AUSTRALIAN ELECTORAL COMMISSION

SUPPLEMENTARY SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

SECOND PREFERENCE HOW-TO-VOTE CARDS

Canberra

15 October 1999

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Attachments

1. Preamble

1.1 This supplementary submission by the Australian Electoral Commission (AEC) is presented to the Joint Standing Committee on Electoral Matters (JSCEM) in response to its "Inquiry into the 1998 Federal Election", as advertised on 23 January 1999 in all major national newspapers, and is supplementary to:

- Submission No 88, entitled "The Conduct of the 1998 Federal Election", of 12 March 1999 (volume 3)
- Submission No 159, entitled "The Admissibility of Provisional Votes", of 23 March 1999 (volume 4)
- Submission No 176, entitled "AEC Responses to other Submissions and to Hearings", of 4 May 1999 (volume 7)
- Submission No 210, entiled "Further AEC Responses to other Submissions and to Hearings", of 23 July 1999 (volume 10)
- Submission No 232, entitled "Petitions to the Court of Disputed Returns", of 28 September 1999 (not yet bound)

2. Introduction

2.1 This submission addresses the issue of "second preference" how-to-vote cards, and the legal problems they have generated at previous federal elections, including the 1998 federal election.

2.2 Under section 328 of the *Commonwealth Electoral Act 1918* (the Electoral Act), electoral advertisements, containing matter intended or likely to affect voting in an election, must be authorised with the name and address of the authoriser and the name and place of business of the printer, at the end of the advertisement. How-to-vote (HTV) cards are clearly a form of electoral advertising and must therefore be properly authorised. Political parties, candidates, and other interested parties usually comply with this requirement by providing the necessary information at the very bottom of a HTV card in small print, 10 or less font size.

2.3 At the 1993, 1996 and 1998 federal elections, the AEC received complaints about HTV cards authorised by persons affiliated with a major political party (that is, the Australian Labor Party and the Liberal Party of Australia, to date), advocating a *first preference* vote for a candidate from one of the smaller political parties (that is, the Australian Democrats or Pauline Hanson's One Nation Party, to date), and a *second preference* vote for the candidate of the major political party to which the person authorising the HTV cards was affiliated. This "second preference" strategy is designed to secure the valuable second preference votes for the candidate from the major political party authorising the HTV card.

2.4 On their face, and without reference to the small print notifying the real authorisers, the HTV cards might appear to be cards authorised on behalf of the "first preference" smaller political party candidate, when they are in fact HTV cards authorised on behalf of the "second preference" major political party candidate. Not only are such HTV cards potentially misleading to the voters, in representing themselves at first glance as HTV cards for the smaller political parties (particularly as they may be printed in colours not normally associated with the major political parties), but they advocate a preference order contrary to the authorised HTV cards for candidates from the smaller political parties, which often direct preferences away from one/other/or both of the major political party candidates.

2.5 The AEC has already suggested to the JSCEM that attention should be given to the issue of second preference HTV cards, in part 6.8 of submission No 88 (**Attachment 1**), and paragraphs 43.46 to 43.50 of submission No 176 (**Attachment 2**). The HTV cards mentioned in these previous submissions are provided again in this submission for convenient reference:

- **Attachment 3** - the 1993 ALP second preference HTV card for Macquarie;
- **Attachment 4** - the 1996 ALP second preference HTV card for Gilmore;
- **Attachment 5** - the 1998 ALP second preference HTV card for Richmond;
- **Attachment 6** – the 1998 LP second preference HTV card for Stirling.

2.6 The AEC has suggested that if the JSCEM is of the view that second preference HTV cards should continue to circulate, but that they should be better identified to avoid misleading voters, then section 328 of the Electoral Act could be amended to put into effect the recommendations of Justice MacKenzie in *Re Carroll v ECQ & Reeves [1998] QSC 190*.

2.7 That is, in addition to the standard authorisation requirements in section 328(1) of the Electoral Act, electoral advertisements (including HTV cards) that recommend a second preference vote for a candidate from the political party with which the authoriser is affiliated, or a second preference vote for an independent candidate with whom the authoriser is affiliated, should contain at the top of the advertisement, the name of the person authorising and the name of the political party to which the authoriser is affiliated, in no less than 12 point font.

2.8 The AEC also suggested that the JSCEM consider whether section 351 might be recast to prohibit second preference HTV cards, or alternatively, if section 328 were to be amended as outlined above, that section 351 be repealed altogether.

3. Queensland Committee Report

3.1 On 17 September 1999, the Legal, Constitutional and Administrative Review Committee of the Queensland Legislative Assembly released Report No 18, entitled (*inter alia*) "Issues of electoral reform raised in the Mansfield Decision" (**Attachment 7)**, which makes detailed recommendations, in the form of drafting instructions, for amendments to the *Electoral Act 1992* (Qld) to improve the authorisation of second preference HTV cards, as a consequence of suggestions made by Justice Mackenzie in *Re Carroll*.

3.2 The Queensland Committee concluded as follows:

> Clearly, the opportunity for electors to claim that they have been misled by how-to-vote cards should be minimised. After carefully considering various options for regulating how-to-vote cards, the committee believes that Justice Mackenzie's suggestion that such material be required to bear, in sufficiently sized print, the name of the party/candidate on whose behalf it is distributed should be implemented. Such a requirement will enable voters to better identify the source of how-to-vote material and exercise their judgment accordingly. Moreover, the committee believes that the requirement is inexpensive, practical and likely to minimise interference in the campaign process.

4. Legal Advice on Section 328

4.1 On 28 September 1999, the AEC obtained legal advice from the office of the Commonwealth Director of Public Prosecutions (DPP) on whether the Queensland Committee recommendations would be a workable scheme at the federal level. In relevant extract, the DPP advice is at **Attachment 8**. In essence, the DPP finds some problems with the recommendations of the Queensland Committee, as applied to the Electoral Act, and fewer problems with the original suggestions made by the AEC in earlier submissions to this JSCEM.

4.2 The AEC concurs with the view of the DPP that any amendments to section 328 of the Electoral Act should not be confined to "HTV cards" (which are not specifically defined in the Electoral Act), or to "distribution" only, as recommended by the Queensland Committee for the Queensland Electoral Act. Instead, amendments to the Electoral Act should apply to any "electoral advertisement" that is "printed, published and distributed" and contains "electoral matter" intended or likely to affect voting in an election, as already prescribed in sections 328 and 4(1)(9).

4.3 The DPP has commented that the second of the two offences recommended by the Queensland Committee, in relation to false particulars, would change the nature of the section 328 provision, and could provide some difficulties in enforcement. For these reasons, the AEC suggests that, rather than inventing a new offences regime as the Queensland Committee has done, the current offences regime in section 328 be retained as is. That is, the offence of non-compliance with the authorisation requirements should remain as the only offence in an amended section 328.

4.4 The AEC notes that the DPP has some concerns about the reference in the recommendations of the Queensland Committee to the word "for" (ie on behalf of) a political party, instead of the word "by" (a political party). It is suggested that the Queensland Committee was concerned to target "front" individuals or organisations, and whilst this is a laudable aim, it might not be effective in practice and would apparently create evidentiary difficulties in enforcement.

4.5 However, this concern is not directly relevant to the form of the AEC recommendation below, which builds on, rather than replaces, the legislative intention in section 328 of the Electoral Act, by referring to a person authorising who is "affiliated" with a political party, rather than "for" or "by" or "on behalf of" a political party. According to later discussions with the DPP, these terms are narrower in reach and could be difficult to prove, whereas the term "affiliated" has a wider reach, and could be defined at the drafting stage, as necessary.

4.6 If it is found at future federal elections that "front" individuals or organisations are becoming an issue in relation to second preference HTV cards, then this can be addressed at a later stage. At present, the AEC has no evidence that "fronts" are being used in this context. Indeed, the major political parties have been scrupulous to date in authorising their second preference HTV cards with the names of known party operatives.

5. Legal Advice on Section 351

5.1 On 12 November 1998, the AEC obtained legal advice from the DPP on whether the Liberal Party second preference HTV card for the Division of Stirling at **Attachment 6** was in breach of section 351 of the Electoral Act. The background discussion provide by the DPP on the history of section 351 in that advice has already been provided as Attachment 13 to submission No 88. The other relevant part of that advice, which directly addresses the Liberal Party second preference HTV card at issue, is now reproduced at **Attachment 9** to this submission, so that the JSCEM is able to consider the detailed reasons why the DPP concluded that section 351 did not apply to these HTV cards.

5.2 It is for these reasons that the AEC has concluded that section 351 should be considered for repeal, as it does not apply to the second preference HTV cards increasingly being distributed at federal elections, and does not appear to have any other relevant, contemporary application. The AEC notes the caution expressed in the later DPP advice of 28 September 1999 at **Attachment 8** advice in relation to the possible repeal of section 351 of the Electoral Act, given its "potential operation". The DPP also commented that its possible repeal is a policy matter for the AEC.

5.3 In the light of the unusual historical origins of section 351; its lack of application to contemporary circumstances; and the current difficulties about its interpretation for those who are endeavouring to understand and apply the law; the AEC restates its view that section 351 should be considered for repeal.

6. Conclusion and Recommendations

6.1 In conclusion, having been informed by the comments of Justice MacKenzie in *Re Carroll*, the subsequent deliberations of the Queensland Committee, and by legal advice from the DPP, the AEC stands by its original suggestions to the JSCEM in submissions Nos 88 and 176, in relation to possible amendments to section 328 of the Electoral Act, and the possible repeal of section 351.

5.2 The AEC therefore makes the following recommendations:

Recommendation 1: That section 328(1) of the *Commonwealth Electoral Act 1918* be amended to additionally require that any person authorising an electoral advertisement,

that recommends a second preference vote for a candidate from the political party with which the person authorising is affiliated, or a second preference vote for an independent candidate with whom the person authorising is affiliated,

must provide the name of the person authorising and name of the political party with which the person authorising is affiliated, or the name of the person authorising and the name of the independent candidate with whom the person authorising is affiliated, in no less than 12 point font, at the top of the advertisement.

Recommendation 2: That section 351 of the *Commonwealth Electoral Act 1918* be repealed.

ATTACHMENTS

Attachment 1

Extract from AEC submission No 88 of 12 March 1999

6.8 Second Preference How to Vote Cards

6.8.1 For the purposes of this discussion, second preference HTV cards are those authorised by one political party (in practice so far, either the ALP or the Liberal Party), seeking the second preferences of the supporters of the minor political parties (in practice so far, the Australian Democrats, and more recently, One Nation), in House of Representatives elections.

6.8.2 The AEC has received complaints that second preference HTV cards from the major political parties are misleading and deceptive because they advocate a first preference vote for a minor political party candidate, and therefore appear at first sight to be the official HTV cards of that minor political party. However, such HTV cards also advocate a second preference vote for the major political party candidate (which is unlikely to be the official preference order of the minor political party). Such HTV cards carry the authorisation of the major political party in small print at the end of the document, so they comply with the authorisation requirements of section 328 of the Act.

6.8.3 There are two sections of the Electoral Act that are relevant to such complaints. Section 329(1) of the Act makes it an offence during the election period to print, publish or distribute any matter or thing that is likely to deceive an elector in relation to the casting of a vote. Section 351(1)(b)(ii) of the Act makes it an offence for any person, who, on behalf of an association, league, organization, and without the written authority of a House of Representatives candidate, to announce or publish anything that expressly or impliedly advocates or suggests that that candidate should receive a first preference vote.

6.8.4 In order to describe the problems that arose in relation to second preference HTV cards at the 1998 federal election, it is necessary to provide some history from previous elections. After the 1993 federal election, an unsuccessful Liberal Party candidate for the Division of Macquarie petitioned the Court of Disputed Returns on a number of grounds, including the alleged illegality of an ALP HTV card, which was directed to Democrat voters and sought their second preferences for the ALP candidate, Maggie Deahm (Attachment 08). Justice Gaudron decided that the second preference ALP HTV card for the Division of Macquarie was not in breach of section 329(1) of the Electoral Act (*Webster v Deahm (1993) 116 ALR 222)*.

6.8.5 At the 1996 federal election, the AEC received a complaint that an ALP HTV card distributed in the Division of Gilmore in New South Wales was in breach of section 329(1) of the Act (Attachment 09). Although the AEC received advice from the DPP that the 1996 ALP HTV card for Gilmore might be misleading and deceptive, and thereby in breach of section 329(1) of the Act, on the further advice of the DPP following an investigation by the Australian Federal Police (AFP), the AEC did not proceed to prosecution, for the following reasons.

6.8.6 During the AFP investigation of this matter, Mr Eric Roozendaal, the then Assistant General Secretary of the ALP in NSW, is reported to have stated that: “we have been advised by our lawyers that such a card does not contravene any section of the [Act] and its distribution is a lawful electoral activity”. Further, the authoriser of

the 1996 Gilmore ALP HTV card in question, Mr John Della Bosca, is reported to have said the following when questioned about his view on its legality:

> The wording of the how to vote card is based on that used in the 1993 federal election in the Division of Macquarie, and which was specifically referred to by Justice Gaudron, in Webster v Deahm (1993) 116 ALR 223 at 229/230. The how to vote card was produced for the same purpose as that previously used in the 1993 federal election, being to encourage Democrat voters to give their second preference to the ALP candidate. I believe the intention is manifested in the wording and does not mislead and is issued for the ALP and as such is authorised by me.

6.8.7 These statements by the NSW ALP officials are relevant in relation to 329(5) of the Act which provides a defence to a prosecution for a breach of section 329(1) of the Act in the following terms: "In a prosecution of a person for an offence against subsection (4) by virtue of a contravention of subsection (1), it is a defence if the person proves that he or she did not know, and could not reasonably be expected to have known, that the matter or thing was likely to mislead an elector in relation to the casting of a vote."

6.8.8 Despite not proceeding to prosecution, the AEC was concerned to ensure that all political parties were aware that there was at least an issue as to whether such second preference HTV cards as the 1996 ALP HTV card for Gilmore might be in contravention of section 329(1) of the Act, and accordingly, on 1 May 1998, published Electoral Backgrounder No 3, entitled "Misleading and Deceptive Electoral Advertising – "Unofficial How-to-Vote Cards". This Backgrounder was distributed in a letter dated 7 May 1998 to the federally registered officers of the ALP, the Liberal Party, the National Party, and the Australian Democrats, in preparation for the 1998 federal election.

6.8.9 On 17 July 1998, after the passage of (unrelated) amendments to the Act, the AEC published a further series of Backgrounders, including Backgrounder No 5, entitled "Electoral Advertising", which discussed the operation of section 328 in relation to authorisation of electoral advertising; incorporated the main message of Backgrounder No 3 on section 329 of the Act and second preference HTV cards; and made mention of section 351 of the Act.

