Submission No 19

ELECTORAL COMMISSION
QUEENSLAND

IN REPLY PLEASE QUOTE	EX/52/DJO:AL
CONTACT OFFICER	Mr D O'Shea
TELEPHONE	3227 7249
FACSIMILE	(07) 3229 7391

26 October 1998

Mr G Fenlon MLA
Chair
Legal, Constitutional and Administrative
Review Committee
Parliament House
George Street
BRISBANE Q 4000

Dear Mr Fenlon

Thank you for your letter of 2 October 1998 inviting the Commission to make a submission relating to your inquiry into issues of electoral reform raised in the Mansfield Decision of the Court of Dispute Returns.

I am pleased to enclose the Commission's submission.

Yours sincerely

D J O'SHEA
Electoral Commissioner

Enc

QUEENSLAND

[redacted]

GPO BOX 1393 BRISBANE QUEENSLAND 4001 AUSTRALIA
LEVEL 6 FORESTRY HOUSE 160 MARY STREET BRISBANE

SUBMISSION BY THE ELECTORAL COMMISSION QUEENSLAND

TO THE

LEGAL CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

OCTOBER 1998

INTRODUCTION

In response to an invitation from the Chair, Legal Constitutional and Administrative Review Committee, this submission has been prepared in relation to how-to-vote cards and to appeals from the Court of Disputed Returns being issues raised by the Honourable Mr Justice Mackenzie when giving his judgment in the Mansfield Petition.

HOW TO VOTE CARDS

The Electoral Commission Queensland made a submission in July 1996 to the Legal Constitutional and Administrative Review Committee in relation to an issues paper pertaining to "truth in political advertising" in which the Commission's position on how-to-vote cards was outlined as follows:

> *The significance of how-to-vote cards has been reduced with the introduction of party affiliations of candidates on ballot papers. However, how-to-vote cards fulfil an important function by informing electors how a candidate or party recommends voters allocate their preferences.*
>
> *How-to-vote cards provide the last source of information to electors in making a choice and the ECQ believes the importance of this source of information to electors should not be underestimated.*
>
> *ECQ also believes that the replacement of how-to-vote cards with a general poster in voting compartments would not provide a satisfactory alternative particularly in cases where there are a large number of candidates (eg. 12 candidates contested the 1996 Mundingburra Election).*
>
> *The argument against having general posters in voting compartments was succinctly expressed by the Electoral and Administrative Review Commission:-*
>
> > *"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."

In recent years a common complaint regarding misleading how-to-vote cards arises where a major political party recommends a first preference for another party or an independent and the second preference vote for their own party. Currently, as long as these how-to-vote cards conform with section 161 of the Electoral Act 1992 (ie contains name and address of person who authorised the card and the name and place of business of the printer) no offence is committed.

If how to vote cards required the approval of the ECQ prior to issue, parties and candidates would experience delays whilst consideration is given to each card submitted.

Depending on the date specified in the election writ, close of nominations for candidates occurs between 8 to 18 days from the issue of the Writ.

Returning Officers issue ballot papers to postal voters as soon as candidates are known and pre-poll in person voting commences 3 days after the cut-off day for nomination of candidates.

Therefore voting would have started before candidates had the opportunity to:

(1) determine preference allocation;
(2) prepare draft how to vote cards to submit for approval;
(3) obtain approval, and
(4) print and despatch cards.

If legislation is introduced to require ECQ to approve how-to-vote cards prior to issue, it is important that the basis for giving approval and the process to be followed be carefully prescribed as delays will occur in the approval process.

The Commission's position in relation to how-to-vote cards has not changed since that time.

Mr Justice Mackenzie recognised the significance of how-to-vote cards in his judgment (page 63 paragraph 148) when he said:

> "However, under optional preferential voting, persuasion of electors both to record a preference at all and to record it in a particular way are particularly important objectives, especially in a close contest."

Suggestions have been made that how-to-vote cards should be approved by the Commission before they can legally be distributed to the public.

It has also been suggested that how-to-vote cards should merely be registered and put on display in the Commission's Office before they can legally be distributed to the public. Once registered and on display, political parties or candidates could take their own legal action to restrain the issue of how-to-vote cards which they consider offensive or misleading. (The judgment of Mr Justice Mackenzie indicates that the Court would be highly unlikely to grant injunctions restraining the issue of "second preference" how-to-vote cards.)

In any event, the difficulty with attempting to regulate the production and/or issue of how-to-vote cards by either approval or registration prior to issue lies in overcoming unacceptable problems which will arise.

Firstly, requiring approval of the Commission before issue will delay the availability of how-to-vote cards for early pre-poll and postal voting.

Secondly, the registration only of how-to-vote cards will delay the availability of how-to-vote cards but not to the extent that will occur if an approval process is introduced.

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 Mr Justice Mackenzie.

APPEALS AGAINST DECISIONS OF THE COURT OF DISPUTED RETURNS

EARC in its "Report on The Review of the *Elections Act 1983-1991* and Related Matters" recommended (page 281 paragraph 13.100) that the determination of the Judge in the Court of Disputed Returns shall be final and without appeal. EARC also recommended (page 285 paragraph 13.120) that the Judge should have power to refer to the Full Court special cases and questions of law.

However, at the time the *Electoral Act 1992* was being drafted, the legislators were conscious of the long delay in determining the Nicklin Petition. In that case, the Full Court delivered its judgment on 21 November 1990. The dispute had its origins in the State Election held on 2 December 1989.

The *Electoral Act 1992* was drafted to ensure that any petitions to the Court of Disputed Returns could be decided in the shortest time possible, thereby enabling the elected representatives to get on with the business of governing without ongoing legal processes in the Courts.

However, Mr Justice Mackenzie points out that, as in the Mansfield Petition, complex questions of law arise and section 141 precludes any appeal. He referred to the former Act (*Elections Act 1983*) where there was provision for an appeal to the Court of Appeal on questions of law only (S154) and power to state a special case (S156) or reserve questions of law for determination by the Court of Appeal (S157).

In the interest of justice, the Commission would support an amendment to the *Electoral Act* as suggested by Mr Justice Mackenzie. However, the matter is a policy one and the Commission does not wish to argue a case one way or the other.