

CORRECTED EVIDENCE

ELECTORAL MATTERS COMMITTEE

Inquiry into whether the Electoral Act 2002 should be amended to make better provision for misleading or deceptive electoral content

Melbourne — 18 August 2009

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Mr S. Newnham, state secretary, Australian Labor Party, Victorian branch.

The CHAIR — Welcome to the public hearings of the Electoral Matters Committee inquiry into whether the provisions of the Electoral Act 2002 should be amended to make better provision for misleading and deceptive electoral content. All evidence taken at the hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Parliamentary Committees Act 2003, the Defamation Act 2005 and, where applicable, the provisions of the reciprocal legislation in other Australian states and territories. I wish to advise witnesses that any comments they make outside the hearing may not be afforded such privilege. Mr Newnham, have you received a pamphlet?

Mr NEWNHAM — Yes.

The CHAIR — For the benefit of the Hansard record could you state your full name and business address?

Mr NEWNHAM — Stephen Newnham, 360 King Street, West Melbourne.

The CHAIR — Are you attending in a private capacity or representing an organisation?

Mr NEWNHAM — I am representing an organisation.

The CHAIR — What position do you hold in that organisation?

Mr NEWNHAM — State secretary of the Australian Labor Party, Victorian branch.

The CHAIR — Mr Newnham, you may now give verbal evidence and we will ask you questions at the end of your presentation.

Mr NEWNHAM — Chair, I thank you and the committee for the opportunity to speak today. This inquiry was instigated in the upper house initially as a stunt — an attempt, as the member for Eastern Victoria Region described earlier in the hearings today, at humiliation and embarrassment. In our view the law on this issue is clear. The law as enunciated by the High Court is very clear, and there is no need for change.

As has been indicated in the submissions by the commissioner earlier today, the law as it currently reads is very clear about the fact that any misleading provisions only relate to the casting of a vote. This is case law that came from the Crichton-Browne case; it was a case that dealt with the commonwealth Electoral Act, and the High Court determined — —

In relation to the casting of his vote it referred:

... to the act of recording or expressing —

the political judgement which the elector has made, rather than the formation of that judgement. In our view section 329 of the commonwealth Electoral Act reflects section 84 of the Victorian Electoral Act 2002, and there is therefore no need to change law. That is our position in summary.

The CHAIR — Thank you, Mr Newnham.

Mr O'BRIEN — Mr Newnham, you have heard evidence, I take it, that the electoral commission concluded that the pamphlet in question, which was authorised by you — that a vote for Les Twentyman is a vote for the Liberals — was misleading. You are obviously familiar with the background to this inquiry and the concerns that the Parliament has expressed about the misleading of voters. Do you believe that this leaflet reflects well on you and the party you serve?

Mr NEWNHAM — As I said earlier, I would run this strategy again if the by-election was being held tomorrow. In our view there was clearly an arrangement between the Liberal Party and Les Twentyman. They preferenced him no. 2 on their how-to-vote card. It was an ultrasafe Labor seat. There is no question they knew there was no chance they could win the seat themselves, so quite understandably and quite reasonably they sought to get him elected.

This is not a new strategy by a political party. Labor has not been averse in the past to encourage Independents to run in other safe conservative seats. The Liberals have not been averse to supporting Phil Cleary when he succeeded in defeating a Labor candidate for Wills in a by-election in the 1990s. In our view it is the truth, and I would run the same strategy again.

Mr O'BRIEN — Thank you, but you did not actually answer my question. Do you believe the leaflet reflects well on you and the party you serve?

Mr NEWNHAM — I think it is a legitimate political strategy, and I stand by it 110 per cent.

Mr O'BRIEN — Do you believe it reflects well on you and the party you serve?

Mr NEWNHAM — If I did not, I would not run it, would I?

Mr O'BRIEN — So you believe it does?

Mr NEWNHAM — I think it is a legitimate political strategy.

