

SUPREME COURT OF QUEENSLAND

No. 5999 of 1998

SITTING AS THE COURT OF DISPUTED RETURNS

Brisbane

Before the Hon. Mr Justice Mackenzie

[re Carroll v Electoral Commission of Qld & Reeves]

IN THE MATTER OF THE *ELECTORAL ACT* 1992

IN THE MATTER OF THE ELECTION OF ONE MEMBER OF THE
LEGISLATIVE ASSEMBLY FOR THE ELECTORAL DISTRICT OF
MANSFIELD IN THE STATE OF QUEENSLAND

FRANCIS EDWARD CARROLL

Petitioner

and

ELECTORAL COMMISSION OF QUEENSLAND

First Respondent

and

PHILIP GERARD REEVES

Second Respondent

JUDGMENT - MACKENZIE J.

Judgment delivered 21 September, 1998

CATCHWORDS:

**STATE ELECTION - disputed election result - second
preference votes - role of polling booth workers - whether
'How to Vote' cards and words spoken were likely to mislead
voters - powers of the Court of Disputed Returns.**

Elections Act 1983-1991 (Qld)

*Electoral Act 1992 (Qld) ss.133(2), 134(2), 136(1)(2), 153,
154, 158, 163(1), 176*

Commonwealth Electoral Act 1918

Legislative Assembly Act 1867, s. 7(1)-(3)

Acts Interpretation Act 1954, s.14B

Broadcasting Act 1942 (Cth)

Local Government Act (1993) (Qld)

Trade Practices Act 1974

The Flinders Election Petition: Forde v Lonergan (1958)
Qd.R 324

Woodward v Sarsons (1875) LR 10 CP 733

Tanti v Davies (No 3) (1996) 2 Qd.R 602

Bridge v Bowen (1916) 21 CLR 582

Amalgamated Metals Foundry and Ship Rights Union Ex parte Adamson (1984) 4 FCR 319

Gray ex parte Marsh (1985) 59 ALJR 804

Evans v Crichton-Browne (1981) 147 CLR 169

Bray v Walsh (1976) 15 SASR 293

Consandine v Strathfield Municipal Council (1981) 44 LGRA
435

Webster v Deahm (1993) 116 ALR 223

Smith v Oldham (1912) 15 CLR 355

Malone v Bird (No. 624 of 1994, unreported, 30 April 1994,
Williams J.)

Goss v Swan (1994) 1 Qd R 40

Taco Company of Australia Inc v Taco Bell Pty Ltd (1982) 42
ALR 177

Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd
(1981-2) 149 CLR 191

Jull v Swan (unreported, Lee J., 24 March 1990)

Robertson v Knuth (1997) 1 Qd.R 95, 97

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Hearing 1 September 1998

date:

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The Petition

1 This is a petition to the Court of Disputed Returns in connection with the election of a member for the electoral district of Mansfield held on 13 June 1998. The second respondent who had been the Australian Labor Party (ALP) candidate was declared elected. The petitioner had previously been the sitting member, representing the Liberal Party (Liberal).

2 The Supreme Court is the Court of Disputed Returns under Part 8 of the *Electoral Act* 1992. This Act emanated from a review of the *Elections Act* 1983-1991 and related matters by the Electoral and Administrative Review Commission (EARC). A draft bill in the report (the EARC Report) issued in 1991 was substantially adopted in all relevant respects by Parliament in the *Electoral Act* 1992.

3 The petitioner originally alleged a number of grounds but at the first directions hearing he indicated that only those upon which the court must now adjudicate would be proceeded with. The remainder were struck out. The remaining grounds are the following:-

3.

g) That at various polling booths in the electorate of Mansfield on the day of the general election certain persons distributed to electors, prior to them voting, a document known as a "How to vote" card, and at the same time by words and/or actions represented that it was the How to Vote card authorised and/or issued or distributed on behalf of and/or preferred or favoured by the Pauline

Hanson One Nation Party and/or its candidate for the electorate of Mansfield;

h) The How to Vote cards referred to paragraph g above were not authorised and/or issued or distributed on behalf of and/or preferred or favoured by Pauline Hanson One Nation party and/or its candidate for the electorate of Mansfield;

i) The conduct alleged in paragraph g above was in contravention of sections 153 and or 154 and or 158 and/or 163 of the *Electoral Act* 1992 and/or misled or was likely to mislead electors in respect of the casting or way of voting at the election, including in respect of the allocation, or not, of second and further preferences;

j) Further the conduct alleged in paragraph g above occurred with the knowledge and/or authority and/or consent of Phil Reeves and/or the Australian Labor Party;

4 Further and better particulars were supplied. The "various polling booths" alleged in para.3(g) were the following:-

- (i) Mt Gravatt East State School
- (ii) Belmont State School
- (iii) Wishart Pre-School
- (iv) Mt Gravatt West (also known as Mt Gravatt Show Grounds)
- (v) Upper Mt Gravatt State School
- (vi) Macgregor High School
- (vii) Warrigal Road State School
- (viii) Eight Mile Plains State School
- (ix) Rochedale State School

(x) Mt Petrie State School

(xi) Mansfield State School

5 It appears from the evidence before me that the booth at Mt Petrie State School is officially called Mackenzie. The alleged conduct is particularised as occurring throughout the day. The words and actions complained of were the following:-

- "(i) handing to electors as they entered the polling booth a how to vote card ("the objectionable HIV") without informing those electors that it was not the authorised One Nation how to vote card;
- (ii) handing the objectionable HTV to electors and saying words to the effect "One Nation" or "One Nation how to vote card" or "thinking of voting One Nation?" and/or in not stating that it was not the authorised One Nation how to vote card;
- (iii) handing to the electors requesting a One Nation how to vote card the objectionable HTV and/or by not stating that it was not the authorised One Nation how to vote card;
- (iv) handing to electors who refused how to vote cards of the Australian Labor Party and/or the Liberal party candidates the objectionable HTV, and/or engaging in the conduct referred to above;
- (v) standing at or around authorised One Nation signage and/or material whilst handing out the objectionable HTV and/or whilst engaging in the conduct referred to above."

6 The allegations in para.3(j) were based on the following:-

- "(i) that the objectionable HTVs were authorised by M Kaiser, the State Secretary of the Australian Labor Party;
- (ii) that Reeves was the endorsed Australian Labor Party candidate for the electoral district of Mansfield;
- (iii) that certain persons who were handing out the objectionable HTVs on the day associated themselves with the persons handing out Australian Labor Party how to vote cards, including for Reeves, and/or also handed out how to vote cards for Reeves and/or the Australian Labor Party;
- (iv) that on polling day stocks of the offending HTVs were at times kept with Australian Labor Party representatives and/or together with Australian Labor Party how to vote cards or material."

7 The grounds set out above allege no defect in the conduct of the election on the part of the Electoral Commission of Queensland (The Electoral Commission). The Electoral Commission remains a party pursuant to s. 133(2). It took a non-partisan stance in the circumstances. As Mr McKenna expressed it in his final address the purpose of the Electoral Commission's submission was to bring points of difference in the submissions of the petitioner and the second respondent into sharp focus to assist the court in its task of determining the matter.

8 With respect to para.3(i) of the petition the main focus of attention was s.163(1). Section 158 was also pressed but ss.153 and 154 were not relied on as strongly as the other two. Each of the sections referred to in the petition is concerned with a quasi-criminal offence. Section 176 provides that if a person is convicted of an offence against s.154, but not the other sections referred to in the petition, the person's seat is vacated in accordance with the *Legislative Assembly Act 1867*, s.7(2). If the person is already a member of the Legislative Assembly, the person is not entitled to be elected or to

sit as a member of the Legislative Assembly for 3 years after the conviction. Section 7(1) of the *Legislative Assembly Act 1867* provides amongst other things that if any member of the Assembly is convicted of crime or any infamous crime the member's seat in the Assembly thereby becomes vacant. Section 7(2) provides that if a member of the Assembly is convicted of an offence against the *Electoral Act*, s. 154, 168 or 170(a) or (b), the member's seat becomes vacant. Section 7(3) provides that despite sub-s.(1) a member's seat does not become vacant under that sub-section if the member is convicted of another offence against the *Electoral Act 1992*.

Legal Principles Applicable to Court of Disputed Returns

9 The *Electoral Act 1992* provides for the Supreme Court to be the Court of Disputed Returns. Under the preceding legislation there had been an Elections Tribunal constituted by a judge of the Supreme Court which was required to be guided by "the real justice and good conscience of the case without regard to legal forms and solemnities" and which was required to direct itself by the best evidence it could procure or which was laid before it whether it was such evidence as the law would require or admit in other cases or not. In The Flinders Election Petition: Forde v Lonergan (1958) Qd.R 324, 332-3, Philp J held that the Elections Tribunal was not bound by the "parliamentary common law" nor by English decisions expounding that law. However, having said that, he said that law and those decisions may be of persuasive value in determining the "real justice" of the case. He applied the principles set out in Woodward v Sarsons (1875) LR 10 CP 733, 743 because they comported with his opinion as to what was real justice in the circumstances of the case before him. The relevant passage from Woodward v Sarsons is as follows:-

"We are of opinion that the true statement is that an election is to be declared void by the common law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is

satisfied, as matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i.e. that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as, by polling stations being demolished, or not opened, or by other of the means of voting according to law not being supplied or supplied with such error as to render the voting by means of them void, or by fraudulent counting of votes or false declaration of numbers by a returning officer, or by other such acts or mishaps. And we think that the same result should follow if, by reason of any such similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate they preferred. But, if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament."

10 Section 134(2) of the *Electoral Act* 1992 provides that the Court of Disputed Returns must not have regard to legal forms and technicalities and is not required to apply the rules of evidence. Section 136(1) provides that, subject to restrictions which have no impact on the present case, the Court of Disputed Returns may make any order or exercise any power in relation to the petition that the court considers just and equitable. Section 136(2) sets out examples of orders which may be made.

11 The proper approach to s.136(1) was considered by Ambrose J in Tanti v Davies (No 3) (1996) 2 Qd.R 602. After discussing Bridge v Bowen (1916) 21 CLR 582 which in turn had considered Woodward v Sarsons Ambrose J said the following at 608:-

"In spite of the absence of any express requirement for the finding of facts involving failure to comply with the statutory requirements of the Act or the occurrence during the election of something declared to be illegal under the Act, as presently advised, I would so construe s. 136(1) as to require as a prerequisite for the exercise of "any power in relation to the petition that the Court considers just and equitable" the determination of a fact or facts going to the validity of the election considered in the light of the statutory requirements to be found in the Act. If established such facts need to be considered in the light of all the circumstances to determine whether any invalidity leads to the conclusion, to use the words of Griffith C.J. in Bridge v Bowen, "that there is good ground for believing that the formal result does not represent the free and deliberate choice of the competent electors."

12 It was common ground that I should adopt this interpretation of s.136 which I will do.

Where the foundation of the case is allegations that practices which infringe against provisions of the *Electoral Act* have been engaged in, the question is not merely whether there is satisfactory proof that that has occurred. It is whether, having regard to what has been proved, it is sufficiently established that such conduct resulted in a situation where there is good ground for believing the result recorded did not reflect the actual preference of a majority of electors. Since this involves a quantitative element a finding that a contravention or contraventions of the Act are sufficiently proved may not necessarily lead to a finding that the election should be set aside. The extent of the likely effect of any such contraventions on the result is important. This is a matter of judgment which must be performed in the particular factual context of each case.

Nature of Evidence Led

13 The petitioner read 30 affidavits including his own. He and 18 other deponents were called for cross-examination. The second respondent read 23 affidavits, including his own. He did not give oral evidence but five other deponents were called for cross-examination.

Cards distributed on election day

14 The ALP distributed two cards which are described on their face as how to vote cards. Exhibit 3 bears the words "How to vote Labor" in large white letters on a red background. It carries the ALP logo on the bottom strip which is red with white writing on it. It also carries photographs of Mr Beattie and Mr Reeves and has a section representing a ballot paper (although not exact) upon which all squares have preferences marked and upon which Mr Reeves' name is printed in larger letters with an arrow "start here" next to it. His name is the only one with a party affiliation next to it. The second ALP how to vote card is a similar card except that it bears Chinese writing in some parts (Exhibit 4).

15 Also handed out on behalf of the ALP were two cards, principally very bright fluorescent orange in colour with contrasting black writing, or black background colour where the writing is in fluorescent orange. Copies are annexed to the judgment. While they are close in colour to the originals, they lack the fluorescent glow of the originals which is their most striking feature, and which has proved impossible to reproduce accurately. The card with the representation of the ballot paper is Exhibit 1 and other is Exhibit 2.

16 The how to vote card for One Nation bears the words "How to vote Pauline Hanson's One Nation" in white on a purple background. There are photos of Pauline Hanson and the candidate Mr Harris-Gahan on either side of a further reference to Pauline Hanson's One Nation. There is a representation of a ballot paper with Mr Harris-Gahan's

name and party affiliation in larger print than the rest. This is in black printing on a white background. Next to the representation of the ballot paper, in black print on a white background, are the words "Please place the number one (1) in the Pauline Hanson's One Nation square on your ballot paper then number other squares if you wish." A purple arrow points from these words to Mr Harris-Gahan's name. None of the other squares on the ballot paper contains a number. A natural reading of the how to vote card is that it was a matter for voters whether they, having voted one for One Nation, registered any other preference and for whom.

17 The Liberal how to vote card has the words "How to vote Liberal-National Coalition". The words "Liberal-National" are in purple and the rest in black on a white background. Beneath these words in white printing on a purple background are the words "Important - please number every square". On one side of this section of the card is a photograph of Mr Carroll and on the other a photograph of Mr Borbidge and Mrs Sheldon. The card identifies Mr Carroll as the candidate for Mansfield and bears the Liberal logo. The card also has a representation of a ballot paper with Mr Carroll's's name and the figure one in purple print larger than the other names which are in black. In accordance with the request to number each square every other square is numbered. One Nation is ranked 4 out of 5, Mr Reeves being number 5.

