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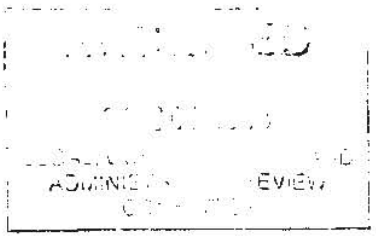

SUBMISSION

TO

THE LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE
LEGISLATIVE ASSEMBLY OF QUEENSLAND

INQUIRY INTO
ISSUES OF ELECTORAL REFORM RAISED IN THE MANSFIELD DECISION

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25 October 1998

The two issues raised by the Hon. Mr Justice Mackenzie are treated under separate headings below.

Vote card specification requirements

A few preliminary words may be helpful. The subject of how-to-vote cards (which is the more common term and I will use) was considered by the Electoral and Administrative Review Commission (EARC) in its *Report on The Review of the Elections Act 1983-1991 and Related Matters* 2 vols (December 1991). The debate was then very much concentrated on a single question, whether such cards should be allowed or prohibited. The considerations raised were (a) the distress experienced by some voters who felt that they were harassed by party activists distributing such cards, and (b) the supposedly "wasteful" consumption of paper the cards involved (pp 152-55). Such concerns continue to be expressed with feeling at every election, and it is probable that the Committee will receive submissions which, in whole or in part, are along those lines.

However a total prohibition of the distribution of how-to-vote cards would, I believe, constitute an unwarranted interference with freedom of speech and with free electoral competition. *Langer v Commonwealth* (1996) 70 ALJR 176 affirmed recently that "those eligible to vote must have available to them the information necessary to exercise such a choice" (Dawson J at 184), though some restrictions may be justified. The centrality of political parties and preferential voting in Queensland elections makes the contents of how-to-vote cards "necessary information".

Moreover there is a small cloud on the horizon from the on-going litigation in the European courts involving the United Kingdom and expenditure-control provisions of its *Representation of the People Act* which depend on the agency principle. The point at issue is the claimed right of a non-candidate "third party" (in this instance a right to life supporter) to involve themselves in an election by spending money distributing a message that has the effect of advantaging some candidates and disadvantaging others. A final decision upholding that right would of course not be binding here, but such a decision would confirm the undesirability of confining the distribution of how-to-vote cards to parties and candidates.

One option is keeping those who distribute such cards further away from the polling place but it makes little difference. Earlier this year I witnessed a by-election in Mauritius where a 100-metre quiet zone is rigorously enforced; the benefit for intending electors was marginal. Another option, requiring distributors to sit behind tables and not approach electors, would be difficult to enforce. It might also possibly require provision of standard disposable tables by the Electoral Commission to avoid a new line of complaints about imposing costs on poor candidates.

An option often put forward which preserves the existence of

cards is prohibition of handing cards to electors as they approach the polling place. Instead, a specimen card (or cards when alternative preference allocations are offered) for each candidate, or a poster on which the cards are reproduced, would be displayed in each voting compartment. The *Electoral Act Amendment Act* 1972 (S.A.), s.18 provided for the display of cards in compartments but did not forbid their distribution elsewhere.

Such a restriction would probably be upheld as a justifiable limit on electoral competition. On the other hand EARC (p. 154) commented:

> 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.

Since that was written, the average number of candidates per electoral district has been increasing, and the provision of alternative distributions of preferences has attracted more attention. I believe EARC's assessment remains valid. But were the Committee to think otherwise, then it would be essential that the subsequent legislation provide (a) that a partial or complete failure to display cards properly and (b) any defacement of material displayed, does not constitute a ground for overturning the election. Either lapse could properly be made an electoral offence with a reasonable penalty.

The preceding matters are, I would submit to the Committee, relevant to putting the seemingly modest proposal made by Mr Justice Mackenzie, clearer identification of a card's origins, in perspective. Further, there is now a different, very real problem involving how-to-vote cards which has led up to that proposal. The problem, which should be viewed in a somewhat wider context than the particular facts of the Mansfield Case, is the increasing frequency of attempts to mislead or deceive electors by offering how-to-vote cards which from their appearance or contents, or the manner of their distribution, are likely to cause the recipient to vote other than in the way they "really intended". Such cards often try to dance along the fine line drawn by the High Court in *Evans v Crichton-Browne* (1981) 147 CLR 169.

