

**ELECTORAL MATTERS COMMITTEE**

**Inquiry into the conduct of the 2006 Victorian state election and matters related thereto**

Melbourne — 28 August 2007

Members

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Witnesses

Dr B. Costar, and

Mr W. Jacomb.

**The CHAIR** — We have 15 minutes or so for questions from the floor. There are some formalities to go through here as well, so I will start those now. I extend a welcome to members of the public and thank them for attending the more informal part of the proceedings — that is, comments from the floor. The Electoral Matters Committee would like to give members of the public an opportunity to address the committee. I wish to advise all present at these hearings that all evidence taken by this committee is, under the provisions of the Constitution Act 1975, protected by parliamentary privilege. I also wish to advise witnesses that any comments made by witnesses outside the committee's hearings may not be protected by parliamentary privilege. The committee is hearing evidence today on the inquiry into the 2006 Victorian state election and matters relating thereto. There are a few procedural things that I need to go through. Please wait to be acknowledged by the Chair or executive officer before speaking. Please clearly state your name and address before making your remarks. Please keep your comments brief, 2 to 3 minutes, and to the point. If you do participate the committee members will take note of your comments but will not in general ask questions. Please note that this is a public hearing and that your comments will be recorded and included in the transcripts of the hearing, which will become a public document. You will receive a copy of the transcript in about a fortnight. Obvious errors of fact or grammar may be corrected, but not matters of substance.

**Dr COSTAR** — My name is Brian Costar and my address is 12 Ardrie Road, East Malvern. I am a professor of politics at Swinburne University, but these are just my personal comments. My first comment is to congratulate the committee for having the informal session of questions from the floor. It has not been a feature of other committees in other parliaments that I have addressed, and I think it is a good feature. I will say just a couple of things to supplement comments made by Dr Coghill. Someone asked a question about the rate of public funding in Canada subsequent to the recent reforms. My understanding is that the rate of public funding has risen quite substantially in Canada. In Australia at a national level public funding accounts for just under 20 per cent of party total expenditure on campaigns. I think in Canada now it is over 50 per cent, so it was a trade-off: the caps came with additional public funding.

On the question of disclosure, political money, if you want to call it that, is one of the big issues around democracy these days, and it is a difficult area to address. One way of addressing it, though, is to be transparent, to have very good disclosure laws. That might not be the only solution, but it is a critical solution. This is a model that has travelled other parts of the United States of America, and Dr Coghill made mention of the principle. The principle is that donations to candidates and political parties from wherever are immediately registered and displayed on, in this case, the New York City Campaign Board's website. This was trialled over a number of years. They had difficulties with it — simply technical difficulties. As it was reported to me, and from some investigations I have done, they have solved these problems largely through the internet. They have software which the campaign board makes available free of charge to candidates and parties, and I understand they are quite happy to make it available to jurisdictions outside New York or the United States. The advantage is obvious; you find out who is donating to whom at the time at which you might want to make a decision about your vote.

Under our system, of course, months and months go by — I am talking about the federal level — before we actually know who donated to whom. If you notice the media takes very little interest in it; it is a one-off story. You might say, 'What is the advantage to political parties or candidates of this?'. It is an automatic accounting system. They are in fact doing their returns in a sequential way. They do not have to wait until the end. They know that various reports coming through the electoral commission and the Joint Select Committee on Electoral Matters — your federal counterpart — came up with the fact that sometimes minor parties and Independents get into all sorts of trouble in recording their donations because they simply do not have the infrastructure to do it. I mean the big parties can hire all sorts of people to do it, but others do not. Yet if you have got this system and the software is free, I understand it is very user friendly, so the process is on going. It seems to me it serves the public interest; we know who is donating to whom, when we

need to know it. The advantage to the parties is that it is an ongoing accounting system. That is all I have to say, Chair, but I am happy to take questions if you wish.

**The CHAIR** — Thank you. Just as clarification, Canada is 20 per cent?

**Dr COSTAR** — No. Australia is less than 20 per cent; Canada is more.

**The CHAIR** — Canada is 50 per cent. Do you know what Canada was prior to this legislation being introduced?

**Dr COSTAR** — I did know but I cannot recall. I can find out for you.

**The CHAIR** — It would be close to 20 per cent, surely?

**Dr COSTAR** — It was not unlike the Australian figure, as I understand it.

**The CHAIR** — This might be asking a bit too much, but do you know what the public reaction has been to that increase in funding?