6.8.10 On 15 September 1998, after the decision was handed down in the challenge in the Queensland Court of Disputed Returns to second preference HTV cards distributed in the District of Mansfield at the 1998 Queensland State election ('the Mansfield case'), the AEC obtained legal advice from Senior Counsel which reinforced the advice already received from the DPP, to the effect that the 1996 ALP HTV card for Gilmore could be found by a court to be in breach of section 329(1) of the Act.

6.8.11 Following the decision by Justice Mackenzie in the Mansfield case, and just prior to the 1998 federal election, the AEC obtained further advice from the DPP on Senior Counsel's advice, and wrote to the federally registered officers of the ALP, the Liberal Party, the National Party, and the Australian Democrats. The letter from the AEC, dated 25 September 1998, outlined the elements of the Mansfield decision, and indicated that certain second preference HTV cards in federal elections (like the 1996 ALP HTV card for Gilmore) might still be found by a court to be in breach of the Act (Attachment 10).

6.8.12 On polling day, 3 October 1998, and after polling day, the AEC received complaints about second preference NSW ALP HTV cards distributed in some Divisions in New South Wales. The AEC concluded that the 1998 ALP HTV card for the Division of Parramatta, which was the same in format as the 1998 ALP HTV card for the Division of Richmond at Attachment 11, was similar to the HTV card that Justice Gaudron, in *Webster v Deahm,* decided was not in breach of section 329(1) of the Act, and accordingly took no further action.

6.8.13 On polling day on 3 October 1998, the AEC received complaints about second preference HTV cards distributed by the WA Liberal Party in at least four Divisions in Western Australia (Attachment 12). The AEC obtained advice from Senior Counsel on polling day that these cards might be in breach of section 329(1) and section 351(1)(b)(ii) of the Act, and accordingly the AEC sought and obtained the voluntary cessation of distribution of these second preference HTV cards by about 4 pm on polling day.

6.8.14 After polling day, the AEC received further complaints about the second preference WA Liberal Party HTV cards, and sought advice from the DPP on whether offences under the Act were disclosed. Following consideration of the DPP advice and further advice from Senior Counsel, the AEC concluded there was good reason for believing that a prosecution for breach of section 329(1) of the Act and/or section 351(1) of the Act might *not* succeed, and accordingly the AEC advised the complainants and the WA Liberal Party that no further action would be taken.

6.8.15 The DPP advice is not for general release, but it is of interest that the DPP looked closely at the legislative history of section 351 of the Act to come to its conclusion that there was no offence disclosed by the second preference WA Liberal Party HTV cards under this provision. The relevant part of the DPP advice is reproduced at Attachment 13, and in the context of the discussion about the historical origins of the provision, the following paragraph is of interest:

> It is apparent from the Parliamentary debate on this section that the intention of the legislators was to address the *detriment* to candidates from the unauthorised endorsement of candidates *by associations etc outside the major political parties*, as such endorsement generated a suggestion of an association between the candidate and the organisation (*emphases added*).

6.8.16 That is, in the view of the DPP, there would be some doubt in any court proceedings as to whether the second preference HTV cards that have been at issue between the major and the minor political parties at the 1996 and 1998 federal elections would be in breach of section 351. (The only previous consideration of the operation of section 351 was at the 1987 federal election, and the result was a technical amendment to the provision that has no direct bearing on the discussion here.)

6.8.17 The issue of second preference HTV cards is obviously a vexed one under the current legislation. It would appear that, as decided by Justice Gaudron in *Webster v Deahm*, section 329(1) of the Act in its current form may not apply to some of the second preference HTV cards now increasingly in use at federal elections. Further, it appears that section 351 of the Electoral Act was never intended to cover second preference HTV cards as they are currently issued by major political parties, but is in fact restricted to a narrow set of historical circumstances.

6.8.18 However, the recommendations of Justice MacKenzie in the Mansfield decision, in relation to the Queensland legislation, are instructive and might provide an avenue for further consideration of the federal legislation:

> The fact that issues of the kind involved in this case have had to be determined by this Court suggests that something should be done to minimise the possibility of them arising again. An inexpensive measure which neither limits solicitation of preferences nor inhibits freedom of debate would be to require all cards distributed with a view to obtaining second and subsequent preferences to bear on their face (and on each face if it is double sided) the name of the party on whose behalf or on whose candidate's behalf it is distributed. Where it is issued by person who is not a party candidate, the fact that he or she is an independent should be stated. Such information should be required to be printed in type of a size which is sufficiently large to be easily read and is not overwhelmed by other printing on the card.
>
> If this is done, there would be little room for the kind of confusion alleged to have occurred in this case to occur again. In view of its inexpensive nature and simplicity of implementation, and the fact that it promotes the ideal of voters being fully informed before they decide whether to give a second or subsequent preference and, if so, to whom, consideration should be given to amending the Electoral Act accordingly. Since, on the evidence of the how to vote cards of all of the parties contesting the election, there is no practical problem about including the party's name prominently on the card, it is difficult to see any reason why there should be any objection to its implementation.

6.8.19 If the JSCEM is of the view that second preference HTV cards should continue to circulate at federal elections, but that they should be better identified to avoid misleading voters, then the JSCEM might consider whether the authorisation provision in the Electoral Act, section 328, should be amended to put into effect the recommendation of Justice McKenzie, and what the detailed wording of such an amendment should be.

6.8.20 For example, section 328 could be amended to require that, in addition to the standard authorisation requirements, any electoral advertisement that recommends a second or later preference vote for a candidate from another political party, or an independent candidate, must contain at the top of the advertisement, the name and address of the person authorising the advertisement, and the political party where applicable, in no less than 12 point font.

6.8.21 If this were to be agreed, then the JSCEM might then consider whether the legislative policy behind section 351, as discussed in the DPP advice, properly reflects contemporary political realities and whether its original intention has not become obscure and irrelevant. If section 328 were to be amended to reflect Justice MacKenzie's recommendation for the improved identification of second preference HTV cards, then section 351 could be repealed to avoid any further confusion.

6.8.22 On the other hand, the JSCEM might conclude that second preference HTV cards should be prohibited altogether, and that section 351 does not properly provide for such an express prohibition in its current form. Section 351 could be completely recast to remove its historical intention as described in the DPP advice, and replaced with a more contemporary prohibition. This would mean, at the very least, that any mention of "association, league, organisation or other body of persons" would be replaced with "another political party or candidate". Further detailed re-

drafting of section 351 would be required, and if the JSCEM requests, the Office of Parliamentary Counsel could be approached for advice.

6.8.23 The Legal, Constitutional and Administrative Review Committee of the Queensland Legislative Assembly is currently inquiring into the implications of Justice Mackenzie's decision in the Mansfield case for Queensland electoral law in relation to second preference HTV cards. The Committee is likely to hand down its report during this session of the JSCEM inquiry.

Attachment 2

Extract from AEC submission No 176 of 4 May 1999

43.46 *Second Preference HTV cards*: On page EM68 of the transcript, Mr Nairn asked what the difference was between the 1993 ALP Macquarie HTV card that Justice Gaudron decided in *Webster v Deahm* was not misleading or deceptive under section 329 of the Electoral Act, and the 1998 ALP Richmond HTV card, and the 1998 WA Liberal Party HTV card.

43.47 The 1993 ALP Macquarie HTV card is reproduced at Attachment 8 to submission No 88, and it will be noted that it is similar in appearance to the 1998 ALP Richmond HTV card reproduced at Attachment 11 to submission No 88. On the basis of Justice Gaudron's 1993 decision (quoted in Electoral Backgrounder No 5 at paragraph 37) the AEC was advised by the DPP that the 1998 ALP Richmond HTV cards were not misleading or deceptive under section 329 of the Electoral Act. Accordingly, any HTV cards of this type and appearance are unlikely to be investigated or prosecuted by the AEC under section 329.

43.48 By contrast, in relation to the 1998 WA Liberal Party HTV card reproduced at Attachment 12 to submission 88, the AEC received a complaint that it was in breach of sections 329 and 351 of the Electoral Act. After seeking legal advice from Senior Counsel through the Australian Government Solicitor on polling day, the AEC concluded that this HTV card might have been in breach of section 351 of the Act (but probably not section 329), and accordingly sought and obtained the voluntary withdrawal of the WA Liberal Party HTV cards by about 4 pm on polling day.

43.49 After polling day, the AEC obtained legal advice from the DPP, which is extracted in Attachment 13 to submission No 88, on whether a prosecution under section 351 of the Electoral Act was recommended. Despite the prior opinion of Senior Counsel on polling day that an application to the court for an interlocutory injunction would be successful, the DPP advised after polling day that the current terms of section 351 of the Electoral Act would probably not have sustained a prosecution.

43.50 In the view of the AEC, the legislative policy behind section 351 requires attention before the next federal election. The complaints of the major political parties about the difficulties of legislative interpretation, and the complaints of minor political parties about second preference HTV cards, provide further support for this view. Accordingly, in part 6.8 of submission No 88, the AEC asked the JSCEM to consider possible amendments to the Electoral Act to ensure that the relevant provisions are clear in their meaning to all parties to the electoral process.

Attachment 3

1993 ALP second preference HTV card for Macquarie

THINKING OF VOTING DEMOCRAT?

If you're casting your No 1 Vote
for the Democrat candidate
be sure to give your No 2 Vote
to the Labor Candidate

Maggie Deahm

Number all squares

Your preferences will count

Maggie Deahm will stop the GST

Attachment 4

1996 ALP second preference HTV card for Gilmore

(see attached)

Attachment 5

1998 ALP second preference HTV card for Richmond

(see attached)

Attachment 6

1998 LP second preference HTV card for Stirling

(see attached)

Attachment 7

Report No 18 of 17 September 1999 of the Legal, Constitutional and Administrative Review Committee, entitled (inter alia) "Issues of electoral reform raised in the Mansfield decision". (extract on HTV cards)

LEGISLATIVE ASSEMBLY OF QUEENSLAND

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

Issues of electoral reform raised in the Mansfield decision:

Regulating how-to-vote cards and providing for appeals from the Court of Disputed Returns

September 1999

Report No 18

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

49TH PARLIAMENT

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EXECUTIVE ASSISTANT:	Ms Tania Jackman

* Dr Prenzler was appointed to the committee on 11 November 1998 having replaced Mr Charles Rappolt whose resignation from Parliament was received by the Speaker of the Legislative Assembly on 4 November 1998.

CHAIR'S FOREWORD

This inquiry has its genesis in events which occurred in the Mansfield electorate on the day of the 1998 State general election. In a decision on a subsequent petition challenging the electoral result for that electorate, the Honourable Mr Justice Mackenzie (sitting as the Queensland Court of Disputed Returns) raised a number of issues of electoral law reform for the legislature's consideration. Given that this committee's areas of responsibility include 'electoral reform', the committee resolved to inquire into those issues following a request by the Attorney-General.

The two issues raised by Justice Mackenzie are quite distinct. The first concerns the regulation of second preference how-to-vote cards to try and minimise the recurrence of the conduct complained of in the Mansfield petition. After considering various 'regulatory' options, the committee has broadly agreed with Justice Mackenzie's suggestion that how-to-vote cards should be required to bear, in sufficiently sized print, the name of the party (or independent candidate) on whose behalf they are distributed. The committee believes that by clearly stating the political source of such material, voters will be equipped with the means to make informed decisions when handed how-to-vote material.

While more robust regulation of how-to-vote cards than what is proposed by the committee is clearly possible, there is also a real limit to the degree to which a voter's hand should be held within the voting booth. The intention of these provisions is to create adequate laws upon which a voter may rely in understanding any particular how-to-vote material. Beyond that, it is not unlike any consumer matter, that is, *caveat emptor*.

The second issue Justice Mackenzie raised concerns appeals from the Court of Disputed Returns to the Court of Appeal. Previously, Queensland's electoral legislation allowed for such appeals on questions of law. However, Queensland's 1992 *Electoral Act* provides that decisions of the Court of Disputed Returns are final and not subject to appeal.

The issue of appeals raises the competing policy considerations of ensuring the quick resolution of disputes, especially important in the formation of Parliament and hence Government after general elections, and the need to provide parties to a dispute with procedural justice. The committee believes that it has achieved an appropriate balance between these two considerations by recommending the introduction of a right of appeal from the Court of Disputed Returns on questions of law only, together with certain other procedural requirements designed to ensure that appeals are dealt with expeditiously.

The committee has recommended that this appeal be to a new Appeals Division of the Court of Disputed Returns, not the Court of Appeal. The committee has also recommended that the existing provisions regarding the Court of Disputed Returns be reviewed to ensure that Court's clear separation from the Supreme Court. Some of the reasoning behind this is drawn from the logic of the recent High Court decision of *Sue v Hill* which the committee believes raises issues that warrant closer consideration. Essentially, the committee is adamant that there should only be one layer of appeal, which is to a State body, and that the possibly of (further) appeals to the High Court are, to the extent achievable, precluded.

On behalf of the committee, I thank those who have assisted the committee throughout its inquiry, namely: submitters for their valuable contribution; the various

Australian electoral commissioners and, in particular, the Queensland Electoral Commissioner, Mr Des O'Shea; Justice Mackenzie who arranged for a copy of his decision to be easily accessed by members of the public, Parliamentary Counsel, Mr Peter Drew, and his officers, particularly Mr Ian Larwill; and the committee's research staff.

Finally, I wish to record my appreciation of the hard work of my fellow committee members throughout this inquiry.

Gary Fenlon MLA
Chair

September 1999

Introduction

The Legal, Constitutional and Administrative Review Committee ('the committee' or 'LCARC') is established under the *Parliamentary Committees Act 1995* (Qld). The committee has four statutory areas of responsibility: administrative review reform; constitutional reform; electoral reform; and legal reform. This report concerns issues arising under the committee's area of responsibility about electoral reform.

The Mansfield decision

On 21 September 1998, the Honourable Mr Justice Mackenzie of the Supreme Court of Queensland, sitting as the Court of Disputed Returns, handed down a decision in relation to a petition by Mr Frank Carroll disputing the 1998 State election result for the electorate of Mansfield (the 'Mansfield decision').[1] Mr Carroll had been the sitting member for the Mansfield electorate representing the Liberal Party and a candidate in the 1998 election.

Mr Carroll's petition concerned the distribution by Australian Labor Party ('ALP') affiliates of two 'unofficial' Pauline Hanson's One Nation party ('One Nation') how-to-vote cards in the electorate of Mansfield on the day of the 1998 State election. These how-to-vote cards, which were headed 'Thinking of voting One Nation…?', encouraged electors to distribute their second preference vote to, alternatively, the ALP or the ALP candidate, Mr Rhil Reeves. (Copies of these two cards appear as Appendix A.) The 'official' One Nation how-to-vote card in fact did not indicate any preference allocations.