18 The Liberals also utilised a lemon coloured card soliciting a second preference for Mr Carroll. The card has the words "Are you voting for Democrats, One Nation or the Greens?" in fluorescent lemon on a black background. The next section in black writing on the lemon background says "Vote 2 Frank Carroll Liberal for Mansfield". The remainder of the card is taken up with writing in lemon on a black background "Remember - your second vote will decide who governs Queensland".

19 The Australian Democrats (Democrats) card was less elaborate. It was printed in black and white with the name of the party and the electorate on it. There was a representation of the ballot paper with its candidate emphasised. Each square was numbered with a preference. There was also another card referred to in evidence. It is a yellow card, double sided, with the words "Thinking of voting Green, Democrat, Independent or One Nation ... and you don't want Joan Sheldon back" on one side. On the other side there is further reference to Mrs Sheldon and a large section in yellow on black saying "Give your preference 2 Labor". This is said to have been handed out on at least one occasion on polling day by the ALP. However, there is other evidence in the affidavits on behalf of Mr Reeves that suggests that it was a pre-polling day distribution.

20 Where the term "how to vote card" is used subsequently in these reasons, a reference to the cards bearing the words "how to vote ..." and soliciting a number 1 vote for the party issuing them is intended.

Evidence of Candidates

(a) Mr Carroll

21 In his affidavit there was a good deal of material designed to demonstrate that he had been a good and active representative of the electorate during his time in Parliament and that he had good links with churches in the area. It is unnecessary for present purposes to repeat the detail of this evidence. He deposed that on polling day as he toured the polling booths he received complaints about Exhibit 1 from voters and campaign workers. The complaints included complaints that words and conduct used by people distributing the cards were apparently inducing voters to believe that the card was an authorised Pauline Hanson's One Nation Party (One Nation) card. He discussed the matter with staff at Liberal Party headquarters but took no other action that day.

22 Mr Carroll deposed that the distribution of the orange cards on polling day had the combined effect of:-

- (i) increasing the One Nation primary vote (about one-fifth of which exhausted without expressing a second preference); and
- (ii) increasing the flow of preferences to the ALP.

23 He deposed that this trend was exacerbated by the fact that, in his perception, One Nation ran a very low profile campaign in the electorate and that many One Nation workers were from interstate.

24 Mr Sofronoff's cross-examination of him focused largely on establishing that the words on the card were not in themselves misleading since a One Nation supporter who did not want to assist the Coalition might be persuaded to deliver a preference rather than exhaust the vote, and if so, give the preference to the ALP. Mr Carroll's response was that the visual impression created by the card was that it was a One Nation card. He agreed that the Liberals, by handing out their second preference card (Exhibit 8) had attempted to persuade voters to give him their second preference. Mr Sofronoff also questioned him about the proportion of overseas born electors in the electorate including those from non English speaking backgrounds, with particular reference to an occasion when both he and Pauline Hanson attended a National Party function and Mr Carroll was photographed giving her a "polite brush" on the cheek when presenting her with a bouquet.

25 In passing, and accepting, for the purpose of argument only, the stereotyping inherent in the question, this issue was more likely to have an impact on the primary vote than on allocation of preferences of One Nation voters since the underlying premise is that such voters would be unlikely to give a primary vote to One Nation.

(b) Mr Reeves

26 Mr Reeves deposed that the ALP strategy was to nullify the flow of One Nation preferences except to the extent that One Nation voters might be persuaded to give their second preference to the ALP. He agreed to second preference cards being handed out in the electorate on election day. He placed some significance on the fact that in this electorate One Nation did not direct preferences to the Liberals in its how to vote card. He estimated that about 2,500 second preference cards would have been handed out altogether based on what he disposed of after the election. The majority were Exhibit 1. Exhibit 2 was only distributed at a few booths. He also deposed to his belief that the Liberals' decision to distribute preferences to One Nation had a major negative impact on the Liberal vote, particularly having regard to the fact that 26 per cent of the voters in the electorate were born overseas, and 17 per cent were born in non English speaking countries. He gave his own interpretation of the result which need not be reproduced in detail for present purposes.

Evidence of ALP campaign directors

27 Mr Zackeresen, campaign director for Mr Reeves, deposed without being required for cross-examination that the only ALP cards to be handed out were the ALP how to vote card and Exhibits 1 and 2. At some time between 9 and 11 a.m. he heard a One Nation worker at Mt Gravatt East booth telling voters who had been given an orange card that it was an ALP card and drawing attention to the authorisation on it.

28 Mr Allen, the assistant campaign director, deposed without being required for cross-examination that he instructed booth workers to hand out both the ALP how to vote card and a second preference card. They were told to hand out the second preference card if there were extra people on duty. If the number of workers dropped they would hand out only how to vote cards to people as they passed through to the polling booths. He also deposed that most booth workers were specially printed Phil Reeves T-shirts

and hats. Not enough had been produced for all workers so some were a generic Labor T-shirt or a Labor booth worker rosette. Shortages occurred due to the fact that on some booths there were a large number of people assisting for short periods of time.

29 He deposed that booth workers were not instructed to say anything in particular when handing out the cards. Indeed no instructions were given as to what to say. He deposed that, commencing from 8 a.m., at all but four polling booths, booth workers handed out how to vote cards seeking a primary vote for Mr Reeves and preference cards seeking a second preference for Labor. He said that because of the early rush between 8.30 and 9.30, some booths reported difficulties in handing out more than the how to vote cards and on this basis for the early part of the day many preference cards remained in the booth kits until around 9.30 a.m. He deposed that by 11 a.m. booth workers at Mt Gravatt East had stopped handing out the preference cards. The reason he gave for it was that many of the booth workers were friends of Mr Reeves or older party members who wished to hand out cards only for him. He did not register concern with the booth captain over this.

30 He deposed that at Wishart he noticed that booth workers were taking shifts at handing out ALP how to vote cards which they handed out together with the preference cards. He deposed that all of the booth workers were wearing clothing identifying them as ALP workers. He also deposed that he went to Mt Gravatt West and a decision was taken, on the basis that the One Nation how to vote cards were receiving a bad response from the public, that the workers should stop handing out the ALP preference card. He deposed that for most of the rest of the day only the ALP how to vote card was handed out. He further deposed that around 3 p.m. he noticed that at most booths the activity was starting to slow and he began routinely telling workers to hand out only the ALP how to vote card if there was no-one handing out how to vote cards for One Nation. He said

that this was the case for two or three booths although he could not remember which ones.

31 At about 5 o'clock he checked on the Belmont and Rochedale booths and at that time they were only handing out Labor how to vote cards. He said, on the basis of what was returned to him, that less than 40 per cent of the orange cards had been distributed. As I have previously observed Mr Allen was not required for cross-examination. While his evidence in that sense stands uncontradicted it is still for me to give such weight to it as I see fit. Much of it must of necessity be in the nature of impressions and subject to more detailed evidence from people who were at the booths. He entered into refutation of some matters referred to in affidavits on behalf of the petitioner. I will refer to those later in the sections concerned with the relevant booth.

Evidence of events at Polling Booths

a. Mansfield

32 Mrs Neill deposed that while going to vote she was handed an orange card identical to Exhibit 1 by a man without any party identification. He said "This is the new how to vote card for One Nation". On looking at the card she noticed the ALP authorisation at the bottom and told him that he was being devious. He just laughed. She also heard another woman ask why the orange card differed from the blue One Nation card she had received. The man again said "This is the new card for One Nation". In cross-examination she remained quite definite that the words concerning the nature of the card were said. Mr Olive said that while going to vote he was given an orange card the same as or very similar to Exhibit 1 by a man whom he could not recall wearing any party identification. The man said "This is the latest One Nation how to vote card". Later that day he realised that it was not a One Nation card. Under cross-examination he too was definite that the words were said. It is also clear from his evidence that he had

made up his mind prior to coming to vote as to how he would vote and that the card did not actually influence him.

33 Several deponents on behalf of the petitioner were not required for cross-examination. Mrs Dewis, a booth worker for the petitioner, said that she saw a man in a track suit handing out the orange cards the same as or very similar to Exhibit 1 between 8 a.m. and 9 a.m. She did not hear him say anything when he was handing the cards out.

34 Ms Gannon deposed that as she went to vote she was handed an orange card identical to Exhibit 1. She said that at the time it was handed to her "a statement was made to me which reinforced the initial message I gained from quickly reading the card, namely that it was the preferred 'how to vote card' issued by Pauline Hanson's One Nation Party". She said that she learnt after polling day that it was not an approved One Nation card. Mr Smith, a booth worker for the petitioner, deposed that between 10 a.m. and 1 p.m. a male without party identification handed out an orange card the same as or similar to Exhibit 1. On two occasions when he was close enough he heard the man say "One Nation? Vote Labor two." Mr Wilson, booth captain for the petitioner, was there all day. He saw "one or two persons" not identifiable as ALP workers handing out an orange card the same as or very similar to Exhibit 1. A One Nation supporter was handing out One Nation how to vote cards only to people entering from one direction till 2 p.m. After that he positioned himself where he could give cards to people entering from another direction as well. Mr Wilson estimated that about a quarter of the voters came from the second direction.

35 Mr Bitossi deposed that as he went to vote he was handed an orange card identical to Exhibit 1. He also said "At the time the card was handed to me a statement was made to me which reinforced the initial message I gained from quickly reading the card namely that this was the preferred 'how to vote card' issued by Pauline Hanson's One Nation

Party." He did not learn until 18 June that it was not an authorised card.

36 For the respondent, Mr Bullock, a booth worker, swore an affidavit but was not required for cross-examination. Mr Bullock deposed that he arrived at about 10 a.m. Because of the number of workers available it was decided he would hand out second preference cards, which he did until about 2.30 p.m. He handed out about 400 of Exhibit 1. To his knowledge he was the only person doing so. He did not recall saying or doing anything to make anyone think he was other than an ALP worker. He deposed that if questioned about the second preference card he endeavoured to make it clear to voters that if they chose to vote One Nation the ALP would appreciate their second preference. He deposed that he was not the person referred to by any of the petitioner's witnesses.

Findings: The evidence of Ms Neill and Mr Olive as to what was said to them is not directly contradicted by this evidence. Mr Bullock says he is not the person referred to by them. The highest his evidence goes is that to his knowledge he was the only person who was handing out the cards. That is ambiguous at best, and remains unclarified. As the evidence stands, I have no reason, having seen the witnesses give evidence, to doubt that someone made the comments to which they deposed and reaffirmed in oral evidence. However, Mr Smith's evidence shows that the words complained of by Mrs Neill and Mr Olive were not the only catchphrase used. The words he heard are equivocal. They are capable, on their face, of being advocacy for a second preference and in the absence of a clear indication that they were otherwise, I cannot positively find that they were intended or likely to mislead. The evidence also does not allow a finding to be made as to the frequency with which the objectionable words were used. The evidence of Ms Gannon and Mr Bitossi, which is similarly expressed but does not attempt to specify what was said, does not, for that reason, assist me.

b. Rochedale

37 Ms Eldridge gave an affidavit and was called as a witness. She visited the booth twice. The first time was with her invalid mother in mid-morning. She said she had gone on that occasion intending to vote for One Nation and was attracted by the orange card which was identical to Exhibit 1. Upon enquiring from the people handing them out if they were "One Nation people" they said "yes". She said that she believed that the card expressed the genuine wish with respect to preferences of the One Nation Party.

38 Under cross-examination she maintained that a positive response was made to her enquiry and denied that she was handed the card without anything being said to her. She said that at the time she voted she knew Mr Reeves was ALP candidate. I am satisfied that Ms Eldridge genuinely believes that she received a positive verbal response. However, if it is important to decide for later purposes whether the verbal response was given, I would have reservations about being satisfied of that to the necessary standard. On the second occasion she went to the booth, the purpose was to assist her sister register an absentee vote for the Cairns electorate.

39 The petitioner also called Mr Alderton who disclosed in his affidavit that he was a former ALP voter who had gone to the booth to hand out how to vote cards for One Nation. He said in his evidence that the person handing out orange cards identical to Exhibit 1 had previously identified himself as Craig Brown and that that person had said "Voting One Nation? This is your preference card" or words to similar effect. He denied in cross-examination that the person was saying "ALP, give us your preference".

40 Mr Brown denied in his affidavit saying "Voting One Nation? This is your preference card". He said that he recalled saying on a few occasions "ALP give us your preference". He said he was the only person handing out the orange preference card. He also said that as booth captain,

he saved the ALP shirts and hats for the workers and was therefore not wearing them himself.

41 Under cross-examination when he gave evidence by telephone he said as follows:-

"All right. Now, in the normal situation on a booth you would indicate to an intending voter what candidate or party you were handing out the How to Vote cards for; is that so?-- At a normal booth you would, yeah.

And this was a normal booth?-- I guess at this booth, because it was joint, the question you're asking people more was if they were voting in Springwood or Mansfield. So that's about as far as it went and, you know, if people said they were voting in Mansfield, you would offer them the card and if they took it, well and good.

But normally, if they indicated that they were voting in Mansfield, you would say, "Labor" or "Reeves", wouldn't you?-- It's a long day. When you arrive at 4.30, when you think of the number of people who come through, I honestly wouldn't say that. I wouldn't have the energy of repeating that all day.

Well, are you serious about that?-- Yeah.

What, you decided you got a bit bored with it during the day, did you?-- No, no, it would be - previously, when I have worked on booths, people know what it is you are handing out and they take it, if they feel free - if they feel fit.

HIS HONOUR: Were there any occasions when you identified yourself as a Labor party booth worker in handing out the orange card?-- Yes.

