AEC
Australian Electoral Commission

Minute

<u>The Meaning of 'Obscene' under the *Commonwealth Electoral Act 1918*</u>

Section 129(1)(b) of the *Commonwealth Electoral Act 1918* (the Electoral Act) states that an application by a political party applying for registration under the federal scheme will be refused by the Australian Electoral Commission (AEC) where the name or abbreviation of the party name is, in the AEC's opinion, 'obscene.'

The issue of whether an application for registration as a federal political party should be refused on the grounds of s.129(1)(b) has never previously arisen. Accordingly, the standard for what should be considered 'obscene' for the purposes of the political party registration provisions of the Electoral Act remains unclear.

The word 'obscene' can also be found within the Electoral Act in the provisions governing enrolment. Section 98A provides at paragraph (2)(a) that a Divisional Returning Officer (DRO) or an Australian Electoral Officer (AEO) may refuse to include in a Roll, or transfer to a Roll, a person's name if the DRO or AEO considers the name 'fictitious, frivolous, offensive or obscene.' While the 'fictitious' and 'frivolous' aspects of the provision have been widely considered before, the question of whether a name is 'obscene' and should be precluded from appearing on the electoral roll has never before been examined.

As will be demonstrated below, an assessment of the standard for 'obscenity' under electoral legislation involves obtaining a balance between the tendency to 'deprave and corrupt' the class of people that will be exposed to the material in question and public interest considerations such as free speech. Some guidance can be afforded by examination of case law considering the term 'obscene' and legislation, particularly at the state level, where in some cases a tentative definition has been attempted.

The Development of the Law in relation to the word 'Obscene'

A vast majority of the case law in relation to the word 'obscene' relates to publications and printed material released simply for commercial gain. Thus, while valuable guidance and direction can be derived from a detailed examination of these cases, a stark distinction in subject matter is clearly evident. As above, when assessing the term 'obscene' in the context of political party registration and the Electoral Act, broader considerations relevant only to that area – such as free speech and general public interest – must be taken into account. The significance of the case law analysed below is that it provides a starting point from which to consider the operation of the term under the Electoral Act.

Common Law

The old English case of *R v Hicklin* has had a significant influence on the way in which 'obscenity' is approached in Australian courts. The case was the first to define the term 'obscene' by reference to a 'tendency to deprave or corrupt.' This definition is now found in UK *Obscene Publications Act 1959.* Windeyer J stated in *Crowe v Graham* that the reason

Hicklin has played such a large role in Australian interpretations of the word 'obscene' is that there has been a significant misunderstanding in relation to its implications. Despite this, Windeyer J went on to state that the judgement could not be dismissed, due to the influence it had had up to the point at which *Crowe v Graham* was decided. The tendency to deprave or corrupt is not the characteristic alone that makes a publication (as was relevant in that case) obscene. The question is what the subject is, and how it is dealt with. As stated in *R v Close*, obscene means offensive according to current standards of decency.

These cases immediately give rise to two considerations when conducting an assessment of 'obscenity.' First, there is a question of what exactly the subject matter is. Second, there is a question of how the subject is dealt with. In assessing how a particular subject is dealt with, it must be determined whether the subject has been addressed according to common notions of decency. This last standard was addressed in *Wavish v Associated Newspapers*, where it was stated:

> There exists in any community at all times...a general instinctive sense of what is decent and what is indecent...

The High Court in that case, which concerned the Victorian *Police Offences Act 1928-1954*, indicated that it was not true to state that any 'publication' (which was at issue here) dealing with sexual relations was obscene. The subject matter simply had to be dealt with according to the standards of decency that prevailed in the community.

Statute

The tentative definitions of 'obscene' that have been enunciated in legislation appear to follow the line established under the common law. For example, the Victorian *Police Offences Act 1928-1954* and s.3 of the NSW *Obscene and Indecent Publication Act 1901-1954* both state that the issues to be considered when determining whether a publication/article is obscene are its nature; the class of persons or age groups to or amongst whom it is intended or likely to be distributed and the tendency to deprave or corrupt any persons, class of persons or age-group. Importantly, in *R v Neville* it was stated that the provision of the latter Act was not necessarily conclusive of whether a publication was obscene.

