

16 NOV 1977

IN THE COURT OF DISPUTED)
RETURNS OF WESTERN)
AUSTRALIA)

10th & 23rd June, 1977.
13th, 14th, 15th, 16th, 18th,
19th, 20th, 21st, 22nd, 23rd,
25th, 26th, 27th, 28th, 29th
& 30th July, 1977.
1st, 2nd, 3rd, 4th, 17th,
18th, 19th, 20th, 23rd, 24th,
25th, 26th, 29th, 30th &
31st August, 1977.
7th, 8th, 9th, 12th, 14th,
15th, 16th, 26th & 27th
September, 1977.

CORAM: SMITH J.

Delivered: - 7 NOV 1977

COURT OF DISPUTED RETURNS NO. 1 OF 1977

B E T W E E N :

ERNEST FRANCIS BRIDGE

Petitioner

- and -

KEITH ALAN RIDGE

First Respondent

- and -

ALLAN ROBERT LOUIS REES

Second Respondent

Mr. P.L. Seaman and Mr. P. McC. Dowling (instructed by Paterson & Dowling) appeared for the petitioner.
Mr. T.A. Walsh and Mr. J.B. Gebbie (instructed by Parker & Parker) appeared for the first respondent.
Mr. D.J. O'Dea and Mr. P.D. Blaxell (instructed by The State Crown Solicitor) appeared for the Chief Electoral Officer.
Mr. J.R. Quigley (instructed by Kott Gunning & Co.) appeared for Sgt. Corlier.
Mr. R.S. French (instructed by McDonald French & Harrison) appeared for Mr. H.W. Dixon.

Authorities Cited:

The Australian Citizenship Act, 1948-73 (C1th).
The Electoral Act, 1907-76 (W.A.).
The Electoral Act, 1904 (W.A.).
The Commonwealth Electoral Act, 1918-73 (C1th).
The Commonwealth Electoral Act Amendment Act 1905, s.56 (C1th).
The Commonwealth Electoral Act, 1902 (C1th).
The Representation of the People Act, 1949 (U.K.).
The Electoral Act Regulations 1949 (W.A.).
Representation of the People Regulations 1974, S.I. 1974, Reg.40, Schedule, Form H, (U.K.).
The Australian Digest, 2nd Ed. Vol. 30.
The English & Empire Digest, Replacement Vol. 20.
Halsbury's Laws of England, 3rd Ed., Vol. 14. 4th Ed., Vol. 15.
Blundell v. Vardon (1907) 4 C.L.R. 1463.
Borough of Hackney Case, (1874) 2 O'M & H 77.
Boyle v. Telfer (1944) 40 W.A.L.R. 2.
Cameron v. Fysh (1903) 1 C.L.R. 314.
Chanter v. Blackwood (No. 1) (1904) 1 C.L.R. 39.
Chanter v. Blackwood (No. 2) (1904) 1 C.L.R. 121.

Authorities Cont'd.

Evans v. Thomas (1962) 2 Q.B. 350.
 Fell v. Vale (No. 2) (1974) V.R. 134.
 Franklin v. George (1934) 37 W.A.L.R. 45.
 Gunn v. Sharpe (1974) Q.B. 803.
 Hamersley v. McCabe (1916) 18 W.A.R. 130.
 Islington West Division Case (1901) 5 O'M & H. 120.
 Kean v. Kirby (1920) 27 C.L.R. 499.
 Lambert v. Corbey (1930) 33 W.A.L.R. 41.
 Millicent Election Case, 1968 South Aust. (Unrep.).
 Morgan v. Simpson (1974) 3 All E.R. 722.
 Scarcella v. Morgan (1962) V.R. 201.
 Taplin v. Hegney (1947) W.A.L.R. 4.
 Woodward v. Sarsons (1875) L.R. 10 C.P. 733.

SMITH J.

This is a petition under s.157 of the Electoral Act, 1907 and its amendments by Ernest Francis Bridge, disputing the validity of the return of Keith Alan Ridge as a lawfully elected member of the Legislative Assembly for the Kimberley District, pursuant to the terms of which the petitioner seeks a declaration that the election held on the 19th February 1977, was absolutely void.

