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TO: Kerryn Newton

OF: Legal, Constitutional and Administrative Review Committee

FAX NO: 3406 7070

DATE: 2 November, 1998

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MESSAGE:

Dear Kerryn,

Re: Inquiry into Issues of Electoral Reform Raised in the Mansfield Decision

Thank you for your letter of 2 October 1998.

I enclose a submission in relation to this reference.

I am also sending you a copy by email.

Please do not hesitate to let me know if I can be of any further assistance to the Committee in relation to this matter.

With kind regards,

TONY MORRIS

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2 November, 1998

The Research Director
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Review Committee
Queensland Legislative Assembly
Parliament House
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BRISBANE QLD 4000

Attention: Ms. Kerryn Newton

Dear Ms. Newton,

Re: Inquiry into Issues of Electoral Reform Raised in the Mansfield Decision

Thank you for your letter of 2 October 1998.

I regret that my professional commitments have not permitted the time to prepare a detailed submission in relation to these important issues. I trust that the Chair and Members of the Committee will not assume that the brevity of this submission reflects (on my part) a lack of interest in the issues under consideration, or a failure to recognise their fundamental importance.

There are four issues raised in the Reasons for Judgment of the Honourable Justice Mackenzie, upon which I wish to comment. Before doing so, however, I should make a formal disclosure. As some members of the Parliamentary Committee may be aware, I have from time to time acted in a professional capacity for various political identities. As this has included members of various political parties - the Liberal Party, the National Party, the Australian Labor Party and the Australian Democrats - it could not truthfully be suggested that my position in respect of the issues under consideration is influenced by my previous professional involvements. However, I have appeared in one case which did involve an issue of a similar nature to one of the issues which emerges from the Reasons for Judgment of Mackenzie J., concerning "truth in electoral advertising". On that occasion, I appeared for the Liberal Party (specifically, for the then Parliamentary Leader, the Honourable Joan Sheldon M.L.A.) in Supreme Court proceedings where an injunction was sought (unsuccessfully) to restrain the distribution of electoral advertisements in the form of postcards implying, falsely, that Mrs. Sheldon was in favour of a sale of the Caloundra Hospital.

The issues arising from the Reasons for Judgment of Justice Mackenzie upon which I wish to comment are these:

Optional or Compulsory Preferential Voting

Paragraphs 144 to 148 of the Reasons for Judgment refer to the differing views which exist as to the desirability of optional preferential voting, as contrasted with compulsory preferential voting. As his Honour noted,.this is a question for the Parliament rather than the courts.

Australia is one of the few countries in the world where voting is compulsory. Some people regard it as anti-democratic that voters are compelled to vote at all, arguing that if citizens have a democratic right to vote, they should also have a democratic right not to vote. This argument strikes me as illusory. In fact, nobody is compelled to record a valid vote, and there is no penalty for recording a vote which is invalid or "informal". The significance of our compulsory voting system is that everyone who is entitled to vote is required to attend at a polling booth, and to cast a vote (whether it is a formal or an informal vote).

In my opinion, the compulsory voting system is extremely important, as it ensures that electoral outcomes are not decided by extraneous factors such as the weather, or competing sporting or cultural events, or whether or not people can be bothered to attend at a polling booth. For example, the recent Federal Election coincided with a major musical concert in Brisbane, and one imagines that many of the young people attending this concert would not have voted if it were not compulsory to do so. In other parts of the world, electoral results are often influenced by whether there is a relatively large or relatively small turn-out of voters. Statistically, a small turn-out generally tends to favour right-of-centre political parties, whereas a large turn-out statistically tends to favour left-of-centre political parties. The reasons for this are not entirely clear. But it would be a sad thing if the Australian political landscape were to be influenced by (for example) whether the polling day happens to be a cold and wet day, reducing the turn-out, and thereby favouring the Coalition parties, or alternatively a warm and fine day which produces a larger turn-out for the benefit of the ALP.

Of course, no one is suggesting that we should abolish compulsory voting . But I mention the arguments in favour of compulsory voting, as they are very similar to the arguments in favour of compulsory preferential voting. If it is accepted as a good thing that all qualified persons should be required to cast a vote, it must be accepted as an equally good thing that all qualified persons are required to cast a complete vote, rather than a partial vote.