Mr O'BRIEN — You believe it reflects well on you and the party you serve?

Mr NEWNHAM — I think it is a legitimate part of political debate — —

Mr O'BRIEN — I am wondering why you will not answer the question, and whether you think it reflects well on you and the party you serve.

Mr NEWNHAM — — which both parties have run at different times. As has been pointed out in the upper house debate when this inquiry was established, the National Party have run out this same argument against Craig Ingram in Gippsland East, so there is nothing new or particularly different about this approach. In our view it is a statement of the truth, and I am quite relaxed about that.

Mr O'BRIEN — You said you would run the same strategy again. I refer you to an article in the *Age* dated 30 July this year 'Brumby promises fair election fight'. It says:

In an interview to mark his second anniversary as Premier, Mr Brumby indicated he would not accept a repeat of Kororoit at the state election.

He said day-to-day campaign tactics were 'not decisions that I take, they are matters for the campaign director ...

'But I think the campaign team and the state secretary in the future will need to be cognisant and will need to take into account any of the views that have been expressed by the electoral commissioner'.

Given the electoral commissioner has criticised your leaflet as being misleading, and given the Premier has expressed concerns about it, are you at odds with the Premier in saying you would run this same strategy again?

Mr NEWNHAM — I do not think the Premier and I are at odds. I think if you have got any queries about that, you should ask him.

Mr O'BRIEN — I am asking you, Mr Newnham. You said you would run the same strategy again. I have referred you to criticisms made by the electoral commissioner as to the misleading nature of this leaflet and quotes from your own Premier, that you should be cognisant of the criticisms of the electoral commissioner. Are you saying that, despite those criticisms, you would run the same strategy again?

Mr NEWNHAM — Absolutely, Michael. The answer is because it is the truth.

Mr O'BRIEN — Mr Newnham, I refer you to the submission of the VEC. They expressed some concern, as I said, about the misleading nature of these matters. They refer to your infamous leaflet and they say:

Such statements, that a vote for one candidate or party is a vote for someone else, are effectively exploiting community misunderstanding of how preferential voting works.

In the same paragraph they say:

Misunderstandings are likely to be especially prevalent in electorates with concentrations of voters who are not proficient in English.

I refer you to the electoral commission/census statistics for Kororoit: persons born overseas in non-English speaking background countries, 40.9 per cent, which is sixth out of 88; persons who speak a language other than

English at home, 53.1 per cent, which is fifth out of 88; persons not fluent in English, 10.1 per cent, which is sixth out of 88.

Mr Newnham, is it not true to say that, given what the electoral commissioner has said about 'Misunderstandings are likely to be especially prevalent in electorates with concentrations of voters who are not proficient in English', is not your tactic actually exploiting those non-English speaking people who are highly prevalent in Kororoit and deliberately trying to mislead them?

Mr NEWNHAM — No, because your starting position is that this is a misleading leaflet. Our starting position is a statement of fact and, as a result, in our view we are communicating via that leaflet an absolute statement of fact and informing voters before they go to the ballot box.

Mr O'BRIEN — Mr Newnham, as state secretary you issue or you authorise how-to-vote cards with the intention, I presume, that Labor supporters will take the how-to-vote card and follow it. Is that correct?

Mr NEWNHAM — Yes.

Mr O'BRIEN — And the intention therefore is that your supporters will cast a vote in a way set out on the how-to-vote card. Is that right?

Mr NEWNHAM — We provide them with an advice about how they might want to vote; yes.

Mr O'BRIEN — And your intention is that, by giving them that, you are hopefully influencing them to vote that way?

Mr NEWNHAM — Yes, but when we make judgements about — —

Mr O'BRIEN — So — —

Mr NEWNHAM — No, I have not finished. When we make judgements about how we order our preferences there are a multiplicity of factors. For example, in Mr Twentyman's case a significant part of his support base — we assessed — were going to be Labor supporters, therefore we made a judgement that we had to be seen to be preferencing him as no. 2. That did not take away from the fact that we saw him ultimately in that by-election as our primary political opponent. It did not change that fact, and we dealt with him accordingly.

