CORRECTED EVIDENCE

ELECTORAL MATTERS COMMITTEE

Inquiry into whether the Electoral Act 2002 should be amended to make better provision for misleading or deceptive electoral content

Melbourne — 18 August 2009

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Professor B. Costar, coordinator, Democratic Audit of Australia.

The CHAIR — Welcome. All evidence taken at the hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Parliamentary Committees Act 2003, the Defamation Act 2005 and where applicable the provisions of reciprocal legislation in other Australian states and territories. I also wish to advise you that any comments you make outside the hearings may not be afforded such privilege. Professor Costar, no doubt you have received and read the pamphlets on giving evidence. For the benefit of Hansard, can you please state your full name and business address?

Prof. COSTAR — Brian John Costar, Swinburne University of Technology, Hawthorn.

The CHAIR — Are you attending in a private capacity or representing an organisation?

Prof. COSTAR — I am representing the Democratic Audit of Australia.

The CHAIR — And what is the position you hold in that organisation?

Prof. COSTAR — The coordinator.

The CHAIR — The evidence that you give today will be taken down and become public evidence in due course. You may now make some opening remarks.

Prof. COSTAR — Thank you, Chair, and thank you for the invitation to address the committee. Reading the submissions, I think we are all agreed in our aspirations around this matter — that is, that there should be truth in public life and there should be truth in electoral advertising. The problem, and Mr Tully alluded to it, is: how can that be achieved? If it is going to be achieved by way of some form of sanction — probably a legal sanction — how can that be achieved without creating unintended consequences that are more negative, more disruptive and more problematic than the problem that we set out to solve? I feel a bit embarrassed coming along here and being seen as an advocate for untruthfulness, which a cynic could read into my submission, because, as you know, to cut to the quick, my recommendation is that the act not be amended along the lines that have been suggested. As I said, that is not because I want to encourage untruthfulness in electoral advertising.

I think it is important to go back — and some of the submissions did not seem to go back to this — and note that we had an attempt to achieve what might be intended today as long ago as 1983 and 1984 in the federal jurisdiction. When the Joint Standing Committee on Electoral Reform reported and the then Hawke government legislated in 1983 for a major renovation of the Commonwealth Electoral Act, there was a truth in electoral advertising component, which went beyond the casting of the vote requirement that we have all talked about. Those regulations or sections of the act were never tested because they were repealed before the next election, which was in 1984.

I think it is important to go to that second report of what was then called the Joint Select Committee on Electoral Reform, which is now the Joint Standing Committee on Electoral Matters, and look at the legal advice that it got from Michael McHugh, QC, and the reasons that were set out in that report as to why this was an unsound aspiration, if you like, to put into legislation and why it was repealed. It has to be said that the Australian Democrats at the time were not convinced of the reasons. They might not have used this term, but they were alleging cartelisation — that the two big parties were ganging up on little parties. I cannot pass judgement on that, but I must say I find the reasons in that second report convincing as to why we should not go down that path again. There have been other attempts. The Democrats federally have introduced legislation; it has not been proceeded with for various reasons.

I do not intend to go through all of my report. I am sure you will ask questions. I would like to turn to the South Australian case. As I said in my report, at first glance the South Australian jurisdiction seems promising in that it seeks to impugn statements of factual inaccuracy. I apologise for the little, as I have called it, metaphysical exhortation about facts, but to take Mr Tully's point, if you had 300 people in this room and put that view about what facts are to them, they would be sceptical. There is a common-sense view of what a fact is. Unfortunately that common-sense view is not supported by the social science literature, and it has not been supported for half a century, really.

Remember that if we proceed down the South Australian path, in my opinion it has two major problems. One is it involves the electoral commissioner in making judgements about electoral material, and I think Mr Tully was

being gentle in saying that it created administrative difficulties. It was obviously a mess. I do not see any reason why that would not happen again. It has the potential to draw the electoral commissioner into political debate. As we all know, a major and important positive feature of our electoral system, unlike some others, is that the electoral commissions are totally impartial.

It then raises the fact debate — the notion that here on one side we have these very solid things called facts and over here we have these other things called opinions, attitudes, predictions, values and whatever, and they are easily separable. I suggest that they are not, and if this became justiciable then I think some of the social science literature might be exhumed and all sorts of arguments put forward about 'What is a fact?', 'How can it be factually accurate or inaccurate?' and so on and so forth.