When you were handing out the orange card, I mean?-- When people were coming through to vote?

Yes?-- There was a couple of clear occasions when people said, 'Look, I don't live in either of these electorates. I'm from else somewhere', and I said, "Well, look, come with me and I will give you the ALP State-wide how to Vote thing and that will show you how we are voting.

The question I was really asking: in respect to any of the electors to whom you handed the orange card, did you identify yourself as a Labor party booth worker?-- I can't recall, but if anyone had of asked me I would have said, 'Yeah, we are from the Labor party'."

42 When it was directly put to him that he said words to the effect "Voting One Nation. This is your preference card" his reply was "No, I can't recall saying that". The emphasis was on the word "recall".

Findings: Two things emerge from this evidence. The first is that when handing out the orange card Mr Brown would only identify his affiliation if asked. The second is that there is a direct conflict between Mr Alderton and Mr Brown. In his oral evidence he did not repeat the denial in his affidavit that he had said "Voting One Nation? This is your preference card". He merely said that he could not recall saying that. The emphasis was on "recall". In his oral evidence he did not repeat the claim in his affidavit he had said on a few occasions "ALP, give us your preference", which, it will be noted, is not far removed in sound and cadence from what Mr Alderton said he heard. Having heard both give evidence, I am prepared to accept in the circumstances that on some occasions words to the effect of the words complained of by Mr Alderton were said, although how many times is purely conjectural on the state of the evidence.

c. Mt Gravatt East

43 Mr Anderson gave an affidavit in which he said that a girl had held an orange card identical to Exhibit 1 in front of her which clearly showed the words One Nation and asked him "One Nation, Sir?". He said he replied "Yes, thanks" and accepted the card. In his evidence he said that the girl stopped in front of him and held the card up but he was not sure whether it was he or she who said "One Nation". He also volunteered that there might have been no words spoken at all. In his oral evidence he also makes it plain that he realised that the card was not a genuine

expression of One Nation's view as to allocation of preferences. In view of the vagueness of the final position as to what if anything was said and by whom, and the evidence referred to below from Ms McGill do not propose to place any weight on this evidence.

44 Mr Martin, a booth captain for the Liberals, observed One Nation workers explaining to voters that the orange card identical to Exhibit 1 was not a One Nation how to vote card, but one distributed by the ALP. He said he first noticed this soon after the polls opened. (This is similar to the evidence of Mr Zackeresen referred to in paragraph 26.) He said that he saw a young man without ALP identification handing out those cards. Mr Martin was not required for cross-examination.

45 Mr Tattis, a Liberal Party worker, saw both orange cards (Exhibit 1 and 2) being handed out. He heard the persons doing so asking "Voting One Nation?". A limited number of people to whom they were handed tore them up in apparent disgust. Others placed them with other cards they had been given. Mr Tattis said there were two men handing out orange cards and were still doing so when he left. Mr Allen says there was only one who finished doing so before then. I do not consider it necessary to resolve the issue in disposing of the matter.

46 For the respondent, Ms Jones and Mr Kennedy both deposed that when handed the official One Nation how to vote card the worker advised them to give their second preference to Mr Carroll. This evidence is of marginal relevance at best. Ms McGill, a booth worker for the second respondent deposed that she was probably the person referred to by Mr Anderson, but denied the allegation in his affidavit that she may have in some way given the impression that she was working for One Nation when handing him the card. Ms McGill believed that she was the only person handing out the orange second preference card (Exhibit 1) during the period that she was present. She said that she also was aware that One Nation workers were

telling voters that the orange card was a Labor Party card. She said that she handed out only Exhibit 1 not both cards. Under cross-examination she maintained that she was the only person handing out the orange card during the period she was there.

47 Anthony Reeves, the second respondent's brother, was booth captain at this polling booth. In his affidavit he deposed that Ms McGill was the only person handing out Exhibit 1. He also deposed that at about 10 a.m., when she left, it was decided to withdraw from handing out the second preference cards because he needed more staff to hand out the ALP how to vote card. In his oral evidence he became a little less definite about the possibility of the card having been handed out by someone else, and put a different emphasis on the reason for ceasing to hand out the orange card.

"Now, what I want to ask - suggest to you is that there - these orange cards were being handed out by some person after Ms McGill left?-- Well, as far as I'm aware it wasn't.

Now, is there any particular reason why you are sure about that?-- Yeah, because - I mean, the card - it was a particular card and I - I was pretty much aware that it wasn't being handed out.

.....

All right. I can understand when she left then that kind of solved one issue, but the issue still remains that you had a whole lot of orange How to Vote cards in your possession; that's so, isn't it?-- Yeah, in the - along the booth, yeah.

Not you personally?-- Yeah.

But on the booth. And it would be strange, you'd agree with me, wouldn't you, if having had those cards that you didn't get someone else to hand them out?-- Well, not particularly. It was - it was a secondary card. It wasn't - it wasn't the card to be - it wasn't the main card to be handed out.

Well, it was handed out at least for two hours, we know that?-- Yeah.

Well, why wasn't it handed out any more?-- Because I felt it wasn't necessary to hand it out.

Were you ashamed of it?-- No.

Did you think it was tricky?-- No.

Or dirty?-- No.

Well, I really haven't got an explanation as to why, apart from Ms McGill leaving, you would decide that the card ought not be handed out any more?-- Well, the other thing was the One Nation person was pointing out the card to people and that, so we just felt that he was trying to create a problem with it being handed out, so it wasn't - it - we deemed it - it would be easier just to not hand it out.

So the booth worker for the One Nation was telling everyone, "Don't take that orange card.", or something, was he?-- He was pointing out that the orange card was an ALP card.

All right. Do you recall - did that start at 8 o'clock?-- When he started saying that?

Yes?-- No, it was - I'd say maybe half an hour, three-quarters of an hour after it was handed - started to be handed out.

So, when Ms McGill left you say, a best you can recall, you thought it was counterproductive to hand out the orange card?-- That's correct.

Did the One Nation person who had been saying these things work for the rest of the morning or the rest of the day at that booth, do you know?-- As far as I'm aware, yes.

So, was there any point during the day when you retook up the concept of handing out these orange cards?-- No.

I take it it's possible that other people who were working for the Labor Party or Mr Reeves that day still

had the orange card in their possession?-- Well, no, Katrina was the only person who had the orange cards in her possession.

All right. Well, what I want to suggest to you this: is it possible that the Labor booth workers were handing out both the Labor How to Vote -----?-- As far as I'm aware, no.

When you say as far as you were aware, obviously you couldn't watch what every individual was doing on that day?-- That's correct.

And obviously the election and the day in question is a couple of months ago?-- That's right.

So it was possible although - the situation I suggested to you, that the orange card was still being handed out after Ms McGill left, is -----?-- Very unlikely.

But nevertheless possible?-- Possibly.

HIS HONOUR: Just while Mr Hastie is interrupted, can I ask you this: both the cards were ALP cards. Why weren't ALP workers handing out both at the same time?-- One was for the primary vote and that was considered the most important one.

But why would you not consider the preferences important as well if it was a question of getting somebody to register a second preference?-- Sorry?

Well, under the system voting exhausts if you don't get a preference?-- Yes.

Well, isn't it important to get the preference in a tight contest?-- Well, it is, but, I mean, I myself considered that the - the main card to get out was the ALP How to Vote card.

Why wouldn't you just have the same person handing out both?-- Well, I don't know. I just thought that it - it's better if one person hands out one type of card rather than confuse the issue handing out a couple of different cards."

Findings: Several conclusions can be drawn from the evidence concerning activities at this booth. The orange card was handed out by at least one person and perhaps more. The One Nation workers were aware of the card and advised voters from an early time that it was an ALP card. A decision was taken to cease handing out the card because of factors related to that. The words deposed to by Mr Tattis are equivocal at worst for the second respondent. On the evidence, I cannot find that at the time of handing out the cards words were used which were unambiguously a positive misrepresentation that the cards were One Nation cards.

d. Eight Mile Plains

48 The petitioner's son, Andrew Carroll, was booth captain at this booth. He was there all day. About 8 a.m. he saw a girl without any party insignia handing out an orange card the same or very similar to Exhibit 1. He heard her say "One Nation" or "Voting One Nation" or words to that effect. He remembered a One Nation worker explaining to a voter that the orange card was not a One Nation card but an ALP card. About noon he saw the same girl handing out the ALP how to vote card while dressed in ALP clothing. During the day he saw several people handing out Exhibit 1 and other instances of people who had been in ALP clothing handing out ALP cards later handing out the orange card while dressed in plain clothes. In cross-examination he accepted that he was not in a position to dispute the possibility that people had changed clothes because of a shortage of supply.

49 Ms Anderson and Mr Pearce attended the booth together and swore identical affidavits. They enquired about the One Nation card. They were told it had not arrived. As they proceeded towards the booth an orange card the same as or very similar to Exhibit 1 was thrust into their hands. Someone whom Mr Pearce subsequently found out was a One Nation worker told them that the orange card was not a One Nation how to vote card. Each said expressly in

oral evidence that by the time they voted they were aware that it was not a One Nation how to vote card.

50 Ms Kelly handed out how to vote cards for the petitioner. She saw a heavy-set blonde girl handing out an orange card identical to Exhibit 1 from about 9.30 a.m. Another thin girl assisted her. After the former left, the thin girl continued to do so. She then changed into an ALP T-shirt and handed out the ALP first preference how to vote card. Because of the distance between her and the other women she was unable to hear if anything was said when the cards were being handed out. Mr Allen, the second respondent's assistant campaign director disputes that there was a heavy set woman rostered at this booth. I note the use of the word "rostered", but do not consider it important to make a finding on the issue.

51 Mr Fyfe, booth captain for the second respondent, gave evidence that that about 9.30 a.m. a female volunteer was asked to hand out the orange cards. While doing so, she gave a card on request to a One Nation worker. He said that the cards were handed out for about 2½ hours. After that time handing out the orange cards ceased. He deposed that not all ALP workers were distinctive ALP clothing throughout the day. There was not enough to go around so the workers swapped and changed clothes at the change of shift and at other times. He was not called for cross-examination. *Findings:* Ms Anderson and Mr Pearce do not allege that anything was said to them when the card was given to them. Mr Carroll's evidence refers to words which, depending on how they were said, may or may not have carried the implication that the card was a One Nation card. There is no sufficient basis in his evidence to find that any unequivocal verbal representation that the card was a One Nation card was made at this booth. The onus of proving with precision what was said rests on the petitioner.

e. Warrigal Road

52 Mr and Mrs Jorgensen and Ms Kenny gave affidavits on behalf of the petitioner and were cross-examined on them. Mr Jorgensen deposed that he was making his way to the polling booth when a man called out "One Nation" and held out an orange card identical to Exhibit 1. He said that he saw the card gave the second preference to the ALP and that he accepted it as a genuine One Nation how to vote card. He did not learn it was not until about a week later when his attention was drawn to the small print at the bottom. He said that the card changed his vote. Under cross-examination he said that he understood that if he decided to vote in accordance with the card he would be supporting the ALP candidate by giving his second preference to him. The complaint was that he mistakenly thought that One Nation was urging him to vote that way when it was really the ALP. He maintained that the man handing out the card was the first to say "One Nation". Mrs Jorgensen deposed that as they proceeded towards the polling booth her husband asked "One Nation?". A man said "Yes" and handed each of them an orange card identical to Exhibit 1. She and her husband discussed that it allocated the second preference to the ALP. She took it to be a One Nation how to vote card and did not learn otherwise until about a week later. Under cross-examination she said she appreciated at the time of voting that the purpose of the card was to give the second preference to the ALP on the assumption that the recipient of the card would give the primary vote to One Nation.

53 Ms Kenny deposed that she received five how to vote cards as she walked to the polling booth late in the morning. One was a Democrat card. The person who gave it to her also gave her a black and lemon card urging Greens, Democrat, Independent or One Nation voters to give the second preference to Labor. She was also given an orange card identical to Exhibit 1 by a man with no party identification who said "One Nation Card" as he handed it to her. She glanced at it and accepted it to be a One Nation card. She did not discover otherwise until 6 July.

54 In cross-examination she denied that the lemon card had not been given to her on election day and that she had got it earlier. She also said that the Democrat worker said "the One Nation card" when he handed it to her. From answers in re-examination it appears that while she thought at the time that the orange card was misleading it did not affect the way she voted. Although it not entirely clear from her evidence it appears that she detected that at least one of the cards (probably the lemon card) was authorised by the ALP.

55 For the second respondent affidavits were sworn by Mr Gay and Mr Forsyth. Mr Gay was at the booth from 8 a.m. to 11 a.m. For a period he was wearing a jumper which obscured his Labor T-shirt. During the morning he took the jumper off and acquired an ALP cap and badge. He was handing out the orange card and the Democrat and Greens how to vote cards. He estimated he handed out about 30 of each. Between 8.30 and 9 a.m. he recalled refusing to give one of the orange cards to a One Nation worker who, on looking at the pile of cards in his hands, abused him. He deposed that when handing out the cards he either said nothing or asked "Voting One Nation?." He said he was careful not to say "One Nation!". He denied any knowledge of the events deposed to by the Jorgensens. Mr Forsyth who was at the booth from 11 a.m. to 6 p.m. deposed that he also handed out the orange card identical to Exhibit 1 and Democrat and Greens how to vote cards. He estimated that he handed out 250 to 300 orange cards. He deposed that he was the only person handing out those cards during that period. He said that some voters queried why he was handing out such a diverse range of cards. He deposes that he explained that when the Greens and Democrats were not at the booth the ALP agreed to hand out their material and that the orange second preference cards were asking that, if the voter was going to vote One Nation and "didn't want Sheldon in again", he or she give preferences to Labor. He said a number of people hurried through the crowd and took whatever was offered to them without asking for an explanation.

