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 J. Given.

The CHAIR — Professor Given, all evidence taken at this 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 that any comments you make outside the hearing may not be afforded such privilege. Professor Given, I take it you have received a copy of the guide to giving evidence at public hearings?

Prof. GIVEN — Yes, I have.

The CHAIR — Can you please state your full name and business address.

Prof. GIVEN — My full name is Donald Jock Given, and I work at Swinburne University in Hawthorn.

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

Prof. GIVEN — In my private capacity.

The CHAIR — The evidence you provide today will be taken down and made public in due course.

Prof. GIVEN — Thank you for the opportunity to appear before the committee. I stress I do not at all regard myself as an expert in electoral laws. My background is much more in media and communications law and policy, but the committee's reference is of interest. I guess, just to summarise, my broad position is I am very wary of enhanced, expanded legislative obligations which would make it an offence of some kind for members of Parliament or candidates for office to engage in conduct that might mislead or be regarded as misleading or deceptive.

It is not for a moment that I do not think the goal that MPs and candidates for office should not engage in conduct which is misleading or deceptive, but I simply think that some kind of statutory offence about that, an enhanced kind of protection against that, is unlikely to succeed in taking us closer to that goal without compromising other goals.

The comparisons or analogies I use in that is thinking about how the law and self-regulatory arrangements and the social and cultural norms deal with advertisers and with journalists. Most particularly the experience I had when I worked at the Communications Law Centre in the then Broadcasting Authority's cash-for-comment inquiry about talkback radio presenters. So for each of these different kinds of speakers, similar questions arise.

We would like advertisers, we would like journalists, we would like talkback presenters not to engage in conduct that is misleading and deceptive, but we take different kinds of approaches to that legally, under self-regulatory arrangements and socially and culturally to deal with it. I suppose my experience of those different areas suggests to me that I would not support a more intrusive obligation, a statutory obligation, to turn it into some kind of strong offence to mislead or deceive on matters relating to politics. I note with great interest the comments by the previous witness as well as to the likely constitutionality or otherwise of laws that attempted to do that anyway.

Mr O'BRIEN — Thank you, Professor. I am interested in the rise of new media, and in particular we are seeing the rise of blogging and citizen journalists. I am just trying to think of a hypothetical — not even a hypothetical. With the presidential election in the United States there were a number of blogs on the left and the right, some of them making fairly scurrilous claims about the leading candidates in the presidential race.

I am just wondering about that sort of experience coming to Australia. The fact is that material is produced on blogs which may be scurrilous, wrong and defamatory — and that happens quite regularly — but because it does not have a particularly wide audience, the harm that is caused by those wrong statements, factually incorrect or defamatory statements, is not perceived as being significant. But if those statements are picked up and published by a major broadcaster or a major newspaper, then the harm is greatly aggravated.

How would you suggest we as a committee grapple with this idea that somebody could set up an attack website, an attack blog, on a political party or political candidate that will say the most scurrilous, untrue things about them? How should that be regulated, and particularly should there be different rules that apply to blogs as would apply to major media given that the harm is massively magnified if those allegations are picked up and reported by major media?

Prof. GIVEN — Certainly the technology and services are changing rapidly, and the scope of the speech by what we might have thought of as a small person to be magnified and have large consequences is significant, but we are dealing with that in a whole range of areas of law. In the area of defamation, when we had to deal with the question that the High Court looked at nearly 10 years ago, 'What is going to happen if someone publishes material overseas that is downloaded in Australia; what laws of defamation will apply?', the court came to what I think was in fact a quite orthodox and conservative interpretation of that. It said, 'If the material is downloaded in Victoria, then the defamation laws of Victoria will apply', whereas the publishers at the time, based in the United States, wanted the laws of the relevant United States state to apply.

Mr O'BRIEN — Was that the Gutnik case?

Prof. GIVEN — Yes. The courts came to what seemed like a quite revolutionary technology and service and type of ill that might occur. In fact the court came to a quite conventional and orthodox interpretation of it and said, 'We will apply the laws of Victoria to that'. I think the question that arises in relation to, say, blogs and the extent to which obligations apply to what we might have once thought were small speakers as opposed to large speakers, we have regulated broadcasters particularly intrusively.