Just to take the upper house case, my view would be that Mr Tully is right that at the moment anybody can say anything about preferences in the upper house and probably not be inaccurate. That is because of the nature of the electoral system in the upper house, the issue of cascading preferences and so on, which I am sure you do not want to be bored with. But that is the truth. Preferences can elect candidates who a voter does not want elected, despite the fact that they marked their ballot paper in such a way. However, my view of it is that that would still be permissible under the South Australian regime, because it could not be disproved. You cannot know because of the multiple throwings, as they call them, of recounts and counts and whatever. I think the last person in one region got elected on the 172nd count. Who knows where preferences are flying in all that? You could reasonably defend a pre-election statement that a vote for the DLP was a vote for the Communist Party. I do not think you can disprove that in a court.

That brings me to my last point. I am a bit disappointed that some of the submissions are encouraging you to judicialise this issue. One of the great features of the Australian electoral system is that it is rarely in the courts, which I think is a good thing. By contrast, the American electoral system is basically created and uncreated in the courts, which is one of the reasons why its electoral systems are in the mess they are in. I think we should keep as much as we can. I know there are some issues like courts of disputed returns and there are occasionally things like the Roach case over the right of prisoners to vote and so on, and the evidence and the Crichton-Browne case that has been cited, but comparatively Australia settles its electoral differences either on the hustings or in the Parliament. It does not settle them largely in the courts. I think that is a good thing, and I think to judicialise this matter would be a retrograde step. That is why I have recommended as I have. If someone can come up with a silver bullet that can achieve truthfulness in public life without the unintended consequences, then I am all for it, but the past does not encourage me that that can be done.

Mr O'BRIEN — Thank you for your submission and presentation, Professor. There are a couple of things I wanted to raise with you. In your submission you note that in 1989 the South Australian Attorney-General issued guidelines for the handling of complaints arising from the provisions of the electoral act. I was just fascinated that a political player, an Attorney-General, was issuing guidelines for how complaints about electoral behaviour ought to be dealt with. Do you have any views on that? Do you think it is appropriate for a politician to be issuing guidelines on such matters?

Prof. COSTAR — Maybe he was doing it in his position as Attorney-General rather than as a politician; but that distinction has long gone. I think it is unfortunate. It is not the only case in which that has occurred. As you know, the federal minister for finance — the person who issues the guidelines for the use of federal parliamentary printing, postage, allowances and a stack of other things — is not in the electoral act. It can be changed at any time simply by the stroke of a ministerial pen.

I think Mr Tully probably explained why that occurred. It was trying to clarify a system that had become very messy, but I think it was a noble attempt. But it has obvious disadvantages.

Mr O'BRIEN — I understand the conclusion you have reached is that amending section 84 is not the way to achieve truth in advertising. This is a genuinely open question. Rather than risk having a race to the bottom where everything bar misleading electors as to the actual casting of a ballot is on the table, or rather than relying on just the good offices or integrity of the political apparatchiks who are authorising material — because in this case you cannot rely on that — do you have any alternatives as to what can be done?

Prof. COSTAR — I wish I had. I could be naive and say, 'Leave it to the cut and thrust of public debate', but that can be problematic. It is a difficult one. I think the commissioner was quite correct to draw attention to

the complaints he had received in his report. Perhaps we might be exaggerating the instances of these cases. The other question which cannot be answered is: do they have the effect that they are intended to have? The hapless Claude Pepper, whom I introduced in my report, did not get beaten because George Smathers made that wonderful speech; he got beaten because his nickname was 'Red Hot Pepper'; he was seen in American politics as being rather left wing. Being a Democrat Senator for Florida and being left wing and approving of good relations with the Soviet Union was not designed to win you the primary against a right-wing Democrat like George Smathers.

The other thing is that, as we saw in the Lindsay case, sometimes these shenanigans can rebound on the perpetrator in such a way that they might give some consideration to doing it. I know all that sounds a bit weak, but the only alternative, it seems to me, is either commissioner intervention, which politicises the commission, or the courts, and there were multiple reasons given by Michael McHugh, which the JSCER accepted, as to why you do not go down that path, because it could indeed disrupt an entire election before it happens.

Ms BROAD — Thank you, Professor Costar, for your submission. In the preceding evidence one of the matters I was seeking to draw some clarity around with the electoral commissioner was in relation to what happens when you go down the road of having the electoral commissioner forming judgements about the content of advertising; and that those judgements, in my view, necessarily go beyond the question of what is or is not contained on a registered how-to-vote card and the sort of language that is used in the cut and thrust of political campaigning about whether support for particular candidates and political parties is tantamount to supporting their policies or any number of arrangements which may or may not eventuate in the future, depending on the outcome of the election. Clearly the electoral commissioner had a different view about being able to take a narrow interpretation of simply making judgements about the question of preferences.

