COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

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

TUESDAY, 17 NOVEMBER 2009

CANBERRA

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JOINT STANDING

COMMITTEE ON ELECTORAL MATTERS

Tuesday, 17 November 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: Senators Birmingham, Carol Brown, Feeney and Ryan and Mr Danby, Mr Melham, Mr Bruce Scott 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.

WITNESSES

Committee met at 12.37 pm

CHAIR (Mr Melham)—I declare open this public hearing of the Joint Standing Committee on Electoral Matters. The committee is inquiring into 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 court proceedings were concluded. In its report the committee recommended that the penalties imposed under section 328 of 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 penalty provisions that currently exist under section 328 of the Commonwealth Electoral Act. At this hearing we will hear from representatives of the Attorney-General's Department and the Australian Electoral Commission.

I remind members and the media who may be monitoring this hearing of the need to fairly and accurately report the proceedings of the committee. I should also point out that we had a hearing in Sydney in relation to this matter where the Electoral Commission gave evidence, together with other witnesses. Let me just say at the outset that we are not interested in revisiting the actual facts per se or looking at guilt or innocence in relation to the matters in Lindsay. That has been determined before the courts. People pleaded guilty. People were found guilty and one person was found not guilty because the question of intent was not proven under section 328. The interest of this committee is to look at and to pursue whether there should be a redrafting of this section according to strict liability, absolute liability, reversal of the onus of proof. At the same time, we are looking at the penalty provisions of other sections of the Electoral Act.

A letter has been sent to the Electoral Commission and the Attorney-General's Department by the secretariat. I understand that the officers cannot provide advice about whether a specific Electoral Act offence is suitable for redrafting, but you can advise on factors that will be taken into account in general terms in the making of such a decision. So what we are seeking today is to get a level of guidance and a few propositions. Obviously members are free to ask other questions as well and we can cite examples.

[12.40 pm]

BARKER, Ms Catherine, Acting Senior Policy Officer, Criminal Law Reform Section, Commonwealth Attorney-General's Department

CHIDGEY, Ms Sarah, Assistant Secretary, Criminal Law and Law Enforcement Branch, Commonwealth Attorney-General's Department

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

CHAIR—Do any of you want to make an opening statement?

Mr Pirani—No.

CHAIR—Mr Pirani, you appeared before the committee in Sydney, so you basically understand where we are coming from.

Mr Pirani—Yes.

CHAIR—What I am interested in is, one person having been found guilty before a magistrate—this is not a plea of guilty—and another being found not guilty on the basis of intent, why shouldn't an offence under section 328 become a strict liability offence? For everyone listening, can I preface this by saying that I am not in favour of strict liability and absolute liability carrying prison sentences. If we are looking at strict and absolute liability we might be looking at increased civil penalties. The Australian Labor Party in New South Wales suggested a tenfold increase in the fine might be imposed but also a five-year jail term. If we were to do that, I would be looking at where intent was required to be proved. Is that sufficient to get the discussion rolling?

Mr Pirani—Chair, as I indicated at the last hearing, when I had a look at the international experience I found that the only jurisdiction which has a similar offence is Canada, in the Canada Elections Act 2004. I noted that in relation to the offence of failing to have authorised material in the Canadian legislation, which is section 320, the punishment for a breach of that offence is the strict liability offence, and that is section 495 of the Canada Elections Act.

I also noted in my evidence at the last hearing that the levels of offences and penalties that are currently in the Electoral Act have not been changed since the major rewrite that occurred in 1983. So the $1,000 fine for a natural person and the $5,000 fine for a body corporate is the same as it was in 1983.

Mr DANBY—Are there more penalties or just those two?

Mr Pirani—A number of additional offences were added—for example, section 328A, which is the internet offence, was introduced much more recently. It has a penalty of 10 penalty units, which is $1,100. When it was put in, it was obviously thought to have an alignment with section 328 and that was the level of the offence that was determined by the parliament to be

appropriate. The AEC has been doing some work in relation to responding to the JSCEM recommendations in the first report dealing with the 2007 election, in particular, reviewing issues such as the level of penalties for the electoral offences in part 21 of the act. I also note that in the political donations bill that is presently before the Senate there are a range of increased penalties in relation to offences to do with funding and disclosure of funding to political parties. The Australian Electoral Commission acknowledges and accepts the view that there is a need to review the penalties in the act.