**Dr COSTAR** — I think the public reaction has been either neutral or supportive, but it could well be because of why this new scheme was brought in. It was brought in as a result of a scandal known as Adscam. I cannot recall all the details of it, but it had something to do with lobbyists and political money and certain advertising firms getting preference from governments because they had worked for them and whatever. This became a matter of public notoriety in Canada. In a sense the circumstances were right for the public to accept a change as far as I understand it. It has not been in place for very long, so we need to bear that in mind, but it has been well accepted.

**The CHAIR** — There was a major trigger there.

**Dr COSTAR** — I can see your point. Is the Australian taxpayer going to stump up more money for political parties? I can understand that. I have been on record elsewhere as saying that the public funding scheme in Australia does not work and it should be abolished. But if it were attached to something else that makes it a different proposition. If you are getting something for the dollar rather than just giving it to parties and candidates, who, of course, just hand it on to media owners.

**The CHAIR** — Surely with an increase of 50 per cent, internal scrutiny of the party processes will be even greater because the taxpayer is funding more?

**Dr COSTAR** — It may well open up what is an issue. It has been suggested that in response to receiving public funding parties should be more open in terms of their candidate preselections. In Queensland there has been a slight move in that direction. In order to qualify for public funding parties have to register a constitution which is — I think the phrase in the act is — ‘broadly democratic’.

**Mr THOMPSON** — Brian, just going through Dr Coghill’s submission and the donations to political parties: the highest donations by my reckoning in the four-year period to 2002 is by Tattersall’s Holdings Pty Ltd and George Adams to the Labor Party. I might add also in that case to the Liberal Party as well, although for a lesser amount. They are some of the higher ones, so to speak. The other significant donations are from Multiplex and Central Equity. Among another group — a different category of service company — is Ernst and Young. Do you have any comment on large-volume donations to political parties?

**Dr COSTAR** — I think you would find that if you looked at other states and the commonwealth it is a fairly similar pattern of the sorts of organisations that are giving large amounts of money, although I guess companies involved in gaming would not be giving to federal candidacies because it is simply not in their jurisdiction. Of course, as Dr Coghill said, the

Canadians have really gone a long way on this and simply banned donations from corporations, which includes, as Dr Coghill said, labour unions. That has been talked about in Australia; I do not think it is quite there yet. But in Canada the argument is that it has got to be individuals. My own view is that there is too much money in the system. We have said that we are scandal free. I would encourage the committee to have a look at the Queensland Crime and Misconduct Commission's report on the 2004 Gold Coast City Council election. I think there is still legal action going on over that but it was notorious. The breaches of the Electoral Act, the Local Government Act and almost every other act that you can imagine were just multiple in this arrangement.

It involved relatively large amounts of money, and one of the outcomes of it was that most of the donations were from property developers — some of the companies you mentioned — and the property developers, in Queensland at least, have made a public statement to say that they were so horrified at what was done with their money that never again will they donate to a federal, state or local campaign. Now we wonder how long that will actually last, but what happened was that they gave money; they thought in good faith, but the money was grossly misused in breaching the act, and they have said, 'We will never give again'. Maybe there is more support in the community than you might think because I presume — well, I do not presume — they said, 'This has damaged our corporate reputation'.

**Mr THOMPSON** — Dr Costar, in Dr Coghill's submission he made reference to — and I stand to be corrected in terms of the precise quote but the general intent was — his familiarity with an example where government figures had been stood over by a lobbyist. Are you familiar with any background to that?

**Dr COSTAR** — No, I am not. I was as intrigued as you were to hear that. That was news to me, and disturbing news if it is true.

**The CHAIR** — Thank you.

**Mr JACOMB** — My name is William Robert Jacomb of 52 Rhodes Street, St Albans. I am a member of the public. I am a member of a political party. I have worked in state, federal and local elections for the past 20 years. I have also been a computer engineer for about the same period of time. I am the person who found the Y2K bug in Quicken, and I am also the person who found the bug in the ATO's GST software.