Findings: In view of the confusion as to the sequence of events in the evidence of Mr and Mrs Jorgensen and because the evidence as to what cards were handed to Mrs Kenny is open to substantial doubt, I am not prepared to make any adverse finding as to what happened at this booth. I should add that I have no doubt that each witness sincerely believes what he or she said. My only concern is with its accuracy.

f. Belmont

56 This booth was a joint booth for Mansfield and Chatsworth electorates. Several people swore affidavits on behalf of the petitioner. Mr Barton, a booth worker for the petitioner, deposed that he was at the polling booth at various entrances for the whole day. He saw people with clothing identifying them as ALP workers handing out the ALP how to vote card. He saw a women handing out an orange card the same as or very similar to Exhibit 1. If she was not successful in giving a card to voters who had a One Nation card other ALP workers would given them the orange card. He also deposes that he heard words similar to or to the effect "If you are thinking of voting One Nation, this is how you vote". He was not required for cross-examination.

57 Mr Harris-Gahan, the One Nation candidate, deposed that while he was visiting the booth a person handing out an orange card identical with Exhibit 1 apparently mistook him for a voter and "said words to the effect 'One Nation how to vote card'." He deposed that he challenged him and said that it was dishonest. The man replied "Tough isn't it". In cross-examination he maintained that the words "One Nation how to vote card" were used. He was tested as to why he had expressed it more vaguely in his affidavit. He said vagueness was not intended. He said that he had made a note of the conversation the day after it happened with a view to providing a statutory declaration for One Nation. He denied that the person handing out the card might have said "Voting One Nation?". He also gave an actual version of the

conversation he said he had when he challenged the man as to the honesty of the card. Mr Hethorn, a booth worker for the petitioner, deposed that he was present from 10.45 a.m. to 3 p.m. handing out how to vote cards. He saw a man handing out an orange card, the same or very similar to Exhibit 1, saying words to the effect "One Nation card". The man was wearing nothing identifying him as an ALP worker, but he realised later that he was. Under cross-examination he agreed that what may have been said was "One Nation?" (the inflection being as in a question).

58 Ms Krajewski, a booth worker for the petitioner, was there from 9.30 a.m. to 12.30 p.m. From 9.30 a.m. she saw a man handing out orange cards the same as or very similar to Exhibit 1, saying words similar to or to the effect "One Nation". It was put to her in cross-examination that nothing was said when he was handing out the card. She maintained that he had said "One Nation".

59 Ms Sharples, a booth worker for the Australian Democrats, deposed that she was present from 8.15 a.m. until 1.30 p.m. and when she commenced duty, saw a person who was not identifiable as an ALP worker handing out an orange card. Something was said at the time the card was handed out but she was unable to hear the words. After about half an hour she asked the person what he was handing out. She saw a card the same or very similar to Exhibit 2. She asked him if he was working for One Nation. His reply was "I have the dirty job for the day". She responded "For whom" he replied "Labor". She also deposed that about mid-morning a person identifiable as a One Nation party supporter began handing out the official One Nation how to vote cards. He made a particular point of ensuring that people who received the orange card were handed his card and said to them "This is the authorised One Nation version". He only stayed at that gate for about 20 minutes. She was not required for cross-examination.

60 Mr Axe, booth captain for the second respondent, deposed that he was there all day, at all times dressed in

clothing identifying him with the ALP. He principally handed out how to vote cards but sometimes handed out the orange card Exhibit 1 at the same time. He estimated that he handed out less than 50 of them. He said that he either said "Phil Reeves for Mansfield" or "How to vote ALP". He denied that Exhibit 2 was handed out at the booth. He said that he did not hear either Mr or Ms Nunan say anything to suggest that they were representing One Nation nor say anything to mislead people coming to vote. He deposed that neither Mr or Mrs Nunan initially had any clothing identifying them as ALP workers. Ms Nunan got a "Terry Mackenroth" cap at some stage and Mr Nunan got an ALP shirt and cap which had become available at some time during the day.

61 Mr and Ms Nunan (both booth workers for the second respondent) swore affidavits upon which they were cross-examined. Mr Nunan deposed that from 8 a.m. to 1.30 p.m. he handed out orange cards while dressed in clothes which did not identify him as a member of the ALP. He said that what he handed out was Exhibit 1, not Exhibit 2. At about 1.30 p.m. he changed into a T-shirt and cap which had Labor identification and which had become available. He conceded that the person described by Ms Krajewski fitted his description but denied saying "One Nation" at any time and said that the only conversation he had was to ask which electorate the voter intended to vote in. In cross-examination he gave the following evidence:-

"And on the day in question did you indicate the nature of the card that you were handing out?-- No, I didn't.

What did you say?-- I said nothing in reference to the card. Most people had already received their Labor How to Vote cards and whatever else by the time they got to me so I just handed them the card. The only conversation I had with people was when they were confused about which electorate they were in, which was either Chatsworth or Mansfield.

.....

What I want to just suggest to you is that the most natural thing in the world for you to do would be to have a conversation with a voter either in the form of a hello or an indication of the type of card you were handing out?-- Yes - I would have said "hello" to people, I am sure.

What I want to suggest to you is that you would have - and did - use the words, "One Nation" to people as they passed by you?-- No, that's not correct.

Not even as a question mark, in other words, 'Do you want One Nation?', question mark?-- No.

Nothing at all was said?-- Nothing at all was said apart from what I said there. I explained to them their boundary.

Do you say that no-one was really looking to you as if to say, 'Do I need that card? What are you standing there for?'?-- No, well, most people, as I said before, had - well and truly had their particular cards by the time they got to me. A lot of people just wanted to rush in there and didn't want a card and were looking at the cards they had, so it was just my job - I put my hand out, held the card out. If they took it, they took it, if they didn't, they didn't.

You say you had no need to say it was a One Nation card?--
-

HIS HONOUR: Did you feel any need to say it was a Labor card?-- No, because I thought the cards were self-explanatory anyway by the time they read them.

Yes. Did you hand out any Labor cards during the day?-- Later on in the day, I did. Yes. What did you do in those instances?-- I did say, "Phil Reeves."

Why the difference between the two procedures?-- At that stage when I was handing out those cards, because they were a main card I was standing in a different position to hand them out. It was later in the afternoon, there wasn't as many people around, so I was trying to get out the How to Vote cards to the people.

Yes. But why would you not identify the second preference card as a Labor card to reinforce it in your mind?-- I didn't think it was necessary as such."

(The word "your" in the last question is incorrectly transcribed for "their").

62 Ms Nunan deposed that she was present from 7.30 a.m. to 12.30 p.m. and came back at 2 p.m. She was not wearing any clothing identifying her as an ALP worker because of the shortage of shirts, caps and badges. She said that she handed out only Exhibit 1 and denied handing out Exhibit 2. She said that she had made no comment except to ask in which electorate the voter intended to vote. Under cross-examination she said that she was the only person handing out the orange card at the gate at which she was positioned. She did not feel it necessary to say that the card was an ALP card because she was standing at the end of a line and people would have obtained the ALP how to vote card by the time they passed her.

Findings: The issues of credibility with respect to this booth are complex. I did not find Mr Nunan a particularly impressive witness. Ms Krajewski was only cross-examined on the issue of the words used by the person whom she described. The question asked was as follows:--

"Could I ask you to search your recollection and think about that and I suggest to you that when you got the card nothing was said, when he was handing out the card nothing was said by him?-- Yes, he said, "One Nation.", and I thought all the time that's the - representing One Nation party."

63 Mr Axe's evidence of not hearing anything of that nature said, of course, adds nothing. There is no reason to assume that he heard everything, especially as the Nunans were at different gates. Combining these factors, I prefer to accept Ms Krajewski's evidence on the point. The consequences of what was said will be discussed later.

64 So far as Mr Harris-Gahan's evidence is concerned, several things may be said. Mr Harris-Gahan does not purport to describe the person who gave him the card, except as a young man. The time when he was given the card was 2-2.30 p.m. This was after Mr Nunan ceased handing out the orange card and by that time he was dressed in ALP clothing. It is not suggested anywhere in the evidence that no other persons handed out the orange cards, nor that handing out of them ceased at a particular time. In the circumstances, I am prepared to act on Mr Harris-Gahan's version of events, and find that what he alleged was said.

65 With regard to Ms Sharples' evidence, there are two factors which make her evidence of little use. One is that the card she says was handed to her is Exhibit 2, the card without a candidate's name on it, and there is evidence that it was not handed out at this booth. If that is taken to mean that it was not used as part of the Mansfield effort, there remains the possibility that it was handed to her in connection with the other electorate. I do not think her evidence helps.

g. Mt Gravatt West

66 This was a joint booth for Mansfield and Mt Gravatt electorates. Mr and Mrs Hitchcock were cross-examined on affidavits given on behalf of the petitioner. Mr Hitchcock deposed that he was handed an orange card identical to Exhibit 1 by a person who said "One Nation" at the time it was handed to him. When he was in the booth voting, it occurred to him that it was odd that One Nation would direct its preference to the ALP. On further examination of the card on returning home he saw that it was authorised by the ALP and took steps to complain about it. Under cross-examination he denied that the person who handed him the card had asked him "Mansfield or Mt Gravatt" because it was unnecessary to do so because he had said that he was a Mansfield voter to adjacent people handing out how to vote cards. He also denied that the person had said "If you are voting One Nation give your second preference to Labor" or

words to like effect. The card did not affect the formation of his judgment as to how to vote.

67 Mrs Hitchcock deposed that she received an orange card identical to Exhibit 1 from a man who said "One Nation" as he handed it to her. She saw the card gave the second preference to the ALP. She only realised that it was an ALP card when she returned home. She deposed that when handed the ALP how to vote card the person said "Labor". Under cross-examination she said "One Nation" was not said in a tone indicating a question. She said she appreciated if she voted in accordance with the card she would advantage Mr Reeves, and disadvantage the Coalition.

68 Mr Bates the ALP booth captain deposed that the orange card Exhibit 1 was distributed by a booth worker until no later than 12 noon. None were distributed after that. He also deposed to an incident where a person vented his anger on a booth worker over the orange card. He was not required for cross-examination.

69 Mr Neilson, a booth worker for the second respondent, deposed that he had been at Mt Gravatt West booth from 8 a.m. to 11.30 a.m. He handed out Democrat how to vote cards and the orange card Exhibit 1. He was not wearing any clothing identifying him as an ALP worker. He said that he enquired of voters whether they were voting in Mansfield or Mt Gravatt, when he handed out the Democrat how to vote card he said "Democrat how to vote". For the orange card, he also asked "Mansfield or Mt Gravatt" and after the reply, stated "If you're considering voting One Nation, consider Labor for your preferences". He said that he could not estimate how many cards he handed out. He said that while handing out the orange cards he was approached by several people asking if he was representing One Nation, he said each time he answered "No, I'm handing out for Labor" and then repeated "If you're considering voting One Nation consider Labor for your second preference". He recalled no heated exchange over the cards.

Findings: There is no clear evidence that Mr Neilson was the only person handing out the orange cards. Having seen them give evidence, I saw no reason to discount the evidence of Mr and Mrs Hitchcock as to what was said. I accept that the words were said.

h. Upper Mt Gravatt

70 Mr Ladewig, a booth worker for the petitioner, deposed that he saw two persons with ALP badges handing out both the ALP how to vote card and an orange card which he identified as Exhibit 2. He also saw another person handing out an orange card which he identified as Exhibit 1 from 8 a.m. to 1 p.m. He heard the man say that he was "copping abuse" for handing it out. Mr Ladewig was not required for cross-examination.

Mr Barrett, a booth worker for the second respondent, deposed that he handed out about 20 of the orange cards (Exhibit 2). He said he gave it only to people who had taken a One Nation how to vote card and no other. He said that he identified himself as an ALP booth worker and solicited a second preference on behalf of the ALP. He denied that he was the person handing out the other card (Exhibit 1) and denied that there was any such person in attendance at the booth while he was there.

Findings: There is no evidence that anything objectionable was said at this booth.

i. Wishart Pre-school

71 Mr Low, booth captain for the petitioner, deposed that there were a number of people dressed in ALP clothing at the booth. He also saw a man without identifiable clothing handing out the orange card Exhibit 1. He was not close enough to hear anything he may have said when the cards were handed out. The man was replaced at about lunch-time by another person without party identification who took over handing out those cards. Under cross-examination he said he was clear that a person was handing out orange

cards from the beginning of polling, not only in the middle of the day. He believed that for part of the day persons identified as ALP workers handed out both ALP how to vote cards and orange cards.

72 On behalf of the second respondent, Mr Gay deposed that he was at Wishart booth from about 12 noon to 1.30 p.m. He did not refer in his affidavit to Mr Low's affidavit. His affidavit is largely concerned with his activities at Warrigal Road. Ms Bellino, the booth captain, was there for most of the day. She deposed that she were clothing identifying herself as an ALP worker. She said they had two kinds of orange cards (Exhibits 1 and 2) Exhibit 2 was handed out with the ALP how to vote card by booth workers identifiable as ALP workers. She deposed she said either "Phil Reeves" or "the ALP" when she was handing out the cards. She estimated about 800 of Exhibit 2 were handed out during the day. She deposed that a man named Steven Brown handed out orange cards from about 11 a.m. to 12 noon on his own. Mr Gay was there for about an hour and was identifiable by ALP clothing. He was handing out ALP how to vote cards together with an orange card. She deposed that there was no unidentified person handing out orange cards. She was not required for cross-examination.