Mr O'BRIEN — The fact is that anyone who cast a vote for Les Twentyman following Mr Twentyman's registered how-to-vote card would have preferenced your party higher than the Liberals?

Mr NEWNHAM — Les Twentyman put out a number of how-to-vote cards. Before he lodged that registered one he put out two — —

Mr O'BRIEN — I am asking about the registered how-to-vote card, Mr Newnham.

Mr NEWNHAM — I have not finished.

Mr O'BRIEN — I am asking you about the revelation — —

Mr NEWNHAM — Yes, I will answer that — —

Mr O'BRIEN — The question I asked rather than the one you would like me to have asked.

Mr NEWNHAM — No, no. You asked me about how-to-vote cards.

Mr O'BRIEN — I asked you about the registered how-to-vote cards, Mr Newnham.

Mr NEWNHAM — He put out three different how-to-vote cards. The first two were an open ticket, which did not indicate a preference at all. It just says 'Vote 1 Les Twentyman'. The last one was the registered how-to-vote card, which preferenced as you indicated. As I said, in our view he was our primary political opponent, and throughout this entire by-election we were simply informing voters of the facts.

Mr O'BRIEN — Mr Newnham, given that the Liberal Party stood an endorsed candidate in Kororoit and running against Mr Twentyman and the Labor candidate, and given that Mr Twentyman's registered how-to-vote card, which is the only one that can be given out on election day, preferenced the Labor Party ahead of the Liberal Party, on what planet does a vote for Les Twentyman mean a vote for the Liberals?

Mr NEWNHAM — Because your political objective was to get Les Twentyman elected, quite understandably and quite reasonably. As a result we took a view that there was an arrangement between your political party and Les Twentyman, and we were going to inform the electors of Kororoit about that arrangement, and that is precisely what we did.

Mr O'BRIEN — Mr Newnham, a last — —

The CHAIR — One more, then we will move on and come back.

Mr O'BRIEN — Thank you, Chair, I appreciate your forbearance. Given what the electoral commissioner has said about community misunderstandings, and particularly vulnerable communities with high proportions of non-English-speaking backgrounds, do you not feel that this tactic is something which, whether you intended it or not, has misled voters and therefore is something that should be abhorred and for which you should apologise?

Mr NEWNHAM — As I said earlier, Michael, in our view we have told people the truth about an arrangement we believe exists between your party and Les Twentyman, and we were informing the electors of Kororoit about that arrangement.

Ms BROAD — Thank you, Mr Newnham, for your evidence today. In the debate which took place in the upper house surrounding the reference from the upper house to this committee I expressed the view that the Labor party had no difficulty at all with this reference. I drew attention to the circumstances surrounding not only the Kororoit by-election but also a whole range of elections and activities by a range of political parties and candidates and statements made in relation to votes for Independents and votes for political parties, which I think included pretty much every party represented in the Victorian Parliament at one time or another as having made statements which may be contested in the cut and thrust of political debate.

Given that you have asserted previously and again today your views about the veracity of the statements that were made about arrangements between the Liberal Party and Mr Twentyman in the Kororoit by-election, clearly one of the matters for this committee to consider in considering the arguments that have been put forward in some submissions to changes to the electoral laws or administrative arrangements surrounding Victoria's electoral laws about the content of political advertising is one that necessarily arises if you go down that road — that is, how do you make judgements about the veracity or otherwise of these sorts of statements?

I think it is fair to say that earlier today the electoral commissioner took a very legalistic view about how you might make those judgements in relation to any referenced preferences or preferencing. Certainly I think there is a wealth of experience to indicate that wider views can be taken about such political statements.

You have put a position today that you do not think there is a case for the law being changed. Can you indicate from the Labor Party's standpoint what you think might happen if alternative approaches were to be employed and how those judgements might be made based on your observations of other jurisdictions or experience in other instances?

