

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

Members

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Witness

Ms A. Birrell, co-convenor, Port Phillip Greens

The CHAIR — The Electoral Matters Committee welcomes Ann Birrell, the co-convenor of the Port Phillip Greens. All evidence taken at this 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 reciprocal legislation in other Australian states and territories. I also wish to advise you that any comments you make outside the hearing may not be afforded such privilege. I take it you have received a copy of the guide to giving evidence?

Ms BIRRELL — Yes.

The CHAIR — For the benefit of Hansard can you please state your full name and address?

Ms BIRRELL — Ann Christina Birrell, 94 Page Street, Albert Park.

The CHAIR — Are you attending today in your private capacity or are you representing an organisation?

Ms BIRRELL — I am representing the Port Phillip Greens.

The CHAIR — What is your position in the organisation?

Ms BIRRELL — I am a co-convenor.

The CHAIR — The evidence you provide today will be taken down and become public evidence in due course. I invite you to make a verbal submission.

Ms BIRRELL — Thanks for the opportunity to speak and for all your work on this important issue. We welcome this inquiry and hope some good will come of it. Our experience in Port Phillip is probably less spectacular and less politically interesting than the Twentyman case or the Lindsay case, but perhaps it is useful in that it highlights a particular class of cases and quite serious cases, which I think would be down the offence end of the spectrum that Michael Pearce talked about. This is a class of case involving a how-to-vote card, which is right at the last moment of the election. It is also a case which involves the identity of a person, which I think actually might fall into that class of cases referred to in the High Court, the class of cases that might be misleading and deceptive in the casting of the vote. It is actually quite an interesting case from that point of view, even though it is local government and ordinary folk.

What happened was a rival candidate — I assume you have read my submission — printed a how-to-vote card in a triangular shape, and it is green. I have got photocopies of the cards in my submission, but I have brought along a few of the originals for you to have a look at; I have not got many. One is a bundle of the sorts of documents the voter might have received, and that is the card by itself. I will hand them over for you to have a look.

When we saw the card we thought it was misleading. I did not see it until election night. We thought voters would be misled, and that was really confirmed by our experience on voting day. I would just like to read a few sentences — things that people said to me about voting day.

One is from a Greens member — ‘I walked into the polling booth, and I said, “I am looking for the Greens sign”. Sean — that is the rival candidate — said, “Here you go” and handed me his how-to-vote card. I looked at it, and I was a bit confused. I wondered why Dinesh’s picture was not on it. I said, “Is this the Greens one?”, and he did say no. I said, “What if I had just picked it up?”. There were people ahead of me who had been given the card, and he seemed more than happy to let me think it was the Greens card until I actually asked him’. That is a Greens member who knew the candidate and was nearly confused and could have been left to be confused.

Another Greens campaign worker said, ‘People would go past, a significant number, maybe a third, and not go to grab one of the Greens cards. I would go up to them and catch them and say, “Here is the Greens card”, and their body language and what they said indicated they thought they already had the cards’.

Serge Thomann, who is one of the rival candidates for unChain St Kilda, another community group, said, ‘A lot of people were coming up to me and complaining that it was misleading too’.

Dinesh, our candidate, said, ‘A lot of people were coming through, and I would say “I am the Greens candidate and this is the Greens card”, and they would stop and they would look at the bundle and at me, and they were

confused; it was quite noticeable. I vividly remember there was one woman who was quite disgusted. She came up and she said to Sean's volunteer, "Why are we handing this out? You are obviously not the Greens, but you said this was their triangle". I think she threw it on the ground to their feet and left. There were people who said to me, "I've already got it", and when she followed them and explained they replied, "Oh really? Oh God. It is so typical. Lucky you explained it to me". There were also a couple of people handing out for Serge, who were annoyed and helped us to explain to people who is in which group'.