There were three candidates at the election, the petitioner Bridge, the respondent Ridge and one Allan Robert Louis Rees. The poll was held on the 19th February 1977 and on the primary count the official number of votes allotted were as follows:

BRIDGE	1631
RIDGE	1726
REES	118

After the elimination of Rees and distribution of his preference votes, and a recount of votes it was declared that the respondent had been elected by a majority of 93 votes over the petitioner. The petitioner thereupon lodged the present petition.

Objections totalling thirteen in all were taken by the petitioner. The matters of complaint when the petition was filed fell broadly into four categories.

- (i) Irregularities arising out of acts of commission or omission on the part of electoral officials at seven of the twenty-one polling stations within the district.
- (ii) The failure of the Chief Electoral Officer
 - (a) to provide sufficient polling stations and electoral staff and
 - (b) to instruct adequately and in a uniform manner the electoral officials at the seven nominated polling stations as to the performance of their duties.
- (iii) The commission of an illegal practice by a person purporting to act as a scrutineer for the respondent at one polling station and a contravention of the Act by another person at a second polling station.
- (iv) The unlawful interference at the Kununurra Polling Station by a member of the Police Force with the right of assembly and voting of a group of aboriginal electors.

At that stage, the incident involving the commission of an illegal offence apart, there was no allegation that the conduct of the respondent or his agents contributed to the vote loss claimed to have been suffered by the petitioner.

PRELIMINARY MATTERS

The respondent maintained his right to the seat and both he and the petitioner were represented by counsel. Rees did not seek to participate in the proceedings. The allegations in the petition led to applications being made by the Chief Electoral Officer and Sergeant Corker, for leave to be heard and represented by counsel. These applications were granted but in the case of Sergeant Corker, right of audience was restricted to evidence touching upon the incident occurring at the Kununurra polling station. Near the conclusion of the proceedings, Haydn Dixon sought and was granted leave to be represented by counsel.

The requirements of ss. 153 and 160 of the Electoral Act were proved to have been complied with.

At the commencement of the hearing the petitioner by his counsel intimated his intention to call as witnesses, a large number of electors said to be illiterate who claimed to have been deprived of the right to vote or not to have been afforded the assistance for which the Act makes provision when attempting to record their votes. By reason of the anticipated volume of evidence and the remoteness of the areas in which the witnesses resided, I acceded to his request that such evidence be taken in the Kimberley District and I directed that while the Court was in the vicinity of a particular polling station, such evidence as any party wished to adduce in relation to events at that particular polling station, be called. By agreement of all parties, it was arranged that sittings in the Kimberley District commence at Kununurra. When the Court convened at that town, application was made by counsel for the Aboriginal Legal Service on behalf of a large group of witnesses who formed part of a community of aboriginals living at Turkey Creek. I was informed that these persons had been subpoenaed by the petitioner to attend at the Kununurra Court for the purpose of giving evidence but that the journey to Kununurra would cause hardship by reason of the age and frailty of the persons subpoenaed. I acceded to this request also, and in the result evidence was taken at Kununurra, Turkey Creek, Halls Creek, Fitzroy Crossing, Derby and Perth from one hundred and sixty-three witnesses during the course of forty-two sitting days.

While the Court was sitting at Kununurra, the question of discovery of documents in the possession, custody or power of the petitioner and respondent was raised and when it became apparent that counsel for the petitioner and the respondent were unable to agree as to the nature or extent of the documents to be discovered, I made an order that each of the parties exchange formal lists of documents certified by counsel by reason of the inconvenience associated with the swearing of affidavits by the parties in such a remote place. The exchange of these lists led to an application

by the petitioner that the respondent give discovery of certain documents, in respect of which a claim for privilege had been made by the respondent. I ruled that a number of documents, including a document entitled "Instructions to Legal Scrutineers in the Kimberley District" were discoverable. Inspection of these documents led to an application to amend the petition while the Court was sitting at Halls Creek in the following terms:

"G16 For use on election day Ridge adopted a plan to deprive illiterate Aboriginal voters at the Polling Stations, at Derby, Fitzroy Crossing, Go Go Station, Hall's Creek, Kununurra, Mowanjum and Turkey Creek of a fair and free opportunity of voting for Bridge, the candidate of their choice.

The plan was contained in a document and annexures entitled "Instructions to Legal Scrutineers in Kimberley Electorate" and the means to give it effect was the despatch to the Kimberley District of five solicitors who (as at all material times Ridge well knew) put the plan into effect at the places and under the written authorities set out below. They were however all acting for him in the execution of the plan.