If it is concluded that a total or partial prohibition of the distribution of how-to-vote cards along the lines discussed above is not the answer, what can be done to prevent such cards having such an effect? Possible remedies fall into three categories: regulating the cards, regulating those who distribute the cards, and dealing with the sudden ambush which cannot be remedied before the polls close.

Regulating cards

The main characteristics of a how-to-vote card are that it (a) resembles a ballot-paper to some extent, (b) usually gives advice on how to allocate preferences beyond the candidate and party on whose behalf it is distributed, and (c) may contain extraneous brief political messages about policies or issues. The definition in the *Electoral Act Amendment Act* 1972 (S.A.), s.18 is "a card indicating the order of preferences in which the candidate suggests that electors should vote for candidates for election in the district." The introduction of optional preferential voting for state elections in New South Wales and more recently Queensland allows first-preference-only cards to be effective.

Misunderstanding or deception may arise from a card's design (including its colour and layout) that causes it to resemble those being distributed by another candidate or party, use of misleading words concerning preferences, and use of misleading other words such as slogans. It would be possible to prescribe very exactly what a card must look like and what information it may contain. For example, to require that all cards issued by or on behalf of a party must be in the same colour(s), follow the same layout, and (Mr Justice Mackenzie's proposal) bear their authorisation in a prescribed type size in a prescribed place (as e.g. *Electoral Act* 1992, s.162(c)). Or extraneous messages directed to the elector, like "Vote No Dams", could be prohibited and the card made to resemble as closely as possible a completed ballot-paper, though one consequence of that course is likely to be an increased number of cards deposited in the ballot-box and completed ballot-papers carried away.

On balance I think it better not to go down that road. Detailed requirements as to what an acceptable how-to-vote card may look like will only lead to more misplaced ingenuity seeking to evade the intention of the new rules, and new uncertainty as to what is permissible and whether an election outcome can or should be challenged.

Regulating distributors

It would also be possible to formalise the status of those who hand out cards, to require their formal nomination by parties or candidates or, possibly, "third parties" (who are a category increasingly known to electoral law because of the need to regulate their expenditure during the campaign), to require them to wear appropriate correct identification, and to penalise anyone who hands out cards in proximity to a polling place who has not been properly authorised and identified.

Such a course would be fairly easy to enforce, but by itself it only goes part of the way to improve the situation. It may make proof of responsibility simpler - or, more likely, apparent proof of no responsibility. Nevertheless a belt and braces solution may be attractive to some extent: an authorised distributor of defective cards would commit an

offence, and so would an unauthorised distributor of valid cards. In each case the trail would lead back to a candidate though the problem of proof of effect on the election's outcome would remain.

Preventing ambush

A characteristic feature of episodes that have ended up in the courts or at least been widely publicised has been the element of surprise. The offending item or behaviour appeared unexpectedly on polling day in maybe only one electoral district or perhaps at only one or two polling places. Often the problem appeared for only a brief period during polling hours. Sometimes responsibility could be sheeted home to top-level political operatives, but at other times it appeared to have been conceived and executed locally. In the absence of a single legally responsible figure in each electoral district, like the electoral agent of British law, it might be difficult to prove responsibility and liability.

The course here proposed for the Committee's consideration seeks to minimise the amount of regulation, allowing those engaged in the political process to get on with their business as they think best. But, the better to hold the ring fairly among the competitors, it seeks to ensure an effective opportunity for opponents to test the legality of what is being done before irreparable damage occurs and the only remedy left is to overturn the election. To this end, I suggest the Act should be amended to provide as follows.

1. Within a brief period (perhaps three days) after the close of nominations each candidate or registered officer of a party who has nominated candidates should lodge with their local Returning Officer or with the Electoral Commissioner a copy of the how-to-vote card (with its two sides if required) which they propose distributing at polling places on polling day and also at those places where pre-poll or postal voting takes place prior to polling day.