The preferential voting system is, again, a very rare concept, when Australia is contrasted with other countries of the world. And yet, it is undoubtedly the most democratic system of voting which exists anywhere in the world. In most countries, a person can theoretically be elected to political office by receiving substantially fewer than half of the votes cast at a particular election. For example, with the "first past the post" system, if there are four candidates, the winning candidate need only receive a little over 25% of the vote.

A simple example demonstrates how unfair the "first past the post" system can be. Let us say that, in a particular seat, there are 10,000 voters. Of these, 4,000 support one of the Coalition parties, 3,500 support the Australian Labor Party, and there is a balance of 2,500 who support a minority party (such as the Greens, or the Australian Democrats), but who would prefer to elect a Labor candidate rather than a Coalition candidate. Under the "first past the post" system, the Coalition candidate would win, although only 40% of voters wish to elect a Coalition candidate, and 60% of voters would prefer to elect a Labor candidate. Under the preferential system, allocation of preferences should result in the majority view prevailing.

(Of course, in the example just given, preferences favour the Labor candidate. But it would be a simple matter to offer a contrasting example, where a Labor candidate is elected under the "first past the post" system, even though a majority of voters would prefer a Coalition candidate.)

One does not need to be a student of political science, to realise that preferences have become increasingly important in Australian electoral campaigns over recent years. This phenomenon is closely linked with the rise of minority parties, especially the Australian Democrats and (more recently) the One Nation Party, and to a lesser extent independent candidates like the current members for Gladstone and Nicklin. It is trite to say that the flow of preferences can work in both directions: a popular independent candidate, or candidate from a minor party, may win a seat based on preferences received from one of the major parties; but, by the same token, a candidate representing one of the major parties can win a seat through the allocation of preferences from minor party and independent candidates.

I wish to emphasise that this phenomenon is <u>highly</u> democratic, because it fulfills two objects: on the one hand, it ensures that voters who support an independent or minor party candidate do not "squander" their votes, but make a meaningful contribution if the ultimate result comes down to a contest between major party candidates; and on the other hand, it ensures that there is an opportunity for independent and minor party candidates to obtain election, if it is the case that a majority of voters in a particular seat would prefer to be represented by an independent or minor party candidate, rather than a candidate representing one of the major parties.

For these reasons, it is my submission that any review of the electoral system should be directed to reinforcing and enhancing the preferential voting system, rather than detracting from it.

The real risk is that, under the optional preferential system, a candidate - and particularly a candidate with extremist political views - may win "by default". Consider a purely hypothetical example, where a new political party (so as to avoid confusion with any existing political party, I will refer to it as "Party X") stands a candidate in a part of the State which is not well known for its tolerant attitudes in respect of issues such as land rights, Asian immigration, and gun control. Let us say that Party X espouses the legislative repeal of the *Mabo* and *Wik* decisions, the abolition of all benefits to Australians of Aboriginal or Torres Strait Islander descent, and the forced repatriation of all Australian citizens of Asian racial or ethnic origin. Let us say that Party X, in an

electorate of 10,000 voters, manages to secure 2,600 primary votes. One can imagine a scenario where there is a voting pattern along these lines:

Party X	2,600
Australian Labor Party	2,400
National Party	2,200
One Nation	1,800
Green Candidate	1,200

Voters who voted for the Green candidate may be opposed to the policies of both of the "major" parties, and therefore choose not to cast preferences. By doing so, they unintentionally assist Party X. One Nation voters may choose not to allocate preferences, or their preferences may be evenly spread between Party X, the National Party and the Labor Party. Again, National Party voters may perhaps allocate preferences to One Nation, but if no further preferences are allocated these votes are exhausted. Ultimately, it comes down to a contest between Party X and the ALP, with the result that Party X wins, with only 26% of the primary vote. This is despite the fact that, if supporters of the Green candidate - who, we may assume, are completely opposed to the policies of Party X - had allocated preferences, the result would have been completely different.