CHAIR—What is the time frame in relation to when some of that might come to light? Are you able to say?

Mr Pirani—That is a matter for our minister and the government, but we have done some work and briefing on that. I understand that the current green paper process is a fact that is being considered. I note that the responses to the second green paper are due on 27 November. Hopefully, work will be progressing forthwith after those responses are received.

CHAIR—It is an area where I would like to us to achieve cross-party support. This is not a matter where one stakeholder has a greater interest than another stakeholder. I think all the stakeholders' interests are equal in relation to this—government, non-government, Greens and Callithumpians, whoever.

Mr Pirani—Part of the concern of the Australian Electoral Commission is we seek to resolve these complaints and offences quickly. In an election campaign scenario, and that is the environment in which we deal with these matters, I normally try to resolve these matters within two working days. Therefore, the introduction of anything that will assist in the speedy resolution of these matters would be something that the Electoral Commission would clearly support.

CHAIR—You were there when Mr Morrison, the deputy chair of the committee, raised the question of infringement notices—

Mr Pirani—That is correct.

CHAIR—basically, on-the-spot fines on election day. The issue was whether that should be through the divisional returning officer or through the polling officials in the particular polling booths, where it might not necessarily have a consistent application.

Mr Pirani—Indeed.

Mr DANBY—What offences—for those of us who do not know?

CHAIR—Offences on election day itself, I think.

Mr Pirani—He also raised the example, my recollection was, about unauthorised material that was being shown on the day. It was not just the polling place offences in section 340; it was also section 328 that, in my recollection, he referred to.

Mr DANBY—What are some of those polling place offences, just to remind me?

CHAIR—If you are within a certain distance of the polling place and you refuse to obey a direction from the polling officials, there are a number of issues in relation to that.

Mr Pirani—Canvassing votes, soliciting for votes of an elector, inducing an elector not to vote for any particular candidate, inducing an elector not to vote at the election and exhibiting any noticeable sign relating to the election within six metres of the polling booth are all offences.

Mr DANBY—Was Mr Morrison proposing that this power be given to all polling officials at the booth and are you restricting it just to the chief electoral officer?

CHAIR—The issue was raised at the last hearing, and I am raising that for the benefit of the people who were not there. One of the question marks was whether officials would need to get authorisation from the divisional returning officer before issuing such an infringement notice. It was suggested in terms of canvassing the options or how this might work in a way that people could have confidence in. I am just wondering whether there have been any subsequent discussions, Mr Pirani, in relation to that suggestion.

Mr Pirani—Not at this stage.

CHAIR—Okay. So you—or the government, obviously—would respond to something from the committee if we made recommendations?

Mr Pirani—That is right. If the committee would recall, we have almost 7,700 polling stations around Australia. We have almost 70,000 staff, who are temporary, and many of them are engaged with only a short period of training prior to being polling place officials. Clearly, if an infringement notice scheme were to be introduced in relation to polling place offences, we would have to restrict it somehow to either the divisional returning officer or the officer in charge of the polling place. They have lots of other duties to do. We would not want it to be exercised by any officer who was exercising powers and duties on behalf of the Electoral Commission at a polling place.

Mr DANBY—Because this is on the record, I want to emphasise that I think that is very good judgement because a lot of people's experience is that some people get excited by their powers as polling place officials. While people from the AEC, who are divisional returning officers, are quite responsible, my experience is that some people who suddenly become officials at polling booths do not know the electoral law and become very excited about their powers. Giving them something like the ability to give on-the-spot fines would have to be done very cautiously.

Mr Pirani—And we would acknowledge that.

CHAIR—It was raised by the deputy chair of the committee; it was not raised by the Electoral Commission. Can I go to the representatives of the Attorney-General's Department at this stage. I am interested in the response to the letter the secretariat sent you on some issues that we hoped to raise. You made the point, obviously, that you are not able to provide advice on a specific offence but the factors that will be taken into account in general terms. Can I ask in the first instance about the general terms in terms of strict liability and civil penalties. There is no conflict in relation to that, that is common?