   The Electoral Commission should have power to extend time to lodge for good cause where the candidate is not personally at fault.

   Whether "third parties" should initially be brought within such a provision requires consideration. On the one hand, it is my impression that their direct activity on polling day up to this time has been very limited or non-existent though there can be newspaper advertising that appears on polling day. On the other hand, they are becoming more numerous and more active and better resourced. The discovery late in the day that they may not legally hand out "No Dams" type material (which they and many of the public will probably not regard as how-to-vote cards) on polling day could turn into a civil rights issue leading in turn to extensive disobedience in

the polling compartments and bring the election process and its outcome into disrepute rather as the Langer campaign did. On balance, I would recommend anticipating trouble and make provision in advance of an actual need. It is not unreasonable to ask whether groups wishing to take part in an election campaign to make that decision by the time nominations close. Even if they decide later, they will have the opportunity to use other modes of campaigning.

2. The cards lodged may subsequently be inspected without charge at the relevant Returning Officer's office and any such other places as the Electoral Commission may determine. This access will enable the usual parties (candidate or elector) if they wish to launch a legal challenge to a card under the present law (which leaves only the Truth in Advertising advocates dissatisfied), and to have the matter determined in advance of polling day. A card that is so disqualified by the court should not be a ground for impugning votes cast prior to its disqualification and their protection should be stated in the Act. When the court makes a disqualification order it should at the same time approve an amended or new card to replace the previous card with appropriate effect.

However it should not be open to apply to the court to vary a card that has been lodged, e.g. if there were a late falling out over preferences. If it became possible to disendorse a candidate after nominations had closed and to remove the party label from them as a consequence that point would require reconsideration.

3. Distribution of any other electoral matter (as defined by the Act) anywhere on polling day and during a reasonable preceding period (say the electronic media blackout time) to prevent last minute letter-boxing, or in proximity to a place where pre-poll or postal voting takes place prior to polling day, should be an offence in the 20 penalty units, six months or both class.

The officer in charge of each polling place will have to be supplied with a document reproducing exactly (colour and size) the authorised cards, and to make that available to scrutineers who have concerns about what is being distributed. An alternative is to produce a poster of this material that could then be displayed and spare the officer in charge from distraction from other duties, but on balance I doubt that it is necessary and the cost could be saved. Joint polling places may require some special provision and absent polling centres even more so.

4. In addition to this procedure, it would be desirable to implement Mr Justice Mackenzie's proposal that each card should be identified by the name of the candidate (as it appears on the ballot-paper, including any extra

identification under s.97(2)(e)), and the full name of their party (if any) at the top of the card.

Appeals to the Court of Appeals

EARC's recommendation (p. 285) was to retain the existing provisions allowing a reference to the Full Court of special cases (then s.119) and appeals on questions of law (s. 118). I still find persuasive the argument:

> These provisions ultimately serve to minimise the possibility of a legal error occurring in the hearing of the case where complex questions of law are involved or at least the single Judge's decision being challenged on that ground. Furthermore, in such a case, a decision by the Full Court carries more weight and it is important to maintain public confidence in the electoral system when there is an electoral dispute. (p. 285)

I am unaware (or have forgotten) why the present Act took the course it did and these provisions disappeared, though the position in the other mainland States (p. 269, para.13.25) *may* have influenced the outcome.

An important consideration is ensuring the expeditious resolution of election disputes, in extreme cases to settle who is to form the government and at the very least determine the representation of that electoral district. The unfortunate examples of the protracted Nicklin Case and a number of unheard petitions in Western Australia encouraged the recommendation for what became s.134(3) and (4). I would be hesitant to see such peremptory language directed to the Court of Appeal, but I seem to recall the Privy Council imposing on itself an obligation of urgency when hearing electoral appeals and it may be that a formula could be found to encourage a similar outcome if appeals are to be introduced.

There should be no difficulty with restoring a reference of special cases. What I find more worrying is creation of a right of appeal which might be abused by protracting essentially political attacks on the conduct of an election and on its outcome, Ensuring that the Electoral Commission is a full party to any appellate proceedings with a capacity to apply similar to that set out in s.135(1) would be advisable.