There is one other important consideration in this regard, and it is the fact that the current electoral system in Queensland differs from the Federal electoral system, which utilises the system of compulsory preferential voting rather than optional preferential voting. There is no doubt that this difference creates some confusion in the minds of voters. A good instance is the seat of Dickson, on the North side of Brisbane, at the last Federal Election. It is my understanding that a large number of ballot papers failed to allocate a preference to every candidate; and it may be assumed that, in many instances, this was the result of confusion between the Federal and State electoral laws. In that particular seat, the result was so close that it may well have been influenced by errors of this nature.

For the reasons stated, I strongly urge that consideration be given to the reintroduction of compulsory preferential voting. In my respectful submission, the arguments in its favour are compelling, and the argument against are largely illusory.

Honesty in Electoral Advertising

Although the remarks made by Justice Mackenzie in his Reasons for Judgment do not address the larger issue of "honesty in electoral advertising", I would strongly urge that it is time for the Queensland Parliament to address this troublesome issue.

Since 1975, legislation at both Federal and State level has imposed a code of ethical conduct in respect of commercial advertising, under the *Trade Practices Act* (Commonwealth) and *Fair Trading Act* (Queensland). The essential rubric in each of these Acts is that business-people are prohibited from engaging in conduct which is "misleading or deceptive, or likely to mislead or to deceive".

The language of the *Trade Practices Act* and the *Fair Trading Act* reflects the undoubted reality that published material can have the effect of misleading or deceiving people, and can even be intended to do so, without actually being untruthful. In the commercial world, it is now unlawful to produce an advertisement with colouring, graphics, and cleverly-worded text, which creates a misleading impression, even if the contents of the advertisement are literally true. It is disappointing that Parliamentarians, both at State and Federal level, have not sought to impose upon themselves the same ethical standards as their legislation has imposed on members of the business community.

If, to take a simple (and, of course, purely hypothetical) example, the proprietors of "Burger King" were to have one of their employees hand out brochures urging members of the public to patronise their products, but presented these brochures in such a way as to create the false impression that they were distributed by (or with the authority of) "McDonalds", such conduct would undoubtedly give rise to a civil action for damages and injunctive relief, as well as (quite possibly) criminal proceedings. Frankly, it is difficult to see any distinction of substance between this conduct, and the conduct committed by most or all political parties, of the kind referred to in the Reasons for Judgment of Justice Mackenzie.

The strongest argument against "truth in political advertising" legislation is that it will embroil the courts in deciding political issues. But, in my view, careful legislative drafting will ensure that the courts are not troubled with cases where there is a dispute which falls within the realm of genuine differences of opinion. I agree that it would be highly undesirable for a court of law to have to consider, for example, whether one party's political advertising is "misleading or deceptive" where the advertisement makes claims in relation to the party's policies which are not capable of objective verification. But, at the very least, I would urge consideration be given to instituting legislation which prohibits political advertisements that:

- Represent or imply that the advertisement, or a particular party or candidate, has the support of a specified individual, group or organisation, where this is not the case; or

- State facts which are capable of being demonstrated to be objectively false, and not merely a matter of belief, opinion or supposition.

"How to Vote" Cards

I would strongly endorse the recommendation of Justice Mackenzie in para.153 of his Honour's Reasons for Judgment, requiring that all "how to vote" cards distributed with a view to obtaining second and subsequent preferences should bear on their face (and on each face if the card is double-sided) the name of the party on whose behalf or on whose candidate's behalf it is distributed, or, if the card is issued by a person who is not a party candidate, the fact that he or she is an independent. However, any such legislative provision would require careful drafting, both to ensure that there are no "loop-holes", and also that the legislative provision does not constitute an unreasonable inhibition on freedom of expression.

The following are the considerations which I would regard as significant:

(1) First, there is always a risk of such a legislative provision 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. The only solution to this, in my view, would be a requirement that any card, leaflet, hand-out or other printed material provided with a view to soliciting votes (whether first or subsequent preferences) must bear a statement which either:

- Commences with the words, "THIS CARD IS DISTRIBUTED ON BEHALF OF ...", followed by the name of the candidate or the candidate's party; or

- In the case of material distributed without the express permission of any candidate or party, the words "THIS CARD IS NOT DISTRIBUTED ON BEHALF OF ANY CANDIDATE OR PARTY".