<u>SOLICITOR</u>	<u>POLLING STATION</u>	<u>WRITTEN AUTHORITY</u>
JOHN CHANLEY	(KUNUNURRA (TURKEY CREEK	REES REES
PETER LLOYD	HALLS CREEK	WITHERS
TERRENCE McCAULIFFE	GO GO STATION	RIDGE
RICHARD BROMFIELD	FITZROY CROSSING	RIDGE
LAYDN DIXON	(DERBY (MOWANJUM	RIDGE REES

The result of the execution of the plan was to pressurise polling staff and Aboriginal electors in relation to the use of How to Vote Cards and the asking and answering of S.119 questions.

In addition to specific matters pleaded elsewhere in the Petition, and the loss of valid votes for Bridge elsewhere claimed in the Petition, Bridge says that because of the matters pleaded in this paragraph the electors of the Kimberley District may have been prevented from electing him. "

While not disputing that the Court had the power to grant the amendment, counsel for the respondent opposed the application

on the basis that the Court had then been sitting for nineteen days and that the granting of the application would raise issues which were not in the contemplation of the respondent or his advisers at the commencement of the hearing. I overruled these objections by reason that a proceeding of this type is not one as between party and party, but one which affects the rights of electors: cf Barton J., Bridge v. Bowen 21 C.L.R. 582 at p.603 - 4. I was also satisfied that counsel for the respondent had not been able to demonstrate any prejudice to the respondent which could not be cured by reserving to the respondent the right to recall any witness who had already given evidence. I reserved this right to the respondent but in the result, his counsel did not seek to exercise it. The matters raised in the amendment led to submissions as to the applicability of what is called the common law of elections to this type of proceeding under the Electoral Act and in particular, the need for the petitioner, if proof of the matters alleged in the amendment was forthcoming, to satisfy the Court that the result of the election had been affected. These submissions raised matters fundamental to the petitioner's challenge to the validity of the election and I will deal with them at the outset.

COMMON LAW OF ELECTIONS

In the course of his opening, Mr. Seaman for the petitioner, had stated the petitioner's case to be that the petitioner had been deprived of the benefit of a critical number of votes by reason of the cumulative effect of the matters pleaded in the petition which included the allegation that an agent of the respondent had been guilty of an illegal practice at the Derby polling station. Mr. Seaman while contending that the principles of the common law of elections had general application to the proceedings, accepted nevertheless that the provisions of the Electoral Act derogated from the common law to the extent that it would be necessary for the petitioner to establish that the accumulated votes so lost, either equalled or exceeded the respondent's

majority before the Court would be able to make the declaration sought notwithstanding the allegation of an illegal practice at one polling station. Counsel was there drawing the Court's attention to the effect of ss. 164 and 166 of the Act. The latter section relates to various matters, including errors by electoral officials and insofar as it is relevant to these proceedings, is in the following terms:

" 166. No election shall be voided on account of error of any officer which shall not be proved to have affected the result of the election. "

The negative form of the section emphasises that an election is a serious and expensive matter and not lightly to be set aside. As Waller J. said in Levers v. Morris (1971) 3 A.E.R. 1300 at p. 1304, in relation to a not dissimilar section in the Representation of the People Act 1949 "....it is negatively stated to limit occasions when an election must be declared invalid. In other words it is an enabling section setting out circumstances in which, despite irregularity, a new election need not be held. "

Mr. Seaman also conceded that s.164 of the Electoral Act was expressed in terms which required the petitioner to satisfy the Court that the result of the election was intended to be and was actually affected thereby even if the illegal practice alleged was established.

It was not disputed that "result" in that context meant "the return of the particular candidate and not the number of his majority" - c.f. Isaacs J. (as he then was) Kean v. Kirby 27 C.L.R. 449 at 458.

When moving the amendment, it was Mr. Seaman's contention that if the Court found the allegations therein proved, it would be open to the Court to make the declaration sought without proof that the result of the election was actually affected. The basis

of this proposition was that as the actions of the persons named in the amendment were the true cause of the irregularities complained of in the petition and not carelessness or like human error on the part of the electoral officers, s.166 could have no application. Likewise he contended that the conduct pleaded in the amendment did not fall into the category of any illegal practice, in that such conduct did not contravene any provision of the Act and therefore s.164 did not apply. In support of this proposition generally he prayed in aid that part of the dicta in Woodward v. Sarsons (1875) L.R. 10 C.P. 733 relating to the common law of elections which had been cited with approval by Griffiths C.J. in Chanter v. Blackwood (No. 2) (1904) 1 C.L.R. 121 at 129 and which commences at p.743.