First and foremost, I would like to thank honourable members for the opportunity to speak before them. I apologise for not having a written submission but due to recent serious health problems from my naval service, I have not had a chance to do that. However, what I am going to ask questions on today will be in writing by the end of the week for the benefit of the committee. To paraphrase Jefferson, 'The speech is best loved which is the least', so with your permission I will be brief. I would like to raise with and ask the committee to consider the following sections of the act: section 74, which deals with the ballot draw; section 84, dealing with false, misleading and deceptive conduct; section 110, which covers electronic voting; section 120, recounts; sections 130 and 146, Court of Disputed Returns; section 174, powers of election officials, the VEC in general and donations, mentioned by speakers.

Section 74 is about the preparation of ballot papers. Under that section there are two methodologies allowed at the discretion of the commission — one is electronic and one is the manual system. I first observed that it is essential that the system be like Caesar's wife: not only above suspicion but seen to be above suspicion. We have seen how people bend over backwards to break computer systems: things like the federal government's pornographic filters and things like the Aristocrat gambling machines, and I submit that it takes little time to do a manual ballot draw. The problem with computers is that they can be hacked into and people do not want to feel ripped off in an election. If it is done in public where people can see the marbles being drawn, there can be no doubt that whoever got that first position on the ballot paper and that extra 5 per cent from the donkey vote has got it fairly and squarely.

My second observation is that the problem with the way the commission interprets the act for both state and local governments is that it is a single ballot draw. The problem with that system is they literally put the marbles into a bingo machine in the order that the nominations are received. I have had numerous experiences where, due to inadequate shaking of the device — they just roll the handle — the later you lodge your nomination form, the greater the probability of you getting no. 1 on the ballot paper. I will provide a copy to the committee of the standard statistical textbook example on why this methodology is wrong.

I recommend to the committee that we mandate in the legislation that we adopt the federal model of double-blind random. This involves having two bags. Bag A has the numbers of the position on the ballot paper; bag B has numbers representing the candidates. Both bags get shaken. Someone draws the position on the ballot paper out of bag A and marries it up with a name from bag B. That seems to work well at the federal level, and very rarely do we see actions in the AAT disputing the ballot draw process.

The second thing I draw the committee's attention to is section 84: false, misleading and deceptive behaviour. Clearly, from the minister's second-reading speech for both the state act for the state elections and the Local Government Act, the intent is to stop people during the election period behaving in a way where they are saying, 'Billy Blogs is a terrorist' or, 'I am the endorsed candidate for the Greens' — and we all know about the famous Nunawading by-election 20 years ago when somebody put out what was purported to be the Greens how-to-vote. The problem with the act as it stands is that it is based on certain High Court decisions — and I will provide the authorities to the committee in my submission. In order to successfully overcome that false, misleading and deceptive behaviour you have to prove that the act of the voter filling out their how-to-vote card was when the false, misleading conduct had its effect.

The way court judgements stand at the moment I can go around throughout the election saying, 'I am the official ALP-endorsed candidate or 'I am the official Greens candidate'. This leads the voter in the formation of their intent to vote to think I am the official ALP-endorsed candidate when I am not. There was a classic case in South Australia where somebody was disendorsed but continued. Because of the relevant High Court decisions, even though our intent in the act is to stop this behaviour, unless I can prove what happened at the time they filled in the ballot paper, it does not work. The only time it works at the moment is if I can prove that the how-to-vote card was false, misleading and deceptive. That is about the only time the Court of Disputed Returns or the Municipal Electoral Tribunal would overturn the election result. Yet the intent of the act, based on the second-reading speech, is to prevent this behaviour. I would suggest to the committee, with great respect, that perhaps consideration should be given to amending the wording of the act to include the phrase 'in the formation of their vote or of their intent to vote'. The problem with politics, I would argue, is that we have the dichotomy that we attract our brightest and best, but we also attract our brightest and worst. The problem with bright people is that they will always find a way to work around the rules, and we need to factor that in.

With permission, the next thing I draw to your attention is section 120, recount of ballot papers. I speak from personal experience at a state and federal level. Again, if you read the minister's second-reading speech for both the state and the local government acts the clear intent was to say, 'I am a candidate or a candidate's representative. I reckon it is close. I want a recount. All I have to do is put in a letter with reasons for a recount'. That is quite clear, and I will provide examples from the second-reading speech. In my experience the VEC returning officers take the attitude that it is at their pleasure, and they have the right to deny. Yet, based on what the minister said at the time the bill was passed, it was not an optional extra. It was, 'If I or the candidate put in writing that I want a recount, it happens'. This is important because government is decided not on the safe Labor and not on the safe Liberal seats, it is decided on the marginal seats. When we start having close votes in the marginals we need to get it right, so if a candidate feels aggrieved and Parliament has given in the legislation the ability to order a recount, the VEC should not be saying it does not want to go through the costs, and I have had that experience. I suggest again to the committee that that section of the act should be revisited. If the committee decides that it should be

an option and not a mandatory requirement, that is equally fine, but I suggest the matter should be cleared up.