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.

(2) There is always a risk that, by carefully structuring a "how to vote" card, such information - even if it appears on the card - can be concealed amongst other information. I would suggest requirements that:

- On each face of the document which contains printing (whether it is single-sided, double-sided, or folded so as to present more than two faces containing printed material), the required statement should appear.

- The required statement should occupy the top quarter of each face, which should be blank apart from the required statement;

- The type-face or lettering used should be no smaller than the largest type-face or lettering which otherwise appears on the document; and

- The colouring and lay-out should be such that the required statement is no less distinctive than any other part of the document.

It seems to me that a good comparison may be found in the Federal regulations relating to warnings on cigarette packets, which contain similar requirements to ensure that the warning is very distinctive, and is not "lost" amongst other printed material appearing on cigarette packets.

(3) It should also be an offence to hand-out such literature if the required statement has been removed or obliterated, or if the required statement is concealed by folding or otherwise.

A further suggestion which I would raise for consideration, and which (in my view) would go a long way towards solving this problem, is outlined below. This proposed solution would also have the benefit of saving a part of the considerable wastage of paper - and the considerable expense to all political parties and candidates - in printing "how to vote" cards.

My suggestion is that, in each polling booth, and at each voting cubicle within each polling booth, each candidate should be provided with an area (say, the size of a single A4 sheet) to display a single "how to vote" card. Parties and candidates would be required to submit proposed material to the Electoral Commission some time (say, four working days) prior to polling day, and the submitted material would be open to inspection by scrutineers for other parties and candidates. The Electoral Commission would be empowered to reject material which does not comply with legislative requirements, and the Commission's decision would be subject to review by the Supreme Court. It would not be permissible to place any information on these "how to vote" cards, other than:

- The name of the candidate;
- The name of the party (if any) by which the candidate is endorsed;
- The candidate's recommended order of preferences for himself/herself and all other candidates; and
- If the candidate wishes to offer alternative recommendations, any number of alternatives preceded (in each case) by a brief and factually accurate description of the alternative, such as (in the case of an Australian Democrats candidate): "IF YOU WISH TO VOTE FOR THE AUSTRALIAN DEMOCRATS CANDIDATE, AND WANT TO GIVE YOUR SECOND PREFERENCE TO AN ALP CANDIDATE, YOUR BALLOT PAPER SHOULD LOOK LIKE THIS:"; or "IF YOU SUPPORT THE AUSTRALIAN DEMOCRATS, BUT WANT TO GIVE YOUR NEXT PREFERENCE TO THE LIBERAL PARTY CANDIDATE, THIS IS HOW YOUR BALLOT PAPER SHOULD APPEAR:".

The form should not contain any promotional material, encouraging voters to support a particular candidate or party, and should be limited to the party's or candidate's recommendations for completing the ballot paper.

If this measure were adopted, I am sure that it would not see the end of "how to vote" cards distributed outside polling booths, but it would serve two useful purposes: it would provide voters with clear and unambiguous guidance as to how they should mark their ballot papers to support a particular candidate or party, and to indicate their preferences in accordance with that party's or candidate's recommendation; and it would reduce the risk of voters being tricked by misleading "how to vote" cards distributed outside the polling booth.

Appeals in Electoral Matters

As Justice Mackenzie notes in para.155 of the Reasons for Judgment, "finality is important in a case of this kind". However, the decision of the Court of Disputed Returns is, in each case, just one man's (or woman's) opinion. It is unsatisfactory that a decision which may affect the political complexion of the State Government - like the 1995 decision which overturned the outcome of the State election, and resulted in a fresh election which brought the Coalition to office - should depend on the judgment of a single individual.

One solution, which I would urge as warranting serious consideration, is a legislative amendment to stipulate that the Court of Disputed Returns is to be constituted by a bench of three judges. This would ensure that a quick and final decision is reached, whilst at the same time avoiding a situation where the outcome in such a case depends entirely on the opinion of one individual.