Ms Chidgey—That is right, in the sense that civil penalties are obviously not criminal provisions at all. I would just like to distinguish that because I noticed in the transcript from the early hearing that there had been a bit of confusion about fines for criminal offences, which are still criminal penalties, as opposed to civil penalties, which are provisions that prohibit certain conduct but are not criminal in nature. There are regimes in Commonwealth legislation where a set of criminal offences sits alongside a civil penalty regime and often they cover similar types of conduct. In some ways the provisions can be constructed in similar ways. The key difference is obviously that for a criminal offence, even for strict liability, it has to be proved beyond reasonable doubt. In civil penalty provisions the standard of proof is on the balance of probabilities, and often civil penalties can be set at higher amounts.

CHAIR—But there are no factors that would militate against a recommendation that, for instance, section 328 become a strict liability offence?

Ms Chidgey—If it is helpful, I could run through some of the factors that are relevant.

CHAIR—Yes.

Ms Chidgey—The guidance that the Attorney-General's Department would generally give to agencies who are considering making an offence strict liability would be that, firstly, the offence not be punishable by imprisonment. Secondly, we would recommend that the maximum available penalty be a fine of up to 60 penalty units for an individual, and the standard relationship to a penalty for a corporation is that the corporation has—

CHAIR—Sixty penalty units is, what, $6,600?

Ms Chidgey—That is right.

CHAIR—It is $110 per penalty unit.

Ms Chidgey—That is correct. That would mean the penalty for a body corporate would be a maximum of 300 penalty units because there is a one-to-five ratio generally.

We also suggest that agencies who are considering that look at whether the punishment of offences not involving fault—that is, strict liability offences—is likely to significantly enhance the effectiveness of an enforcement regime in deterrence value and whether there are legitimate grounds for penalising individuals even though they lack fault as a relevant mental element. For example, you would expect in the context of that particular regime that individuals would be put on notice and you would expect, given the situation, that individuals take steps to make sure that a particular element exists. In the context of 328, you would say it would be reasonable to expect individuals to check that material was appropriately authorised and marked.

CHAIR—So a recommendation along the lines of strict liability would not offend the principles that you have enunciated under section 328, because what it would mean is that they would need to check that something is authorised before they go and distribute it.

Ms Chidgey—That is right. In a sense, it places more of an onus on the individual. The department gives that guidance, but on the deterrent effect and the policy considerations in this

instance we defer to the Australian Electoral Commission. But from the perspective of the department we do not see any of these factors as ruling out strict liability in this instance.

CHAIR—So if you are going to distribute material of a particular nature you have got to be careful before you distribute it. Strict liability seems to me to be more preferential than absolute liability because at least you have a defence under strict liability.

Ms Chidgey—That is right. You have a defence of mistake of fact that is available. If an individual can show that they turned their mind to it and, for whatever reason, had an honest and reasonable belief that the material was appropriately authorised and marked then they would be able to avail themselves of that defence.

CHAIR—My understanding also, however, is that in the criminal law there are a number of offences that carry a level of imprisonment that are strict liability offences.

Ms Chidgey—There may well be some, but it certainly is a departure from what we recommend.

CHAIR—My recollection is that when the former government first introduced their terror laws they introduced offences of strict liability that carried life imprisonment on some of the offences.

Ms Chidgey—My recollection is that those were in fact reverse onus offences, which is different.

CHAIR—There were some strict liability offences go in there, though, that carried imprisonment in relation to membership—

Ms Chidgey—No; I think they were all reverse onus.

CHAIR—That is fine.

Ms Chidgey—I can explain what the difference between strict liability and reverse onus is.

CHAIR—I think you should.

Ms Chidgey—The description of what a reverse onus offence is in the letter we were sent is not quite how we would generally see it. Usually reverse onus would mean that you would apply absolute liability to a particular element of the offence, which would mean that no fault element would apply, but then you would enable the defendant to have a defence where they could prove that they, for instance, were not reckless, which is different. The material we received suggested 'honest and reasonable belief', but that is the standard defence that actually applies to strict liability, so that would not be reverse onus; that would just be how a strict liability offence would work. Reverse onus would usually be the application of absolute liability and then the defendant if they could demonstrate that they were not reckless—

CHAIR—In terms of policy grounds what differentiates why you would go for strict liability, absolute liability or reverse onus?

Ms Chidgey—Reverse onus offences are quite unusual. They are not part of the usual set of fault elements in the Criminal Code and go against the general principle that it is for the prosecution to prove fault elements and the physical elements of offences and not the defendant. That said, in terms of—

CHAIR—Strict and absolute.