Mr Carroll alleged that the ALP had misled voters by handing out these cards prior to them voting at various polling booths in the electorate of Mansfield and by simultaneously representing by words and conduct that the cards were authorised, distributed or issued on behalf of One Nation. The combined effect of this, according to Mr Carroll, was to increase the One Nation primary vote and increase the flow of preferences to the ALP.[2] Mr Carroll primarily argued that the ALP's conduct in distributing these cards was in breach of ss 158 and/or 163 of the *Electoral Act 1992* (Qld) and that it occurred with the knowledge of the ALP and/or the ALP candidate, Mr Reeves.[3]

Section 158 makes it an offence for a person to *'hinder or interfere with the free exercise or performance, by another person, of another right or duty under [the Electoral Act] that relates to an election*'. According to Justice Mackenzie, the underlying question in relation to s 158 was whether proved conduct of the ALP workers was a hindrance or interference with the exercise of the right to vote.[4]

Section 163(1) of the Electoral Act provides that: '*A person must not, during the election period for an election, print, publish, distribute or broadcast anything that is intended or likely to mislead an elector in relation to the way of voting at the election*'.

Critical to determining whether these sections were breached was High Court authority which restricts the operation of sections like s 163(1) to the voter's act of actually recording their judgment as to whom they wish to vote for, rather than the formation of that judgment.[5] Thus,

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1 *Re Carroll v Electoral Commission of Qld & Reeves* [1998] QSC 190. A copy of the decision can be obtained from the Internet via the Austlii website at <http://www.austlii.edu.au>.

2 Judgment, para 22. In evidence, Mr Reeves deposed that it was ALP strategy to nullify the flow of One Nation preferences except where voters might give their second preference to the ALP: Judgment, para 26.

3 Mr Carroll also argued that the conduct in question breached ss 153 and/or 154 of the *Electoral Act 1992* which concern false and misleading statements published 'under or for the purposes of the Act'. However, Justice Mackenzie held that those sections did not apply because handing out how-to-vote cards did not meet the threshold requirement of being 'under or for the purposes of the Act': Judgment, paras 79-80.

4 Judgment, para 82.

5 Principally, *Evans v Crichton-Browne* (1981) 147 CLR 169 which has been applied in Queensland: *Robertson* v *Knuth* (1997) 1 Qd R 95. For a good discussion on judicial interpretation of the Commonwealth's s 163(1) equivalent—*Commonwealth Electoral Act 1918*, s 329(1)—see the

misleading electoral advertising merely directed at encouraging an elector to vote for a particular party or candidate generally does not breach sections such as s 163(1).[6]

In the case of s 158, Justice Mackenzie accepted that a misleading statement might hinder a voter freely recording a vote. However, His Honour noted that a similar question to that under s 163 must be asked, namely, whether '*the conduct alleged hindered or interfered with the right to express, by marking the ballot paper, his decision to vote in a particular way*'. His Honour observed that the section is not concerned with conduct affecting an elector's making of a political judgment for whom to vote.[7]

In applying the law to the facts at hand, Justice Mackenzie noted that, if the cards were all that was objected to and there was no suggestion that any 'subterfuge or disinformation' had been engaged in when the cards were handed out, neither s 158 nor s 163(1) would be infringed. In this regard, His Honour noted that the cards were not materially different from a card that had been previously held by the High Court (sitting as the Commonwealth Court of Disputed Returns) not to contravene a provision similar to s 163(1) and, importantly, the cards were not directly contradictory to One Nation's 'official' how-to-vote card.[8] Therefore, neither provision was infringed by mere distribution of the cards.

However, His Honour considered it possible that handing out a card *combined with* saying words while handing it out could convert '*the case from one where the formation of political judgment is affected to one where the act of recording or expressing the political judgment is affected*'. In this regard, Justice Mackenzie heard evidence from polling booth workers associated with various political parties, including the ALP and the Liberal Party, and voters who received the cards in question. In evidence, it was alleged that ALP workers distributing the cards either purported to represent One Nation or represented that the card was an official One Nation card indicating that party's preferred preference flow.

Justice Mackenzie found that in a number of instances there were deliberate attempts to represent that the card was a One Nation card when handed out and that in those cases it was '*an inevitable inference that such conduct was intended to mislead the voter*'.[9] However, as noted above, the key issue was whether that conduct was intended to mislead voters in relation to recording or expressing their political judgment already made (a breach of the Act), or in relation to the formation of their political judgment as to for whom they would cast a vote (not a breach of the Act). While noting the 'artificiality' of this subtle distinction, His Honour found that there was little direct evidence of people actually being influenced in their vote by the card.[10] Accordingly, on this interpretation of the sections and the factual evidence there had been no contravention of either s 158 or 163(1).[11]

The final threshold issue was whether, having regard to the impropriety proved, such conduct resulted in a situation where there was good ground for believing that the result recorded did not reflect the actual preference of the majority of voters.[12] In this regard, Justice Mackenzie held

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Australian Electoral Commission's (AEC) *Electoral Backgrounder No 3, Misleading and deceptive electoral advertising: 'unofficial' how-to-vote cards*, AEC, May 1998 and *Electoral Backgrounder No 5, Electoral Advertising*, AEC, July 1998. (Available on the Internet at http://www.aec.gov.au.) In Backgrounder *No 3* (p 3), the AEC gives the example of conduct that would breach s 329(1) as an erroneous statement about the operating hours of a polling booth so that an elector consequently missed out on the opportunity to vote.

6 Although, in *Evans* the High Court said that a statement that a person who wished to support a particular party should vote for a particular candidate, when that candidate in fact belonged to a rival party, might breach s 329(1).

7 Judgment, paras 81-83.

8 Judgment, para 120, referring to the decision of Gaudron J in *Webster v Deahm* (1993) 116 ALR 223.

9 Judgment, para 127.

10 Judgment, paras 128-129.

11 Judgment, paras 133-135.

12 This arises from the 'proper approach' to the *Electoral Act 1992*, s 136 (Powers of the court), as recently expounded by Ambrose J in *Tanti v Davies* (no 3) [1996] 2 Qd R 602 and followed by Mackenzie J: Judgment, paras 9-12.

that '*where the margin was 83 votes it is insufficiently established that there is good ground for believing that the result recorded did not reflect the actual preference of a majority of electors*.'[13] Accordingly, the petition was dismissed.

Issues for the legislature

In the concluding paragraphs of his judgment, Justice Mackenzie raised a number of issues concerning electoral reform that the Queensland legislature might consider addressing. In particular, His Honour made some suggestions to avoid the recurring problem of misleading how-to-vote cards. While Justice Mackenzie recognised that it might be legitimate to argue that encouraging voters to express preferences is ultimately a matter for candidates and parties and not the electoral system, His Honour felt that nevertheless the electoral system *'ought to at least minimise the opportunity to engage in conduct directed towards obtaining a preference which, while not unlawful, is likely to exacerbate disillusionment with the political process'*.[14]

In the current case it was, His Honour noted, a 'compelling conclusion' that the intention of some of the ALP workers distributing the cards in question was to conceal from unwary voters that the cards in question were in fact ALP cards. Similarly, one of the cards was 'cleverly designed' to make the words 'One Nation' particularly conspicuous at first glance, even though there were other words on the card which should have alerted the more observant voter to the fact that it was not a One Nation card. This was despite the fact that the cards bore in small print at the bottom of the card the name and address of the ALP official who authorised the card as well as the letters 'ALP'.[15]

Accordingly, at paragraphs 153-154 Justice Mackenzie stated:

> *153 The fact that issues of the kind involved in this case have had to be determined by this Court suggests that something should be done to minimise the possibility of them arising again. An inexpensive measure which neither limits solicitation of preferences nor inhibits freedom of debate would be to require all cards distributed with a view to obtaining second and subsequent preferences to bear on their face (and on each face if it is double sided) the name of the party on whose behalf or on whose candidate's behalf it is distributed. Where it is issued by a person who is not a party candidate, the fact that he or she is an independent should be stated. Such information should be required to be printed in type of a size which is sufficiently large to be easily read and is not overwhelmed by other printing on the card.*
>
> *154 If this is done, there would be little room for the kind of confusion alleged to have occurred in this case to occur again. In view of its inexpensive nature and simplicity of implementation, and the fact that it promotes the ideal of voters being fully informed before they decide whether to give a second or subsequent preference and, if so, to whom, consideration should be given to amending the Electoral Act accordingly. Since, on the evidence of the how-to-vote cards of all of the parties contesting the election, there is no practical problem about including the party's name prominently on the card, it is difficult to see any reason why there should be any objection to its implementation.*

Justice Mackenzie also made the following observation regarding appeals from the Court of Disputed Returns.

> *155 One other matter which may bear consideration is that sometimes, as in this case, complex questions of law arise. Under the former Act there was provision for an appeal to the Court of Appeal on questions of law only (s.154) and a power to state a special case (s.156) or reserve questions of law for determination by the Court of Appeal (s.157). Those provisions are absent from the current Act. At present s.141 precludes any appeal. No doubt finality is important in a case of*

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13 Judgment, para 138.

14 Judgment, para 148.

15 Judgment, para 151.

> *this kind. However, in cases of genuine difficulty, there is always a risk that one of the parties may feel aggrieved, with no redress available. Whether there should be some mechanism to alleviate this is, once again, for the legislature to decide.*

The committee's inquiry

The Attorney-General and Minister for Justice and Minister for The Arts, the Honourable Matt Foley MLA, wrote to the committee on 22 September 1998 advising that, as the Minister responsible for the *Electoral Act,* he proposed to give urgent consideration to Justice Mackenzie's suggestions regarding how-to-vote cards and appeals from the Court of Disputed Returns to the Court of Appeal. In his letter, the Attorney-General requested that the committee examine Justice Mackenzie's suggestions and report to Parliament as a matter of priority.

Given the committee's statutory responsibility in relation to electoral reform, the committee at its meeting on 30 September 1998 resolved to conduct an inquiry and report to Parliament on these two issues. In particular, the committee resolved that the terms of reference of its inquiry be limited to inquire into whether—and, if so, how—the *Electoral Act* should be amended in light of the comments made by Justice Mackenzie in his judgment:

- at paragraphs 153 and 154 regarding how-to-vote card specification requirements, as currently set out in s 161 of the *Electoral Act*; and
- at paragraph 155 regarding the possibility of appeals to the Court of Appeal from decisions of the Court of Disputed Returns.

As the first step in its inquiry process, the committee called for public submissions by advertising in *The Courier-Mail* on Saturday, 3 October 1998 and writing directly to a number of identified stake-holders inviting them to make a submission. Potential submitters were assisted by Justice Mackenzie kindly arranging for a copy of the Mansfield decision to be posted on the Supreme Court of Queensland's website. (Submissions closed on 2 November 1998.)

The committee received 40 submissions to its inquiry, the majority of which the Chair tabled on 12 November 1998. A list of persons and organisations who made submissions to the committee appears as Appendix B.

The committee's approach

The committee has been concerned throughout its inquiry that it has considered all possible options and carefully assessed the *practical* advantages and disadvantages of each option in responding to the issues under question. After conducting and considering preliminary research, the committee wrote to the electoral commissioner of each Australian jurisdiction seeking responses to specific questions about the practical operation of current electoral laws in their jurisdiction as they related to the committee's terms of reference.

In the case of the how-to-vote card issue, the committee felt that the only way in which it could be confident that its final proposal would be workable in practice was to see its proposal as draft legislation. Accordingly, once the committee had reached a preliminary position on addressing this issue, the committee requested, and kindly received, the assistance of the Office of Queensland Parliamentary Counsel in drafting proposed amendments to the *Electoral Act*. Once the committee was satisfied with these draft provisions, the committee met with the Queensland Electoral Commissioner, Mr Des O'Shea, in order to gain his thoughts on the practicalities of the committee's proposals. The committee has considered the Commissioner's comments in preparing this final report to Parliament.

The decision of the High Court of Australia in *Sue v Hill* (handed down on 23 June 1999) has had major implications for the committee's consideration of the issue of appeals from the Court of Disputed Returns. The potentially significant considerations raised by that decision are evident from the discussion in chapter 3.

In accordance with the committee's terms of reference for this inquiry, the following chapters of this report separately deal with:

- how-to-vote card specification requirements; and
- appeals from the Court of Disputed Returns.

How-to-vote cards

How-to-vote cards play an important role in the electoral process in Queensland. While their significance has been reduced with the introduction of candidates' party affiliations appearing on ballot papers, how-to-vote cards inform voters about how to allocate their preferences in order to most advantage the candidate or party they wish to support. How-to-vote cards are usually the last piece of electoral information that electors receive before casting their vote.

Since 1992, a system of optional preferential voting has operated in Queensland's State elections.[16] This means that, in order to record a valid vote, an elector need only indicate their most preferred candidate on the ballot paper. Prior to 1992, a system of compulsory preferential voting operated whereby for electors to record a valid vote they were required to designate a preference for each candidate on the ballot paper. This change in voting system has made it particularly rewarding for parties, especially in closely contested seats, to encourage electors to not only record second and subsequent preferences, but to record their preferences in the manner desired by the party.[17]

Queensland's *Electoral Act* contains few provisions regulating the publication and distribution of how-to-vote cards and other electoral material. The relevant provisions are contained in Part 9 (sections 149-177) of the *Electoral Act*.

As already noted, the petitioner in the Mansfield decision relied heavily on s 158 and s 163(1) of the *Electoral Act*. Yet, as is evident from the Mansfield decision, these sections must be read in light of the narrow interpretation that the High Court has given s 163(1)'s equivalent in the *Commonwealth Electoral Act 1918* (Cth).

In addition, s 166 prohibits during the 'election period',[18] the canvassing for votes, inducing an elector to vote in a particular way, loitering or obstructing the free passage of voters inside a polling place or within six metres of the entrance to a polling place. Section 169 likewise prohibits the displaying of political statements inside polling places or within six metres of the entrance to a polling place.

Section 161 of the *Electoral Act* provides that a person must not during the election period for an election:

- print, publish, distribute or broadcast; or
- permit or authorise another person to print, publish, distribute or broadcast;

any advertisement, handbill, pamphlet or notice containing 'election matter'[19] unless there appears, or is stated, at its end the name and address (other than a post office box) of the person who authorised the advertisement, handbill, pamphlet or notice.

Section 161, like its Commonwealth counterpart, is apparently designed to ensure that '*anonymity does not become a protective shield for irresponsible or defamatory statements in election advertising, where there is no legal recourse for those whose interests may have been damaged by such statements'*.[20]

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16 *Electoral Act 1992*, s 113. This change followed a recommendation by the former Electoral and Administrative Review Commission (EARC) in its *Report on Queensland Legislative Assembly Electoral System*, Government Printer, Brisbane, November 1990, volume 1, para 6.26.