Thus, the law as it stands in relation to the meaning of 'obscene' appears to possess three limbs requiring consideration:

- The nature of the 'issue' proposed to be obscene;
- The class and age-group of persons who will be exposed to it; and
- The tendency to deprave or corrupt any person who may be exposed to it.

'Obscene' in the Context of Electoral Legislation

The question of what constitutes 'obscene' material for electoral purposes has arisen under the *Parliamentary Electorates and Elections Act (NSW)*. In *Gregory Paul Best v Electoral Commissioner of NSW* the issue of obscene language/material on how-to-vote cards was considered.

Section 151G(7A)(c) of the *Parliamentary Electorates and Elections Act (NSW)* requires that the Electoral Commission of NSW refuse to register electoral material if it appears to the commissioner that the material contains words that are obscene or offensive. Here, the how-to-vote cards to be presented to the electors at polling places on polling day contained the phrases 'we're screwed' and 'd*ckheads rule.' The commissioner held that these were obscene and offensive and declined to register the material. This decision was upheld by the NSW Supreme Court.

The rationale for the decision stemmed from the fact that voting is compulsory under the law. People of all ages with diverse views and perspectives must attend polling places to meet this legal obligation. How-to-vote material is thrust into electors' hands as they enter a polling place to cast their vote and there is little to no element of choice involved as to whether to accept the material handed to them. Accordingly, it was stated in *Best* that the standards that apply to electoral material to be distributed on election day must meet the 'broadest community expectations of not causing offence to the broadest range of electors, from young residents to older citizens of different views, beliefs and perspectives'.

The Court noted in *Best* that this standard does not apply to electoral material at large – it was said to apply exclusively to how-to-vote cards. Electoral material, including how-to-vote cards, should not be rejected on the basis that *any* member of the public might be offended by it. Importantly, it was stated that in all cases there remains the general resort to public interest and public policy. There is also recourse to the principles of free speech.

Thus, in addition to the three considerations listed above, where electoral matters are concerned, it seems that the class of persons that may be exposed to the material and may consider it obscene, must be balanced with public interest concepts relating to the Australian political and democratic process.

Objections to the Registration of the Australian Sex Party

The AEC received a number of objections to the registration of the Australian Sex Party upon its advertisement under s.132(1). Many of these were based on the party's policies and the organisational base from which it has grown. The only objections relating to the grounds for refusal of an application for federal registration listed in s.129(1) were based on the party name being 'obscene' as per s.129(1)(b). The two objections that expanded on this stated that the name 'Australian Sex Party' invoked 'orgiastic notions.' Each of the three issues requiring analysis as derived from the case law and statute will be addressed separately.

The Nature of the 'Issue' Proposed to be Obscene

The issue at question is the name of a political party seeking federal registration. Registration as a federal political party leads to the party name appearing on the publicly available federal register of political parties and allows the party name/abbreviation to be printed next to the candidate name on ballot papers at an election. It also provides that election funding (where 4% of the formal first preference vote is obtained) is paid to the registered party rather than to its candidates, as in the case of independent candidates.

The Class of Persons Exposed

A political party name will be seen and heard by a vast array of people of different ages, values and beliefs. As above, the name appears on the register, which can be seen by anyone that wishes to access it on the AEC website. The party name or abbreviation will also be printed on ballot papers used by most Australian citizens at least 18 years of age when they exercise their compulsory duty to vote. During election periods, the name is likely to be seen in political advertisement in the media and appear on electoral material, including how-to-vote cards, on polling day. There is no requirement for advertising or campaign material to show the party name as registered, but that is most often the case. Exceptions can occur as in the last Northern Territory election, where the C.L.P. campaigned as the Country Liberals, while registered as the Northern Territory Country Liberal Party. Thus, the class of persons exposed to this material, that is, the party name, is incredibly broad and as in *Best* there is little to no element of choice involved in much of this exposure.

Is the name Australian Sex Party 'Obscene'?