" We are of the 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 a 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 free and fair 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 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 errors 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 the same result should follow if, by reason of any such or 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. "

Mr. Walsh for the respondent answered this submission by drawing attention to what he contended was the policy of the

legislature demonstrable from the sections to which reference has been made, namely that only the most serious of conduct on the part of the candidate or those for whom he was responsible was to lead to the vitiation of an election without proof that the result was affected thereby. He contended that Part V of the Electoral Act was in effect a codification of the law on this subject and that if the common law had any application in this State, at least it did not apply in the particular circumstances under consideration. It was also Mr. Walsh's contention that in attempting to establish that the result had been affected, it was not open to the petitioner to bring to account votes lost by reason of what he referred to as "isolated incidents or mishaps" by which he meant, as I understood him, incidents to the happening of which neither of the parties had made any contribution. His contention was that votes proved to have been so lost even if sufficient in number to affect the result, could not, by virtue of the provisions of the Act, be a ground for avoiding the election whatever the situation might be at common law and that if the votes lost were insufficient in number to have that effect, such votes could not be accumulated with any votes proved to have been lost as the result of other allegations in the petition.

The answer to the first problem, I think, lies in the allegations in the amendment and in the proper interpretation of s.164 of the Act. The amendment does not aver that a majority of the electors in the electorate were prevented from recording their votes by reason of the matters pleaded in the amendment or that the election was not carried out under the electoral laws, but under some other method. The thrust of the amendment is an allegation in the alternative that the vote loss claimed in the petition came about not by reason of official error, but, in part at least, as the result of the action of the respondent by his agents implementing a scheme to pressurise such officials. If the facts to support this allegation were established, clearly s.166 would have no application. The question remains as to the effect of s.164. It

seems to me that in this section the legislature has stipulated the circumstances in which it is open to the Court to vitiate an election on the ground of the conduct of a candidate or his agents. If the Court finds that a successful candidate has committed or attempted to commit bribery or undue influence by subs.(1) of that section, it is mandatory that the Court shall declare the election void. Subsection (3), although far from elegant in its drafting, seems to make it clear that the Court shall only avoid an election on the ground of any other illegal practice by any person, including the candidate, if the Court is satisfied that the result of the election was intended to be and was actually affected by such illegal practice. It can hardly be said therefore, in my view, that the legislative intent was that the Court should be at liberty to avoid an election by reason of conduct of a candidate or his agents which falls short of the contravention of any of the provisions of the Act without proof as to the effect of that conduct on the result of the election. The petitioner's counsel accepted that the conduct averred in the amendment, if proved, did not constitute an illegal practice. It seems to me therefore, that notwithstanding the amendment, the petitioner remained in the situation in which he was prior thereto, namely that he bore the onus of satisfying the Court that the result of the election had been affected by the matters complained of in the petition in its amended form.

I do not agree, however, with Mr. Walsh's submission that the common law of Parliamentary elections has no application in this State. There is a long standing line of cases which are collected together and discussed by Smith J. at p.202 of his judgment in Scarcella v. Morgan (1962) V.R. 201 to the effect that Courts exercising the type of statutory discretion conferred by s.162 of the Act, ought in general to apply the rules of the common law of Parliamentary elections unless it clearly appears that the provisions of the statute are intended to supersede the common law in any particular. In my opinion there is nothing in the Act which would preclude this Court for example in circumstances such as a natural

disaster, the proven effect of which was to prevent the majority of electors from recording their votes, from applying the cited dicta in Woodward v. Sarsons and like cases, on the basis that there was "no real electing at all". Likewise it seems to me, that there is nothing in our statute to supersede the common law dicta that a Court may take account of the vote loss accruing to a candidate from various different incidents whether or not the conduct of the candidate contributed to their happening. It follows that if it is established that an incident such as that in which Sergeant Corker is said to have been involved has resulted in loss of votes to the petitioner, those votes may be accumulated with vote loss brought about by other allegations in the petition for the purpose of demonstrating that the result of the election has been affected.

