr MORRISON—I have smeared someone?

Senator Hutchins—You're a Liberal aren't you?

Mr MORRISON—You are happy to come in here under parliamentary privilege and smear me, as a member of parliament, without any evidence and seek to take the high ground on this very right issue, which the Liberal Party has denounced—

CHAIR—I understand—

Mr MORRISON—Chair, if I could finish—

CHAIR—Yes, you can.

Mr MORRISON—The Liberal Party have denounced this. We referred this matter to the Electoral Commission and we have taken action within our own ranks, as well as referring—

Senator Hutchins—This one.

Mr MORRISON—That had nothing to do with us, and you have got no evidence to suggest it did. I am deplored as much by that as all the material before this place. But what I am very surprised about, Chair, is that someone would seek to come in here on that platform and make a smear and an allegation against me which they cannot back up. It is totally outrageous and I ask him to withdraw.

CHAIR—Let's just—

Mr MORRISON—He said that I sought to smear, Chair. They were his words.

Senator HUTCHINS—No, I said that you said that I—

Mr MORRISON—We can read back the *Hansard*. You said that I had sought to smear. You said, 'You sought to smear'.

CHAIR—Senator Hutchins, you do not have evidence that Mr Morrison himself sought to engage in this conduct.

Senator Hutchins—No, I do not.

CHAIR—My understanding of your evidence earlier—and it was repeated on a number of occasions—

Mr MORRISON—I ask him to withdraw the allegation, Chair.

CHAIR—was that Mr Morrison—

Senator Hutchins—What allegation did I make, other than that the Liberal Party was a beneficiary—

Mr MORRISON—You alleged, Senator, that I had something to do with that.

Senator Hutchins—and that you were the secretary of the Liberal Party at the time?

Mr MORRISON—I had no knowledge of it.

Senator Hutchins—That is good, and I am glad you go under the line.

Mr MORRISON—It is outrageous, but you have sought to smear me on the basis of that and I ask you to withdraw it.

Senator Hutchins—Well, good on you.

CHAIR—My understanding on my recollection is—

Senator Hutchins—I am really proud of you that you have withdrawn it, even though your party—

Mr MORRISON—I had nothing to do with it.

CHAIR—Let's move on.

Mr MORRISON—No, Chair. I will not let this go. The witness has made an allegation against me as a member of parliament in this hearing and I ask him to withdraw it.

CHAIR—Just relax. Let's not verbal people. My understanding, my recollection, is that on a number of occasions Senator Hutchins said that you were the secretary of the Liberal Party.

Mr MORRISON—No, that is not what he said, Chair, and we can go to the *Hansard* if you like.

CHAIR—The *Hansard* will show it. But you are not alleging any more than that, are you, Senator Hutchins?

Senator Hutchins—No.

Mr MORRISON—I would ask him then to withdraw his earlier comment.

Senator Hutchins—I will look at the *Hansard* and if there is anything to withdraw, I will go and withdraw it. But I do not recall saying that.

Mr MORRISON—I look forward to you reading that *Hansard* because it is a very serious thing—

Senator Hutchins—I am pretty sure you will have a look at it.

Mr MORRISON—It is a very serious thing to use an inquiry of this nature to make allegations and to undertake in smears.

CHAIR—Let me finish this off. That is not what you are asserting, Senator Hutchins. You are just—

Mr MORRISON—It is cheap and it does not befit a senator.

CHAIR—Senator Hutchins, my understanding is that your assertion is this: that Mr Morrison was the secretary of the Liberal Party division in New South Wales when the matter in Greenway occurred. Is that it?

Senator Hutchins—That is it; and the Liberal Party were the direct beneficiaries of this shit sheet.

Mr MORRISON—Chair, if he wishes to add further to this then I would ask him to withdraw. It is an outrageous slur and allegation to make. It is cheap and it is the sort of thing we are trying to stamp out here. He wants to parade around this committee with some moral virtue and he is engaging in the same gutter tactics which we deplore.

Senator Hutchins—I will be directed by the chair.

CHAIR—As I understand it, Senator Hutchins, you are not making any allegations against Mr—

Mr MORRISON—No; he did make an allegation, chair, and he should check the *Hansard*.

CHAIR—I am just clarifying.

Senator Hutchins—I will check the *Hansard*.

CHAIR—It was not your intention to make allegations against Mr Morrison personally in relation to the Greenway incident?