73 Ms Hovey a booth worker deposed that she was there for most of the day. She deposed that a man named Steven Brown, who was not rostered but who volunteered, was handing out the orange second preference cards on their own for a period of about half an hour or so. When he offered to stay and help he was found a Labor Party T-shirt which he put on and continued to hand out the orange cards along with the ALP how to vote cards. For the majority of the day all persons handing out ALP how to vote cards together with orange cards were dressed in clothing identifying them as ALP workers. She estimated 700 such cards were handed out. She deposed that she approached people saying "Phil Reeves for Labor Party" or "Labor Party how to vote". She deposed that she explained the function of the orange card as a request for One Nation second preferences to approximately

a dozen people who enquired. She deposed that Mr Gay also attended the booth for a period of about an hour during which time he handed out the orange card and the how to vote card at the same time.

74 Ms Simpson was present all day except for a period between 1 p.m. and 2.30 p.m. She wore distinctive ALP clothing. She said that between 11 a.m. and 12 noon Steven Brown handed out an orange card. She deposed he was wearing clothing identifying him as an ALP worker and that he said "Vote Labor" as he handed out the card. She said that the only cards handed out were Exhibit 2. When she was handing them out she said "How to vote Reeves and Labor" and "How to vote Labor in Mansfield". She was not required for cross-examination.

Findings: There is no evidence that anything objectionable was said at this booth.

j. Macgregor High School

75 Mr Oberhardt, booth captain for the petitioner, deposes that he saw two people handing out ALP how to vote cards along with a bright orange card similar to Exhibit 2. They appeared to be trying to ascertain whether voters were interested in voting One Nation and handed the orange card only to those who mentioned One Nation or who appeared unenthusiastic about taking the Labor card. They said "If you are voting One Nation, put Labor second" or words to that effect. From about 9 a.m. he noticed people without identification handing out orange cards Exhibit 1. Throughout the day there were one or two people handing out those cards.

76 Mr Martin, booth captain for the second respondent, deposed that orange cards were handed out from about 8 a.m. to 8.30 a.m. and for about 20 minutes after about 11 a.m. and from 2 p.m. to 6 p.m. The man on duty in the latter period was instructed to hand the card only to those who took a One Nation how to vote card and say "How to vote One Nation with a Labor preference" or words to that effect. He

said it was only when surplus staff were available that the second preference card was handed out.

77 Mr Nielsen, a booth worker, was at Macgregor from about 1 p.m. until 6 p.m. He distributed orange second preference cards and was not wearing any identifying clothing. While handing out the cards he asked "Mansfield or Mt Gravatt". If he received a reply he said "If you're considering voting One Nation, consider Labor for your second preference". He said he was approached by several people asking if he was representing One Nation. On each occasion he answered "No I'm handing out for Labor". He would then repeat "If you're considering voting One Nation, consider giving your preference to Labor".

Findings: There is no evidence that anything objectionable was said at this booth.

k. Mackenzie

78 There is no evidence from the petitioner's witnesses that any conduct of the kind complained about occurred at this booth. I will therefore simply record what appears in one of the affidavits on behalf of the second respondent. Mr Bennett, the booth captain, deposed that he handed out the ALP how to vote card and orange cards. Workers on the booth were identifiable as ALP workers since they were saying "Labor how to vote" as they were handing out how to vote cards. He estimated that about 400 orange cards, the majority being Exhibit 1, but some of the Exhibit 2 type were also handed out. He said that he and his workers said nothing to voters about the second preference card unless asked. If they asked, it was explained that if the voter was considering voting for One Nation the Labor Party was asking for the second preference.

Findings: There is no evidence that anything objectionable was said at this booth.

Analysis of sections 153 and 154

79 The elements of s. 153 are that there is a statement made under or for the purposes of the *Electoral Act*, that the statement is false or misleading in a material particular and that the person making it knows that it is false or misleading in a material particular. The elements of s. 154 are that the document must contain information which is false, misleading or incomplete in a material particular; that the person must know that the document is false, misleading or incomplete in a material particular; and the document must be given under or for the purposes of the *Electoral Act*. Further it must have been given without indicating that the document is false, misleading or incomplete and the respect in which the document is false, misleading or incomplete and without giving the correct information if the person has or can reasonably obtain it.

80 In each case the document or statement must be made under or for the purposes of the Act. Given the reach that the sections would have if those words were not treated as words of limitation it is improbable that they are intended to extend to encompassing all statements which are made or given during the course of an election campaign. In my view the words "under or for the purposes of the Act" are words which limit the scope of the sections. In my view handing out how to vote cards or similar documents is not of that character. It is unnecessary in this case to define more precisely the limits of the phrase. However, I am clearly of the view that it was not intended to extend to the facts of this case.

Analysis of section 158

81 Section 158 is as follows:—

"158. A person must not hinder or interfere with the free exercise or performance, by another person, of another right or duty under this Act that relates to an election."

82 It is concerned with prohibiting a person from hindering or interfering with the free exercise or performance by another person of "another" right or duty under the Act that relates to an election. It was submitted that a person who handed out a false how to vote card would be interfering with the free exercise or performance by the voter of a right under the Act to vote. The words "hinder or interfere with" would often be concerned with some kind of physical act of hindrance or interference. The word "another" is curious in this context. It appears both in the annual volume of the Queensland Statutes and in the current reprint but in the draft bill annexed to the EARC Report the word is "any". Even assuming there is no mistranscription involved in the process of converting the draft bill into legislation, the underlying question in my view is whether what is proved in this case happened is hindrance or interference with the exercise of the right to vote.

83 Reliance was placed on a dictum of Gray J in re Amalgamated Metals Foundry and Shipwrights Union; Ex parte Adamson (1984) 4 FCR 319, 346 where he held that a how to vote card allegedly implying, in a union election, that a candidate had backing of the ALP might be regarded as misleading or interfering with voters in or in relation to the casting of their votes. This decision was the subject of prerogative proceedings in the High Court (re Gray; ex parte Marsh (1985) 59 ALJR 804)). Gibbs CJ, at 810, said "Some misleading statements may hinder the full and free recording of vote" but held that in the case in question the representations "could do no more than influence an elector in his choice of the candidate for whom he would vote. The statements allegedly made ... could not have prevented or hindered the 'full and free recording of votes' within the meaning of the definition." That provision required that the conduct prevented or hindered the "full and free recording of votes". The provisions of s. 158 focus on conduct hindering or interfering with the free exercise of a right under the Act. In addition, what Gibbs CJ said seems to be more of a concession that

examples where the making of misleading statements hindered the full and free recording of the vote may exist, while saying that this was not one of them. It is not intended to be a definitive statement on the issue. Nevertheless, I will approach this matter on the basis that a misleading statement may be capable of hindering or interfering with the free exercise of a right under the Act. In the context of this case the question to be answered if the misleading statement is to have the requisite character is, in any event, similar to that which must be asked under s.163, 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. Conduct affecting the making of the political judgment for whom to vote is not subject to the section.

Analysis of section 163

84 Section 163 is as follows:-

"**163.(1)** 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.

(2) A person must not for the purpose of affecting the election of a candidate, knowingly publish a false statement of fact regarding the personal character or conduct of the candidate.

(3) A person must not, during the election period for an election, print, publish, distribute or broadcast by television any representation or purported representation of a ballot paper for use in the election if it is likely to induce an elector to vote other than in accordance with this Act."

85 The first element of s. 163(1) is that something must be printed, published, distributed or broadcast during the election period for an election. The second is that what is printed, published, distributed or broadcast must either be intended to mislead an elector in relation to the way of voting at the election or likely to mislead the

elector in relation to the way of voting at the election. It was expressly accepted by Mr Sofronoff for the second respondent, after being asked by me about the proper scope of s. 163(1) that where a card was handed over and, at that time, words were said, the combination of handing the document over and saying the words was within the subsection. Neither counsel for the petitioner nor for the Electoral Commission submitted otherwise. The provision considered in Evans v Crichton-Browne (1981) 147 CLR 169 and the predecessor of s.163(1) in the *Elections Act* 1983 (Qld) were each concerned with printing, publishing or distributing any electoral advertisement, notice, handbill pamphlet or card. The question whether those words extended to material broadcast on television was raised in the Case Stated in Evans v Crichton-Browne but was ultimately not answered, the court saying (208) "The question whether the publication of electoral advertisements by means of television or radio comes within the scope of (the provision) is one of some difficulty, but in the circumstances it is unnecessary to answer it." In Evans v Crichton-Browne at p. 177 the recital of facts in the case stated says the following:-

"The respondent further contends (but the petitioner denies) that insofar as the petitioner relies on advertisements broadcast by radio or television stations his claim is bad in law as disclosing no contravention (of the provision) because (it) does not apply to advertisements so broadcast."

86 The question asked of the Full Court in this regard was whether the provision had any application to electoral advertisements broadcast on radio or television. A reading of the arguments in the High Court in the CLR report in an attempt to discover what was argued on the point does not provide much assistance. The only submission which seems referable to the point is at p. 196 where Mr Hughes QC for the respondent submitted that "the maxim *noscitur a sociis* applies" to the provision. I take that to be a submission that the kind of "electoral advertisement" controlled by the section was limited by the context created by the

surrounding words. Since those words were concerned with printing, publishing or distributing a notice handbill pamphlet or card with particular content, the term "electoral advertisement" should be similarly limited to printed material. The Commonwealth Act was subsequently amended to expressly include publishing by broadcasting by radio and television. At the time EARC considered the matter, it was still an unresolved issue whether sections referring to an electoral advertisement or notice in that context extended beyond written material. The introduction of term "broadcast" in s. 163(1) extends its coverage to anything broadcast by radio or television. Section 163(3) confirms this, since in prohibiting printing, publication, distribution or broadcasting of a representation of a ballot paper if it is likely to induce electors to vote other than in accordance with the Act, it refers specifically to broadcasting by television. Section 163 as enacted envisages that, in the case of radio and television, words alone or in conjunction with images may infringe it if they have the necessary character. However, it does not, except to the extent that it incorporates the concept of a requirement not to "publish ... anything", clearly address the issue of whether words spoken other than on radio or television are capable of infringing the section.

87 Where there is an ambiguity, it is permissible to consider extrinsic material, of which the EARC Report is an example, for the purpose of assisting in the interpretation. (*Acts Interpretation Act* 1954 s.14B).

88 The EARC Report upon which the *Electoral Act* is based discussed what became s.163(1) under the general heading of provisions concerning political advertising. However, as that term was used against a background of law which included cases concerning how to vote cards such cards are obviously included in the category of political advertising for the purposes of the discussion. What was proposed must be seen against that background. The relevant passages in the report are paras. 11.33, 11.34, 11.65,

11.66, 11.96 and 11.97. The draft section proposed was as follows:-

"163. (1) A person must not, during the election period in relation to an election, print, publish, distribute or broadcast any matter or thing that is intended or likely to mislead an elector in relation to the manner of voting at an election."

89 The words "matter or thing" used there were replaced in the Act by "anything". That word is of the widest possible scope. In its ordinary usage it extends to words as well as objects. The only limitation of its comprehensive definition would come from the context in which it was used in a particular case. There is no reason to think that a more restricted meaning than that intended by EARC when it used the words "matter or thing" was conveyed by the change. The words "matter or thing" are those used in the Commonwealth Act. Inclusion of anything broadcast within the subject matter of the sub-section necessarily extends its operation to at least some kinds of spoken words. For the purposes of the present case the question is whether anything in the context of s. 163(1) excludes words spoken in a situation where they were intended or likely to mislead an elector in relation to the way of voting but not broadcast. For reasons already explained it is doubtful whether the spoken word was within the scope of s.112 of the *Elections Act* 1983. The specific categories referred to in it have been replaced by "anything" in the present s.163. That removes argument whether, e.g. "newspapers" with only "news" about a Member were within them. The meaning to be given to "publish" in s.163(1) is also important in resolving the issue. Depending on the context it may relate to material generally or to printed material. It is used in each of the three sub-sections of s. 163. In s. 163(1) and (3) it is used in the group of words "print, publish, distribute or broadcast". In s. 163(2) it is used in the phrase "knowingly publish". Section 163(2) appears to be the analogue (without the element of purpose) of the former s.105(4) of the Criminal Code. It is essentially a

defamation section and there is no reason to restrict the meaning of "publish" to the written word in it. Nor are there any surrounding words to colour its meaning. Because it refers to a "representation ... of a ballot paper" s. 163(3) is necessarily restricted to a written publication except in the case where the representation is shown on television. With respect to s. 163(1) the resolution of the question under consideration is not easy. The EARC Report and the explanatory notes to the bill contain no express statement of what was intended. However, in discussing the "general issue" whether the existing provisions governing political advertising in Queensland were adequate it recommended (para. 11.33) that "controls over political advertising be established to prevent misleading or false advertising which may adversely affect political parties and individual candidates. These controls should apply to both electronic and printed advertisements" (my underlining). Paragraph 11.34 refers to s. 163 of the draft bill. Issue three within this "general issue" is concerned with what restrictions if any should be placed upon party candidate and third party political advertising and whether the current provisions in Queensland were adequate. The recommendation in para. 11.65 is as follows:-

"The commission recommends that while current legislation is generally regarded as adequate provision should be made to deal with advertising that may be false or misleading and including a remedy for threatened breaches of the legislation."

90 Paragraph 11.66 refers once again to s. 163 of the draft bill. In dealing with issue 6 under the same "general issue", which is whether legislative sanctions should apply to cases of misleading advertising and, amongst other things, to what types of cases they should apply, reference is made in para. 11.85 to s.112 of the *Elections Act* 1983. The fact that the High Court had given a narrow interpretation to the words "in or in relation to the casting of his vote" was referred to and s.105(4) of the Criminal Code is also referred to.

91 Paragraph 11.93 is as follows:-

"It is considered that current provisions regarding misleading advertising are generally adequate. However such provisions would be enhanced by the insertion into the Electoral Act of a section similar to s.105(4) of the Criminal Code which relates to misleading statements about candidates' personal character or conduct."