We are not so interested in the facts of this particular case, but we want to explain how we tried to stop this, there was nothing we could do and that this is a serious issue. We wrote to the VEC. We asked them to take action. We asked them to investigate it and perhaps take action. They wrote back and explained they would not because they did not think it was misleading and that we had an opportunity to object. On the opportunity to object, we looked at it, but the provisions of the Act also need fine-tuning. A candidate can have as little as 24 hours, or 8 working hours, to object. That is not really a reasonable opportunity to consider taking legal action.

There are lots of little things we felt that the VEC could do to make it easier to object, but I think we would support what Liberty said and what a number of the witnesses have said — there is not really a realistic and reasonable opportunity to object in the heat of the campaign when these things are handed out right at the last moment.

I would just finally like to say that the commissioner expressed concern about cases involving preferences. I know you are all interested in that. Looking at that whole spectrum of what should be offences and what are not and where you should draw the line, we think this is quite an interesting case because what it does is involve the Greens supporter, or somebody who may have made their mind up already to cast a vote; it does not involve questions of policy, it does not involve questions of assessing one candidate's worth over another. You have people coming to polling day with an intention to vote for a particular party, and they are told to vote for a rival candidate who actually belongs to another party. This is another variation on the facts. The High Court said that a statement — that a person who wished to support a particular party could vote for a particular candidate when that candidate in fact belonged to a rival party might mislead. We thought it was quite an interesting case in that it could broaden that class of cases and may not have floundered on that casting of the vote requirement.

Just to wind up, we support the amendment to the Act. Bob Brown has made a submission on the 2007 federal election to that effect. I do not think there is any silver bullet here. You are probably going to have to do a number of things to get the best imperfect system. That might be an amendment to the Act, enforcing the provisions, a more active role by the commissioner because he seems to have lost confidence in the legislation and fine-tuning to give greater time to object and other issues that I have mentioned, minor matters that I have mentioned in my submission.

Mr DAVIS — I am just trying to understand your point in particular about the material you have provided to us just so I am absolutely clear. Your objection here is the fact that a candidate who is actually campaigning on reclaiming the triangle has used a triangle as part of their material and that it happens to be coloured green? Is that the issue?

Ms BIRRELL — He actually was not the unChain St Kilda candidate either; they were upset about that, too.

Mr DAVIS — I understand that.

Ms BIRRELL — If you look at the trade practices cases, and 'misleading and deceptive' — it is quite a subtle thing. There is no clearly in and clearly out; it is the overall impression. We have triangles on display outside polling booths. We have triangles on all our literature. That green is a distinctive green.

Mr DAVIS — I do not want to sound argumentative, but are you suggesting that the Greens own the triangle — —

The CHAIR — And green.

Mr DAVIS — And green? Sorry, I am just not quite understanding your point.

Ms BIRRELL — I suppose the Liberals used to have that navy blue colour and certain sorts of symbols; it is an overall impression that you give. Merely a triangle may not have amounted to much, but the fact of that colour green and the fact of the triangle as well — I think if that were a packet of pasta, it would be a passing off case, or it would be in the Federal Court. Courts well understand how to make those sorts of decisions. I do not think it is so much a problem of its being misleading and deceptive, it is whether it is significant; all the sorts of things that everyone has been talking about.

The CHAIR — Is that a single member ward?

Ms BIRRELL — Yes.

The CHAIR — And which candidate won ultimately?

Ms BIRRELL — Serge, the unChain St Kilda candidate.

The CHAIR — So not a Greens candidate? The Greens candidate did not win? Or this chap did not win?

Ms BIRRELL — No.

The CHAIR — Was he a dummy or was he was preferencing — the person that he was preferencing to; did that person win. Who was he preferencing? What you are saying is he was in the race just to split the Greens vote and preference to Serge?

Ms BIRRELL — I am not sure it is that Machiavellian down there.

The CHAIR — Because if the Greens are getting a quota, it is silly.

Ms BIRRELL — We are actually really interested in the general issue of misleading. We did not take action against Sean, and we have not personalised it. This is an example where a significant number of the community were misled. I think law-abiding candidates were treated unfairly, and the electoral process was discredited. A lot of people in the community thought it was really shocking.