Ms Chidgey—In terms of how the offences would cascade down, I guess the most difficult situation for the prosecution is one where they prove full fault of either recklessness or intent, below that probably is in fact a reverse onus offence because it gives the defendant a more generous defence than strict liability, and below that is strict liability where the defendant has a defence of honest and reasonable mistake of fact. Always there is the option to tier offences so that you have fault based offences and strict liability offences.

CHAIR—I will tell you what I am interested in—I do not know what my colleagues are interested in. I want to send a message in terms of the Electoral Act that that sort of behaviour in Lindsay is not going to be tolerated and that, in terms of the conduct of our elections, if you infringe in a manner like that—and some people have put to me that the penalty was pretty light: $1,000 and $5,000.

Ms Chidgey—$1,100 I think.

CHAIR—Section 328 tells you. It is $1,000 plus $5,000 for corporations. In other parts it is penalty units. It is not consistent.

Ms Chidgey—I think it is $1,100 because there is a provision in the Crimes Act that converts dollar amounts to penalty units and back again that adds 10 per cent. That is why the fine was that.

CHAIR—That is what I am interested in. One of the recommendations we made by majority report was returning the safety net to the Electoral Act for lower house voting—the old Langer amendment—and I think we also said we should bring back the penalty. The principles you enunciate seem to suggest that where you go out and intentionally advocate something, like Langer did, that could fall into a prison sentence category rather than just a financial penalty.

Ms Chidgey—I suppose I would revert to my earlier comments about the policy which we generally—

CHAIR—What is the policy that takes it then to the next level?

Ms Chidgey—The policy would be that, if you are going to apply a term of imprisonment, that you should be applying fault elements like recklessness.

CHAIR—I am not arguing for strict liability on that. I am saying that the nature of the offence is one that, if it carries a prison sentence, I would expect a fault element in it. I am not arguing strict liability and a period of imprisonment; I am saying that the nature of that particular offence is one that would require a fault element and a prison sentence in terms of deterrence. That is what I am thinking of.

Ms Chidgey—That is something we would suggest is for the Australian Electoral Commission. In terms of the appropriate penalties for deterrence, that would be more of a policy decision for the relevant area.

CHAIR—I am just trying to work out what ones should attract civil penalties with intent, strict liability and penal provisions with fines. From the commission's point of view what takes them to that next level? If we were to reintroduce, for instance, the safety net provisions of the Electoral Act, is it an argument of, 'Don't go back to the penal provisions, but just do civil penalties' or not? What takes it to that level?

Mr Pirani—The concern of the Electoral Commission is that at the moment the current offences that are there have an objective test. It is clearly objective as to whether you have the name and the address of the authorised person.

CHAIR—Yes, that is in section 328.

Mr Pirani—To the extent that that is an objective test, then that is something we are able to resolve fairly quickly and fairly regularly. In the election campaigning scenario that is something on which we are able to get a fairly quick result. Once we start getting into something that has more subjective elements, the concern is that we are going to be locked into something which is more long range, something that is going to be tied up in court and something that is going to be more difficult for us to administer.

CHAIR—But you are not suggesting that you just have what we talked about earlier—spot fines in relation to the distribution—are you?

Mr Pirani—No, I am not suggesting that for a moment.

CHAIR—Strict liability is an easier offence for you to prove in relation to distribution.

Mr Pirani—That is true and that is why we suggest in relation to section 328 that it may well be an appropriate offence to have as a strict liability offence. As to the other ones, we would have to do an analysis of what the issues are, what the concerns to be addressed are and how that is going to affect and apply to the franchise.

CHAIR—I am interested in it. How long would it take for you to do that?

Mr Pirani—We would need to have a few discussions and probably develop a couple of papers in relation to that. It would probably be a couple of months.

CHAIR—I am not interested in a knee-jerk, ill-considered reaction to what has happened. What I want is something that is sustainable, transparent and open. I want the parliament to send a message to people operating at election time about their conduct and what it means if they breach the rules. I do not want to railroad people. If people have an honest mistaken belief or mistake of the facts, that is fine. It seems to me that the only reason the people of Lindsay were brought before the court was that the sting went in—someone basically gave advanced notice of it. From an evidentiary point of view there was an element of evidence upon which the commission and the DPP could act, which was unusual.

Mr Pirani—I acknowledged that at the last hearing. One of our greatest concerns is dealing with anonymous electoral advertising.