Mr NEWNHAM — Sure. As you saw today the commissioner has no appetite for being the judge and adjudicator of these disputes; none at all. In our experience as well that is certainly the case. So there are two options: either the court is the ultimate determinant on these matters or the commissioner is. Given we have a commissioner who really does not want to, and, as Brian Costar outlined earlier, in South Australia there is quite a good argument as to why you may not want the electoral commissioner to be the sole determinant and sole arbiter on these sorts of issues, it then comes back to the fact that the only other option is the courts. The question then is, 'How do you make these matters an offence? How do you make them something which the courts can deal with?'

I think there are issues about criminalising political debate and criminalising public debate and sending that into the courts. They are things which I think people have to weigh very, very carefully because there are all sorts of

implications in going down that path. My layman's view — and I am not a lawyer — is that if you are going to regulate this kind of thing, then it probably is going to require some kind of court-sanctioned action at some point or a change in the law which enables the courts to act. That is the only way I can see it happening. The only other real option for public debate, as I understand, are the laws regarding defamation which can be utilised. Aside from that, I think it is something the committee would have to weigh very carefully.

In reality, given we have a commissioner who really does not want to be the arbiter and there is a good argument as to why you do not want the commissioner to be playing that role, the courts are the only other option. The question then is: what laws do you seek to change to give the courts that power?

Mr DAVIS — Mr Newnham, the evidence of the previous two witnesses — and certainly the commissioner's view was endorsed by the Premier — leads to a view that the pamphlet under discussion was clearly misleading and deliberately misleading and, as Professor Costar said, it is not known whether there was actually a consequence to it but it was clearly misleading, and given that you have said in evidence that you believe it is a legitimate political strategy and you would do it again tomorrow, is there perhaps a question in your mind that you can answer for the committee about your competence to make a judgement about honesty?

Mr NEWNHAM — As I said to the member for Malvern earlier, our view is that this material was an absolute statement of truth, and we were informing the electors of Kororoit about that arrangement. Other people can have a different view. Essentially other people have different opinions about this issue. The law as it currently stands is very clear, and according to the law there is no breach unless it relates to the casting of a vote. It is very straight up and down. So the law says one thing, and people over here have their opinions, which is fine, they are entitled to their views.

In answer to your question, in my view we have told the absolute truth about an arrangement that exists. That is our view. Other people can have a different view, and that is fine. That is our view.

Mr DAVIS — Can I ask you what evidence you have for your view?

Mr NEWNHAM — Evidence that — —

Mr DAVIS — Given that the commissioner has said your view does not exist on the basis of fact. The fact is that there was a different sequence.

Mr NEWNHAM — The commissioner has expressed a view. The commissioner has put a view about a range of things today, and it is an opinion. That is all it is — an opinion. He is entitled to his view.

My view and our view on this issue is very clear — that is, there was an arrangement between Les Twentyman and the Liberal Party. The evidence of that arrangement is the fact the Liberal Party preferenced him no. 2 on their how-to-vote card. He was clearly their real option to get elected. The political reality of the seat was that the primary vote for the Liberal Party was not going to get much above 22 or 23 per cent; there was no way they could win. So quite reasonably they thought, 'Who can we preference who might give Labor a fright or potentially get elected?' and that is what happened.

In our view we were telling the electors of Kororoit the truth about what the arrangement was in Kororoit.

Mr DAVIS — Given that the Liberal and Labor parties had Mr Twentyman at the same place on their respective tickets and given, I assume, you are alleging there was some arrangement with the Liberal Party, what was the arrangement between the ALP and Mr Twentyman?

Mr NEWNHAM — As I outlined earlier, we made a political judgement about how we would issue our preferences, and I explained that. The judgement was simple and that was that most of his support base were Labor voters. In order to appeal to them in the event of him coming in no. 3, we thought we would preference him as no. 2 on our how-to-vote card. That was our rationale, that was our thinking.