The community looks at people like you to solve these issues — you and the judiciary — to come up with the best imperfect solution. I thought this was quite a good example of what goes on. Maybe it is in that class of cases, because it is a sort of identity issue. It is a slightly different one from some of the others.

The CHAIR — Can I just say, when I first saw this I thought it was outrageous. I thought this was a Greens party how-to-vote card, and this guy had ripped it off. Looking at it, there is a genuine issue there, is there not? The green triangle is a big issue, as it does have to be a triangle. It is interesting. It just goes to show how these things are not black and white.

Mr SCOTT — In terms of the issue raised around the time that was available to dispute how-to-vote cards, under the Local Government Act, I take it, you are referring to this case that there was only potentially one day from when the last how-to-vote cards could be registered to when a dispute could be lodged. Is my interpretation — —

The CHAIR — Can I just say in this particular instance there were about eight days, were there not?

Ms BIRRELL — We have a bit of confusion about that. I do not think it is necessary for me to sort that out, because we are not bringing the action. There was a bit of an issue about when it was perhaps registered and when it was publicly recorded as registered. The problem is that under the provisions of the Act, and I have got it here — —

The CHAIR — You have to display them, though.

Ms BIRRELL — I beg your pardon?

The CHAIR — As soon as they are registered you have to display the how-to-vote cards.

Ms BIRRELL — No, I think they are listed on the website, as to who has lodged them.

The CHAIR — And there is also a displayed copy at the counter.

Ms BIRRELL — Yes, so what I suppose you do is check out what is on the website and then you go down and have a look. The Act actually says that two days or 24 hours after the returning officer has received it, he has to make a decision. But there is also this subsection that says this all has to be done the Tuesday before an election. If a candidate lodges late, as they often do, you can be left with only eight working hours to decide what to do. We have suggested that should be lengthened. It is really more a minor issue. I can dig out a copy of the Act, if you want to have a look at it. I think that is right, though.

Mr SCOTT — Further, your contention in this case is that the nature of the how-to-vote card is such that it led to confusion of voters. Are you alleging that that was done deliberately or as an act of omission or commission?

Ms BIRRELL — I do not know.

Mr O'BRIEN — I am sort of familiar with the trademark case where Cadbury has tried to trademark the colour purple and stop rivals from using that colour in any of their packaging. Noticeably Darrell Lea is the other party to this action. So far I think it has gone as far as the High Court. The battle continues, but it seems to have been lost at every point along the way. It does seem that what may be argued for, if I am reading your submissions correctly, is that essentially the Greens had some sort of right to trademark the colour green and the shape of a triangle.

I suppose I would like your response to my observation that the Liberal Party has put up with 'liberals for forests' being registered as a party, particularly in Western Australia, which arguably cost us the state election when they took Liberal seats. The Liberal Democratic Party has also been registered. Labor has had to put up with the Democratic Labor Party.

There are a lot of parties that try to appropriate, whether it is words, colours or symbols. Certainly every time it has been challenged by the Liberal Party and the Labor Party the answer has been that that is part of the cut and thrust of politics. You do not own a name; you do not own a colour. I am just trying to think: if you wanted to try to regulate this, how would you do it in a fair way that does not give established parties — and I would call the Greens an established party, as I would Labor, Liberals and The Nationals — essentially a monopoly over methods of political communication that might stop your party from getting elected?

Ms BIRRELL — We have not gone down the path of the trademark issue. I am not sure why, but I assume it is probably the sort of reason of rigidity, that this is an area which is best left to courts to look at the more general thing about misleading and deceptive conduct. When it amounts to significantly serious amount of deception, then action should be taken. I would not like to see all the big parties registering all the different colours and shapes and names.

Mr O'BRIEN — No?