17 See further comments on the importance of how-to-vote cards particularly in a preferential voting system by: Justice Mackenzie in the Mansfield decision (para 147); Dr Paul Reynolds' submission; Professor Colin Hughes' submission; the Electoral Commission of Queensland's submission.

18 'Election period' for an election is the period: (a) beginning on the day after the writ for the election is issued; and (b) ending at 6pm on the polling day for the election: *Electoral Act 1992*, s 3.

19 'Election matter' is anything able to or intended to: (a) influence an elector in relation to voting at an election; or (b) affect the result of an election: *Electoral Act 1992*, s 3.

20 Australian Electoral Commission, *Electoral Backgrounder No 5*, 17 July 1998, p 1. The precise intention of s 161 is not stated in either the explanatory memorandum or second reading speech to the *Electoral Act 1992*. The precursor to s 161 was s 111 of the *Elections Act 1983* (Qld). It is similarly unclear as to precisely why s 111 was introduced.

If a person is engaging in conduct or failing to do anything and that conduct or failure constitutes a contravention or offence against the *Electoral Act*, then, pursuant to s 177, a candidate or the Electoral Commission of Queensland (the 'ECQ' or the Commission') may apply to the Supreme Court for an injunction.

At paragraph 153 of his judgment, Justice Mackenzie raises for the legislature's consideration whether the *Electoral Act* should be amended to additionally require:

- all how-to-vote cards distributed with a view to obtaining second and subsequent preferences to bear on each face the name of the party on whose behalf or whose candidate's behalf it is distributed (and where the card is issued by a person who is not a party candidate, the fact that he or she is an independent); and
- that this information be printed in type of a size which is sufficiently large to be easily read and is not overwhelmed by other printing on the card.

In this chapter, the committee considers the merits of, and alternatives to, Justice Mackenzie's suggestion. As explained in this chapter, in reaching its final recommendation, the committee has reviewed relevant work undertaken by its predecessor committee, considered the regulation of how-to-vote cards in other Australian jurisdictions and taken into account suggestions raised in public submissions.

Background

The former LCARC's inquiry into truth in political advertising

The issue of restricting misleading how-to-vote material was considered by the former LCARC in its Report No 4, *Truth in political advertising*.[21] The committee's terms of reference for that inquiry specifically included inquiring into the matter of 'bogus' how-to-vote cards, which that committee defined to include:

> *cards which are designed to mislead, or have the potential to mislead, voters as to which political party has issued that card and how that particular party wishes its preferences to be placed. The term would also include cards that have incorrect statements of fact as a preamble*.[22]

The former committee considered a number of broad options with respect to regulating how-to-vote cards. These options were:

1. support the status quo of the current Queensland legislation;
2. seek to increase regulation via the prohibition of distributing how-to-vote material near polling places;
3. allow continued distribution but restrict the content of what may be distributed through a regime of registration and/or authorisation;
4. a combination of 2 and 3, for example, ban distribution on polling day but allow the distribution of pre-poll material which is registered;
5. allow continued distribution but make it an offence to distribute misleading information.[23]

Important to the former committee (and equally so to this committee) was the consideration that any proposal to further regulate how-to-vote material must be able to withstand legal challenge that it is unduly interfering with the freedom of political discussion implied in the *Commonwealth Constitution*.

However, as the former committee went on to note:

> *a regime which expressly and specifically limited itself to prohibiting only untruths and confusion, might well pass the test that the legislation is a considered and proportionate attempt by Parliament to strike a balance between the implied right*

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21 Government Printer, Brisbane, December 1996.

22 Ibid, p 42.

23 Ibid, p 45.

> *and promoting the public interest of preventing the misleading of voters in recording the preferences they hold.*[24]

On that basis, the former committee concluded that a provision banning how-to-vote cards or placing serious restrictions on their availability would run the risk of being considered unduly restrictive of constitutionally protected free speech.

The former committee also concluded that:

- there are too many practical difficulties with requiring the ECQ's prior *approval* of how-to-vote cards; and
- a system requiring *registration* of how-to-vote material with the ECQ prior to polling day (without any coinciding requirement for the authorising of that material by the ECQ) would also be 'highly impractical'. In particular, the committee was concerned that registration prior to the election would prevent candidates from altering their preferences or publishing late how-to-vote material because of changed circumstances.[25]

Instead, a majority of that committee recommended that there should be a general legislative restriction on misleading how-to-vote material. In this regard, the majority recommended that its proposed 'truth in political advertising' provision (recommended earlier in its report[26]) be extended to include how-to-vote material which, while not containing false 'statements of fact', are nonetheless designed to mislead electors. In particular, the majority recommended that there should be restrictions on material that was designed to represent how-to-vote material of other entities.[27]

While the government of the day accepted the majority's recommendation, events subsequent to the former committee's report have shown that, in practice, drafting a general provision aimed at ensuring truth in political advertising (and thus banning how-to-vote material designed to mislead voters) is difficult.

The regulation of how-to-vote cards in other Australian jurisdictions

The electoral laws of other Australian jurisdictions regulate how-to-vote cards in a variety of ways.

The Commonwealth, each state (except New South Wales) and the Territories ban or restrict canvassing for votes within a certain radius of a polling booth.[28] In most cases canvassing is banned within six metres of a polling booth. However, in Tasmania and the ACT the radius is 100 metres. Moreover, in the ACT the ban not only relates to the canvassing and soliciting of votes but the doing of *'anything for the purpose of influencing the vote of an elector as the elector is approaching, or while the elector is at, the polling place'*.[29]

In Tasmania, how-to-vote cards play a limited role in the electoral process given that in addition to the 100 metre canvassing ban, there is also:

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24 Ibid, p 46.

25 Ibid, p 48. Approval and/or registration of how-to-vote material is discussed further in sections 2.2 and 2.3.3.

26 The majority of the committee believed that its proposed 'truth in political advertising' provision would be *'a reasonable, proportionate interference with the right of free speech and thus acceptable in terms of recent decisions of the High Court and in terms of the fundamental legislative principles outlined in the Legislative Standards Act 1992 (Qld)'*. Ibid, p 29.

27 Consequently, the majority of the committee recommended that the remedies and penalties which it had recommended apply to its general truth in political advertising provision should also apply to misleading how-to-vote material. Ibid, pp 48-49.

28 *Commonwealth Electoral Act 1918* (Cth), s 340(1); *Electoral Act 1985* (SA), s 125(1); *Electoral Act 1985* (Tas), s 133; *Constitution Act Amendment Act 1958* (Vic), s 193(1); *Electoral Act 1907* (WA), s 192(1).

29 *Electoral Act 1992* (ACT), s 303(1)(a).

- a total prohibition on the distribution of matter including how-to-vote cards on polling day[30]; and
- a provision which makes it unlawful for a person to print, publish or distribute matter (including a how-to-vote card) which contains the name of a candidate without the written consent of the candidate.[31] Thus, parties/candidates would require the consent of *all* candidates before *any* how-to-vote card could be issued (effectively prohibiting all 'unofficial' cards).

It might be questioned whether the ACT and Tasmanian provisions would withstand constitutional challenge for infringing the implied freedom of political discussion.[32]

The electoral laws of most Australian jurisdictions make it an offence to mislead an elector 'in relation to the casting of a vote' (or some equivalent phrase).[33]

New South Wales and Victoria have systems requiring registration of how-to-vote cards. In Victoria, the handing out of printed electoral material except for registered how-to-vote cards is banned within 400 metres of the entrance to or within a polling booth on polling day.[34] In New South Wales, only registered how-to-vote cards can be distributed in public places on polling day.[35]

South Australia is the only Australian jurisdiction to have a 'truth in political advertising' provision, that is, a provision which makes it an offence for a person to authorise or publish an electoral advertisement which contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent.[36]

The Commonwealth and the ACT also have laws stipulating that a person shall not, on behalf of a body or association, publish a statement:

- expressly or impliedly advocating that an election candidate is associated with or supports the policies or activities of that body or association; or
- expressly or impliedly advocating that a candidate should be given the first preference vote;

without the written authority of the candidate.[37]

The *Northern Territory Electoral Act* similarly makes it an offence for a person to publish on behalf of any body or persons, without the written consent of the candidate, that a candidate in

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30 *Electoral Act 1985* (Tas), s 246(1)(a).

31 *Electoral Act 1985* (Tas), s 243(4).

32 See G Williams, *The state of play in the constitutionally implied freedom of political discussion and bans on electoral canvassing in Australia*, Commonwealth Parliamentary Library, Research Paper No 10, Canberra, 1996-97, pp 10-13. See also Williams' submission and evidence to the former committee's inquiry into truth and political advertising. An ACT parliamentary committee recently recommended that the ban on how-to-vote cards at polling places remain: Select Committee on the Report of the Review of Governance, *Report of the Select Committee on the Report of the Review of Governance*, Canberra, June 1999, para 3.36.

33 See the: *Commonwealth Electoral Act 1918* (Cth), s 329(1); *Parliamentary Electorates and Elections Act 1912* (NSW), s 151A(1)(b); *Electoral Act 1985* (Tas), s 209(1); *Electoral Act 1992* (Qld), s 163(1); *Constitution Act Amendment Act 1958* (Vic), s 267B(1); *Electoral Act 1907* (WA), s 191A; *Northern Territory Electoral Act 1995* (NT), s 96(1)(c) and (d); *Electoral Act 1992* (ACT), s 297(1). However, as already noted, *Evans* v *Crichton-Browne* indicates that these provisions only relate to statements which affect the recording of a person's vote, not the formation of their political judgment.

34 *Constitution Act Amendment Act 1958* (Vic), s 267P(1).

35 *Parliamentary Electorates and Elections Act 1912* (NSW), s 151F(1).

36 *Electoral Act 1985* (SA), s 113(1). As the former LCARC noted in its Report No 4 (Op cit, pp 13-15), the constitutional validity of this section was upheld in *Cameron v Becker* (1995) 64 SASR 238.

37 *Commonwealth Electoral Act 1918* (Cth), s 351; *Electoral Act 1992* (ACT), s 301.

an election is associated with, or supports the policy or activities of, that person or body of persons.[38]

The intent and operation of some of these 'candidate consent' provisions is discussed later in section 2.3.5 of this report.

Currently, no other Australian jurisdiction's electoral legislation requires printed electoral/how-to-vote cards to bear the name of the party on whose behalf, or whose candidate's behalf, it is printed, published or distributed. Like s 161 of Queensland's *Electoral Act*, all that is required is the name and address of the person who authorised the matter and, in some cases, the name and place of the printer.[39]

However, the issue of whether the name of the party or candidate should be included with the name and address of the person who authorised the electoral matter was canvassed by the ACT Electoral Commission in its December 1998 report on the operation of the *Electoral Act 1992* (ACT) in regard to the 1998 ACT Legislative Assembly election.[40]

The ACT Electoral Commission reported that it had received complaints about political advertising that commented about various candidates and recommended casting votes for particular candidates but did not directly identify which party or candidate was responsible for the advertisement. The Commission went on to note that in some cases the printed authoriser's name was the name of a party office holder and the printed address was their party's address. However, any elector who wished to clarify which party was responsible for the material would have to conduct some research to link the name and address with the party.

The Commission reasoned:

> *The purpose of the authorisation provisions is to prevent "irresponsibility through anonymity". By being aware of the sources of political advertising, voters are better able to judge the messages being imparted. However, where material is being published on behalf of political parties and candidates, but that fact is being hidden behind an authorisation that does not clearly identify the name of the party or candidate, it could be argued that the spirit of the authorisation provisions is not being complied with.*[41]

Accordingly, the Commission recommended that the ACT's *Electoral Act* be amended to provide that, where printed electoral matter is being published by or on behalf of a registered political party or a candidate, the name of the party or candidate should be included with the name and address of the person who authorised the matter.

The ACT Government is yet to publicly respond to this recommendation.

The (private member's) Electoral Amendment Bill 1999 (Qld)

On 23 March 1999, Mr Bill Feldman MLA (Member for Caboolture) introduced the Electoral Amendment Bill 1999 (Qld), a private member's bill. The objective of the bill is to amend the *Electoral Act* '*to provide truth in political advertising by preventing as far as possible, the production and distribution of false or misleading political advertising material*'.[42] The member's second reading speech refers to the distribution of 'fake' One Nation how-to-vote cards during the 1998 state election in the Mansfield electorate, Justice Mackenzie's comments in this

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38 *Northern Territory Electoral Act 1995*, s 105(1).

39 See the: *Commonwealth Electoral Act 1918* (Cth), s 328(1)(a); *Parliamentary Electorates and Elections Act 1912* (NSW), s 151E(1)(a); *Electoral Act 1985* (Tas), s 243(1)(a); *Constitution Act Amendment Act 1958* (Vic), s 267A(1)(a); *Electoral Act 1907* (WA), s 187(1); *Electoral Act 1985* (SA), s 112(1)(a); *Northern Territory Electoral Act 1995* (NT), s 96(1)(b); *Electoral Act 1992* (ACT), s 292(1). The requirement for electoral advertisements to bear the name and place of business of the printer was removed from Queensland's *Electoral Act* in 1997.

40 ACT Electoral Commission, *Review of the Electoral Act 1992 (The 1998 ACT Legislative Assembly election)*, Publishing Services, Canberra, December 1998, p 11.

41 Ibid.

42 Explanatory notes to the Electoral Amendment Bill 1999.

regard, and the recommendations of the majority report of this committee's predecessor regarding truth in political advertising (discussed in section 2.1.1 above).[43]

To this end, the bill seeks to include in the *Electoral Act* provisions which make it an offence for a person, during the election period for an election, to publish or authorise an electoral advertisement or how-to-vote card containing a statement that is false or misleading in a material particular. The bill also seeks to amend s 161 of the *Electoral Act* to, amongst other matters, require an authoriser who is a member of a political party, to state the name of the party (in addition to their name and address), and require the authorisation to be in print not smaller than 12 point.

In its *Alert Digest* no 4 of 1999,[44] the Queensland Parliament's Scrutiny of Legislation Committee raised a number of concerns regarding the bill. At the time of writing, there had been no further debate on the bill.

Comments made in submissions

The committee's call for submissions drew a wide range of suggestions on regulating how-to-vote cards. Some submissions canvassed issues which clearly fell outside the terms of reference of the committee's inquiry. Issues in this category included abolishing optional preferential voting and returning to compulsory preferential voting, and extending the current restrictions on canvassing for votes within a certain radius of polling booths. The committee has not canvassed these issues in this report.