Senator Hutchins—No.

CHAIR—Thank you.

Mr SULLIVAN—Thank you, chair. I have a couple of questions, Senator. The first one relates to evidence that was given by the AEC while you were not here today. They indicated that they referred three matters off to the Australian Federal Police: the Lindsay matter, a matter in Wentworth and a matter in Tasmania. In only the Lindsay matter were they able to achieve any outcome because of the fact that people participating had been identified. I think they said, although these were not the exact words, that the photographs were particularly helpful. To me that raises the question of what would appear to be in most instances people getting away with this kind of behaviour no matter what the deterrent is. Do you believe that a higher deterrent is

going to prevent people from seeking to act in this way given that at this point in time they appear to be acting on the basis that if they are clever enough they are not going to get caught?

Senator Hutchins—Yes. I will go back to the Lindsay incident and the men involved there. I am pretty sure that if they thought that they were going to be heavily fined and/or imprisoned because of their activities, they would not have done it, and if we increase the penalties, it will not happen. We are talking about middle-aged men doing this. Can you imagine Young Liberals, Young Labor or Young Greens? If they thought that their political careers were going to be destroyed because of being asked by someone to do a shit-sheet run a few days out from an election, do you reckon they were going to do it? I do not think so.

CHAIR—Anyone who was directing them to do it would have second thoughts if the penalties were substantially increased.

Senator Hutchins—That is right, but also the young men or the middle-aged men or the young women would not do it. If they are caught, there is a big fine. You know from Queensland, Mr Sullivan—

Mr SULLIVAN—Yes.

CHAIR—Can I also say that whilst I am obviously interested in deterrents for rogue elements within the major parties, I am also interested in deterrents for people outside the major political parties. Let us not say that this is just something that originates from major political parties. My experience of some of this material over the years is that it has originated from certain crackpots within certain communities. At the end of the day you need to catch them in the act and you need to identify them but I think, if there is to be a deterrence effect, then substantial increases in penalties will soon get out there.

Mr MORRISON—Which I strongly support, and I think we all do around this committee. To deter this behaviour—

CHAIR—Yes, I understand that.

Senator Hutchins—And to the Liberal Party's credit it was a Liberal Party member who tipped us off on the Lindsay incident.

Mr SULLIVAN—Can I then move on to one of your other recommendations, and that is in relation to reproduced newspaper articles. Do you not think it also important that anybody who is going to distribute that article should be authorised to do so by the content owner? Or do you think that publication in the newspaper is sufficient?

Senator Hutchins—Mr Sullivan, I am not legally qualified. I do not know the ownership of the article once it is printed but I would assume that that is really a matter between the person who wrote the article and the printer. I mean, if it is out there—

Mr SULLIVAN—The chairman of News Ltd was reported the other day as making some comments about 'content kleptomaniacs', so I just wondered whether he might have a view there. The third thing I want to say is in relation to the Greenway pamphlet that you provided to

the committee. The question always asked is, ‘Who is the beneficiary?’ But I ask, ‘Who is harmed by that particular article, and who might wish to do that person harm?’ And it may not be the group that you indicate as the beneficiary. That comes to what the chairman said, which was that, in the absence of any evidence to the contrary, it is quite likely that that pamphlet was produced by a disaffected person who has a personal vendetta—and I have seen plenty of those in my time. I wonder whether an offence of that nature, which makes it appear that the source is someone else, escalates the crime.

Senator Hutchins—To deal with the individual, I have known Eddie Husic for many years. I hope Eddie is not offended by my saying that I do not believe he is a devout Muslim or that he is trying to work hard to get a better deal for Islam in Greenway. I do not know that Eddie had too many enemies. In fact, I would say Eddie was well respected. He won a Labor Party rank and file preselection—when we used to hold them.

CHAIR—He even had respect from members of the Left, high regard from members of the Left.

Mr MORRISON—I have know Eddie Husic since 1995. I first met him when he worked for Michael Lee. I have always had a very high regard for Eddie, and that is why I took offence, Chair, at the implication that you made.

Senator Hutchins—Then you would agree with me, Mr Morrison, that Eddie Husic probably did not have too many enemies outside of his enemies in the Liberal Party in that seat.

Mr MORRISON—I do not think you can make that claim, knowing the Liberal Party in Blacktown and the Labor Party in particular.