THE ELECTORAL ACT

Before entering upon the facts relating to the objections raised in the petition, it is desirable to consider the scheme of the Act and those particular provisions thereof which relate to the duties and obligations of the Chief Electoral Officer and his subordinate officers, as it was to the actions of these persons on polling day that much of the evidence was directed.

The long title of the Act is "An Act to regulate Parliamentary Elections" but it is this statute which also confers the franchise. The Act restricts the franchise in traditional manner by employing the criteria of age, citizenship and residency to qualify voters. There are certain specific disqualifications from enrolment none of which are of relevance to these proceedings but it is worthy of note that for practical purposes the franchise did not become universal until 1962 in which year the Act was amended to expunge the disqualification of any person who was "a native according to the interpretation of that expression in s.2 of the Native Administration Act 1905 - 1947, who was not the holder of a certificate of citizenship pursuant to the Natives (Citizenship Rights) Act 1944-1950".

Each person whose name is on the roll for a district is, subject to the Act, both entitled and required to vote at any election of a member of the Assembly and of a member of the Council for the Province of which the district forms part.

Provision is made for the administration of the Act, under the Minister, by the Chief Electoral Officer who is empowered, inter alia, to "give such directions as he may consider necessary or expedient to implement the provisions of the Act for the proper and efficient conduct of any election" (s.102A(2)). He is required to appoint a Returning Officer for each province or district whose particular responsibilities include the provision of adequately staffed polling stations to facilitate the exercise of the franchise on polling day. The Returning Officer in turn is obliged to appoint an officer to preside at each polling station in his province. At the conclusion of the polling, it is the Returning Officer who supervises the count, admits or rejects completed ballots and makes the declaration of the poll.

On polling day, however, the Presiding Officer at each polling station also has important functions to discharge. He is responsible for the maintenance of order within the polling place and is required to ensure that no person, other than those for whom the Act makes provision, enters and remains there except for the purpose of voting. The Presiding Officer is also required to rule upon the entitlement of the would be elector to exercise the franchise and in appropriate circumstances the need of an elector for assistance in recording his vote. Upon him the obligation of marking an illiterate ballot paper "according to the instructions of the elector" is imposed. Sections of the Act dealing with these obligations and duties were debated at length during the hearing and call for individual consideration.

DETERMINATION OF ENTITLEMENT TO VOTE

Section 119 of the Act contains a series of questions

which would appear to be designed to assist the Presiding Officer in determining the entitlement to vote of a person presenting himself to the Presiding Officer and claiming to vote. The first only of the prescribed questions is mandatory; the remainder may be put by the Presiding Officer and he is required to ask the questions of the would be elector if requested by a scrutineer so to do. The consequences of the answers and the role which the Presiding Officer is to play before a would be elector is to be excluded from voting, are dealt with in succeeding sections. These sections when read together, appear to me to reflect the concern of the legislature to maintain responsible use of the ballot on the one hand, and to protect the individual's right to vote on the other. This group of sections must be construed as a whole, bearing in mind that "it (the Act) is intended to implement the franchise and that Parliament did not intend to take away the right of franchise unless by clear words or implication", *Wolff. J.* (as he then was) *Taplin v. Hegney* 50 W.A.L.R. 5 at p. 6. The relevant sections are as follows:

"119. (1) The presiding officer shall put to any person claiming to vote at any election the following question:-

- (a) Do you live in the electoral district of*[being the electoral district for which the person claims to vote or the electoral district that forms part of the province for which the person claims to vote]*?

And if such question is answered in the negative, the following additional questions:-

- (b) Have you within the last preceding three months *bona fide* lived within that district?
- (c) Where was your place of living in that electoral district?

(2) The presiding officer may, and at the request of any scrutineer shall, put to any person claiming to vote at any election all or any of the following additional questions:-

- (d) Are you the person whose name appears as*[here state name under which person claims to vote]* on the roll for*[here state District]*?

- (e) Are you of the full age of eighteen years?
- (f) Are you a natural born or naturalised subject of the Queen?
- (fa) Have you lived in the Commonwealth of Australia for six months continuously?
- (g) Have you lived in Western Australia for three months continuously?
- (h) Have you already voted either here or elsewhere at this election?
- (i) Are you disqualified from voting?
- (ia) Have you applied for a postal ballot paper? (and if the answer to this question is Yes, the further question, Have you received a postal ballot paper for this election?).
- (j) Where is your place of living in the Electoral District for which you now claim to vote?