It was also suggested that there be some prescribed/general ban on how-to-vote material designed to mislead or deceive electors. The committee has not, as part of this inquiry, revisited the former committee's truth in political advertising inquiry (discussed above in section 2.1.1).

Other submissions made suggestions which might be seen as alternatives or modifications to Justice Mackenzie's suggestion. These are discussed below and in the following section.

A large proportion of submitters advocated the abolition of how-to-vote cards—some altogether and some on their distribution outside poling booths on election day—primarily on the basis that this would reduce the opportunity to mislead voters and reduce cost, harassment of electors, and waste. Some submitters also claimed that how-to-vote cards give organised parties an advantage over independent candidates. Most of these submitters proposed that, instead, how-to-vote cards be replaced with a single how-to-vote poster in each voting compartment which would effectively amount to one official how-to-vote 'card' for each party/independent candidate. Included in the group who made a submission along these lines were the Australian Democrats (Queensland division) and Brenda Mason of the Queensland Greens.[45]

At the same time, a number of submitters, including the ECQ and Professor Colin Hughes, highlighted problems associated with how-to-vote posters. These submitters largely endorsed the former Electoral and Administrative Review Commission's (EARC's) arguments in its 1991 *Report on the review of the Elections Act 1983-1991 and related matters*[46] (EARC's 'Elections Act report') against having general posters in voting compartments. These arguments include concerns that posters would not be satisfactory where there are a large number of candidates and consideration would have to be given to the effect of actions such as a failure to display a poster and displaying a defaced poster on the validity of an election.

The majority of submissions advocating (or at least working on the basis of) the retention of how-to-vote cards supported the suggestion that how-to-vote material bear the name of the party/independent candidate on whose behalf it is distributed, and that it do so in sufficiently sized print.

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43 Mr Feldman MLA, Electoral Amendment Bill 1999, *Queensland Parliamentary Debates*, Second Reading Speech, 23 March 1999, pp 618-620.

44 Tabled 13 April 1999, pp 18-21.

45 See also similar submissions by: Mr A Sandell; Mr E Walker; J Calway, Ms S Moles; C Gwin; Mr R Weber; Ms D Mahoney; Mrs J Werner; Dr M Macklin, Ms M Johnston; Mr J and Mrs L Leatherbarrow; Dr E Connors; Mr F Brown; Mr A J H Morris QC and Mr J Pyke.

46 Government Printer, Brisbane, December 1991, para 8.112.

The ALP (Qld) submitted that the committee consider a requirement that the registered *abbreviation* of registered political parties appear in the authorisation information of all material produced on that party's behalf (or the word 'independent' in the case of candidates of non-registered parties or independents). The ALP also submitted that the *Electoral Act* contain a minimum print size for this authorisation line but that *'it would be an inappropriate and complex task to seek to legislate on matters of design'*.

Similarly, the Liberal Party (Qld) agreed that the possibility of situations such as occurred in Mansfield arising again could be reduced by *'a clear authorisation on the card indicating the name or logo of the political party which produced the card, and in suitable typeface and font size as to be clearly readable'*.

Mr Anthony Morris QC, in supporting a requirement that how-to-vote cards bear the name of the party/independent candidate on whose behalf it is distributed, also cautioned that this would:

> *require careful legislative drafting, both to ensure that there are no 'loop-holes', and also that the legislative provision does not constitute an unreasonable inhibition of freedom of expression.*

Mr Morris warned that there is always a risk of such a legislative provision being circumvented where how-to-vote cards are produced and distributed by supporters of a candidate without that candidate's (or the candidate's party's) knowledge or approval. Mr Morris submitted that the only solution to this would be a requirement that any card, leaflet, or other printed material provided with a view to soliciting votes (whether first or subsequent preferences) bear a statement declaring whether or not the card is distributed on behalf of any candidate or party.

Mr Morris further submitted that it should be an offence to distribute such material without containing one or other of these statements, or to distribute such material claiming that it is distributed on behalf of a particular candidate or party when that is not the case.

In order to avoid such information being concealed amongst other information presented on the how-to-vote card, Mr Morris also suggested a number of requirements regarding position, type-face, colouring and layout. Mr Morris suggested that the federal regulations relating to warnings on cigarette packets might be a useful guide in this regard.

Dr Paul Reynolds suggested a slightly different system whereby:

- each candidate be permitted two how-to-vote cards, with the second designated as a second preference how-to-vote card;
- the second preference how-to-vote card carry that title, incorporating that party's name and seat (or the independent's name and seat) as a defined header;
- an authorisation in upper case lettering appear immediately below the header identifying the person and status in whose name the card is issued; and
- both how-to-vote cards be registered with the ECQ within seven days of polling day.

Mr John Pyke submitted that, in the first instance, parties should not be allowed to distribute how-to-vote cards or similar matter on polling day. Failing that submission being accepted, Mr Pyke advocated a different system whereby there be a ban on the use of the terminology 'how-to-vote (party name)' as he considers the use of the phrase is misleading and deceptive and hides from uninformed voters the fact that the way they number their subsequent preferences (if any) is entirely up to them. Instead, Mr Pyke advocated that parties should be made to use the language of 'advice' or 'recommendation' and cards should be required to contain a reminder in '*print no less than half the size of the biggest print on the card'* along the lines of:

> *This is a recommendation only. Your choice of which candidate to place first, and which candidates (if any) to give other preferences to, is entirely up to you.*

While Mr Pyke argued that this should greatly reduce the need for second preference cards, he also submitted that, given the current system, the canvassing of second preference votes should only be allowed if done in a way which is not misleading. Mr Pyke submitted that Justice Mackenzie's suggestion at para 153 of his judgment would '*go a long way in ensuring that aim'.*

There was also discernible support in submissions for some sort of registration or approval of how-to-vote cards by the ECQ.[47] For example, the National Party of Australia (Queensland) submitted that the practice of misleading voters by 'bogus' how-to-vote cards should be prevented by:

- establishing a system of registration of how-to-vote material prior to polling day;
- allowing sufficient time for objections to any misleading material to be dealt with by the courts prior to polling day; and
- preventing the representation that how-to-vote material is the material of an entity other than the entity making the material available.

Mr Carroll recommended a simplified system of registration of how-to-vote cards whereby candidates be required to register their cards with their district returning officer only and that it be the duty of that officer to register one card for each candidate/party.

Some submitters advocated that a system of approval or registration should be in addition to a requirement that how-to-vote cards bear the name of the party/independent candidate on whose behalf they are distributed.[48]

However, the ECQ—while supporting Justice Mackenzie's suggestion that how-to-vote cards should bear on their face the name of the party on whose behalf or on whose candidate's behalf it is distributed—reiterated its opposition to any system of registration or approval of how-to-vote cards by the ECQ prior to distribution. The Commission stressed that both systems would delay the availability of how-to-vote cards for early pre-poll and postal voting (though this would be less the case with registration than with approval).

> *It is the view of the Commission that it will be necessary to provide each polling booth with either approved or registered how-to-vote cards at least for the relevant electoral district otherwise the legislation would be virtually unenforceable. Therefore, there would have to be a cut-off of the approval or registration at least eight days before polling day to allow sufficient time for the how-to-vote cards to be transported to the relevant booths. (Faxed copies would not address colour and size issues and would not be a satisfactory substitute for an original card.)*
>
> *The suggestion by Mr Justice Mackenzie for how-to-vote cards distributed with a view to obtaining second and subsequent preferences to bear on their face the name of the party on whose behalf or on whose candidate's behalf it is distributed offers a practical solution which minimises interference in the campaign processes while promoting the ideal of voters being fully informed.*
>
> *The Commission strongly supports the suggestion made by Justice Mackenzie.*

Finally, some submitters suggested that persons handing out how-to-vote cards should be required to be authorised or to wear some form of identification.[49]

The committee canvasses various submissions relevant to its terms of reference below.

Analysis and conclusions

The abolition of how-to-vote cards

The abolition of how-to-vote cards is beyond the scope of the committee's inquiry. However, the committee believes that, given the number of submissions which advocated this option, it is appropriate that the committee record its opposition to a total prohibition on how-to-vote cards.

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47 An approval system would require the ECQ to approve how-to-vote cards before they could be legally distributed. A registration system would mean that how-to-vote cards would only have to be registered with the ECQ's office and put on display in that office before they can be legally distributed to the public. Political parties and candidates could then take their own legal action to restrain the use of how-to-vote cards which they considered misleading or offensive.

48 See submissions from W J Gabriel and Professor Colin Hughes.

49 See submissions from Professor Colin Hughes and the Liberal Party (Qld).

While the issue is still to be tested in the courts, the committee believes that the likelihood of a provision banning how-to-vote cards being held constitutionally invalid in light of the constitutionally guaranteed freedom of political discussion is high.[50] However, irrespective of this legal issue, the committee believes that on policy grounds an outright ban of how-to-vote cards is unwarranted.

The committee also notes that banning how-to-vote cards has been considered and rejected at the federal level on a number of occasions for reasons including (apart from civil liberties implications) practical difficulties in enforcing such a ban and that it would deny many supporters of political candidates one of the few means by which they can participate in a campaign.[51]

The replacement of how-to-vote cards with how-to-vote posters

A number of submitters who advocated the banning of how-to-vote cards proferred that, as an alternative, parties/independent candidates be able to place how-to-vote posters in the voting compartments of polling booths. The committee has a number of concerns with this suggestion. In addition to inappropriately involving the ECQ in the party political process, potential difficulties with this option include:

- the ECQ would need to receive the posters prior to polling day which could be administratively cumbersome and costly, cause delay, and prevent candidates from making 'last minute' changes to their how-to-vote material;
- difficulties in determining the precise location of how-to-vote posters in voting compartments (presumably there would be much jockeying for eye height positions);
- difficulties in specifying poster shape and size, especially where a large number of candidates are contesting a seat;
- complications in electorates with large numbers of candidates as there is a limit on how much printed material can effectively be displayed inside voting compartments (including ECQ voter assistance material) so as to be equally visible by voters;
- the ECQ would need to be given specific powers to ensure that posters that had been (successfully) objected to were not displayed; and
- there would need to be additional legislative provisions stating that failing to display, or displaying defaced, posters etc would not affect the validity of an election.

As noted above, EARC expressed similar concerns in its 1991 Elections Act report:

> *If there were to be a statutory requirement that a general poster or posters in every voting compartment were displayed, consideration would have to be given to the effect on the validity of the election of a failure to discharge the responsibility. If the poster was not displayed, or was placed in a position where it was difficult to read, would this be a ground for challenging and overturning the election? Where a large number of candidates are standing, and some recommend alternative distributions of preferences, the size of the poster required could be a problem, as could the additional time required by each elector to find their preferred option. With separate cards it is relatively simple to take only the desired one, or to take all of them but use the preferred one in the compartment.*[52]

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50 Similar concerns were expressed by EARC in its 1991 *Report on the review of the Elections Act 1983-1991 and related matters*, op cit, para 8.113 and by Professor Colin Hughes in his submission.

51 See comments by the Joint Standing Committee on Electoral Matters (JSCEM) in: *The 1990 Federal Election*, AGPS, Canberra, December 1990, pp 55-56; *The 1993 Federal Election*, AGPS, Canberra, November 1994, p 113; and *The 1996 Federal Election*, AGPS, Canberra, June 1997, p 94.

52 Op cit, para 8.112.

The option of how-to-vote posters and/or booklets has also been rejected at the federal level on similar grounds.[53]

For these reasons, the committee does not endorse the suggestion that how-to-vote posters in voting compartments either replace, or supplement, how-to-vote cards.

A system of registration and/or approval of how-to-vote cards

A system of registration and/or approval of how-to-vote cards was considered by this committee's predecessor in its truth in political advertising report. As noted in section 2.1.1 above, that committee recommended against both a system of registration and a (more onerous) system of approval. The former committee was clearly influenced in its conclusion by evidence given by the ECQ. The ECQ has reiterated its concerns to this committee.

While registration systems operate in NSW and Victoria, the concept has been rejected at the federal level. In 1990, the Joint Standing Committee on Electoral Matters ('the JSCEM') noted—in relation to the Victorian registration system—that:

> *while such an approach may overcome the difficult problem of misleading and deceptive publications [the committee] would not support such a system because it would be almost impossible to enforce. In addition, registration would represent bureaucratic interference in the political process and further restrictions placed on political parties. Any such restrictions could interfere with the conduct of a campaign and prevent the option of any last minute material being distributed on polling day to address issues which may arise in the final days of campaigning.*[54]

As noted in section 2.2 above, the suggestion was made in submissions that registration be simplified by requiring how-to-vote cards to be registered with a candidate's local returning officer. However, this would still not overcome some of the problems identified by the former committee and by the JSCEM. For example, registration prior to the election (whether with the ECQ in Brisbane or with the local returning officer) would still prevent candidates from publishing late (amended) how-to-vote material because of changed circumstances.

Further, while registration would ensure that all parties/candidates could scrutinise opponents' how-to-vote material prior to election day and take action to restrain the use of how-to-vote material which they consider misleading, the likelihood of a court granting an injunction restraining the use of 'second preference' how-to-vote cards must also be considered. In the Mansfield decision, Justice Mackenzie noted that he had been referred to three previous Queensland cases, all of which were *un*successful applications for injunctions made on election day to restrain the use of signs in one case and cards seeking preferences in the others.[55]

The committee believes that more effective alternatives to systems of registration and/or approval of how-to-vote material can be employed.

Party workers wearing identification

A couple of submitters suggested that, in order to reduce the possibility of the type of conduct that occurred in Mansfield arising again, there should be an additional requirement that persons distributing how-to-vote material be authorised to do so and/or wear some form of party (or 'independent candidate') identification.

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53 JSCEM, *The 1990 Federal Election*, op cit, p 55. In its report on the 1996 federal election, the JSCEM rejected a proposal for banning or restricting how-to-vote material: *The 1996 Federal Election*, op cit, p 94. This followed a previous JSCEM recommendation that the AEC investigate means by which how-to-vote material could be displayed inside polling places at future federal elections: *The 1993 Federal Election*, op cit, pp 113, recommendation 55.

54 Op cit, p 59. Instead, that committee recommended that a more appropriate solution would be to introduce harsher penalties for existing provisions aimed at the distribution of misleading publications.

55 Judgment, paras 111-113.

The committee has concerns about the practicality of such a requirement (of which there is no equivalent in any other Australian jurisdiction's electoral legislation). On polling day, a large number of volunteers work in shifts to staff each polling booth. Prescriptive regulations requiring hundreds of volunteers to be authorised and/or wear some form of identification only adds to the administration of elections. Policing such requirements would increase the already substantial burden on the ECQ during the election period and inevitably cause difficulties. Consideration would also have to be given to the effect of a distributor not being authorised and/or not wearing the required identification, especially where that distributor has engaged in objectionable conduct.