We have got a lot of requirements about broadcasters and some in relation to electoral advertising. I think there are large questions about the extent to which some of those rules may be equally applicable to other kinds of enterprises. So, for example, as I would read it — and we are just working on a different context — if material is broadcast by a broadcaster using their licensed spectrum, the content rules that would apply to them at the moment in this area, as I would see it, would be different from those that would apply to a podcast of the same material that someone downloaded off the internet. They are going to be regulated in different ways, and the Broadcasting Services Act electoral advertising laws will not apply.

The starkest example is the blackout period which does apply in broadcasting but does not apply online. It is quite significant, I think. But I suppose what those technological changes are doing is forcing us to rethink whether the legal settlements we have got now with what we might call old media are actually the right ones. So you look at that, and people are saying, 'What's the point of the blackout period?' Has technology moved on? It makes us think that the blackout period is inappropriate. I think we are being forced to ask questions not just of how we should regulate the new media but what it is we are asking of established media.

We looked at the question of commercial interests with talkback radio hosts 10 years ago now. When that inquiry was launched we looked at the legislation, and the conclusion was, 'We are not regulating that hard enough; we are not asking enough of radio broadcasters', and the regulator introduced a new standard that requires them to disclose publicly on websites and every time they mention someone with whom the talkback presenter might have some kind of commercial agreement. So the law has expanded on that.

It seems to me there is a live question for someone who might be engaged in very similar activity but doing it online, 'Why do we not expect as much from someone online as we do from a commercial radio talkback host?' It may be because we think Neil Mitchell and Alan Jones are much more powerful than those people, but it is not out of the question that someone operating in a purely online environment over time could acquire a similar kind of power to that. Would we think it was appropriate that the online presenter should disclose commercial interests that affected what they were saying in just the same way as a Neil Mitchell or an Alan Jones? I think we could well make that same argument.

Ms BROAD — Professor, thanks for your evidence. One of the matters which has been put before the committee in asking it to consider changes to the electoral laws in Victoria has been particularly in relation to the matter of preferences and any reference to the matter of preferences. Can you comment on your views about whether it is possible to separate out that particular issue in relation to any set of arrangements that might be considered in terms of extending and restricting the law around what is possible in discussion of matters to do with preferencing and the existing state of the law about the impact on voting in particular?

Prof. GIVEN — My understanding of how the existing provisions have been interpreted is to say that if there is conduct relating to the casting of votes, it does appear to me, while the boundary is not going to be neat, that it is reasonable that speech about those matters is treated differently from politicians or candidates for office expressing views about policies or the state of things in the world. It seems to me that the matter of how preferences are being allocated is capable of being encompassed within the terrain of matters about particular

elections and the casting of votes in a way that still leaves aside the very wide range of issues to do with policy matters, views about particular issues, interpretations of what is happening in the world — the general run of political speech.

Mr DAVIS — I am trying to formulate a question that gets to what I want to say, which is that I am not clear how you separate out the rhetoric, without using the particular case study that we have before us which goes to assert that if you do X, something Y will happen, as distinct from dealing with the technical procedure of voting. I am leading on from where Candy was. We have the two issues. We have the machinery, I guess, of actually exercising a deliberative vote, then we have the information that leads to a conclusion about how to exercise a vote. They are the two issues.

You have intimated that you think it is possible to put a ring fence around one and the other, but it seems to me that the machinery is the action which is a consequence of absorbing information. The information is including that if you do A when you exercise your deliberative vote, B will happen, then that is almost part of the deliberative action of exercising the vote. I am just trying to do this without talking specifically about the case in question.

