

Our reference Michael Bradley 12614
Phone +61 2 8216 3006
Email michaelb@marquelawyers.com.au, kierap@marquelawyers.com.au

20 May 2019

Nathan Doria
Divisional Returning Officer – Kooyong
Camberwell Area Office | VIC Divisional Offices
Australian Electoral Commission

By email: Nathan.doria@aec.gov.au
cc: Maree Fasoli Maree.Fasoli@aec.gov.au, Julie Costello <Julie.Costello@aec.gov.au>

Dear Mr Doria

Kooyong Liberal Party signage

1. We act for Oliver Yates, independent candidate for Kooyong.
2. As you know, on Saturday 18 May 2019, Mr Yates's office made a complaint to the Australian Electoral Commission (AEC) about the display of misleading corflutes at select polling booths in Kooyong (**Corflute**). Media reports indicate he was one of a number of complainants, and the affected polling booths spanned other electorates including Chisholm. A copy of one such Corflute is annexed and marked "A".
3. We understand that the English translation of the Chinese characters (printed in white) on the purple Corflute is:

"The correct voting method - Note down number 1 besides the Liberal party on the green ballot paper and then the number from small to large in the rest of the squares."

4. The AEC refused to take any action to remove the Corflutes. By email to Mr Yates on 18 May 2019 (**AEC Email**) the AEC said it would not take action because:
 - (a) it had no proprietary interest in the colour purple, and could not stop it being used;
 - (b) the prohibition on misleading or deceptive conduct in s 329 of the *Commonwealth Electoral Act 1918* (Cth) (**Act**) only concerns conduct which affects the process of casting a vote rather than the formation of the political judgment.

5. Each of those reasons was misguided, as explained below. The refusal has jeopardised the integrity of the votes cast at affected polling booths.

The Corflute would not mislead (or be likely to mislead) an elector

6. The AEC has unduly narrowed the application of s 329 of the Act in a way which is simply not available on its text, the High Court decision in *Evans v Crichton-Browne*¹, or the Federal Court decision in *Peebles v Honourable Tony Burke*² (cited in the AEC Email).
7. That current position in Australian law is as stated by the High Court in *Evans*, that the prohibition is concerned with material:

which are 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.

8. The design, content and locations of the Corflutes must breach this prohibition.
 - (a) First, they clearly intend (and are likely) to affect an elector. They were placed at the entrance to polling booths on the day of the election.
 - (b) Second, the Corflute is an emphatic direction on how to vote. The first line reads 'The correct way to vote' and the remainder instructs the elector as to how that vote should be made. The colour of the Corflute and absence of any party logos or branding make it appear to be an official AEC poster. There is no reference to the policies or campaign slogans of the Liberal party. Nor is there the slightest permissive language to indicate choice, ie. To vote Liberal, mark 1. The Corflutes are not directed to the formation of the judgment. This is the key distinction drawn by the High Court in *Evans*.
 - (c) The consequence of the Corflute appearing to be an AEC communication is that there is a very real risk the reader would think they are being told by the AEC that, to record a valid vote, they must vote 1 for Liberal. That risk is indisputable. When considering the likelihood of a person being misled or deceived, the Victorian Court of Appeal recently said the effect should be on "*any gullible or naïve elector, rather than a sophisticated voter who is informed about current affairs*"³. A person who is not familiar with Australian electoral processes may not be aware that the AEC would never direct the order of the vote. That person must be the benchmark for the assessment of likelihood of being affected.

¹ [1981] HCA 14

² [2010] FCA 838

³ *Rae v Victorian Electoral Commission* [2019] VSCA 13

- (d) It must then follow that this person may be affected when they seek to give effect to the judgment they had formed. If their judgment was anything other than marking "1" next to Liberal, then that person may fear that their vote will be invalid.
- (e) The assessment of likelihood of the Corflute being misleading or deceptive must be made in the actual (and full) context of its use. The fact that it was in Chinese language, and therefore clearly directed to a specific minority group of voters with a higher than average likelihood of having poor English language skills and a higher than average likelihood of having a poor understanding of the voting process, is highly relevant.
- (f) All of the contextual circumstances must be considered in combination, not independently. These include the use of Chinese language, directive tone, AEC colouring, lack of Liberal branding or referencing and physical placement of the Corflute.

Permitted use of the colour purple

- 9. The Corflutes bore a similar colour purple to the colour used by the AEC. The AEC advised that it has no proprietary interest in the colour purple and cannot restrain others from using it. That is relevant to any claim by the AEC for intellectual property infringement. It was not a relevant consideration to the complaint being made on election day, that the Corflute breached the Act.

Next steps

- 10. The AEC must revisit its decision that the Corflutes do not breach the Act. They clearly do, and the impact on the votes in Kooyong and other electorates, cannot be underestimated. Further, the failure to act risks giving the implicit approval of the AEC to candidates engaging in such conduct in the future.
- 11. To avoid an approach to the Court of Disputed Returns in relation to this matter, we request your urgent response.
- 12. In the meantime, it is requested that the outcome of the election in the Kooyong electorate not be declared.
- 13. If the Corflute is determined to be misleading and deceptive, we also seek confirmation from the AEC that the matter will be given the full force of the law and the public be fully informed of the breach.

Yours sincerely



Michael Bradley
Managing Partner

Annexure "A"