The next item I bring to your attention is very important. It is the Court of Disputed Returns. People do not go to the Court of Disputed Returns or to the Municipal Electoral Tribunal because they have nothing better to do. We all have a lot better things to do. The only time we go to these places is when we feel that something has been done very wrongly in the election. There are a number of issues with that. Firstly, a lot of the time it might just be that horrible thing: the litigant appearing in person. They may think they have been unfairly ripped off, but it may well turn out that that is merely their perception and that the letter of the law has been obeyed and there has been no miscarriage of justice in the electoral process.

The other thing I have observed is that electoral law is very complicated law. You really have to understand the relevant High Court cases, the New South Wales Supreme Court cases, the Victorian cases and South Australian cases. Having a litigant appearing in person just drags the process out. It clogs up the court and racks up bills. We are very generous — at least at local government level — and we will only award costs on a justice basis, which is good, but it still takes up time. Time and time again I have seen people appearing — for example, before the MET— and the judge will say, ‘What do you want, Mr Smith?’ ‘I want justice’. Justice is irrelevant. The MET, and it is the same with the Court of Disputed Returns, can only give you the relief that the act provides. Furthermore, when you go to the MET or the Court of Disputed Returns you are taking the Victorian Electoral Commission to court; you are going up against the public purse. Quite rightly, they will go out and get their solicitors from the VGS and they will go out and get decent barristers. You are only a two-term or a one-term member of Parliament; you have just been ripped off in the election, or at least you think you have, so you say, ‘Right, I am going to the Court of Disputed Returns’. Where are you going to find the \$50 000 or \$60 000 to hire a decent barrister and run a case in the Victorian Supreme Court, sitting as the Court of Disputed Returns, or for a lesser amount in the Municipal Electoral Tribunal?

I would suggest that whilst everyone wants money out of the government and at the same time they do not want to pay taxes, we need to make provision in the act for equality and fairness so that when an applicant makes an application to the Court of Disputed Returns we provide them with competent legal advice at the public expense. The benefit we would accrue is the more frivolous cases would be more likely disposed of before going to the court, and the same token is that the decision that gets made at the MET list, if it has been argued correctly and well, will result hopefully in the correct judgement, not just whoever had the best barrister on the day. Justice, especially with elections, must not only be done, I would submit to the committee, it must be seen to be done. Until we provide a quality funding so we have people representing the applicant of equal calibre to the VEC, it is really an unfair fight. The worst part and what I have seen happen is that people after the event say, ‘If only I had known, I could have hired this barrister who had the knowledge to help me, the case might have been decided differently’.

I will admit that, as Winston Churchill said, democracy is the worst form of government there is. It is just that every other form of government we have tried before is worse. It is important that it should be seen and done as fair as possible. I submit that point to the committee for its consideration. That also covers section 135 of the petition. It is very complicated and very expensive, I would submit. We need finality of the decision on the election result. Yes, we do need it as quickly as we can, but let’s make sure it is a fair decision providing equality of legal representation so we get it right. I know I am going to pay it in the hip pocket through taxes, but it is the overhead of democracy. I am a computer engineer. If my car breaks down or my service drive breaks down, I may not have the money to fix it. I will find the money because if I do not have the tools, I cannot do my job. With some things you just have to cop it sweet and pay for, and I would submit that that is perhaps an issue that should be considered.