CHAIR—I think the committee would be interested in a considered submission in terms of the gradation of offences within the Electoral Act. As I said, I am not looking for something tomorrow or next week.

Mr Pirani—It is something I will take on board.

CHAIR—And based on, as I said, the principles that Ms Chidgey has told us—proper principles and prosecution guidelines: the lot—because these things have not been looked at for 25 years.

Mr SULLIVAN—I want to go back firstly to on-the-spot fines. Would the commission have maintained records of the types of offences that are alleged to have occurred or that actually occurred at polling places on election days?

Mr Pirani—That was raised by Mr Morrison. Each of the officers at polling places actually files a report. It goes in to the operational managers in the state offices. We do not have any matters that were escalated to offences that were raised at the last election, because they would be reflected in our figures that we provided to the committee previously in relation to matters that were referred to the AFP and matters that went to the courts for prosecution, because they are all criminal offences. There were a number of incidents—and there were some that were brought to my attention—but none of them ended up with actual criminal convictions.

Mr SULLIVAN—I guess where I am going is that, although there are, I think you said, 7,700 polling places, it would be a simple matter to provide a handbook for the officer in charge as to what sorts of things he or she might expect to see and have to make a judgement about.

Mr Pirani—We actually have training manuals that are provided for all electoral officials in relation to the sorts of matters that they should be looking out for, and their various powers in relation to issuing directions to ensure there is proper conduct at a polling place in accordance with section 340. They also have contact phone numbers for a range of people, including me, so if an issue does arise we are able to readily intervene.

CHAIR—If we are going to do this from the point of view of recommendations, the other thing that we have got to consider is providing an opportunity where people can challenge that is not expensive and does not necessarily require them to go to the Administrative Appeals Tribunal, because my experience over 35 years at every level of government is that we do have some conscientious officials but sometimes they go over the top. So I am interested in—

Ms Chidgey—I might be able to assist on that score. Often, with strict liability offences, there is a provision for an infringement notice scheme—that is how parking fines work. Again, they should only apply where it is strict liability, because that is an offence where you do not have the complications of proving thought, which would be make it very difficult to determine the things that you would need to to issue an on-the-spot fine. For infringement notice schemes, we would suggest the maximum penalty be a fifth of the total maximum penalty for the full offence, so in

that case it would mean a maximum penalty of 12 penalty units for the infringement notice for an individual—it is $1,320, I think—and 60 penalty units for a body corporate.

CHAIR—And, if you want to challenge that, tell us about a scheme for how to do it cheaply—

Ms Chidgey—Basically, the way that it usually happens is that, if you challenge it, you do not pay but then it becomes a matter that proceeds to a court in the ordinary event, like a trial. That is how an infringement notice scheme works.

CHAIR—Yes, I know that is what happens. What I am interested in is that in some instances that might just have people paying because of the cost of going to court, the time delay or whatever. If we go down this path—I am not saying we are; I am just looking at all options—I do not like the court option where you might have to pay a solicitor or a barrister and spend a day in court waiting to argue the case.

Ms Chidgey—Infringement notice schemes do not provide for merits reviews. You can get an administrative decisions judicial review, I think. But it is a criminal offence. The infringement notice is just to enable you, if you choose to just accept that, to pay the smaller penalty—

CHAIR—Right, cheaply.

Ms Chidgey—rather than proceeding to a full hearing in court. But if you dispute that and do not wish to pay the lower penalty then it proceeds to court in the ordinary course of events.

CHAIR—But, if the Electoral Commission is going to, say, administer a lot of this stuff, why can't you have a provision that allows you to go before the state electoral officer?

Ms Chidgey—It would not be appropriate with a criminal matter, which is what an infringement notice scheme is about. It might be possible to deal with through a civil penalty regime that would be administered civilly, possibly by the AEC—

CHAIR—That is actually what I was interested in, a civil penalty regime, where we are talking about on-the-spot fines, for instance, not the other stuff.

Ms Chidgey—Infringement notices are on-the-spot fines; that is how parking fines and speeding fines are done. But, yes, it is distinct from dealing with—

CHAIR—There is nothing, for instance, if the divisional returning officer or the returning officer for the polling booth—if we go down this path—issues this on-the-spot fine or whatever you want to call it.

Ms Chidgey—If it was done as part of an infringement notice scheme that had a strict liability offence as s provision—

CHAIR—Yes, in the same regime.