Mr SULLIVAN—It only takes one. But in the context of that piece of paper, of which I have seen a number in my time, it is likely that it was an individual rather than an organisation.

CHAIR—There is no evidence.

Mr SULLIVAN—There is no evidence either way—

Mr MORRISON—There is no evidence at all. That is why introducing this matter is outrageous.

Mr SULLIVAN—But my question is: when it is an individual performing this act, though it appears that an organisation has done so, is it a greater offence?

CHAIR—The penalties proposed for an organisation are much more substantial. Let us get that clear.

Mr SULLIVAN—I am going back to the evidence that the AEC gave in the Wentworth matter, where somebody produce something that looked like it came from a religious organisation and the religious organisation said, ‘No, it wasn’t us.’ Is making it appear that somebody else had actually produced or distributed it a greater offence? I think it is trying to put the blame on somebody else.

CHAIR—These things can have an electoral impact. In the seat of Lindsay I think it is fair to say it had a very damaging effect on the government, and it had a damaging effect on the Labor candidate in Greenway in 2004. What we do not want is a continuation of this. We want to try and stop it.

Senator Hutchins—That is my point.

CHAIR—It is in everyone's interest—not just one political party or another—that we have clean, open and honest election campaigns and that we throw the book at people who seek to manipulate campaigns like this.

Senator Hutchins—We need to make the temptation very punishable.

Mr SULLIVAN—I want to throw a heavier book at somebody, that is all.

CHAIR—I do not think there is any disagreement on that. Senator Hutchins, is there anything else?

Senator Hutchins—No, thank you.

CHAIR—Thank you for your attendance today. There will obviously be a transcript sent to you. You can have a look at that and let the secretary know if you need to make any corrections.

Senator Hutchins—I am sure that Mr Morrison will.

Mr MORRISON—Well, it is for you to raise it in the Senate.

[11.01 am]

FOLEY, Mr Luke Aquinas, Assistant General Secretary, NSW Branch, Australian Labor Party

CHAIR—Welcome. Although the committee does not require you to give evidence on oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. I thank you for rearranging your schedule to get here much earlier than you were scheduled. If you wish to make an opening statement to the committee you can do so.

Mr Foley—Thank you, Chair, and I will. I thank the committee for the invitation to appear today. I have read the report by your committee on the conduct of the 2007 federal election and matters related thereto. I have been invited to attend today to give evidence on the matter of the penalties imposed under section 328 of the Commonwealth Electoral Act. I should state that it is the policy of the New South Wales branch of the ALP that the penalty provisions of the act ought to be substantially increased so as to deter people from publishing and/or distributing the sort of material that was distributed in Lindsay on 20 November 2007. I will take you to the decision of our annual conference in 2008. The following was adopted as policy:

Annual conference notes that the Rudd Government's electoral reform green paper process will examine a broad range of options to reform and modernise our electoral laws. Conference calls for reform of the Commonwealth Electoral Act to significantly increase penalties for offences under section 328 of the Act concerning the printing and publication of electoral material. Individuals found guilty of printing and publishing bogus electoral material such as that distributed in Lindsay in 2007 and in Greenway in 2004 should face a maximum penalty far greater than a \$1,000 fine. Conference calls for reform to impose a maximum penalty of \$10,000 or imprisonment for five years, or both.

That is the policy of the ALP New South Wales branch. I will speak briefly about why our organisation feels so strongly about the matter. I was contacted on 20 November 2007, in the closing days of that election campaign, with a tip-off that Liberal campaigners in the electorate of Lindsay were intending to distribute that evening fake leaflets linking the Labor Party to Islamic extremism. The events that unfolded are well known and I will not take the committee through them in detail. I have a copy of the leaflet that was distributed, which I am happy to hand up, but I assume you have it.

CHAIR—We have got copies but it does not hurt to have it formally here.

Mr Foley—The events have been well canvassed in the media and, indeed, in the courts. It was not the first occasion on which one of our candidates was subject to this sort of material. In the final days of the 2004 election campaign similar material was distributed, once again under the cloak of darkness, in the federal seat of Greenway. I have a photocopy of that to hand up. It stated: 'Ed Husic, Labor Candidate for Greenway. Ed Husic is a devout Muslim. Ed is working hard to get a better deal for Islam in Greenway.' It contained the ALP campaign slogan, 'A fresh approach', and an authorisation from our local campaign director without, I might say, her knowledge. That material was distributed widely in the closing days of the 2004 election

campaign. The seat of Greenway was won very narrowly by the Liberal Party, by Louise Markus.