A consent of first preference candidate provision

As part of its inquiry, the committee has considered whether Queensland's *Electoral Act* should contain a provision making it an offence to use any candidate's name on how-to-vote material as the candidate for whom a first preference vote should be given without that candidate's written consent. This would mean that a first preference candidate would have some control over whether, and how, their name was to be used on second and subsequent preference cards.

As noted in section 2.1.2, the electoral laws of various jurisdictions contain provisions which, on their face, appear to be of this nature.

Section 351(1) of the *Commonwealth Electoral Act* provides that:

> *If, in any matter announced or published by any person, or caused by any person to be announced or published, on behalf of any association, league, organisation or other body of persons, it is, without the written authority of the candidate (proof whereof shall lie upon that person):*
>
> *(a) claimed or suggested that a candidate in an election is associated with, or supports the policy or activities of, that association, league, organisation or other body of persons; or*
>
> *(b) expressly or impliedly advocated or suggested:*
>
> *…*
>
> *(ii) in the case of an election of a Member of the House of Representatives—that that candidate is the candidate for whom the first preference vote should be given;*
>
> *that person shall be guilty of an offence.*[56]

During the last federal election the AEC received complaints about certain second preference how-to-vote cards distributed by the Western Australian Liberal Party. Advice received by the AEC on polling day indicated that the cards in question might have breached s 329(1) and s 351(1)(b)(ii) of the *Commonwealth Electoral Act*. However, the AEC later decided not to prosecute for a breach of either of those sections based on legal advice from the Director of Public Prosecutions (DPP) and further advice from Senior Counsel that such prosecutions might not succeed.

In its advice, the DPP examined the legislative history to s 351 and established that the section, inserted into the *Commonwealth Electoral Act* in 1940, was not originally intended to have a bearing on how-to-vote cards issued by the major political parties.[57] Instead, the section was

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[56] The penalty is $1000 if the offender is a natural person or $5000 in the case of a body corporate. The section does not apply to any publication made or authorised by any political party respecting a candidate who is a candidate for that party (ss 4).

[57] In fact, it was made clear during the bill's passage through the Senate that the (then proposed) provision *'does not affect the distribution of preferences as between candidates of genuine political parties'*, Senator Foll, Electoral Bill 1939, Senate, *Debates*, 23 May 1940, p 1176. For a detailed discussion on the history and operation of s 351 see the AEC's submission to the JSCEM's inquiry into the conduct of the 1998 federal election, 12 March 1999, section 6.8 and attachment 13 (available on the Internet at <http://www.aec.gov.au>).

apparently introduced to prevent the unauthorised endorsement of candidates by certain associations other than the major political parties. The concern was that this might cause detriment to the candidate as persons who did not agree with the views of the association might have been discouraged from voting for the candidate.[58] (In particular, the provision appeared to be aimed at the Communist and Temperance parties.[59])

In this light, the DPP considered that there was some doubt as to whether second preference cards, such as had been the subject of complaints during the last two federal elections, would be in breach of s 351.

Section 351 had been previously considered in some detail in 1987, also in relation to an 'unofficial' second preference how-to-vote card.[60] However, in that case the DPP advised the AEC that there was insufficient evidence to prosecute either the second preference candidate listed on the how-to-vote card or the 'authoriser' of the card (allegedly an associate of the second preference candidate).[61]

In its report on the conduct of the 1987 federal election, the Joint Standing Committee on Electoral Matters (JSCEM) recommended some amendments to overcome the seeming unenforcability of s 351.[62] While the government accepted some of the JSCEM's recommended amendments, it noted that the recommended deletion from s 351 of the requirement to prove that a matter is published on behalf of any association, league, organisation or any other body of persons:

> *…will have the effect of creating an offence of claiming that a candidate is associated with or supports the policies of any organisation. Such an offence would be very broad and would constitute a major restriction of free speech. Because of these unintended results, it is suggested that the Committee should reconsider the recommendation.*[63]

Despite the presence of s 351, it is apparent that the AEC usually relies upon s 329(1) of the *Commonwealth Electoral Act* (Misleading or deceptive publications etc) when considering whether to prosecute for misleading 'unofficial' second preference how-to-vote cards.

In its submission to the JSCEM's inquiry into the conduct of the 1998 federal election,[64] the AEC canvassed both the current relevance of s 351 and Justice Mackenzie's recommendation regarding party/independent candidate identification on how-to-vote cards. In particular, the AEC:

- noted that the issue of second preference cards is a 'vexed one' under the *Commonwealth Electoral Act* as: (a) s 329(1) may not apply to some of the second preference cards now increasingly in use at federal elections (based on the High Court's interpretation of that section described in section 1.1 above); and (b) it appears s 351 was never intended to cover second preference how-to-vote cards as they are currently issued by major political parties;
- noted that Justice Mackenzie's suggestion in the Mansfield decision *might provide an avenue for further consideration of the federal legislation*'; and

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58 See the House of Representatives debate on the Electoral Bill 1939, *Debates*, 21 May 1940, pp 1059-1063.

59 Although, the section is so widely drafted that it arguably encompasses political parties.

60 *Gary Johns v John Hodges & Max Mathers*, Unreported decision, Supreme Court of Qld, no 2689 of 1987.

61 Joint Standing Committee on Electoral Matters, *The 1987 Federal Election*, AGPS, Canberra, May 1989, pp 66-68. The facts of the particular case and the evidentiary difficulties are described in the report.

62 Ibid, p 68.

63 Senate, *Debates*, 30 April 1992, p 1932.

64 AEC, submission to the JSCEM's inquiry into the conduct of the 1998 federal election, 12 March 1999, paras 6.8.17-6.8.23 (available on the Internet at <http://www.aec.gov.au>.

- submitted that the JSCEM might consider amending the authorisation provision in the *Commonwealth Electoral Act* (that is, s 328 which is equivalent to s 161 of the Queensland *Electoral Act*) to put into effect Justice Mackenzie's recommendation and what the detailed wording of such an amendment should be:

> *For example, section 328 could be amended to require that, in addition to the standard authorisation requirements, any electoral advertisement that recommends a second or later preference vote for a candidate from another political party, or an independent candidate, must contain at the top of the advertisement, the name and address of the person authorising the advertisement, and the political party where applicable, in no less than 12 point font.*

The AEC went on to note that if s 328 was to be amended along the lines of Justice Mackenzie's suggestion, then the JSCEM might consider recommending the repeal of s 351 given its peculiar legislative history and to avoid 'any further confusion'. Alternatively, the AEC noted that the JSCEM might conclude that second preference cards should be prohibited altogether and that s 351 does not currently provide for such an express prohibition. If this view was taken, then s 351 could be completely recast to suit contemporary political realities.

Section 301 of the ACT's *Electoral Act 1992* is based on s 351 of the *Commonwealth Electoral Act.* This provision, which has only been in force for the 1995 and 1998 Territory elections, provides that:

> ***301. Publication of statements about candidates***
>
> *(1) A person shall not publish, or authorise to be published, on behalf of a body (whether incorporated or unincorporated) a statement—*
>
> *(a) expressly or impliedly claiming that a candidate in an election is associated with, or supports the policy or activities of, that body; or*
>
> *(b) expressly or impliedly advocating that a candidate should be given the first preference vote in an election;*
>
> *without the written authority of the candidate.*[65]

The ACT electoral commissioner advised that the section is mainly intended to:

> *prohibit a candidate from being disadvantaged by appearing to be associated with a body with which the candidate may not wish to be associated.* ***It would also act to prohibit a party or candidate issuing a how-to-vote card that advocated casting a first preference for another candidate without that candidate's consent****. It would not prevent the type of how-to-vote card along the lines of "Thinking of voting Democrat?" Then give your second preference to…".*[66]
> [Emphasis added.]

The ACT electoral commissioner also advised that s 301 has not been the subject of any complaints or legal action.

It is clear from the above discussion of s 351 of the *Commonwealth Electoral Act* that, in the words of the AEC, the section *was never intended to cover second preference how-to-vote cards as they are currently issued by major political parties, but is in fact restricted to a narrow set of historical circumstances*'. Further, the experience with s 351 highlights that there might be evidentiary difficulties with enforcing such a provision.

By careful drafting it might be possible to overcome these and other potential difficulties with such a provision. Other potential difficulties include:

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65 The penalty for non-compliance is $3000. Again, the section does not apply to any publication on behalf of a political party respecting a candidate who is a candidate for that party (ss 3).

66 Letter to the committee dated 22 November 1998.

- the provision only requires the consent of a first preference candidate and does not apply to second and subsequent preference candidates and these preferences can, in close seats, be important; and
- the provision would not apply to how-to-vote cards which, instead of listing a candidate as a first preference, merely list a party's name.

However, the committee is concerned about the free speech implications of such a provision which, in reality, would very likely operate to restrict lawful how-to-vote cards to those which are, or are in accordance with, 'official' party/independent candidates' second preference cards. This is because a first preference candidate (or their party) is likely to only consent to a card which *fully* accords with their desired preference allocation. In a case where a party/candidate is not directing any preferences, presumably that party/candidate would not consent to any second preference how-to-vote material. Such a provision therefore has the potential to restrain, for example, concerned community groups from issuing how-to-vote material. The committee believes that, in a democratic society, an organisation should be able to say "vote for candidate X" (whether that person is a first preference candidate or otherwise) without that candidate's consent.

For these reasons, the committee is not supportive of a 'first preference candidate' consent provision.

A party/candidate identification requirement

Currently, s 161 of Queensland's *Electoral Act* requires certain election material, including how-to-vote cards, to bear the name and address of the person who authorised the material. In light of the 1998 election events in the Mansfield electorate, Justice Mackenzie suggested that Queensland's *Electoral Act* be amended to insert a requirement that all cards distributed with a view to obtaining *second and subsequent preferences*:

- should *bear on their face* (and on each face if double sided);
- the *name of the party* on whose behalf or on whose candidate's behalf it is distributed (and where it is issued by a person who is not a party candidate, the fact that he or she is an independent should be stated); and
- such information should be required to be *printed in type of a size which is sufficiently large* to be easily read and is not overwhelmed by other printing on the card.[67]

As discussed, no other Australian jurisdiction currently has a provision in its electoral laws to this effect (though, the ACT Electoral Commission has recently proposed a similar requirement be inserted into the ACT *Electoral Act*).

No submission to the committee's inquiry provided a reason why Justice Mackenzie's suggestion should *not* be adopted. In fact, the majority of submissions which advocated the (or at least worked on the basis of) retention of how-to-vote cards supported such a requirement.

The committee is similarly supportive of Justice Mackenzie's suggestion.

Requiring how-to-vote material to bear, where applicable, the name of the party/candidate on whose behalf it is distributed in sufficiently sized print, should reduce the potential for voters to be misled. More specifically, such a requirement will equip voters with the means to make informed decisions when handed how-to-vote material. Voters will be in a better position to judge how-to-vote material if it is ensured that the (political) source of that material is clearly stated.

Making voters aware of the source of electoral material is an important aspect of voter education as it helps to ensure that voters are making fully informed political judgments.

As Justice Mackenzie observed of previous Queensland cases concerning applications for injunctions to restrain the use of 'misleading' how-to-vote material:

> *The point to be made in respect of these cases is that the issue whether cards advocating a second preference are likely to mislead is not uncommon.*

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[67] Judgment, para 153.

> *Controversy whether identification of the source of the document is adequate is a common feature of the cases*.[68]

His Honour also noted that his suggested solution to reduce the kind of confusion alleged to have occurred in the Mansfield electorate promoted *'the ideal of voters being fully informed before they decide whether to give a second or subsequent preference and, if so, to whom…'*.[69]

The committee concurs that Justice Mackenzie's suggestion promotes the ideal of voters being fully informed before casting their vote. The committee also believes that Justice Mackenzie's suggested requirement is:

- inexpensive;
- practical and simple to implement (in fact, as was evident from the Mansfield decision, some parties already state their party name in the s161 authorising statement); and
- likely to minimise interference in the campaign process.

However, while the committee agrees with Justice Mackenzie's general suggestion, the committee proposes a number of modifications to it. The committee's final proposed provision appears in recommendation 1 of this report. The discussion below explains the committee's policy position behind its provision.

The broad application of a party/candidate identification requirement

The committee believes that a party/candidate identification requirement must be (a) directed to the mischief it is attempting to address and (b) be workable. To this end, the committee advocates a minimalist approach to implementing such a requirement.

Having said this, the committee makes the following observations at the outset.

- The requirement should only apply to the 'distribution' of 'how-to-vote cards'. Stipulating additional requirements regarding the distribution of how-to-vote cards—that is, additional to those which apply to other forms of electoral advertisements and material—can be justified on the basis that such cards are usually the last piece of information that voters receive before casting their vote. At that stage, voters are not only vulnerable to being influenced/misled by the cards but are also unlikely to have any independent means at their disposal to verify the political source of the cards provided to them.
- 'How-to-vote card' should be defined to encompass all cards, handbills and pamphlets whether they represent part or all of a ballot paper, or are narrative in nature. (A narrative card might state, for example, 'Voting for the ABC party?. Then make your vote count and give your next preference to the XYZ party'.)
- The requirement should apply to *all* how-to-vote cards distributed with a view to soliciting votes whether first or subsequent preferences. (Justice Mackenzie's comments were confined to how-to-vote cards distributed with a view to obtaining *second and subsequent preferences*.) To have different requirements applying to different types of how-to-vote cards would cause confusion and increase the likelihood of inadvertent non-compliance. (Nevertheless, the committee concedes that when it comes to narrative how-to-vote cards, the provision should not cast too wide a net, and should instead be confined to second and subsequent preference cards.)

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68 Judgment, para 113.

69 Judgment, para 154.

The essential details

Clearly, the party/candidate identification requirement should be additional to the current authorisation required by s 161, that is, the name and address[70] (other than a post office box) of the person who authorised the card.

In particular, the committee believes that the following should be required to appear with this statement:

- in the case of cards authorised for a registered political party or a candidate endorsed by a registered political party—the party's name (or where an abbreviation of the party's name is included on the register of political parties, the abbreviation);
- in the case of cards authorised for a candidate of a non-registered political party or an independent candidate—the candidate's name and the word 'candidate'.[71]

The committee recognises that various organisations interested in the outcome of an election, such as community and lobby groups, might wish to issue how-to-vote cards. Moreover, the committee believes that this is appropriate in a democratic society whose constitution contains an implied freedom of political discussion. Where cards are distributed without the authorisation of any candidate or party, only the current requirement under s 161 would apply.

The fact that a party's name or the words 'candidate' do not appear on how-to-vote material should put voters on notice that the material is not authorised for any candidate or party. Again, general voter education should assist in alerting voters to the fact that such material is issued for either individual citizens or organisations such as community and lobby groups. The latter in particular may well choose to clearly state authorship on their material for the ready information of their members.