Ms Chidgey—then that would be done in the way that I have just outlined, but it might be possible to create a completely separate civil regime.

CHAIR—The reason I am saying that—and, Mr Pirani, you can come in in due course—is that my impression is that the commission want the ability to do their own thing on some of this, that that is consistent with them being able to do their own thing—not on what I regard as the more serious stuff but on the on-the-spot stuff, which could then be dealt with within the commission, and if there is a dispute it goes before the senior electoral officer for the state.

Ms Chidgey—I might just add that infringement notices do allow for representations, usually, to be made by the individual—

CHAIR—Or to the electoral officer.

Ms Chidgey—but not for it to proceed through the AAT. Usually, if those representations were not accepted by the officer who issued it—

CHAIR—Correct; it then goes to the next level.

Ms Chidgey—it would go to a court.

CHAIR—But that is what I am trying to get into my head.

Mr Pirani—We already have that in the act, in section 245, in relation to nonvoting. The DRO issues the notice for nonvoting, which is the equivalent of an infringement notice. If a person seeks to challenge that, instead of paying the $20 fine which is imposed by the infringement notice, they then go to court and the court imposes up to a $50 fine, plus court costs. So we already have an infringement notice regime in the act for the non-voting offences.

CHAIR—Yes, but you are missing my point. If we are extending this, quite frankly, I personally have a real problem with tying up court time for matters like this.

Ms Chidgey—The idea, though, is that you usually would not because most individuals do just pay the infringement notice.

CHAIR—I understand that, but it is the principle of it. Having a legal background, I am averse to people going to court. I know what you are saying. I am not talking about the other offences. I am not talking about section 328 and things like that. Mr Morrison came up with the novel idea of on-the-spot fines. I know Mr Pirani's view is that he would like the commission to be the controllers. I do not see why we cannot set up something that works within the current environment.

Mr Pirani—Maybe we have to do more work on the civil type offence regime.

CHAIR—Yes, a civil type thing, without tying up a magistrate's time. No disrespect.

Ms Chidgey—Civil penalty regimes are heard in courts as well.

CHAIR—I understand that. Maybe I am not making myself clear. What I am trying to say to you is that I understand court procedures. I understand courts determining most matters. I also understand about mediation, alternative dispute mechanisms. If we go down this path, I want to look at a non-court option. In my opinion, that is more efficient and less costly for everyone involved. I know what you are saying. It is novel.

Mr Pirani—My understanding is that if we are going to introduce something that is civil in nature and more of an administrative penalty—and we are talking about an administrative decision as opposed to a judicial one—we have to have some form of merit review mechanism available to challenge it. Whether that needs to be at the level of the AAT or whether it can be something like the Commonwealth Ombudsman is something that we can possibly take on notice.

CHAIR—Could you look at that. Ms Chidgey's point can still be taken up, but the other one could be the alternative path to take. If people want to go to court, let them go to court, because they have a hearing in front of a magistrate or whatever, but then there is the alternative route.

Ms Chidgey—My advice was based on a criminal offence regime, which is obviously an area in which we have expertise.

CHAIR—I am not interested in the criminal regime.

Ms Chidgey—Whenever an infringement notice was challenged, because it is a criminal matter it would have to be ultimately dealt with by a court.

CHAIR—If it is a criminal matter, I have no problem with what you are saying. My view is that you let them go to court. I am looking at a civil regime as an alternative mechanism. You are absolutely right; I am not disagreeing with you about a criminal regime.

Ms Chidgey—In a civil penalty regime there may be more capacity to have a merits review, but ultimately it would always have to be a person's option to end up in court.

Mr Pirani—My recollection is that there are some provisions in the Customs Act where there is an alternative pathway that they are able to take.

Mr SULLIVAN—I am much taken by the idea that presiding officers are able to deal effectively and quickly with things like booth workers encroaching within the six-metre limit and the like. This will happen time and time again amongst the political class. They will push whatever envelope they can but not if they are going to cop a $1,200 fine for doing it. I do not really care whether they have to go to court. If we end up having proper behaviour at polling booths and the person in charge of the polling booth is able to ensure that by saying, 'Do what I tell you or it's a ticket,' I do not really mind that. Mr Danby is concerned that that person might get a bit too big for his breeches about it. I have seen enough bad behaviour at polling booths in my area over the last 20 years to know that this could be a useful tool for the AEC on election day. But these are not the offences that we are talking about. We are not talking about giving on-the-spot fines for these types of offences. A whole range of other matters exist in the act for which there is no penalty. The law says you cannot get within six metres. What is the penalty?