So we have had our candidates in marginal seats, in Greenway in 2004 and in Lindsay in 2007, subject to this sort of bogus material being distributed at night in the final few days of an election campaign. We want to ensure it never happens again. The only difference between Greenway in 2004 and Lindsay in 2007 is that the perpetrators were caught in Lindsay. They got away with it in Greenway. Louise Markus was elected narrowly over Ed Husic.

So we would submit that there is an unfortunate trend in Australian politics exhibited at the last two federal elections concerning bogus material seeking to push the buttons of religion and race and seeking to divide the community on that basis. When that sort of material has been distributed on both occasions the aim has been to hurt the Labor candidate in a highly marginal seat. We are concerned to ensure that these tactics are drummed right out of Australian politics. We think that a \$1,000 fine, the current maximum penalty that exists, is clearly inadequate for offences of this degree of seriousness. We submit that to increase the deterrence the penalty provisions ought to be substantially increased. Our conference has given a guide but we would be open to the committee's view about what the new penalty provisions ought to be. But we do believe they ought to be substantially greater than they are now.

Unfortunately, there are some mavericks involved in politics who are prepared to go to extreme lengths to peddle this sort of material. We believe that the Commonwealth Electoral Act ought to attempt to close down these sorts of operations. Increasing the deterrence through harsher penalties would be a significant step by the legislature to ensure that these sorts of events are not repeated in the future.

CHAIR—Senator Hutchins, in his submission, recommended an increase in the penalty under section 328 to \$10,000 for an individual and \$50,000 for a body corporate, so he has picked up the same amount that you have. He did not mention the alternative of imprisonment. I notice that you are submitting that it should be as high as five years. Is that on the basis that you would regard five years as a truly deterrent indicator to anyone who might practise this?

Mr Foley—Yes. What is important for us is that there be a significantly greater deterrent than there is now. I think officials in all political parties would welcome that to ensure that maverick elements cannot peddle, or would think twice before peddling, this sort of material in the future. We do not have a particularly strong view on whether it should be five years or three years. We believe that a maximum penalty of imprisonment would send a clear signal to political activists that they cannot peddle this sort of material in Australian politics.

CHAIR—At the moment in the act it has a smattering of imprisonments of six months, 12 months and up to two years. If we went to five years for this particular offence, it would certainly send a signal.

Mr Foley—Yes, it would.

Mr MORRISON—I have two questions. Earlier today I put forward a suggestion that, particularly for minor offences that occur on polling day, we look at giving returning officers the power to hand out on-the-spot fines for breaches or failure to obtain authorisation, particularly

for material—if there is literally someone standing at a polling booth and handing that out or if there are signs there that contain messages that are critical of candidates or otherwise unauthorised. Do you have a view on whether that would help enforce a less unruly election day and stamp out a range of these things that, as you and I both know, happen on a regular basis around polling booths on election day?

Mr Foley—Yes, we would have no objection to that as long as the power was vested in the divisional returning officer—

Mr MORRISON—Yes, of course.

Mr Foley—rather than volunteers who supervise an individual polling place. It would have to be a power held by the DRO in a particular division.

Mr MORRISON—So you would not give it to the actual returning officer on the booth.

Mr Foley—No, because I think the divisional returning officer in each division has the experience to more properly deal with these matters. The presiding officer at an individual booth is often someone who is just engaged casually for the day and may not have experience.

Mr MORRISON—True, but there is a process to appoint them and they have usually been working on that booth on many occasions. They have to enforce the electoral laws on that day at that booth. They know what the laws are. They know whether something needs to be authorised or not. They are on the spot and they are in a position to issue a fine. The DRO is not going to be anywhere near the place, and by the time they turn up I am sure the person would have moved the stuff away only for it to reappear later. So the presence of an on-the-spot enforcement opportunity is not something the ALP would support in New South Wales?

Mr Foley—We would have no objection to an on-the-spot fine, but I would contend that the DRO would be the appropriate person.

Mr SULLIVAN—That is fine in an inner city seat in any of our major capitals. What about a regional seat, where there may be one DRO covering three-quarters of Western Australia? Can you have a rule that applies to Sydney and does not apply to Western Australia? The reality of Mr Morrison's question is that these matters occur quite frequently. They are not always members of political parties; they may be rogue citizens' groups or single-interest groups that turn up. They are bastardising the process.