This is, I think, preferable to having a hearing before a single judge, with a right of appeal to a bench of three judges constituting the Court of Appeal. In the first place, it will be quicker to have the initial decision made by three judges, rather than an initial decision by one judge and a subsequent appeal to a bench of three judges. Also, if a right of appeal is introduced, there is a risk of the very unsatisfactory situation where the decision at first instance is overturned by a 2:1 majority in the Court of Appeal, with the result that two judges decided one way and two judges decided the other way: whilst this occasionally happens with ordinary civil and criminal appeals, it is much more important that in electoral matters there is no scope for the community to feel that the outcome of a particular case is unsatisfactory because of what is effectively a 2:2 split amongst four judges.

Moreover, the traditional appeal structure leaves very little scope for challenging findings of fact made by the judge at first instance. If the initial hearing is conducted before a bench of three judges, the parties (and the community) may feel a greater degree of confidence in factual conclusions reached by the court.

It may be objected that a legislative amendment requiring all such cases to be heard by a bench of three judges will put unnecessary pressure on the judicial resources of the Supreme Court. But such cases do not arise very often. And the importance of such cases, and the desirability of ensuring that the outcome is one in which all members of the community can feel complete confidence, makes this proposal a justifiable use of judicial resources.

Although the particular case decided by Justice Mackenzie is not one which has resulted in wide-spread community controversy, there have been previous cases where Judges have found themselves to be under huge pressure when sitting as a Court of Disputed Returns.

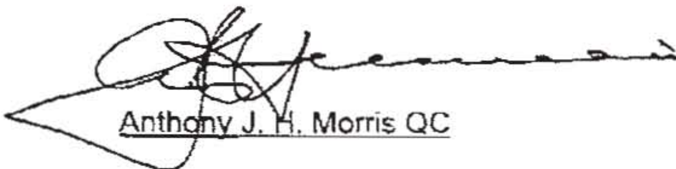
A notorious instance of this was the *Ithaca Election Petition Case*, [1939] St.R.Qd. 90, which is extensively discussed in Justice B.H. McPherson's book on the history of the Supreme Court of Queensland (Butterworths, 1989) at pp.339-341. The case was heard, at first instance, by Justice E.A. Douglas, who found that the ALP candidate (and subsequently State Premier), Mr. E.M. Hanlon, had acted improperly when, as Minister for Home Affairs, he ordered the removal of the ballot boxes to the "safety" of the Treasury Building. The Judge also found that Mr. Hanlon was knowingly involved in the distribution of unsigned pamphlets attacking his political opponent. In those days, an appeal was available, and the Full Court overturned the decision of Justice E.A. Douglas. But the decision of the Full Court was not unanimous. One member of the court, Acting Justice Hart, agreed with the decision of Justice E.A. Douglas. This resulted in the unsatisfactory situation (earlier mentioned) where there was, effectively, a 2:2 split amongst the four judges who heard the case. Worse still, the dissenting Judge in the Full Court (Acting Justice Hart) was made to suffer for his decision against the then incumbent party, for his appointment as Acting Judge was terminated and he was never again offered a judicial appointment.

Judges are only human. Many people, outside the legal system, imagine that judges are offended when their decisions are appealed. On the contrary, it is my experience that most judges find it very gratifying to know that, if they do make a mistake, there is an opportunity for their errors to be corrected on appeal. It is unsatisfactory that, in cases which are amongst the most important which judges are called upon to decide, a single judge must decide the case alone, without the comfort of knowing that any errors or mistakes can be reviewed on appeal.

If (for reasons which do not immediately come to my mind) it is felt inappropriate for such cases to be heard by a bench of three judges, then I would strongly urge that consideration be given to the suggestions offered by Justice Mackenzie, for the reinstatement of appeals at least in respect of questions of law, and the reintroduction of provisions allowing the Judge who constitutes the Court of Disputed Returns to submit special cases or reserve questions of law for determination by the Court of Appeal.

I should, of course, be pleased to supplement these remarks if the Committee (or any of its Members) requires further elaboration or explanation, whether in writing or by way of oral submissions to the Committee.

Yours faithfully,



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