92 Paragraph 11.95 states that the commission considers that provisions in regard to misleading advertising should also cover such advertising on electronic media. The recommendation in para. 11.96 recommends that current provisions regarding misleading advertising should be enhanced by the insertion into the proposed *Electoral Act* of a section similar to s. 105(4) of the Criminal Code. When one reads those passages of the report the impression is not gained that EARC was of the view that the existing s.112 of the *Elections Act* nor the proposed s. 163(1) in the draft bill applied to the kind of situation with which I am presently concerned. Such indications as there are suggest that it was intended that written political advertising and such advertising by radio and television were to be covered. There is certainly no suggestion in the EARC report that it was thought that the proposed new provision enlarged the law except to the extent that it made plain that electronic dissemination of information would be included. The words of the section enacted, by using the words "print, publish, distribute or broadcast", are consistent with an intention to cover material in writing (by the first three words), and the electronic media by the last.

93 Notwithstanding the concession made by Mr Sofronoff, I do not think s.163(1) extends to the conduct alleged in this case, verbal representations about the nature of a card seeking that a vote be cast in a particular way. If it does not apply to that kind of case the petitioner could not succeed on the basis of s.163(1) because, for reasons developed in the analysis of the cases which follows, the card itself standing alone does not fit

the description of one intended or likely to mislead in the sense explained by the High Court in Evans v Crichton-Browne. However, since the same issue arises under s.158 it is necessary to discuss the law in some detail to extract the underlying proposition which governs the case.

94 Adoption of the wide view of s. 163, where words accompanying the handing over of the document would be within the scope of the section, would create a problematical consequence. In a case of this kind ephemeral statements, proof of which will often depend on word against word, must be relied on by the petitioner. The problem is avoided in the case of broadcast material because of the obligations in the *Broadcasting Act* 1942 to retain records of broadcasts for a period of time which is longer than the time for bringing a petition.

95 I should point out that s.329 of the *Commonwealth Electoral Act* is differently structured from the Queensland Act in that it specifically defines the meaning of the word "publish" to include publishing by radio or television. The proper interpretation of s.329 is a separate question upon which I need not dwell.

96 It is also convenient to note a further concession by Mr Sofronoff that proof of complicity by the second respondent was not necessary if the effect of something done independently of his will was to deprive the electorate of its free and deliberate choice of a candidate. It is unnecessary to explore that subject further for the purposes of deciding this matter.

97 The phrase "way of voting at the election" differs from that in Evans v Crichton-Browne where the phrase was "in or in relation to the casting of his vote". However in Robertson v Knuth (1997) 1 Qd.R 95, 97 the Court of Appeal considered s.336(1) of the *Local Government Act* (1993) which is materially identical to s.163(1). Pincus and Davies JJA said the following:-

"As to subs.(1), assuming that the publication was intended or likely to mislead an elector, it was not "about the way of voting" at the election. That phrase, like the phrase "in relation to the casting of a vote" in s.329 of the Commonwealth Electoral Act 1918 (Cth), is concerned with statements "intended or likely to affect an elector when he seeks to record and give effect to the judgment which he has formed as to the candidate for whom he intends to vote, rather than with statements which might affect the formation of that judgment": *Evans v Crichton-Browne* (1981) 147 C.L.R. 169 at 204. It is true that the analogous phrase in that case is different and that its context is a little different but the purpose of the two provisions is plainly the same. It is unlikely that the Queensland legislature intended any relevant change of meaning when it enacted s.336(1) in substitution for s.5A(1)(ii) of the Local Government Act 1936 which, like the Commonwealth Act, used the phrase "in relation to the casting of his vote".

I apply the same interpretation to s.163(1).

98 In *Evans v Crichton-Browne* the High Court referred to *Smith v Oldham* (1912) 15 CLR 355, 362 where Isaacs J said:-

"The vote of every elector is a matter of concern to the whole Commonwealth, and all are interested in endeavouring to secure not merely that the vote shall be formally recorded in accordance with the opinion which the voter actually holds, free from intimidation, coercion and bribery, but that the voter shall not be led by misrepresentation or concealment of any material circumstance into forming and consequently registering a political judgment different from that which he would have formed and registered had he known the real circumstances."

99 The joint judgment of the High Court (206) then proceeded in the following terms:-

"... the framers of a law designed to prevent misrepresentation or concealment which may affect the political judgment of electors must consider also the importance of ensuring that freedom of speech is not unduly restricted, especially during an election

campaign, and the practical difficulties that might result if an election were liable to invalidation on the ground that statements made in the interests of candidates were found in subsequent litigation to be untrue or incorrect. This Court is not concerned with what it would be desirable for Parliament to provide, but with the meaning of what Parliament has in fact provided, but the possible difficulty and inconvenience to which the wider construction of the provision might give rise is a matter properly to be considered in determining the meaning of the words used if they are ambiguous. Counsel for the petitioners recognized that par.(e) - which of course refers to incorrect as well as to untrue statements - might have a very drastic effect if it applied to any statement which is intended or likely to affect the political judgment of electors, and therefore made an attempt to read down the words of the section so as to restrict their meaning - in particular an attempt was made to limit them to statements of fact. However a statement may be one of opinion, belief or intention as well as of fact, and there is nothing in the words of par.(e) to limit the provisions of that paragraph to statements of the latter kind. But even if the paragraph were thought to apply only to those statements affecting a voter's choice of candidate which appear to be statements of fact, that construction would require an election campaign to be conducted in anticipation of proceedings brought to test the truth or correctness of any statement made in the campaign. Indeed any person who published an electoral advertisement containing an incorrect statement of fact might be exposed to criminal proceedings. In a campaign ranging over a wide variety of matters, many of the issues canvassed are likely to be unsuited to resolution in legal proceedings; and a court should not attribute to the Parliament an intention to expose election issues to the potential requirement of legal proof in the absence of clear words. Neither the words nor the context suggest such an intention either clearly or at all."

At p.205 the joint judgment said the following:-

"It was submitted that the formation of the political judgment which precedes the casting of the vote is sufficiently related to the casting of the vote itself to come within the section. There are however a number of reasons for rejecting the contention that the paragraph

is intended to refer to statements which affect the elector in his decision or choice. In the first place, the use of the expression "the casting of his vote" was quite inappropriate if it was intended that the paragraph should refer to untrue or incorrect statements which affect the judgment of the elector in making his choice. If that had been the intention of the Parliament, it would have been very easy to say so. To construe the paragraph as applicable to statements which might influence the political judgment of an elector would give it a more extensive operation than its words appear to warrant."

100 The dividing line between what is permissible and what is not is easily stated. Like many principles of this kind the difficulty is in applying it to a particular set of facts. No authority found by counsel is precisely the same as this case. The fact that it arises under an optional preferential system is in my view a further complication for reasons which I will discuss later.

101 No objection can be taken to persuasion, even at the last minute, to influence a person's judgment as to whom he or she should vote for. The first sentence from the passage referred to above from Evans v Crichton-Browne, 206, alludes to the reason why. One of the difficulties, as the submission from Mr McKenna on behalf of the Electoral Commission points out, is that there is an ambiguity in the test formulated by the High Court in Evans v Crichton-Browne. The test formulated by the High Court turns on identification of the point at which an elector has formed a judgment as to the candidate for whom he intends to vote (p.204). It also refers to the mental process of decision or choice by an elector which precedes the formal expression of that opinion or choice by the casting of a vote (p.205). It also focuses on the judgment of the elector in making his choice (p.204-5). Statements which are apt to mislead an elector in making such a judgment are not contraventions of s.163(1). Statements which are apt to mislead an elector in giving formal expression to that judgment are in contravention of it.

102 The ambiguity in the test arises from the fact that an elector's mental process of decision or choice commonly involves a series of decisions each of which in one sense or another may arguably be said to constitute his judgment. Mr McKenna illustrated this argument by the following example:-

- "(1) A devout elector may decide that he will cast his vote in accordance with the recommendation of his religious leader.
- (2) Having determined that his religious leader favours the approach taken by a particular political leader (Mr L), the elector's decision evolves into a decision to vote for the local candidate who is politically aligned with Mr L.
- (3) Having determined that Mr L is a member of Party L, the elector's decision evolves into a decision to vote for the local candidate from party L.
- (4) Having determined that Mr C is the candidate from Party L in his local electorate, the elector's decision evolves into a decision to vote for Mr C."

103 As the argument was put, the critical question is the point at which one can properly characterise the elector's decision as the "judgment" which the elector has formed as to "the candidate for whom he intends to vote" (p.204). I will return to this argument at a later stage. Before doing so it is necessary to refer to some of the authorities to which reference was made.

Analysis of cases other than Evans v Crichton-Browne

104 In Bray v Walsh (1976) 15 SASR 293 (which preceded Evans v Crichton-Browne) Mitchell J was concerned with a case where a Magistrate had held in prosecution proceedings that a document in the form of a how to vote card was likely to mislead an elector in relation to the casting of his vote. The facts were that the Liberal Movement in the

electorate of Sturt had published a how to vote card recommending preferences be distributed in a particular way. The card contained the words "How to vote LM Liberal Movement in Sturt". As far as one can tell from the report the offending card was in the same colours and layout as the official card but contained the additional words after those quoted "but keep Fraser out". There was a different distribution of preferences in it from that in the Liberal Movement card. Mitchell J dismissed the appeal saying the following:-

"A person who wished to fill in his voting card in accordance with the suggestions made by the Liberal Movement party and who had already seen a "how to vote card" put out by the Liberal Movement might well have been sufficiently influenced by the similarity of the documents to believe that the document produced by the appellant was one of the documents produced by the Liberal Movement. Mr Abbott argued that the inclusion of the words "but keep Fraser out" was sufficient to warn a voter that this was not the card of the Liberal Movement. The Special Magistrate did not agree with this contention, nor do I. The card produced by the appellant gave the first vote in the House of Representatives to the same man as did the card produced by the Liberal Movement and gave the Liberal Movement candidates the first six votes for the Senate, but in each case thereafter distributed the preferences differently from the way in which preferences were shown to be distributed in the official Liberal Movement card. It therefore was likely to mislead an elector who wished to cast his vote in the way indicated by the Liberal Movement."

105 Mr Sofronoff submitted that I should regard Bray v Walsh as no longer being good law since it preceded Evans v Crichton-Browne and because Mitchell J did not focus on the test formulated by the High Court in that case for determining whether what was likely to be affected was the process of casting the vote.

106 Mr Dunning for the petitioner relied on Bray v Walsh, submitting that the card in each case added words referring to the objective of the advice in it but misled the elector as to how to effect the decision he had already

made to vote in accordance with the wishes of the party. In my view the facts in Bray v Walsh are significantly different from the present case. The present case is not one where there has been, in effect, an attempt to duplicate the One Nation how to vote card, with the addition of a few words and different preference allocations. It is not necessary in my view for me to pronounce finally on the current status of Bray v Walsh since it is distinguishable in any event on the facts.

107 In Consandine v Strathfield Municipal Council (1981) 44 LGRA 435, 440-1 the objectionable material consisted of material implying that seven ungrouped candidates, five of whom were ALP candidates who had failed to comply with the procedures entitling them to separate grouping in their own right were members of a group of which Consandine was entitled to the number one vote. The relevant passage, which follows a reference to the principle in Evans v Crichton - Browne, is as follows:-

"The material presently under consideration was clearly enough likely to mislead or improperly interfere with an elector in forming his judgment as to whom he wished to vote for. But it went significantly further than that. It represented to an elector who came to cast his vote that the seven persons, who were in fact ungrouped, listed in the right-hand column of the ballot-paper, were in fact a group. The unauthorized heading of the column "PROGRESSIVE RE-FORM", and the reference at the top of the facsimile ballot-paper in both documents to "his progressive Re-Form group" is a direct representation of at least an affinity, if not an identity, of policies on the part of the seven named persons as well as of the existence of some mutual association between those seven persons.

An elector coming into the polling booth with the intention of casting a vote for, say, Mr O'Donnell, or any one of the other four Australian Labor Party candidates numbered three to six in the appellant's "how to vote" card, knowing for certain that the candidate of his choice was a member of the Australian Labor Party, could well have concluded from the appellant's "how to vote" card that the seven persons listed in the right-

hand column were all Australian Labor Party candidates. It is by no means fanciful to conclude that a substantial number of individual electors would not have been aware of the political alliances of all twenty four candidates. It is by no means fanciful to conclude that a substantial number of individual electors might have known one or more of the five Australian Labor Party candidates but have been ignorant of the appellant's comparatively recent estrangement from that party. It is by no means fanciful to conclude that a substantial number of individual electors falling within the category described in the preceding sentence, recognizing the name of their favoured Australian Labor Party candidate or candidates in the favoured positions numbered two to six on the appellant's how to vote card, would have assumed that the seven names in that column which the appellant had identified as a group were at least associated together in the pursuit of Australian Labor Party policies if not actually officially candidates sponsored by that party. This would amount to a misleading or an improper interference with such electors in relation to the casting of their votes. It was likely to influence directly the actual numbering of the squares. The recommendation put forward by the appellant was in terms aimed at the manner in which the squares would be numbered, that is to say at the manner in which the vote would be cast. It was misleading in that it conveyed an impression of affinity in policy and association in political identity as between the appellant and the other six persons where no such affinity or identity existed. Electors could thereby have been misled in relation to the casting of their votes."