CHAIR—As a halfway house, if we have the divisional returning officer, can't we then have a number of designated persons who have been trained up to a particular level if it involves a regional seat? I understand what you are saying. What you are, in effect, saying is that you might get a different standard depending on the polling official at a particular polling place.

Mr MORRISON—Training would be appropriate.

CHAIR—But you do not have a problem with the concept of an on-the-spot fine?

Mr Foley—Not at all. It is a good suggestion.

CHAIR—We can look at that.

Mr SULLIVAN—The point I was hoping to get to—and I know I am a bit longwinded—is that, whenever any occurrence has occurred in polling booths, to my knowledge, where the presiding officer has found that the person displaying something is going to argue the toss, he now rings the DRO anyway and so the DRO would be aware, I should imagine, of any material that was being refused to be removed. That is usually the case.

Mr Foley—I take your point. It may well be that the presiding officer at an individual booth could be delegated the power by the DRO once they have spoken to the DRO on the day. I think we have all had the experience where an individual presiding officer's performance has been less than adequate at times. That is no disrespect to any individual; it just reflects the fact that the AEC has to hire casually an army of people to work on election day.

Mr MORRISON—A process of training and protocols and maybe even a warning system or whatever would be appropriate. The committee can think about that. The matters that are before the committee today are very disturbing. They are disturbing to all political parties. Obviously there are some very sensible suggestions in terms of how we might be able to increase the fines and penalties available to deter that behaviour. I think there is a unanimous view amongst the committee and amongst political parties on that. Since the events that took place in 2007, the Liberal Party has made a number of changes to its constitution here in New South Wales. We have toughened up a number of provisions to internally ensure that any rogue element would be significantly discouraged. Has the Labor Party in New South Wales undertaken any reforms to its constitution to ensure similar rogue elements in its ranks would be dissuaded?

Mr Foley—I do not think such reforms or rules changes would be necessary. I would contend that we already have the power to expel people who engage in unworthy conduct. No-one from the Labor Party has ever been accused of handing out the sort of material we saw in Lindsay in 2007.

Mr MORRISON—I hope the ALP is not pleading complete innocence on matters of distributing unauthorised material over its 100-year history.

Mr Foley—We have not ever distributed any material that seeks to link Liberal Party candidates or any other candidates with Islamic extremism, no. But, to the substance of your question, we believe our rule book is adequate to deal with any party members who engage in unworthy conduct, for want of a better term. The power is there for the party officers to deal with people right away.

Mr MORRISON—Has your administrative committee or the executive in the ALP—I am not sure which—

CHAIR—Party officers.

Mr MORRISON—Since 2007, has the equivalent of your state executive formally undertaken any review of the constitution or set up any forum for that to be reviewed to ensure that your constitution does protect against these sorts of things internally?

Mr Foley—Yes. We have a rules committee that meets regularly that is almost in permanent session in the couple of months prior to every annual conference.

Mr MORRISON—Sure, but did they receive any reference from your equivalent of a state executive body to examine this matter specifically and recommend any changes to your rules?

Mr Foley—No, because no-one from the Labor Party has ever been accused of peddling the sort of material that was distributed in Lindsay in 2007.

Mr MORRISON—All parties have their rogue elements. Don't you think, whether it is something obscene of this nature or of any other nature, that it is incumbent on parties, whenever these sorts of events take place, to not only look at the house of those on the other side but to have a good look at their own house and make sure that things are tidy from their perspective as well?

Mr Foley—I contend that there are no elements within the Australian Labor Party that would peddle material that seeks to divide the community on the basis of race or religion.

Mr MORRISON—That was not my question. I am talking about the distribution of unauthorised material that seeks to make untrue allegations about another candidate. I experienced that in Cook. I do not know who did it. I do not know whether it was the ALP, an independent or just anyone out there—I have no idea. But the fact is, this stuff goes on and it needs to be stamped out, as we have all said here today. I am interested to know what the ALP thinks—you have said that there has not been any request to look at the constitution but I would have thought that we should all have a good hard look at our constitutions. We are talking about penalties under the Commonwealth Electoral Act, which is appropriate and we should do that, but I think it is also important for the ALP, for the Greens, for the Liberal party, for the National party and for all parties to make sure they have very strong internal discipline measures. We have done that since 2007. It is important to learn from these issues and I think we have done a number of things to do that. Has the ALP done the same thing?