What I would ask you to comment on further, in considering alternative approaches to the one that currently applies in Victoria, is whether you think it is possible to put in place a system whereby judgements are made purely on the basis of preferences in the sense of what is on a registered how-to-vote card.

Prof. COSTAR — I think it is probably the case in the lower house, in what we will call a simple preferential system. I think I would agree with the commissioner that the South Australian legislation, as it stands, would have impugned a vote for, although there was another case in South Australia where an allegation was made that a vote for an independent was a vote for Labor, and that did not proceed.

My reluctance in this is the general issue that electoral commissions and commissioners should not be drawn into these things. It is a different matter when they are dealing with the casting of the vote issue. So let us say somebody did put out a statement like, 'If it is raining on Saturday, the polling booth will stay open until 8.00 p.m.'. That is clearly in breach of the current law, although it is not in breach of American law and it happens there all the time.

I think the other problem is that you have two houses of Parliament. You have a preferential system in one house and a quota preferential system in another house. While I have great faith in the intelligence of the Australian electorate, and I think they see through a lot of these attempted stunts, again Mr Tully is right. Fine knowledge of different types of preferential systems is not widespread. It is quite strange, given that we have had preferential voting and we have had quota preferential voting in the Senate for half a century, that people still struggle with the concept of preferences, particularly when it is a quota preferential system.

So what I am getting at here is: could you cast the section of the act which says that misleading statements about preferential voting in the lower house can be impugned but you say nothing about the upper house because you know they cannot? That seems to me to be a practical problem. This is what bedevils, I think, all this. We all aspire to the same thing, but the devil is in the detail and there is a lot of devil in it, so I would say, no, I would not go down that path.

Mr DAVIS — In regard to the commissioner's evidence and his view that there could be a code of conduct which would not have sanctions attached to it, I would just like to tease out your view about whether that would materially assist or hinder the question of honesty in politics. Clearly we are here today because of what is perceived to be a dishonest act. That is what has generated this inquiry. The commissioner has clearly stated that in his view there was no breach of the act.

Prof. COSTAR — I agree with that.

Mr DAVIS — That is clear. But the question then is an ethical and moral one, so would a code of conduct that had no sanction applying thereto assist in any manner?

Prof. COSTAR — It might, is all you can say. You know the problem of what happens if you put sanctions in it. Firstly, who imposes the sanction? Not the electoral commissioner. So then it has to be some court. Is it a current court? Is it a special court? What sort of a court? How long does it take? And we are talking about an election campaign. It is heating up, getting close to the poll. Will people make frivolous complaints as the commissioner said happens now and happens everywhere. I guess most of the complaints electoral commissioners get during campaigns never see the light of day because they are simply not based on any section of the act on which you can operate.

The only thing I would say is that I was giving evidence before your colleagues on the Law Reform Commission a couple of weeks ago, and they are looking at a code of conduct just for MPs. This was in relation to the register of interests. I do not want to put words in their mouth, but the discussion seemed to be that there was some support for a splitting of the act to say, 'Okay, here is a register of MPs interests and this is what happens there', and then there is a code of conduct. Codes of conduct inside parliaments can have sanctions on them because the presiding officers or the privileges committees, or whatever, can do that. We do not have that interim mechanism out in the wider community, though it may be worth seeing what the Law Reform Committee comes up with to see if it can be applicable, but I know the point. If you put out a code of conduct and say, 'Well, there is the code of conduct and nothing happens to you if you breach it', what does it do?

Mr DAVIS — I guess what I am trying to tease out is the reality is that it is the public opprobrium of the discussion in the media, the public forums, inquiries such as this that tease out these matters which are perceived in the public mind to be grossly negligent or indeed deliberately unethical.

Prof. COSTAR — It is hard to be firm about this, but it is often said the Australian electorate is very cynical and whatever about politics and politicians. That cynicism might be more positive than negative — that is, that people know this is a tough contest. You do not go along to a Collingwood-Carlton match expecting to attend the ballet. People know what is going on. It is an election campaign. As Steve Tully said, the stakes are high, and I think they take a pretty hard-headed attitude to these things. It is impossible to know, but can we say that that statement in Kororoit misled voters, that actually caused a voter to do something that they were not going to do? I have no idea of knowing that, so again this is the problem.

Mr DAVIS — But we can presume what it was intended to do.

Prof. COSTAR — Yes, we know what it was intended to do, but whether that intention was reality is a completely different matter. This is where I suppose I am surrendering and saying do nothing, but in many cases it is better to do nothing than to do things that then cause problems.

The CHAIR — Thank you, Professor Costar, for your time. You will receive a copy of the transcript in a few weeks time, as you know.

Witness withdrew.