It is highly unlikely that the name of this political party could be said to have a tendency to 'deprave or corrupt.' As stated in *Wavish* and *Crowe v Graham*, what matters is *how* the subject matter is dealt with.

When examining the name 'Australian Sex Party' on its own, there is nothing 'lewd' (see *Greater Shepparton CC v Hardie*) or contrary to general standards of decency about the name. The name was most likely selected because of the substance and subject matter of many of the party's key policies, such as the legalisation of marriage for same sex couples, the introduction of sex education into schools, and the listing of drugs used to treat sexual dysfunction on the Pharmaceutical Benefits Scheme. In fact, the party membership forms state:

> Sex is deeply rooted in the lives of all Australians. It is relevant to hundreds of pieces of legislation made around the country.

Additionally, the party membership forms contain a message instructing members to 'Vote 1 for personal freedom and sexual rights'. The party constitution itself states at paragraph 2(a) that the party aims to 'progress the sexual health, sexual rights and sexual equality of people in Australia'. However, it is the placing of the word 'sex' next to the term 'party' that has given rise to objections based on the name invoking 'orgiastic notions', as well as notions of prostitution and pornography.

The term 'party' is commonly employed to refer to groups participating in the Australian political spectrum. For example, the name 'Australian Labor Party' is a reference to that party's early roots. Likewise, the names 'Christian Democratic Party'; 'Nuclear Disarmament Party' and 'Non-Custodial Parents Party' are all names embodying the beginnings and the central ideas and cultural factors of each group as participants in the democratic process. As the response from the Australian Sex Party enunciated, the Liberal Party does not represent 'liberals' and the Labor Party does not represent only 'labourers.' Nonetheless, these are all party names that attempt to encapsulate a range of ideas and concepts fundamental to that political party. It follows that the Australian Sex Party too should be entitled to have ideas important and relevant to it and its supporters reflected in its name. This in itself does not render the party name 'obscene'.

In *Best* the lack of choice involved in receiving how-to-vote cards at a polling place, as well as the lack of choice involved in attending a polling place in the first place meant that a broader standard had to be applied to determine whether the material was 'obscene.' However, a distinction between the current situation and that which existed in *Best* can also be drawn on the fact that in that case, inappropriate phrases on a how-to-vote card, which were directed at other participants in the democratic process, were at issue. Here, the more central, more widely used name of a political party that reflects that party's major political issue is the major concern. Importantly, the finding in *Best* did not have an effect on any political party being able to obtain the benefits and obligations of registration.

Party registration is not compulsory to participate in the Australian political process. However, it seems to be an essential element to achieving significant representation in the Commonwealth Parliament. While an occasional candidate not endorsed by a registered party is elected, that situation is by far the exception rather than the rule. No organised groups of unendorsed candidates have been elected since party registration commenced in 1984. Ultimately, the decision in relation to which parties or issues are represented in Parliament is one for the Australian people on election day. However, to prevent the Australian people from being presented with a variety of registered political parties that are concerned with a variety of important and legitimate issues based on an interpretation of the party name by a small number of people seems contrary to the public interest. As Bell J stated in *Best,* electoral material cannot be said to be 'obscene' simply if *any* member of the public would be offended by it. An effective balance between free speech and the public interest and desire to have these issues represented by a federal political party must be obtained.

Again, when the concepts of free speech and public interest are considered, it seems impossible to convincingly argue that the name is obscene as per s.129(1)(b), so as to preclude federal registration.

Conclusion

The name 'Australian Sex Party' is not obscene for the purposes of s.129(1)(b). The guidance afforded by an examination of the available case law indicates that the standard for obscenity is quite difficult to meet. Further, where electoral and political matters are concerned, it would seem that additional considerations – such as public interest and concepts of free speech – applicable only to this area, need to be taken into account. When these concepts are balanced with the 'double entendre' that has been alleged to exist in relation to the party name, it is difficult to reach a conclusion other than that the name is not obscene for the purposes of s.129(1)(b) and that federal registration of the party should be allowed. The perception by *any* member of the public that the name is 'obscene' is simply not enough.

Project Officer
Funding and Disclosure Section

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