Mr Foley—I think the best way to answer that is to say that we are satisfied that our rule book gives sufficient power to party officers at all times to deal with any misconduct or aberrant behaviour that Labor Party members might engage in.

Mr MORRISON—That question has not even been asked.

CHAIR—No, let me just go there, Mr Foley. The situation has been in recent history that the New South Wales branch has removed members from the party for conduct that has brought the party into disrepute.

Mr MORRISON—So has the Liberal Party before 2007.

CHAIR—In effect, that is what you are saying: that the rules exist to give you sufficient power, whether it is a federal election or in between federal elections—

Mr MORRISON—I am sure the witness can answer for himself. He is a very clever and intelligent fellow.

CHAIR—He has been but you seem to be ignoring what he is saying.

Mr MORRISON—No, I am not. I am sure the witness can answer the questions himself. All I am saying is that what happened in 2007 was a wake-up call for all political parties and that we should have a good hard look at our own rules. I am asking whether the Labor Party has asked that question of itself since 2007. In your evidence you said, ‘No’, you have not but you think it is okay. But you have not asked.

Mr Foley—We review our internal rules on an ongoing basis. I believe that our rules are sufficient to deal with any party members who step out of line. I would say that the allegation that Sussex Street officials do not hold enough power over Labor Party members is not one that is raised regularly.

Mr MORRISON—The only other question I have is about a matter that was brought up previously. I want to make sure—because I am sure that this witness would not make this suggestion—about the matters in 2004 you referred to: I assume that you are making no allegation against the Liberal Party or any of its officers in relation to the events you referred to in 2004?

Mr Foley—I have made no allegation. I have simply stated that the leaflet I have tendered to the committee was distributed under the cover of darkness—

Mr MORRISON—I understand all that.

Mr Foley—in the closing days of the campaign. It was designed to hurt our candidate and whoever peddled it got away with it.

Mr MORRISON—But there is no suggestion—the ALP has made no allegation—that that had anything to do with the Liberal Party or anyone in the Liberal Party?

Mr Foley—I do not know, and no one in the Labor Party knows, who distributed that material so we are not in position to make any allegation against anyone. That is right.

Mr MORRISON—As referred to by the previous witness, I was secretary of the Liberal Party at the time and no one I am aware of knows the answer to that question either. I would like the record to be clear that the ALP is not making any allegation against the Liberal Party or any of its officers on that matter.

Mr Foley—I have said what I have said, which is that we make no allegation against any individual or group of people. Having said that, the material was designed to hurt Ed Husic, the Labor candidate, in a very tight contest—and it did.

Mr MORRISON—I do not know if I am getting an answer to the question. It is a simple question: ‘Are you making any allegation against Liberal party or any of its officers in relation to the events you raised for 2004?’ Either you are or you are not.

Mr Foley—No, I am not.

Mr MORRISON—Thank you.

Mr SULLIVAN—Mr Foley, I am interested in, and have asked a couple of questions about, the non-political party maverick activists engaged in this kind of activity. At the moment, my mind is occupied considering whether an offence of that nature, which makes it appear that somebody else may have committed the crime, is worse than being caught out. In the 2007 election, there was a matter in Wentworth where material that appeared to have come from a religious group was distributed. I am considering whether that—trying to falsify the origin of the material as well as the material itself—is a worse offence than the religious group handing out that material, if they had done so. Do you have any thoughts about that?

Mr Foley—Yes. I am not sure it is possible to come up with a hierarchy of offences. The act covers what is prohibited, but I take the point you make about somebody engaging in blatant deception; where they knock up some bit of material that purports to come from another source. In Lindsay in 2007, the leaflet purported to come from a non-existent Australian Islamic federation. I take the point you make: that, where there is that level of deception, a more serious breach of the act has been committed than in cases where there has been a failure to authorise material that on its own is acceptable.

CHAIR—I thank you for your attendance here today, Mr Foley. I think it is fair to say that all the members of the committee are attracted to the concept of more substantial penalties for the offences that we are talking about, because they want to see, in the future, a clean and open contest that is not skewed by such behaviour. I appreciate your submission to the committee. You will get a transcript of evidence, which you can make corrections to if need be. Again, I thank you for the fact that you came earlier.

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

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

Committee adjourned at 11.28 am