108 The remarks echo an example given by the High Court in Evans v Crichton-Browne, 205, where it is 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 be an example of a misleading or incorrect statement contravening provisions of this kind. Moffitt P at p.442 of Consandine said the following:-

"As legislative and executive power rests upon the party system of politics, the decision of persons to be candidates for election have come substantially to depend on their selection by a political party to stand as its

endorsed candidate. For a like reason voting at parliamentary elections has come substantially to depend on voters identifying candidates by their membership of a political party. In consequence many electors vote for a particular candidate because he is a member of a political party which or whose leader has the voter's approval. Thus the decision of an elector as to how he will cast his vote may be simply to vote for a particular political party or group, in the sense that he will vote for those candidates, whoever they are, who are members of that party or group. He may go to the polling booth having decided to cast his vote in this way or as put colloquially to vote for "X party", so that the only significance of his knowing the identity of particular candidates whose names appear on the ballot-paper will be to provide the means by which he can carry out his decision as to how he will cast his vote. When he comes to the polling booth, to present him with a "how to vote" card in the form of a ballot-paper which has matter added which misleads him into thinking that a candidate or candidates, whose names are on the ballot-paper, are members of the group for whom he has decided to cast his vote when they are not "misleads (him)... in or in relation to the casting of his vote".

These considerations, which are applicable in parliamentary elections having regard to the operation of the party system, apply, although to a degree less obviously to municipal council elections. party or group politics have existed at least to some degree for some years in such elections but now the ordinances recognize their existence and make provision for political grouping, but without naming the group in the ballot-paper. In such elections, particularly as voting is compulsory, the chance of a "how to vote" card in fact misleading voters could well be greater than in parliamentary elections, because of the number to be elected and because of the unawareness of some voters of the personal identity of the candidates or a sufficient number of candidates to fill the vacancies by reason of less public interest in municipal council as compared with parliamentary elections."

109 Once again the factual situation is not identical to the present case. This is not a case where the true political affiliation of the recipient of the vote, albeit a second preference vote, was misrepresented. The present

case is one where the allegation essentially is that a representation was made that the card represented a true expression of One Nation's wish that in the contingency referred to on the card, the elector should cast a second preference for the ALP candidate. The party affiliation appears after the second respondent's name on the card.

110 Webster v Deahm (1993) 116 ALR 223 involved a card the wording of which has many similarities with the card in the present case. The layout of that card, although not in facsimile form, appears at p.230 of the report. Gaudron J said the following:-

"When read as a whole, the document clearly could only influence the formation of a judgment as to the candidate who should receive the elector's second vote. For reasons already given in relation to the third and fourth allegations, it does not, when read as a whole, offend s329(1). But even if given only a cursory glance, the document could not have been mistaken for a how-to-vote card, whether for the Democrat candidate or anyone else. Thus, contrary to the purport of the allegation, the particulars and the submission for the petitioner, the document could not have affected the casting of a vote in any manner amounting to a contravention of s329(1) of the Act."

111 I was referred to three Queensland cases, all of which were unsuccessful applications for injunctions made on election day to restrain the use of signs in one case and cards seeking preferences in the others. Each judge referred to the fact that the matter was being decided urgently and in each case reasons were delivered on the same day as the application. Jull v Swan; (unreported, Lee J., 24 March 1990) was decided under the *Commonwealth Electoral Act*. Nothing turns on that. The other two were decided under the *Electoral Act* 1992. Goss v Swan (1994) 1 Qd R 40 was not concerned with a card. It is therefore not of particular assistance on this aspect of the matter.

112 In Jull v Swan there was no suggestion that the nature of the card was actively misrepresented. However, in

other respects the facts bear a noticeable similarity to the present case.

"The evidence shows that this document is selectively handed out to people apparently under the age of 30 years and who might have an interest in environmental matters. There is also evidence that it is being handed out by Labour Party workers at polling booths with official Labour "How to Vote cards" (Exhibit 6), although not necessarily only by them.....The concern is that many electors, or at least some of them who receive this document might form the view that this is an independent document from a separate source indicating that the second preference vote, in cases where they are thinking of voting first for the Democrats or Independents, should go to Labour, or that it is an Australian Democrat document to same effect."

Lee J held that it was "difficult to conclude that it clearly falls within the constraints referred to in Evans v Crichton-Browne."

113 Malone v Bird (No. 624 of 1994, unreported, William J. 30 April 1994.) was concerned with a card directed to voters of the Confederate Action Party and similar in concept to Exhibit 1 in the present case except that it did not have a representation of the ballot paper on it. The argument was that the document was misleading in the circumstances of its distribution because it appeared to be an official Confederate Action Party document and did not make it clear that it was in fact an ALP document. The argument was that the first thing an elector would note were the words "Confederate Action Party", that the card was predominantly the same colour as the Confederate Action Party card and that the ALP logo was small and not the traditional ALP colour of red, but the same predominant colour as the card, blue. Williams J. found it difficult to evaluate the strength of the contentions because he had only a photocopy and not the original cards. For the ALP the submission was that the card was obviously not a how to vote card and could not be so regarded even by an ordinary elector quickly perusing the document. The presence of the logo indicated the source of the document. Williams J.

refused to grant an injunction, observing that he could see that there were arguments in favour of the conclusion that the document was misleading in the circumstances of its distribution, but the evidence was too vague to persuade him that the situation existed that called for the granting of an interlocutory injunction. 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. Controversy whether identification of the source of the document is adequate is a common feature of the cases.

Summary of how ss.158 and s.163(1) operate

114 Section 158 requires identification of a right or duty under the *Elections Act* and satisfactory proof that the free exercise or performance by someone of that right or duty has been hindered or interfered with. Proof that someone was actually hindered or interfered with is essential.

115 In the circumstances of the present case, the relevant right is the right to record on the ballot paper a decision made by the voter for whom he would vote. Influencing the making of that decision is not an act of hindering or interfering with that right.

116 Section 163(1) is concerned with the printing, publishing or distributing written material intended or likely to mislead an elector in relation to the way of voting at the election, or broadcasting material intended or likely to mislead in that respect.

117 There are subjective and objective elements. In the former, the focus is on what the material disseminated was intended to achieve. In the latter, the tendency of the material to mislead is the focus. Proof that someone was actually misled is not essential, but is admissible if available.

118 Precedents, the leading one being a unanimous High Court decision, restrict the operation of sections like s.163(1) to the act of recording the choice already made concerning for whom the elector wishes to vote.

119 If this state of the law does not strike an appropriate balance, it is for the legislature to address what alteration should be made.

Application of law to the cards

120 In the present case, if the form of the cards was all that was objected to and there was no suggestion of any subterfuge or disinformation engaged in at the time when they were handed out, neither s. 163 (1) nor s. 158 would be infringed. The card is not materially different from that held by Gaudron J in Webster v Deahm not to contravene a similar provision to s. 163(1). If the cards are read objectively, they are premised on the proposition that the recipient is thinking of voting One Nation and does not want Joan Sheldon back, in the case of Exhibit 1, for 3 more years, and in the case of Exhibit 2, at all. If the recipient was in fact thinking of voting One Nation, it would require some further application of thought processes on the part of the person to decide whether to allocate a preference at all (which was one of the possibilities left open on the how to vote card distributed on behalf of One Nation) and, if so, whether the preference should be directed in a way perceived to be detrimental to Mrs Sheldon. If the form of the card was all that was complained of, if anything was affected by it, it was the formation of a political judgment, not the "way of voting" in the relevant sense. It is also important to remember that this is not a case where the material distributed is directly contradictory of the how to vote card of the party whose voters' second preference is solicited. The One Nation card says "Please place the number one (1) in the Pauline Hanson's One Nation square on your ballot paper then number other squares if you wish". Neither s. 158 nor s. 163(1) are infringed by distribution of the cards alone.

121 However the findings of fact made in respect of individual booths raise a further issue. That is whether the combination of handing out of the card and saying words found to have been said at the same time convert the case from one where the formation of the political judgment is affected to one where the act of recording or expressing the political judgment is affected.

122 The findings of fact about what was said are the following:-

At the Mansfield booth one witness deposed to hearing "This is the new how to vote card for One Nation" said as the card was handed to her. She also heard the same man say to another voter "This is the new card for One Nation". A second voter said that a man handed him the card saying "This is the latest One Nation how to vote card".

At Rochedale a witness said that he heard a named person say "Voting One Nation? This is your preference card" or words to similar effect on an unspecified number occasions.

At Belmont the One Nation candidate heard a man say to him words to the effect "One Nation how to vote card". Another witness heard a man saying "One Nation" at the time when he was handing out Exhibit 1. The number of times is unspecified.

At Mt Gravatt West a husband and wife each said that a person handed Exhibit 1 to them saying "One Nation" at the time. The female witness said under cross-examination that "One Nation" was not said in a tone indicating a question.

In each case I find a deliberate attempt to misrepresent the nature of the card.

At these booths, 8608 valid votes were cast. Of these, the One Nation candidate received 1290 first preferences.

123 There is evidence that the words set out below were said by some persons handing out Exhibit 1 at some booths.

At Mt Gravatt East, persons handing out Exhibits 1 and 2 were heard to say "voting One Nation?".

At Eight Mile Plains a witness heard a person handing out Exhibit 1 say "One Nation" or "Voting One Nation?" or words to that effect.

At Mansfield, a man said that on two occasions he heard a man handing Exhibit 1 out saying "One Nation? Vote Labor two".

124 In each of these instances, I find that what was said was not a deliberate attempt to represent the card as a One Nation card. The fact that a question is asked cannot be unequivocally construed as more than an attempt to ascertain who was likely to be a One Nation voter with a view to exercising persuasion to give the ALP a second preference vote.

125 There is some evidence at Warrigal Road that the words "One Nation" or "One Nation card" were used. However, because of my findings as to reliability, I am not prepared to draw an adverse inference in respect of the way in which they were said.

126 In respect of four booths, Upper Mt Gravatt, Wishart, Macgregor and Mackenzie, there is no evidence that words implying that Exhibit 1 was a One Nation card were used. At the booths apart from Mansfield in these three categories, 13006 valid votes were cast. The One Nation candidate received 1908 first preferences.

Conduct intended to mislead

127 In those cases where a direct positive representation that the card was a One Nation how to vote card was made at the time it was handed out, it is an

inevitable inference that such conduct was intended to mislead the voter. The only remaining question is whether it was intended to mislead in relation to recording or expressing the political judgment which the elector has made, or in relation to formation of the political judgment as to whom the elector will cast a vote for. There is an air of artificiality about this, since no doubt the subtlety of the distinction was not in the mind of the person handing out the card at the time. The object of the exercise would most probably have been described as getting the second preference. However, one of the intentions would have been to mislead anyone who was committed to vote according to One Nation's directions and who was unwary enough to believe that Exhibit 1 was an authentic expression of them.

128 It is convenient at this point to return to the submissions made on behalf of the Electoral Commission. As it was put in the written submissions, the difficulty with the present case is in deciding whether the operative "judgment" for the purposes of Evans v Crichton-Browne occurs at the stage at which the elector has decided to give second or second and subsequent preferences in accordance with a particular party's official how to vote card but does not know which person or party is to receive those preferences until he or she receives further information at the polling booth, or whether the judgment as to the candidate for whom he proposes to vote is made at some later stage such as the time when he receives and forms an opinion that he is in a category to whom the card is addressed and decides to vote according to it. One additional difficulty is that, because of the way in which the case was conducted the evidence is sparse as to this aspect of the matter. No-one expressly said that, having decided to vote for One Nation, he or she was influenced to add to the marking on the ballot paper a second preference where there was no intention to record more than a number one vote for One Nation before the card was received. There is little direct evidence of people actually being

influenced in their vote by the card. Some said they were not.

129 For example, at the Mansfield booth, Ms Neill immediately detected the nature of the card. Mr Olive did not until later in the day, but he had made up his mind before he came to vote and the card did not influence how he recorded his vote. At Mt Gravatt West, Mr Hitchcock said that the card did not affect his judgment as to how to vote, even though he only detected that it was an ALP card after he had returned home. At Eight Mile Plains, Ms Anderson and Mr Pearce were aware that the card was not a One Nation Card by the time they voted. At Warrigal Road, Ms Kenny was not affected by the card even though she only discovered its true nature later, although Mr Jorgensen said it did change his vote. Otherwise the evidence is silent as to the issue. It is therefore in the realms of speculation as to how many voters may actually have been influenced to give a second preference to the ALP where, prior to receiving it, they would have either registered no second preference or a different second preference.

130 This is important, because s.158 is concerned with someone actually being hindered or interfered with in freely exercising the right to record a vote in accordance with the political judgment formed by him or her. If the act of recording or expressing that political judgment is not interfered with or hindered, s. 158 is not contravened. Section 158 is not concerned with what happens during the process of formation of that political judgment.

131 If there were substantial evidence that a card was distributed in circumstances intended to mislead and people were misled into recording a vote in accordance with it a further question is involved, namely whether they should be regarded as misled as to the way of voting or merely as to the formation of a judgment as to whether a second preference should be allocated and if so to the ALP. In one sense there is still a contingency involved. The representation is that the card is a One Nation how to vote

card, but the person still has to make a decision whether to accept that the card applies to him or her. That is to say, the person has to consider whether he or she is a person thinking of voting One Nation who does not want Joan Sheldon back for three more years. In that sense there is a process of reasoning which has to be gone through culminating in the recording of the vote. Another way of looking at it is to consider the situation of a person who had decided to vote for One Nation and who understood the card to be an expression of One Nation's wish that if a person was thinking of voting for One Nation and did not want Joan Sheldon back for three more years, that person should give a preference to Labor. In other words, because of what was said when it was given to him the card was construed as a statement that irrespective of the position on the One Nation how to vote card, which said that a One Nation voter may record other preferences if he or she wishes, it was One Nation's wish, in a case where the voter does not want Joan Sheldon back for three more years that the person register his second preference and that it be given to the ALP. In that sort of situation, if the person had formed the intention to vote in accordance with One Nation's directions and genuinely took the card to be a One Nation card, in my opinion it would remove it from the category of a case in which it was left to the voter to decide whether to mark any other squares and place it in a category where a person who wished to vote in accordance with One Nation's wishes was induced to complete the ballot paper in accordance with the card by the combination of the appearance of the card and what was said when it was handed to him. It would, however, be misleading to assume that everyone necessarily fell into that category, since it is entirely possible for example that there might be a category of persons who had not yet made up their minds how to vote and whether to give preferences, and if so to whom. In that case, the outcome may be different. The notion that only one outcome follows from the fact that Exhibit 1 was handed out, accompanied by words representing it as a One Nation card, or that there are necessarily closed categories of facts is erroneous.