Ms BIRRELL — I would not like to see that either, because there are probably ways to mislead and deceive people there, too. I tend to think that there is no silver bullet here. You are going to have to do a bit of this and a bit of that, and there may be a role for tightening the legislation and a greater role for more test cases to perhaps indicate to the community where the lines are.

Mr O'BRIEN — You mentioned 'passing off' before. From my brief experience of intellectual property law, you have to establish a reputation in the market before you can establish 'passing off', and you have to establish that the reasonable person would be confused by what they see.

If you will excuse a very quick anecdote, back in 1992 at the time the Liberal Party was running a big campaign against Labor in the state election and branding them as the 'guilty party', I was there at a polling booth on election day wearing a 'Guilty party' T-shirt, handing out Liberal Party how-to-votes. I remember somebody coming back to me, 'I don't want this. I thought you were Labor, because you have "Guilty party" on your shirt'.

There can be no accounting for taste, I suppose, is the point I am trying to make. You are always going to find someone who will be confused, because a lot of people do not take an interest in politics. They are dragged to

the ballot box because they want to avoid a fine, and they may not pay a lot of attention. I suppose the question is: how can we as a committee come up with something which pitches to the average reasonable voter without being so prescriptive that it stifles genuine, free debate. I will be interested in your views.

Ms BIRRELL — It is the fact that the Chair said he thought it was outrageous. Some of the experienced Greens voters were nearly confused. What we thought when we looked at it suggested to us that this is in a class of cases where there is not just two or three people or a small number misled.

Mr O'BRIEN — I do not mean to interrupt, but can I just ask: is it the combination of the green and the triangle that was, in your view, too much? If it was just a triangle leaflet, would that have been okay? Or if it was rectangular but not green, would that have been okay? Was it the combination, or would you object to either a triangle or the colour green being used?

Ms BIRRELL — I suppose different voters may have been misled by different aspects of it. I think it was the green colour. I thought the triangle was unfair too.

The CHAIR — Surely it was both?

Ms BIRRELL — Yes, it was probably both.

The CHAIR — The mitigating circumstance surely is that the green triangle is a real issue; a genuine issue?

Ms BIRRELL — It is clever but a little bit tricky. And this type of stuff is demoralising for everyone.

The CHAIR — Just out of interest, what did this person and the Greens get, combined. If you combined those votes, would the Greens have won that particular ward?

Ms BIRRELL — I do not know. We did very well, though.

Ms BROAD — I would certainly accept that the matter of where you draw the boundaries in terms of what goes to protecting identity is a particularly complex one particularly in circumstances where candidates and parties will sometimes go to great lengths to push out those boundaries. Going back to an election that was mentioned a moment ago, the question of having a candidate challenging a sitting member who has the same name, D. White, in order to arguably cause electors some confusion as to the identity of who they were voting for. That certainly is not the first, and I am sure it will not be the last time that something like that has happened.

So seeking to regulate these matters is particularly challenging. I am interested to ask why, beyond the issues around the provisions in the legislation about how-to-vote cards, there was a decision not to take up or seek an inquiry under the Local Government Act through, for example, a municipal electoral tribunal to look at these particular circumstances?

The letter which is included in your submission seems to specifically rule that out by saying this is not an application for an inquiry under, in this case, the Local Government Act. So you have restricted yourself to only pursuing provisions that relate to how-to-vote cards rather than an overall inquiry into an election, what went on and all of the factors that could be taken into account. As far as my recollections of those positions under the act go, there is certainly more time given to putting forward a case for such an inquiry. They sometimes proceed over a very long period of time. Do you recall why that was ruled out?

Ms BIRRELL — I think a lot of reasons from a lot of different people. I think we may make a different decision next time. I am not sure; we will see.

Ms BROAD — So would you agree then that there were possibly other avenues that could have been pursued but were not for a range of reasons?

Ms BIRRELL — Yes. But I probably would wonder about the wording that Michael Pearce used — ‘whether the opportunities were reasonable and meaningful’.

The CHAIR — Thank you very much for your time. The transcript will be available in about 14 days time.

Witness withdrew.