Mr Pirani—$500.

Mr SULLIVAN—So that $500 fine exists?

Mr Pirani—Yes, it does.

Mr DANBY—What is that for?

Mr SULLIVAN—Getting within six metres of a polling booth.

Mr Pirani—It is being within six metres and undertaking certain actions under section 340. The sorts of actions, again, are canvassing votes, soliciting for votes, inducing an elector not to vote for a candidate, inducing an elector not to vote in the election or exhibiting any notice or sign relating to the election. My understanding of the issue that was raised by the deputy chair in Sydney was that it was that final one which caused him concern, with the false advertising about supporting nuclear power stations or something in the division of Cook.

Mr SULLIVAN—For all of those sorts of offences, any presiding officer worth their salt would come out and say, 'Move it or you'll cop a $1,200 fine.'

Mr Pirani—Indeed. There are a range of other offences that have the five penalty units and they include using loudspeakers, public address systems, amplifiers, broadcasting vans, sound equipment, radio equipment or any other equipment or device in broadcasting and the activity is audible within the polling place. Those are also offences. Again, it is to ensure we have good conduct and people able to vote in peace.

CHAIR—Has there been anyone dealt with under those sections for a while?

Mr Pirani—Certainly not that I am aware. I have been in the Electoral Commission only for the last election. But I am certainly not aware of any previous cases and reported decisions in relation to misconduct under Commonwealth law in relation to conduct at a polling place.

Mr SULLIVAN—That is the range of offences that I would like to see addressed.

CHAIR—Mr Pirani is going to come back to us, I think.

Mr DANBY—To go back to the answer you just gave Mr Sullivan, does the $500 offence talk about a candidate's proximity to polling booths?

Mr Pirani—No. It is canvassing. There is another offence in section 341 about wearing badges or emblems. The issue that we have is that, if a scrutineer is present all day and if they wearing the emblem, we will ask them to either leave or change their clothing or remove the emblem. That is an offence because that is canvassing at a polling booth. Candidates are able to go in and vote and go out et cetera, but if they are canvassing within six metres of a polling booth then that is an offence.

CHAIR—You have got some guidelines that you obviously give your officials in relation to that.

Mr Pirani—We have.

CHAIR—What I am interested in is what happens when it is a T-shirt that says 'I love Kev' and you go in and you are voting.

Mr Pirani—If it is a scrutineer then it is an offence. If it is just Joe Blow going in and voting then it is not an offence.

CHAIR—Right. So scrutineers can come in and come out but they cannot hang about with such a thing on. Is that your guideline?

Mr Pirani—That is the difference. We have actually published one of our electoral backgrounders, No. 20, which is entitled *Polling place offences*, and this is all set out in that electoral backgrounder.

CHAIR—Okay.

Mr DANBY—One of the things people get edgy about is candidates walking around in schoolyards that are proximate to polling booths. Providing they are not within six metres and are not canvassing votes, is that fine?

Mr Pirani—If they are not within six metres of the polling booth. There is a distinction in the act between a polling place and a polling booth. Quite often the school or the actual larger area is the polling place, but the offence relates to the polling booth. The OIC of the polling place will put up a sign saying 'this is the polling booth' and, therefore, within six metres of the polling booth if you do it then it is an offence and you will be asked to leave or asked to change your clothes.

Mr DANBY—We are one of only 12 countries that have compulsory voting. You just said that the fine for nonattendance or nonvoting was $20.

Mr Pirani—Nonvoting is $20 if you plead guilty in section 245 and $50 plus court costs if you are convicted.

Mr DANBY—How long is it since that has changed?

Mr Pirani—I would have to take that on notice. I would imagine that it has not changed since 1983 but I will take that on notice.

CHAIR—Where does it say '$20 if you plead guilty'?

Mr Pirani—That is section 245(8)(b), on page 267 of reprint 11.

CHAIR—That I find interesting because the principle in courts these days is that if you do an early plea you do get, in effect, discounts. Is that a principle that you think could apply to other sections of the act in relation to some of this—where it is civil penalties, for instance, so if it is a plea, $20, and then $50? It is a discount.