Ensuring that the requirement is not circumvented

The committee is conscious that any legislative provision requiring how-to-vote material to bear the name of the party/candidate on whose behalf it is distributed must be carefully drafted to ensure that it is not easily circumvented and that it does not constitute an unreasonable inhibition on freedom of expression.

Mr Morris submitted that there is a risk of a party/candidate identification requirement being circumvented where how-to-vote cards are produced and distributed by supporters for a particular candidate without that candidate's (or the candidate's party's) knowledge or approval. Mr Morris submitted to the committee that the only solution to overcome this problem is to require that any card distributed with a view to soliciting votes (whether first or subsequent preferences) must bear a statement which either:

1. commences with the words: "This card is distributed on behalf of…[followed by the name of the candidate or the candidate's party]"; or
2. in the case of material distributed without the express permission of any candidate or party, commences with the words: 'This card is not distributed on behalf of any candidate or party'.

---

[70] The committee notes that the AEC recommended in its submission to the JSCEM's 1998 federal election inquiry that the Commonwealth equivalent of s 161 be amended to define 'address' as the full address, including the street number, the street name and the suburb/locality: para 6.4 (available on the Internet at <http://www.aec.gov.au>). This submission was made as a result of a number of queries of the AEC during the election period. The committee is not aware of similar difficulties in Queensland and therefore has not addressed this matter as part of its current inquiry. However, the committee notes that this issue might be considered in relation to amendments proposed by the ECQ to the *Electoral Act 1992* following the 1998 general State election.

[71] The committee had considered the words 'independent candidate' but believes that it would be misleading for candidates endorsed by, or who identify with, unregistered political parties to be required to state that they are 'independent candidates'.

Mr Morris further submitted that it should be an offence to distribute how-to-vote material without containing one or other of these statements, or to distribute such material claiming that it is distributed on behalf of a particular candidate or party when that is not the case.

While the committee agrees that all practical steps should be taken to ensure that the party/candidate identification requirement is not circumvented, the committee is not convinced that the additional words suggested by Mr Morris are necessary or desirable. As noted above, if a card is distributed without the authorisation of any party or candidate, this would be evident by the fact that only the current s 161 statement appears on the card. The committee has real concerns as to cluttering how-to-vote material by overly prescriptive requirements. This is exacerbated if, as the committee advocates below, size requirements are also to apply to the statement.

The committee is more concerned with the possibility that unscrupulous parties or candidates might arrange for third persons to distribute how-to-vote cards in their favour but supposedly not 'authorised' on their behalf. The committee does not believe that the likelihood of this occurring is high. In fact, the how-to-vote cards in issue in the Mansfield decision did bear the registered abbreviation of the political party issuing the cards. Nevertheless, the committee agrees that it should be an offence to:

- distribute a how-to-vote card which does not contain the party/candidate identification requirement where applicable;
- distribute a how-to-vote card if the card states that it is authorised for a registered political party or a candidate and the person knows that the statement is false.

The committee further recommends that the penalty for these offences should be the same as the penalty for a breach of s161.

Stipulations as to print size, colour and legibility

Justice Mackenzie noted that any requirement for how-to-vote material to bear a party/candidate identification statement would also have to be accompanied by stipulations as to print size to ensure that the statement is both 'easily read' and 'not overwhelmed by other printing on the card'. The committee agrees that without such stipulations the requirement could be rendered ineffective.

In terms of print size requirements, the committee has considered a number of options (many of which were suggestions made in submissions). These options include:

- highly prescriptive regulations (such as the federal regulations regarding health warnings on cigarette packets);
- a broad requirement such as 'not less than half (third etc) the size of the biggest print on the face of the card'; or
- a graded minimum print size per page size requirement.

Of these options, the committee favours the last. Overly prescriptive requirements might make compliance and the adjudication of alleged breaches more difficult, and increase the chances of inadvertent, technical non-compliance. A broad requirement, which seeks to make the print size proportional to the largest font on the card, has the potential to interfere with the design of how-to-vote cards. Both would be difficult for ECQ officers to monitor and enforce.

A graded minimum print size per page size requirement seemingly achieves a balance between these two options. It is neither overly prescriptive, nor is it likely to unnecessarily interfere with preferred designs of how-to-vote cards. Further, the committee believes that compliance would be relatively easy to monitor by the use of pre-printed transparency overlays.

The committee believes that, in the case of how-to-vote cards, the authorising statement be required to appear in print no smaller than:

- if the card is not larger than A6—10 point; or
- if the card is larger than A6 but not larger than A3—14 point; or

- if the card is larger than A3—20 point.[72]

A suggestion was also made in submissions that there should be requirements with respect to the colour in which the statement should be printed. For example, Mr Morris submitted that his proposed statement/s occupy the top quarter of each face, which should be blank apart from the required statement and that the colouring and lay-out should be such that the required statement is no less distinctive than any other part of the document.

Again, rather than being overly prescriptive on matters of design, the committee believes that a general requirement that the statement appear in prominent and legible characters is sufficient.

Position of the required statement

It was suggested to the committee that it might be necessary to stipulate the position of the party/candidate identification statement on how-to-vote cards. As noted above, Mr Morris submitted that his proposed statement/s occupy the top quarter of each face of a card. Some submitters also advocated that a party/candidate identification statement be required to appear at the top rather than the bottom of the card.

For similar reasons to those stated above, the committee does not favour such requirements. Attempting to legislate on such specific matters is not only complex but, in the committee's opinion, inappropriately interferes with matters of preferred design. The committee believes that requiring the statement to be prominent and legible should be sufficient. The requirement that the statement appear at the bottom of the card also accords with the current s 161 requirement. This means that, where applicable, the party/candidate identification statement will be located in a position with which most people should be familiar.

However, the committee does agree with Justice Mackenzie's suggestion that the party/candidate identification statement be required to appear on each printed face of any document.

RECOMMENDATION 1

The committee recommends that the Attorney-General, as the Minister responsible for the *Electoral Act 1992* (Qld), amend the Act along the lines of the following draft provisions.

·Amendment of s 161 (Author of election matter must be named)

(1) Section 161(1), 'Subject to subsection (3), a'—

omit, insert—

'A'.

(2) Section 161—

insert—

'**(4)** Also, subsection (1) does not apply to distributing, or permitting or authorising another person to distribute, a how-to-vote card.

'**(5)** In this section—

"distribute", for subsection (4), has the meaning given by section 161A.

"how-to-vote card" has the meaning given by section 161A.'.

·Insertion of new s 161A

After section 161—

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72 Australian Standard AS 1612-1974 (which is based on international standards) characterise A6 as 148 x 105mm, A5 as 210 x 148mm, A4 as 297 x 210mm, A3 as 420 x 297mm and A2 as 594 x 420mm. This page is A4 with body text in 12 point (footnote text is 10 point). Under the committee's proposals, if this page was a how-to-vote card the required statement would have to appear in at least 14 point.

insert—

·‘**Distribution of how-to-vote cards**

‘**161A.(1)** During the election period for an election, a person must not distribute, or permit or authorise another person to distribute, a how-to-vote card that does not comply with subsections (2) to (4).

Maximum penalty—

(a) for an individual—20 penalty units; or

(b) for a corporation—85 penalty units.

‘**(2)** A how-to-vote card must state the following particulars—

(a) the name and address of the person who authorised the card;

(b) if the card is authorised—

(i) for a registered political party or a candidate endorsed by a registered political party—the party’s name; or

(ii) for a candidate who is not endorsed by a registered political party—the candidate’s name and the word ‘candidate’.

Example for paragraph (b)(i)—

‘Authorised P. Smith, 100 Green Street Brisbane for the ALP’.

Example for paragraph (b)(ii)—

‘Authorised R. Jones, 1 Green Street Brisbane for R. Jones (candidate)’.

‘**(3)** For subsection (2)(a), the address must not be a post office box.

‘**(4)** The particulars mentioned in subsection (2) must appear—

(a) at the end of each printed face of the how-to-vote card; and

(b) in prominent and legible characters in print no smaller than—

(i) if the card is not larger than A6—10 point; or

(ii) if the card is larger than A6 but not larger than A3—14 point; or

(iii) if the card is larger than A3—20 point.

‘**(5)** During the election period for an election, a person must not distribute, or permit or authorise another person to distribute, a how-to-vote card if the person knows, or ought reasonably to know, that the particulars, or any of the particulars, mentioned in subsection (2) on the card are false.

Maximum penalty—

(a) for an individual—20 penalty units; or

(b) for a corporation—85 penalty units.

‘**(6)** In this section—

“distribute” a how-to-vote card—

(a) includes make the card available to other persons; but

(b) does not include merely display the card.

Examples—

1. A person "distributes" a how-to-vote card if the person hands the cards to other persons or leaves them at a place for other persons to take away.

2. A person does not "distribute" a how-to-vote card if the person attaches the cards to walls and other structures, merely for display.

"how-to-vote card" means a card, handbill or pamphlet that—

(a) is or includes—

(i) a representation of a ballot paper or part of a ballot paper; or

(ii) something apparently intended to represent a ballot paper or part of a ballot paper; or

(b) lists the names of any or all of the candidates for an election with a number indicating an order of voting preference against the names of any or all of the candidates; or

(c) otherwise directs or encourages the casting of preference votes, other than first preference votes, in a particular way.

"name", of a registered political party, means the party's full name on the register of political parties or, if an abbreviation of the name is also included on the register, the abbreviation.'.

Extending the committee's proposal to local government

Amending the *Electoral Act* as recommended in section 2.3.6 above would operate to further regulate how-to-vote cards distributed in general State elections.[73] However, while the Mansfield decision related to the conduct of State elections, the question arises as to whether the proposed requirement should also apply to local government elections. To impose similar requirements in the case of elections at local government level, the *Local Government Act 1993* (Qld) would also need to be amended.[74]

The *Local Government Act* governs the conduct of local government elections.[75] 'Election' is defined in s 3 of the *Local Government Act* to mean an election of councillors, or a councillor, of a local government.

The *Local Government Act* provides for optional preferential voting in the case of elections of a councillor if the local government area is divided into single-member divisions.[76] Therefore, the arguments for further regulating of how-to-vote cards (made more imperative in optional preferential voting) equally apply to at least some local government elections.

The offences which apply to local government elections are contained in Chapter 5, Part 6, Division 16 of the *Local Government Act* and largely mirror the offences contained in Part 9 of the *Electoral Act*.

For example:

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73 'Election' is defined in s 3 of the *Electoral Act 1992* to be an election of a member or members of the Legislative Assembly.

74 See discussion regarding local government elections in the Mansfield judgment, para 108.

75 The committee notes that, in the case of Brisbane City Council elections, the *City of Brisbane Act 1924* (Qld) provides that the *Electoral Act 1992* generally applies to the conduct of elections: *City of Brisbane Act 1924*, ss 3A(2) and 17(5) & (6).

76 See the *Local Government Act*, s 354. Section 355 (first-past-the-post voting) provides for voting in elections other than those covered by s 354.

- s 161 of the *Electoral Act* (Author of election matter must be named) is largely repeated in the *Local Government Act,* s 392 (Responsibility for election matter);[77]
- s 163 of the *Electoral Act* (Misleading voters) is largely repeated in the *Local Government Act,* s 394 (Misleading voters); and
- s 177 of the *Electoral A*ct (Injunctions) is largely repeated in the *Local Government Act,* s 407 (Injunctions to restrain contravention of chapter).

The committee believes that, for consistency, the additional requirements it proposes in relation to how-to-vote cards for State general elections should apply in relation to local government elections. For this to occur, the committee's proposed s 161A (and proposed amendments to s 161) will need to be mirrored in the *Local Government Act*.

RECOMMENDATION 2

The committee recommends that the Minister responsible for the *Local Government Act 1993* (Qld) amend the Act along the lines of the draft provisions contained in recommendation 1 above.

[77] Although, notably, the requirement to state the printer's name and place of business still applies in s 392 of the *Local Government Act 1993*. This requirement was removed from the *Electoral Act 1992* in 1997.

Conclusion

The issues raised by Justice Mackenzie in the Mansfield decision indeed deserve the legislature's consideration.

How-to-vote cards

Clearly, the opportunity for electors to claim that they have been misled by how-to-vote cards should be minimised. After carefully considering various options for regulating how-to-vote cards, the committee believes that Justice Mackenzie's suggestion that such material be required to bear, in sufficiently sized print, the name of the party/candidate on whose behalf it is distributed should be implemented. Such a requirement will enable voters to better identify the source of how-to-vote material and exercise their judgment accordingly. Moreover, the committee believes that the requirement is inexpensive, practical and likely to minimise interference in the campaign process.

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Walker, K, 'Disputed returns and parliamentary qualifications: Is the High Court's jurisdiction constitutional?', *UNSW Law Journal*, vol 20, 1997, pp 257-273.

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APPENDIX A: THE CARDS COMPLAINED ABOUT IN MANSFIELD

Note: These cards are not true to size and the Mansfield decision reveals that they were principally very bright fluorescent orange in colour with contrasting black writing, or black background colour where the writing was in fluorescent orange.