The political reality of your vote in Kororoit was very simple — and that is a primary vote of 22 or 23 per cent. There was no way you could win, so you thought, 'Okay. Who can we get elected given we can't win?'. So you preferenced Les Twentyman. Quite reasonably your objective was to get him elected. There is nothing wrong with that approach. As I said to you earlier, your party has applied that approach before in the Wills by-election.

Our party has applied that approach in other state and federal elections — state elections in particular in this state.

Mr DAVIS — So the only evidence you have that there was any arrangement between the Liberal Party and Mr Twentyman was the fact that the Liberal Party did exactly what you did and put him no. 2 on the how-to-vote card? That is the only evidence you have?

Mr NEWNHAM — No, we have some other evidence as well but that is our view. So we were simply communicating that — —

Mr DAVIS — So on that basis, having no evidence, you decided to mislead the electors?

Mr NEWNHAM — No, we had a view and we communicated that view to the electors of Kororoit. It is as simple as that. Other people are entitled to have a different view, that is fine. This is our view.

Mr DAVIS — So in summary your position is that, irrespective of the law, you will say anything to achieve your purpose, to achieve a successful political outcome?

Mr NEWNHAM — Not at all. As I said earlier, and as you yourself said earlier, this inquiry was instigated in the upper house as a stunt, and to quote — —

Mr DAVIS — I did not say that!

Mr NEWNHAM — Hear me out.

Mr DAVIS — Do not verbal me.

Mr NEWNHAM — Hear me out.

Mr DAVIS — I did not say that.

Mr NEWNHAM — Hear me out.

Mr DAVIS — You said that; I did not say it.

Mr NEWNHAM — Hear me out. As you said earlier today, and I quote, ‘In an attempt of humiliation and embarrassment’ — your words in this inquiry earlier today — your words, not mine. In our view we told the electors of Kororoit the truth about what we believed was the arrangement in that by-election between the Liberal Party and Les Twentyman. We would do the same thing again if we thought a similar arrangement existed between an Independent and the Liberal Party — or the National Party for that matter, or the Greens. And that is our view.

Mr DAVIS — So your view is that dignity and respect in politics do not count for anything?

Mr NEWNHAM — Our view is we told the truth in Kororoit, and we would tell the truth again. That is our view.

Mr DAVIS — Your words condemn you.

Mr O’BRIEN — I will just take you back to the discussions about the Premier’s view about this matter. He has obviously been questioned about it. He has indicated quite clearly that there is a need for the state secretary in the future to be cognisant and to take into account the views that have been expressed by the electoral commissioner. Given that your leaflet has been criticised by the electoral commissioner, why do you say you would do exactly the same thing tomorrow?

Mr NEWNHAM — The commissioner has expressed a view; he is entitled to that view.

Mr O’BRIEN — And the Premier has said that you should be cognisant of the views expressed by the commissioner.

Mr NEWNHAM — Absolutely.

Mr O'BRIEN — Why do you say you would not take into account those stinging criticisms, that you have misled the electorate?

Mr NEWNHAM — The commissioner has a view; he is entitled to his view. We think his view is wrong. It is very simple.

Mr O'BRIEN — So do you believe that the Premier was telling you to ignore the electoral commissioner's criticisms?

Mr NEWNHAM — Every time there is a report into a by-election or a general election you take into account what the commissioner says and you make a judgement about how you are going to deal with it accordingly.

Mr O'BRIEN — Do you think perhaps when the Premier says:

... I think the campaign team and the state secretary in the future will need to be cognisant —
of these matters, he is suggesting that that might not be a problem for you?

Mr NEWNHAM — I do not see how that is relevant to this inquiry.

The CHAIR — Thank you, Mr Newnham, for your time. You will receive a copy of the transcript within 14 days. You are entitled to correct any errors but not matters of substance.

Witness withdrew.