Prof. GIVEN — It is absolutely right. I think the boundary line is going to be fuzzy, and I have not spent time sitting down thinking how would you draft or redraft provisions to try and achieve the results, which I think is what practice to date has tried to achieve. But I give the example of a line that has often been used in politics, and I will use parties but it is just an example that comes to mind. When people are attempting to align two parties with each other at election campaigns I have heard parties on one side say that, for example, a vote for the Greens is actually a vote for Labor. That seems to be a good example of where I would say that kind of statement has got to be allowed to happen because that is part of the nature of political rhetoric, and electors are going to work it out; they can work out how that works. On the other hand, the kind of situation that is closer to the line is if someone actually says party X is preferencing in a certain way and in fact they are not. I think that is closer to the line.

If we think about how different areas of law deal with this in, say, trade practices — I know some are suggesting we have trade practices-style provisions here — the law there does not catch what lawyers would call puffery, so it does not catch the advertiser who claims they have the best coffee in Melbourne. It is the kind of stuff that we understand socially and culturally; people say that kind of stuff all the time. We deal with it; we can handle that. It seems to me when I hear a politician say, 'A vote for this party is really a vote for that party', or 'A vote for this party led by person X is actually a vote for leader Y because we know they have got a deal to hand over power', that those are the kinds of things we deal with socially and culturally. I think we want to be generous about allowing that kind of speech to occur. Even though in practice some of it might be inaccurate, misleading, wrong-headed, all of that, we have got to allow it to happen, but right at the line of saying, 'The how-to-vote card from party X says this' when it does not actually say that; I am happy that that is much closer to the problem.

Mr DAVIS — That is good.

Mr SCOTT — I want to return to the issues around the media. The press council stated in its submission that the Electoral Act should exclude from its ambit fair third-party news reports and commentary upon these reports. I have noted in other jurisdictions — I am thinking of the UK here, and this really deals with the issue around new media — there are heavy restrictions on broadcast advertising. But what seems to have developed, and I know of one example, is that a new online media has developed which is said to be associated with a particular political point of view which gives comment, often fairly lively, on political issues of the day, including running advertising, talk shows and other such media. How would you see that? It is clearly associated with a particular political point of view, although not formally part of a political organisation. How do you see drawing those lines between what is fair comment and what is clearly advocacy or a wing of a political party seeking to attack an opponent? That is a pretty grey area and hard to define I would have thought.

Prof. GIVEN — It is, but I think the space we give for political speech should be as expansive as possible, and we accept that within that space some very strange and uncomfortable things are going to happen. We are going to let that happen, particularly because we think that the internet and mobile communications are providing scope for speakers of all sizes, scales and grades to talk back — not easily, and I do not pretend for a second that every one of us is suddenly Rupert Murdoch or a large media organisation such as Channel 7, the

Age or the *Herald Sun*, but I think that scope for people to speak back, correct, recirculate corrections, all of that, is significant. We take particular steps, and if we compare it with journalists as well, we do not mire the law about this.

When we look at the misleading and deceptive conduct provisions of the Trade Practices Act and the history of when it was first passed, people had brought actions against the media and said, 'Ah! Here's a way to finally get some redress from the media for misleading and deceptive conduct', and the parliament stepped in after success in the courts and said, 'We are going to have a specific exemption for that because we think we have got to let media essentially make mistakes. We think if we do not give them generous room to make mistakes, overseen by self-regulatory arrangements, we are going to compromise the quality of speech overall'. But a recent case that has been fought out about that has shown that we are not simply going to say that just because it is on Channel 7, it is brought within that exception. We are still prepared to look inside the particular activity that is being performed by an information service provider, as the legislation says, or a media organisation. Actually, generally we would think that the *Today Tonight* program is within the overall broadcasting exemption but if Channel 7 has a commercial arrangement in place with people who are interviewed in that program and that appears to affect the content that is there, that is not going to be saved by that exemption. I think that is really a sign that the courts are going to police — and the ACCC in the first instance — that border with increasing aggression in relation to commercial speech. My point about political speech, I suppose, is that I think we need to allow that space to stay as open as possible, because the consequences of trying to step in are even more troubling.

The CHAIR — Thanks, Professor Given, for your time. In about two weeks you will receive a transcript of today's hearing and you may correct errors but not matters of substance.

Witness withdrew.