Mr Pirani—If it is in the terms of criminal law that is within the discretion of the court because the offence amounts here are always an upper limit, so the court is not constrained as to what it takes into account.

CHAIR—Why was it put in there then?

Mr Pirani—Again, this is historical. I would have to go back and have a look as to why parliament decided it was appropriate to put these levels in.

CHAIR—Is it so that people do not go to court?

Ms Chidgey—It may well be in line with those principles I discussed about infringement notices where generally if you accept the infringement notice and pay up, you pay a fifth of the total penalty that would be available. If you choose to challenge it and go through a full court process—

CHAIR—Is that a principle that you think, if we are going to go down the infringement notice path, we should be recommending for other matters?

Ms Chidgey—Our guidance is that, yes, the head offence would then be strict liability and you apply a maximum penalty of up to 60 penalty units for an individual, and then the maximum penalty for the infringement notice should be 12 penalty units, as a fifth of the strict liability offence.

CHAIR—Thank you.

Mr SULLIVAN—I have a question relating to the type of offences we are talking about—unauthorised material or not identified as to where it is coming from, rather than unauthorised, I guess. Is it an offence for somebody to cause others to distribute that material without distributing it themselves?

Mr Pirani—The offence in section 328 relates to the publication, so it is the persons involved in the publication.

Mr SULLIVAN—So it is not the distribution—or is distribution part of publication?

Mr Pirani—The distribution could be regarded as part of the publication, and that is what the offence is. So it is not just the printer; it is not just the person who authorised it; you could, technically and arguably, go back and do everybody who was involved in the stream of the publication. But we would still need to prove at the moment the requisite intent and the requisite fault elements in relation to the offence.

CHAIR—In relation to the Lindsay matter, no-one was convicted or prosecuted in terms of publishing.

Mr Pirani—In relation to printing.

CHAIR—In relation to printing, yes.

Mr Pirani—That is correct. My understanding is that they did investigate and attempt to locate where it was printed because, as I recollect, there was an allegation about where it was printed, but that was never proven.

Mr SULLIVAN—But somebody could not hire a bunch of Boy Scouts to deliver stuff out to letterboxes—if the Boy Scouts get caught with it, it is going to come back to that person that has hired them out.

CHAIR—Let us say they do hire the Boy Scouts, if that is the facts of the case. I am interested, Ms Chidgey, in your views about the Boy Scouts. They would have a defence, wouldn't they?

Ms Chidgey—At the moment, because recklessness applies to that element, they would have to be proved to be aware of a substantial risk. If it was strict liability then they would have the defence of mistake of fact. Usually, therefore, you would have to show that you had turned your mind to the matter and looked. For minors, depending on what age they are, if they are sufficiently young there are special principles of criminal responsibility that apply as well. Below the age of 10 you have got no criminal responsibility and between ages 10 and 14 there are some special principles that apply, but above 14, if they fail to check any of the material then—

CHAIR—They are gone.

Ms Chidgey—possibly.

Mr SULLIVAN—I just think that the person I am concerned about is captured, and it looks like the Boy Scouts might be too.

Ms Barker—The person who caused it to happen would be captured by the offence.

Mr SULLIVAN—Yes. Was the Kevin 07 T-shirt the subject of an opinion from anybody? I understand at the last election there were some questions about the public, who were buying them in large numbers, turning up at polling booths in them.

Mr Pirani—If they were not scrutineers, if they were not canvassing for votes, they were free to wear it in a polling place. But if they were staying as a scrutineer and if they were seen to be canvassing for votes then that was an offence and they were asked to leave.

Mr SULLIVAN—From the AEC point of view, is that appropriate?

Mr Pirani—That is what the law requires.

CHAIR—They just administer the law; it is not for them to determine whether it is appropriate.

Senator BIRMINGHAM—Did discerning the activities of people wearing them cause difficulties for officials?

Mr Pirani—Certainly not. The OICs were aware of who was there as scrutineers and were aware of how long people were staying in each of the polling booths. If it was felt that someone was staying for too long, they were spoken to and either asked to leave or, if they were a scrutineer, asked to change their attire.

CHAIR—Thank you all for your attendance today. Obviously, Mr Pirani will have further interaction in relation to what he might want to give us guidance on. I thank each of you for coming along today. You will get a copy of the transcript of evidence.

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

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 1.26 pm