EXHIBIT 2

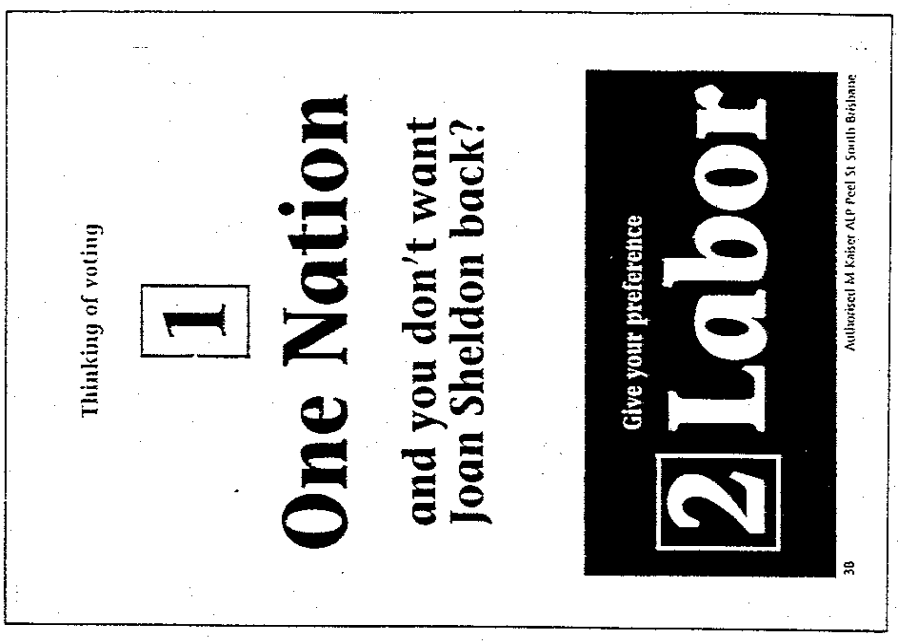
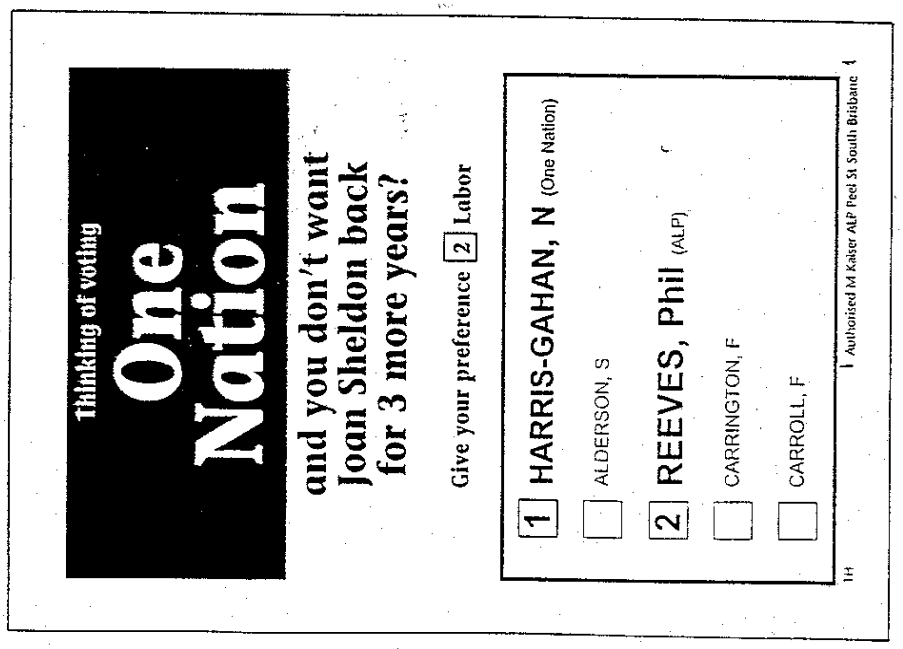


EXHIBIT 1



APPENDIX B: SUBMISSIONS RECEIVED

1. Mr J Wakely
2. Mrs M Morris
3. Hon Justice P de Jersey, Chief Justice, Supreme Court
4. A R Merucci
5. Mr A Sandell
6. Mrs D I Gabriel
7. P Svenson
8. Mr E Walker
9. W J Gabriel
10. Mr D Dalgleish MLA
11. J Calway
12. Murgon Community Association
13. Ms S Moles
14. Mrs M Johnston
15. C Gwin
16. Mr R Weber
17. Ms D Mahoney
18. Ms B Mason, Queensland Greens
19. Mr D O'Shea, Electoral Commissioner, Queensland
20. Professor C Hughes
21. Mr R C Sadler
22. Ms J Sharples
23. Mrs J Werner
24. Mr R Webber
25. Dr M J Macklin
26. Associate Professor N Preston
27. Ms M Johnston
28. Mrs L and Mr J Leatherbarrow
29. Dr E Connors
30. Dr P Reynolds
31. National Party of Australia (Queensland)
32. Mr F Brown
33. Australian Labor Party (Qld Division)
34. Mr F Carroll
35. Mr A J H Morris QC
36. Australian Democrats (Qld Division)
37. Liberal Party of Australia (Qld Division)
38. Queensland Law Society Inc.
39. Nimbin Environment Centre Inc.
40. Mr J Pyke

Attachment 8

Extract from DPP advice of 28 September 1999

The Queensland Committee has put forward a draft provision requiring certain particulars to be included on HTV cards, namely the name and address of the person who authorised the card and if the card is authorised *for* a registered political party or a candidate endorsed by a registered political party - the party's name, or for a candidate who is not endorsed by a registered political party - the candidate's name and the word 'candidate'….

The draft provision would not appear to have as broad an application as the example posited in the AEC's earlier submission relating to any electoral advertisement. The draft provision specifically addresses HTV cards, defined as a card, handbill or pamphlet that includes a representation or something intended to represent a ballot paper or part of a ballot paper or lists the names of any or all of the candidates with a number indicating an order of voting preference against the names of any or all of the candidates or otherwise directs or encourages the casting or preference votes, other than first preference votes, in a particular way.

In being limited to card handbill or pamphlet, the section would not cover publication generally, for example in a newspaper or on the internet. That the section concerns what might be regarded as traditional how-to-vote cards being handed out at polling booths is reinforced in that it only covers the distribution of the defined material. "Distribute" is defined to include making the card available to other persons but does not include merely displaying the card.

The AEC seemed to have in mind electoral advertisements and publications generally and this would seem to have merit.

I also note that the draft provision applies to all HTV cards not just those advocating second and subsequent preference votes as recommended by Justice Mackenzie, although there is a qualification (discussed in the report at page 22) concerning the operation of the section being confined to second and subsequent preference cards in the case of narrative HTV cards. The definition of a "how-to-vote card", as set out above, requires the particulars where a card ...etc that lists the names or any or all of the candidates with a number indicating an order of preference and a card...etc that otherwise directs or encourages the casting of preference votes other than first preference votes in a particular way.

Section 328 of the Act already requires certain particulars relating to the authorisation by individuals to be on HTV cards as these fall within the definition of an electoral advertisement and it appears the difficulties identified exist despite the present requirements in the case of certain cards, in particular those that bear a similarity to the cards put out by the first preference candidate.

As mentioned above, the gravamen of the proposed changes is to require a reference to a political party or a candidate where this is the case on cards. This is not something presently required by the Act as the authorisation requirements relate to individuals. They

are directed to combating anonymity. The proposal under consideration would seem to be directed towards the different object of lessening confusion in relation to HTV cards.

The draft provision includes two offences. The first is distributing... etc a card that does not comply with the section. The second is in relation to false particulars. The second offence is a further extension in this area as the effect of section 328 is to require certain particulars to be included and there is no offence concerning their falsity.

A prosecution in relation to the first offence might arise where no particulars have been included on a card. An offence may be established by proof of the distribution etc of the card. This would appear, subject to the necessary evidence being obtained, relatively straightforward and is an offence similar in concept to that in section 328.

It is not clear whether the Queensland Committee were intending to cast a wider net in the draft provision referring to cards authorised "for" a political party as distinct from being authorised "by" a political party. The Report refers to Justice Mackenzie's suggestion about the name of the party or candidate on whose behalf a card is distributed, and the Committee appears to have intended to implement this.

There would seem to be a distinction between "for" and "by". The latter addresses where a party has in fact authorised the card. The former encompasses this but would seem to be broader in that it would arguably also cover second preference cards put out by others in support of a party or candidate, although not formally authorised by the party or candidate, and is "for" the party or candidate in that sense. The use of "for" could potentially have the result that such cards would appear to have been issued by the party although that was not the case. It is not clear whether the Committee intended the draft provision to have such an application, or whether such cards are seen as falling within the requirement to state the name and address of the person who authorised the card. At page 23 the latter seems to be suggested.

If the requirement is to establish "by" then establishing such a matter as a matter of evidence may be difficult. This would be necessary to sustain a prosecution to show that those particulars should have been included. What level of formality would be necessary or what level of authority would persons have to authorise a card on behalf of the Party? It may be that in such a case an individual might in any event claim that they, rather than the party authorised the card.

Individuals may personally authorise cards and this would really be a continuation of the present system which requires personal authorisation. Such a claim, whether correct or not, would be difficult to disprove in order to establish a breach. This difficulty would also arise in relation to the second offence in relation to the falsity of the particulars should it be alleged the stated particulars were false.

[You have queried]…. whether parties might avoid the requirement in relation to stating the party behind the card, by cards being authorised by individuals and not the party. This would seem to be a valid concern and would strike at the effectiveness of the provision as in this case a party need not be named at all.

In the absence of a regulatory scheme as to who may and may not issue HTV cards, or their being approved by the AEC or in a specified form, for example this would appear to remain a potential difficulty….

In conclusion on this aspect, it is not clear whether the reference to "for" really means "by". In order to avoid confusion it would seem that "by" would be preferable.

…. another approach [has been suggested] in that second preference cards might be required to state that they were not an "Official" HTV card for the party of the first preference candidate. In discussion, you have foreshadowed that this might not be a workable approach. The meaning and import of this may not be apparent to a member of the public. It might even be construed as a statement that it was an unofficial card of that Party which would not be the case. In any event, the meaning of "Official" would appear to require definition. Further, this approach does not focus on who is responsible for the card.

…..The AEC recommends the repeal of section 351 given its unusual legislative history and apparent lack of relevance to contemporary political circumstances, including the regulation of second preference HTV cards issued by political parties. These considerations are within the province of the AEC rather than the DPP. For our part, that the section does not address the particular how-to-vote cards under consideration, would not seem of itself to provide a reason for the section's repeal.

The operation of the section is now apparent in the light of the analysis of that has been carried out previously by reference to its legislative history. Whilst the subject matter that gave rise to its inclusion in the Act may not necessarily arise in contemporary Australia, the detriment to candidates that was behind its enactment could in our view and accordingly the section would seem to us to have a potential operation.

The section was enacted to address the detriment to candidates from the unauthorised endorsement of candidates by associations outside the major political parties, as such endorsement generated a suggestion of an association between the candidate and the organisation. We note that the section has not been utilized in that prosecutions have not been brought pursuant to it, although it may be that its place in the Act may be regarded as providing a measure of protection to candidates from such detriment. The DPP appreciates that this is a policy matter for the AEC.

Attachment 9

Further extract from DPP advice of 12 November 1998

It is apparent from the Parliamentary debate on this section [351] that the intention of the legislators was to address the detriment to candidates from the unauthorised endorsement of candidates by associations etc outside the major political parties, as such endorsement generated a suggestion of an association between the candidate and the organisation.

It appears in some instances the detriment referred to may have been intended, or in others, the endorsement may not have been with the intention of causing detriment to the candidate but nevertheless it may have caused a detriment, as persons who did not agree with the views of the association may have been discouraged from voting for the candidate.

The Parliamentary debate revolved around groups such as the Communist and Temperance Parties although the breadth of the drafting of the section would appear to potentially encompass political parties.

The focus of the section is on *endorsement* by and *association* with organisations. It concerns matter announced or published *on behalf of* any association, league, organisation or other body without the written authority of the candidate. It is not directed to material published by a person in a personal capacity, and would not, for example, prohibit individuals writing letters on their own behalf in support of a candidate without that candidate's knowledge.

The proof of offences is assisted by subsection (3) that deems officers of any association etc guilty of an offence where matter is published on behalf of, or with the support of the association. Subsection (5) provides the person who is stated to have authorised the matter is taken, in the absence of evidence to the contrary to have announced or published, or caused it to be, for the purpose of the section.

During the debate an example of a HTV card by the Communist party was given that advocated a first preference vote: "Vote 1 Labour Party Vote 2 Communist Party." The background to the example was the assertion that cards had been issued by the Communist Party that deliberately advocated a first preference vote for labour with a second preference vote for the Communist party allegedly in an attempt to cause detriment to the Labour candidate by reason of an association created by the card.

As recognised in the debate, this type of card, suggesting a first preference vote, clearly falls within the section and would breach the section if published without the written authority of the candidate.

The background to the card under consideration would seem to be very different, although no evidence about this has been provided. It appears to have been issued for the purpose of attracting second preference votes to the Liberal Party from One Nation voters rather than causing a detriment to the One Nation candidate by suggesting an association of that candidate with the Liberal Party or an endorsement of the One Nation candidate by the Liberal Party. One Nation have complained about the cards, although

the compliant appears to be only in relation to them being understood as a genuine Pauline Hanson One Nation How-to-vote cards, thereby breaching section 329 of the Act.

In my opinion the cards do not breach section 329. They are clearly identified as being authorised by a person in the Liberal Party of Australia (WA DIV INC). They bear no similarity to the One Nation How to vote card provided with your request for advice.

The parliamentary debate reveals that section 351 was not intended to prohibit cards by political parties advocating persons should give their second and later second preferences to candidates of other parties. The thrust of the debate was a concern to ensure that the section did not prohibit political parties issuing how to vote cards for their own candidates 1 and with preferences for candidates of other parties. This was why the section was re-drafted to omit the reference to soliciting votes, replacing it with a first preference vote, in addition to the protection given by subsection (4) to parties. The prohibition is only in relation to first preference votes.

Section 351 prohibits the advocacy, or suggestion, express or implied, in relation to a first preference vote. For example, a card issued by the Liberal Party which specifically said; “The Liberal party does not expressly or impliedly advocate or suggest you should vote One Nation, as we advocate you vote with a first preference to Liberal, but if you do decide to vote with your first preference to One Nation, we advocate you give your second preference to Liberal”, in my view would not breach the section.

On the other hand a card issued by the Liberal Party that said “Make sure you Vote One Nation 1 because ... and make sure you vote Liberal 2 because ...”, if the endorsement of the One Nation candidate was without the written authority of the candidate, would appear to breach the section.

The issue in each particular case, in an election to the House of Representatives, will be whether the card expressly or impliedly advocates or suggests that the candidate is the candidate for whom the first preference vote should be given. In determining if any offence is disclosed, it will be the construction of the particular card that will be critical, rather than the intention of those involved, although this would be relevant in determining if a prosecution should be instituted, should a technical breach of the section be disclosed. Also relevant to the public interest in proceeding would be if the candidate was concerned about the matter.

Do these cards technically fall within section 351 ? There is no evidence the cards were not authorised in writing by the One Nation candidates concerned, although I have assumed this for present purposes.

In my opinion these cards do not expressly or impliedly suggest the One Nation candidate should be given the first preference vote. I am of this opinion despite the name of the One Nation candidate being next to a box marked 1 and the card stating “How to vote One Nation”, and “Number your ballot paper in this order and make your vote count”. These statements appear in the context of the card being clearly issued by the Liberal Party and having the overriding message: PUT LABOR LAST in voting One Nation, and “Don't help Labor sneak into Government”.

The cards do not just state “How to vote One Nation” they state “How to vote One Nation in Swan and put Labor last”.

In my view the cards suggest if a person votes One Nation first preference then that person should vote Liberal as second preference because to do otherwise will help Labor sneak into Government. The message is not to vote One Nation, but to vote Liberal.

In my opinion, taken as a whole, these cards are advocating a second preference to the Liberal Party candidate. There are no statements endorsing the One Nation candidate or providing any reason why the voter should vote for that candidate.