With regard to section 174, I would make the following observations, and the same remarks apply to the Local Government Act, although I will admit that the state Electoral Act is somewhat better

than the Local Government Act: one, whilst at least in the state act we have some form of definition of the role and function of the election official, being the returning officer and the officer in command of polling booths, you in a way have to deduce from parts of the act exactly what the powers are. I would submit that it would be helpful for all concerned, because people do read the act, if we had in both the Local Government Act and this act in one section exactly what the powers are. The second thing I would observe is we need to make it clear what powers are mandatory to be exercised. Typically we might have a thing which says the returning officer has the responsibility to — what is the phrase? I am quoting the Local Government Act, of course, schedule 2, clause 17(c), which provides the power to arrest without warrant any person reasonably suspected of committing an offence against the act. What that means is you just cannot be breaking one part of the act. You have to be breaking a part of the act with penalty units or imprisonment involved. The courts over a period of years have said that power is a discretionary power, so if I am the returning officer and I see someone going around saying, ‘That person over, that candidate, is a terrorist’, I have the right not to do anything about it. But the expectation of the candidates is that the returning officer is the umpire, so if the rule is there it should be enforced; it should not be a discretionary rule to enforce the law, because how would you feel if you went to a Melbourne-Collingwood match and all of a sudden the umpire put on a Collingwood football jumper and paid every free to the Collingwood players and would not pay any frees to the Melbourne players when they got pushed in the back or high-tackled?

It comes back to the point that justice, or in this case fairness in elections, must not only be done but be seen to be done, making it clear to the returning staff ‘This is what you have to do, and if you see an infringement — I do not care whether you get the police, I do not care whether you do it yourself — you will stop the misleading behaviour or the disruption to the polling place on polling day’. It is not an option. It should be mandatory. On one occasion I had the personal experience with the VEC where somebody rocked up and started tearing down my candidate’s posters and started destroying the how-to-vote cards. I believe there is no place for violence on a polling place, so what I did was I went to the officer in command of the polling place. He threw me off the booth for demanding that he uphold the law and stop the violence at the polling place. I submit that was not your intent or your predecessor’s intent with both the state Electoral Act and the Local Government Act. I do not think it would be helpful if the matter was teed up so that it was no longer discretionary but rather mandatory.

With regard to section 110, electronic voting, I draw the committee’s attention to the fact that there have been attempts to do this in America at the federal government level for members of the armed forces. The problem with electronic voting is that at least with our paper system there is a clear audit trail, and at least if we go to a recount in the Court of Disputed Returns there is an old saying that you learn in the navy, ‘If it is stupid and it works, it ain’t stupid’, and because it is simple and has a clear audit trail, again it makes the process transparent.

**The CHAIR** — We have 5 minutes.

**Mr JACOMB** — I am about finished. After all I would not dare come between the honourable committee and its lunch; otherwise I would be lunch!

There is a time and place for computers. A classic example is an old lecturer of mine going to his boss with his pocket diary opened up and saying, ‘Fred, can I see you at 10 o’clock on Tuesday?’. The boss would turn on his computer, wait 5 minutes, flash up sidekick, only to say 10 minutes later he could not do it. Just because it is a computer does not mean it is perfect. In fact if all aircraft were as reliable as the average piece of computer software, no aircraft would leave the ground.

With regard to computerised accounts, I saw with great interest how the committee had a positive experience with going out to the council by-election. I would observe that when there is a by-election we can all throw resources at it. I have done it at a general election. It takes forever. I have compared it to how we used to do it manually, and I am old enough to have done PR

manually and first preferences manually. Any decent returning staff can do it a damn sight quicker and with a damn sight more reliability. I will give an example to the committee where I can show that 461 votes were introduced into the count through the computerised counting, and I do not make that statement lightly, but I will give you the facts.

With regard to the VEC I would make the following observation. Back in the time that communication systems were more difficult, I would argue it did make sense to have a Victorian Electoral Commission, but given that a lot of their work is done by the Australian Electoral Commission, and the Australian Electoral Commission for federal elections employs the same staff at the grassroots level in terms of manning polling booths, the question should be asked whether we should be duplicating the bureaucracy and whether we should give consideration to perhaps just tendering it to the federal electoral commission and saving money that way. That will be contentious and, in the words of *Yes, Minister*, a very courageous decision, but we have a duplication of some staff doing the same job. I do not like paying twice for the same piece of real estate, and perhaps the committee would wish to consider that. I would like to finally say thank you again for permitting me to speak before you, and I trust I have not bored you.

**The CHAIR** — It was very interesting. You made some good points. Thank you, William. Any questions?

**Mr THOMPSON** — Just one question. I would be interested if you could provide the committee with the 461 votes that were introduced.

**Mr JACOMB** — I intend to do so. I apologise for not having it with me. I have been very ill lately. I apologise.

**The CHAIR** — Once again, thank you. That was very useful.

**Witnesses withdrew.**