"Likely to mislead"

132 The second limb of s.163 is concerned with something which is likely to mislead an elector in relation to the way of voting at the election. This involves an objective test. Counsel referred me to the well known discussions of the notion of misleading in connection with the *Trade Practices Act 1974*, especially Taco Company of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177 and Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1981-2) 149 CLR 191. The analogy between commercial transactions and the electoral process is inexact, but the refinement of the concept of what is likely to mislead developed in cases under the *Trade Practices Act* is helpful nevertheless. Identification of the class to which Exhibit 1 was directed is important. Mr Sofronoff suggested that it comprised "literate voters". In my opinion, in the atmosphere of the polling booth, where the cards of all descriptions are handed out and a voter typically proceeds without much further deliberation to the ballot box, the class is not necessarily that wide. There will be, for example, a substantial number of voters who go to the booth definitely committed to vote in a particular way. Such a person is unlikely to subject a card apparently from interests other than the one for whom he or she intends to vote to greater scrutiny than a glance. Such a voter is unlikely to pay any further attention to it, irrespective of any information given to him or her on the way to the ballot box since a firm opinion of how he or she will vote has already been formed. It is in my view necessary to have regard to those to whom it is likely to have some significance. On its face, Exhibit 1 is intended to relate to people who are thinking of voting One Nation. Outside the class likely to be attracted to consider the card further because they fit that description, it is difficult to see how it would be likely to mislead an elector in a relevant sense.

133 Related to this, it is necessary to be cautious about taking at face value statements of electors that they

were misled by a card. Regard must be had to the fact that it is common experience that on election day people pay varying degrees of attention to cards thrust into their hands. The fact that an initial impression was formed that the card was a One Nation card does not necessarily translate into a compelling case that such an impression would remain upon further perusal of the card. In other words, the mere fact that someone says that he or she believed the card was a One Nation card or that he or she did not discover until later that it was not does not say anything definitive in this particular context about the potential of the card to be likely to mislead the person as to the way of voting without knowing more about the degree of scrutiny to which he or she subjected it. The only relevant question under s. 163(1) is whether the card itself was likely to mislead an elector when he seeks to record and give effect to a judgment which he has already formed as to the candidate for whom he intends to vote. The card in this case is similar to that held by Gaudron J in Webster v Deahm to be incapable of doing this and capable only of affecting the formation of the judgment as to the candidate for whom he would vote. In the circumstances, no contravention of s. 163(1) is established.

Application of Section 158

134 It is necessary that there be evidence that something has been done which hindered or interfered with the right to record and give effect to an already formed judgment as to for whom he intends to vote. It is not sufficient if what is done could only affect the formation of the judgment as to the candidate for whom he would vote. Since the issue is the same as that discussed in Webster v Deahm, merely handing Exhibit 1 to a voter would fall into the second category. There would be no contravention of s.158 in those circumstances.

135 If Exhibit 1 was handed to a voter with a positive representation it was a One Nation card and there was evidence that voters who had formed intention to follow One

Nation's wishes as to preferences had acted on it in the belief that, by following it, they were giving expression to One Nation's preferred position with respect to preferences, that may sufficient to place what happened into the first category and contravene s.158. However, actual evidence that this occurred is lacking. There is no evidence sufficient to establish contraventions of s.158.

The quantitative exercise

136 In para.12, I referred to the need to decide whether, having regard to any impropriety proved, it is sufficiently established that such conduct resulted in a situation where there is good ground for believing that the result recorded did not reflect the actual preference of a majority of voters. There is no direct evidence that a significant number of persons who intended to give One Nation their first preference were induced by Exhibit 1 to give a second preference to the ALP. Speculation cannot take the place of evidence.

137 I have previously indicated that not all cases where a preference was allocated to the ALP by a One Nation voter who made that decision on the basis of Exhibit 1 would necessarily result in a contravention of s.163(1). The extent to which contraventions occurred and if so, how many, cannot adequately determined on the state of the evidence. That is a formidable difficulty in the way of the petitioner.

138 I also note, without putting any undue weight upon it, that there is evidence that the petitioner's interest in knowing of the activities of ALP campaigners was publicised in the electorate after the election had finished. There is no doubt a natural reticence on the part of people towards becoming involved in proceedings of this kind. The witnesses who gave evidence were largely campaign workers and members of the public who had come forward. Even allowing for the reticence factor, the number in the latter category was small. Overall, I am driven to the conclusion 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.

139 One other thing marginally related to this subject is that at Belmont, Upper Mt Gravatt and Eight Mile Plains, there was an effort by One Nation supporters to bring to the attention of voters that Exhibit 1 was an ALP card. It emerged in cross-examination that at Mt Gravatt East a decision was taken to cease handing out the card because of this. This demonstrates that self-help in such situations is available and reasonably effective if resources are available.

Statistical evidence

140 Since the impression may have been created by a recent article in the media that part of the evidence admitted in this matter was analysis of the flow of preferences in Mansfield, compared with other seats it is desirable to record the following. Such evidence was not admitted. At the commencement of the trial Mr Dunning sought to read, and Mr Sofronoff objected to an affidavit from Mr Fraser whose curriculum vitae demonstrates a long association with practical politics. This affidavit was sworn on 27 August 1998 and served the same day, the Thursday before the hearing was to commence. This was well outside the period allowed in the order for material to be filed. That was one of the factors that led to the ruling that the evidence would not be admitted since the nature of the evidence was such that the second respondent would be significantly handicapped in attempting to rebut it having regard to the schedule for hearing the evidence. However, it is apparent from my ruling that I also had concerns about the ultimate utility of such evidence. What I said in that regard is as follows:-

"It is generally not appropriate to form any preconceptions about the ultimate assistance that would be gained from this evidence, subject to noting the inherent limitations of statistical evidence. However, it

is pertinent to observe that the evidence has a very great potential to widen issues which are largely collateral to the thrust of the case. In particular, while Mr Fraser gives reasons which on the face of them are understandable for regarding the electorates used as comparisons as truly comparable it seems to me almost inevitable that an attack on his evidence will involve a reasonably detailed examination of factors peculiar to individual electorates and candidates for the purpose of attempting to flatten out the statistical abnormality.

.....

To mention that process inevitably raises the issue of whether ultimately the evidence would be sufficiently cogent in this kind of proceedings,"

141 While statistics have been maligned since at least the time of Disraeli and Mark Twain, statistical evidence can be useful in some kinds of cases. However, like any expert evidence the validity of the ultimate conclusion said to be demonstrated by the statistical analysis depends heavily on the validity of the evidence and assumptions upon which the conclusion is formed. The more the variables and uncertainties the less likely it is that the evidence will sustain an inference sought to be drawn from the analysis. This is so even if the expert is as well qualified to perform the analysis as Mr Fraser's curriculum vitae suggests. Where it is sought compare and contrast outcomes in different electorates it is necessary to consider whether they are truly comparable and to isolate any factors peculiar to the individual electorate or the campaign in it.

142 The question whether there are factors peculiar to an individual electorate or the campaign in it may bear on the question of whether it should be treated as truly comparable but also, assuming broad comparability, on the question whether such factors had any effect on the conclusion said to be supported by the statistical analysis. Further, where, in a case where sufficient proof of conduct of the kind assumed to have been the influencing factor in the outcome is restricted to a limited number of

booths, the value of the evidence becomes more questionable. The concerns referred to in those remarks have not been allayed by the way in which the evidence unfolded in the course of the hearing.

143 What I have said is not to suggest that evidence of this kind may not be admissible on future occasions. It is however incumbent on those who seek to rely on it to ensure that it is presented in a way which addresses the difficulties inherent in it.

Proposal to Avoid Recurring Problems

144 The current system of optional preferential voting is provided for by s. 113 of the *Electoral Act* 1993. In its present form it replaced a system of compulsory preferential voting under which, to record a valid vote, an elector had to mark an order of preference of all candidates on the ballot paper.

145 Chapter Six of the EARC Report on Queensland Legislative Assembly Electoral System deals with voting methods and in paras.6.19 to 6.25 expresses reasons for preferring optional preferential voting over first past the post and compulsory preferential voting. Features of the arguments for the respective forms of preferential voting are summarised in paras. 6.12 and 6.13. Significant support for optional preferential voting came from academics. On the other hand, the three major political parties of the time supported retention of compulsory preferential voting. In the case of the A.L.P., notwithstanding its existing policy of supporting optional preferential voting, its written submission and oral submissions on its behalf advocated compulsory preferential voting.

146 It is not my function to enter into a debate about the relevant merits of the two systems. It is Parliament's responsibility to legislate, not the Court's. However, since this case provides a snapshot of optional preferential voting in operation, it is appropriate to comment on negative aspects of it disclosed by the

evidence, on the assumption that Parliament does not reintroduce compulsory preferential voting.

147 Under compulsory preferential voting, all valid votes ultimately flow to one or other of the two candidates who remain after all others have been eliminated. Under optional preferential voting, there is no such assurance since a valid vote may be exhausted at any time after the expression of the first choice. No doubt, gaining a more advantageous expression of preference in the votes of minor party and independent candidates is important under compulsory preferential voting. 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.

148 The last sentence of para.6.25 of the EARC Report expresses the opinion that encouraging voters to express preferences is ultimately a matter for candidates and parties, not the electoral system. That may be a legitimate position, but the electoral system nevertheless 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. There is compelling evidence that a number of voters were very angry when they realised that the card was an ALP card, not a One Nation card in this case.

149 The focus of this case is what was done by ALP workers. The evidence was not presented more widely than that. The emphasis on what the ALP workers did results from the way the evidence was focused.

150 In the present case, I am satisfied that the practice of handing out the orange second preference cards without saying on whose behalf it was being distributed was widespread. I am also satisfied that in some instances it was handed out by ALP booth workers not wearing any indication of their party affiliation, even though the ALP

how to vote card was being handed out by people who were wearing clear identification as ALP supporters. I am also satisfied that sometimes the same person handed out the how to vote card while clearly identified as an ALP worker and either at an earlier or later time handed out the orange card while not so identified. An explanation was given that this was because there was insufficient clothing with ALP identification on it to go round and people changed clothing when it became available or when a shift ended. Since this was not challenged, I say no more about it. There was evidence that throughout the day ALP workers not identified as such associated with those who were identifiable. It was argued that their identity would therefore be apparent. I have no difficulty in accepting that this was the case where people observed events over an extended period, but think that it is unlikely in the case of people who were only on their way to vote and who were "running the gauntlet" of persons handing out cards. There is also evidence of instances where, when booth workers were handing out ALP how to vote cards only, the fact that it was an ALP card was made known expressly to the person to whom it was delivered but that no such information was given by the same person when only the orange card was handed out.

151 It is a compelling conclusion that the purpose of the exercise on the part of those who were involved in such conduct - and there is evidence that not all booth workers did so - was to conceal as far as possible from those who for some reason were not sufficiently observant that the orange card was an ALP card. Allied to this, I am satisfied that Exhibit 1 was cleverly designed so that the words "One Nation" were particularly conspicuous at first glance even though there were other words on the card which should have alerted anyone who was sufficiently observant or sufficiently interested to read it that it was not a "One Nation" card. In conformity with s. 161 of the Act, the card bore the name and address of the ALP official who was its author in small print on the bottom of the card, as well as the letters ALP. I note in passing that a Liberal

second preference card contains the name and address of the author in even smaller print, if the photocopy of it tendered in evidence is life size, without any reference to his party affiliation. However, the Liberal card was unlikely to confuse the unobservant as to its origin since the one card was addressed to intending voters of three parties, not only "One Nation" voters.

152 The merits and deficiencies of particular systems of voting must be decided in the political arena and for that reason it serves no purpose for the arguments for and against them to be revisited by me. However, irrespective of that, it is undesirable that the outcome of any election be subject to controversy because of allegations that it has been affected by those who for some reason are unobservant having been confused into allocating a preference at all or in a particular way. It would be unduly optimistic to think that such claims could be entirely eliminated. It is also important that legitimate advocacy or persuasion in favour of a particular way of allocating a preference, which is presumably what the E.A.R.C. Report was concerned with in para. 16.25, should not be stifled. However, if the assumption was that the method used to obtain second preferences would be intellectual persuasion during the campaign it overlooked what might happen in the real world as Jull v Swan, Malone v Bird and the present case show.

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.

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 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.

Costs:

156 I will give the parties the opportunity to make submissions as to costs in light of consideration of these reasons. Such submissions should, in the first instance, be in writing and be served on the other parties and delivered to my Associate no later than 4 p.m. on Friday 25 September, 1998. Any reply should be similarly distributed

no later than 4 p.m. on Tuesday 29 September 1998. If a party does not provide submissions by the specified time, I will assume that it is not intended to do so. The need to hear oral submissions will be determined once the submissions in writing have been received.

157 For the assistance of the parties, I will indicate that, in the case of the petitioner and the second respondent, I will need to be persuaded that I should not make an order that each party bear his own costs. The reasons for this are twofold. One is that, although the petition was ultimately unsuccessful, conduct of the kind which led to the petition being brought was proved at some booths. The other is that the proceedings were prolonged by a day by the unsuccessful application to strike out the petition. However, I do not have a closed mind on the subject if one or other of those parties wishes to submit otherwise.

158 The Electoral Commission was a statutory party only once the petition was amended at the directions hearing, and its position needs separate consideration should it apply for costs.

Formal Orders:

159 I order that the petition be dismissed. I reserve the question of costs.