(3) The presiding officer shall make a note in writing of the name and number on the roll of each elector questioned under subsection two, and of each elector under whose name any person questioned claimed to vote, and of each reply or refusal to reply on the part of such elector or person.

(4) The presiding officer may and shall, when requested by a scrutineer, require any person claiming to vote to make a declaration in the prescribed form before receiving a ballot paper.

(5) Subject to the provisions of section one hundred and twenty-two A of this Act, the electoral roll in force at the time of the decision shall be conclusive evidence of the right of each person enrolled thereon to vote as an elector, unless he refuses to answer fully any such question put to him by the presiding officer, or to make the declaration requested of him, or fails by his answers to satisfy the presiding officer that he is entitled to vote.

(6) In the case of a conjoint election a determination of entitlement to vote at the election for the Assembly determines the entitlement to vote at the corresponding election for the Council and only one declaration is required under subsection (4) of this section.

120. If any person refuses to answer fully any such question put to him by the presiding officer, or to make the declaration requested of him, or fails by his answer to satisfy the presiding officer that he is entitled to vote, his claim to vote shall be rejected.

121. The elector's answers to the questions shall be conclusive, and the matter shall not be further inquired into during the polling.

123. (1) No elector shall at any election be required to answer any question or to make any declaration, except as herein provided.

(2) No person claiming to vote at any election shall be excluded from voting thereat except by reason of -

- (a) it appearing to the presiding officer, upon putting the questions hereinbefore prescribed, or any of them -
 - (i) that he is not the person whose name appears on the roll, or
 - (ii) that he has previously voted for the province or district at the same election, or
 - (iii) that he is otherwise not entitled to vote under this Act; or
- (b) such person refusing to answer any of such questions, or to make the declaration required under sections one hundred and nineteen and one hundred and twenty-two.

125. (1) If the name under which the elector claims to vote is upon the copy of the roll, and his right to vote is not challenged, or, if challenged, he makes the necessary declaration, or answers the prescribed questions satisfactorily, the presiding officer shall deliver to him a ballot paper. "

A person claiming to vote who refuses either to answer the prescribed questions or to make the declaration referred to in s.119(4) presents no problem, as both ss.120 and 123 (2)(b) put beyond doubt that in either instance that person's claim to vote is to be rejected. Conversely, if the person makes the declaration when requested so to do, or if the person answers the question adequately, it is not open to the presiding officer to enquire further. Sections 121 and 125(1) make this clear and even if the Presiding Officer knows the person seeking to vote is swearing or answering falsely, he cannot refuse to allow the voter to vote (see Rogers On Elections 17th. Ed. p.106).

The question which was debated at length before me was the obligation of the Presiding Officer in the case of the would be elector, who is enrolled but who in the opinion of the Presiding Officer, due to an imperfect knowledge of the English

language has either failed to answer one or more of the questions, or for like reasons has given an answer to one or more of such questions which is incorrect or which prima facie, would disqualify him from voting. Section 120, the marginal note to which is "consequences of answer" is, as I have said, in imperical terms in relation to the refusal of the would be elector, either to answer the question or to make a declaration, but the section otherwise speaks of failure "by his answer to satisfy the presiding officer of his entitlement to vote". The role of the Presiding Officer in circumstances which could lead to the exclusion of a would be elector, to my mind, is made clear by the provisions of s.123(2) (a). The words "it appearing to the presiding officer upon putting the questions hereinbefore prescribed" in that sub-section constitute the presiding officer the adjudicator of the entitlement of the would be elector to vote on the basis of the response of the person seeking to vote to the prescribed question: cf Channell J. Robinson v. Sutherland Corp. (1899) 1 Q.B. 751 at 757. The negative form in which the sub-section is cast, in my view, emphasises the intent of the legislature that it is only when the answers of the would be elector carry conviction to the mind of the Presiding Officer as to one or more of the matters of which the sub-section speaks, that such person is to be excluded from voting. As the Presiding Officer is required to form an opinion as to those matters on the basis of the answers of the would be elector a proper evaluation of such answers must entail satisfaction on the part of the Presiding Officer that the would be elector has an adequate appreciation of the matters being put to him. It does not follow therefore that an incorrect answer, or an answer which prima facie renders a person ineligible to vote, automatically disfranchises that person. If, in the opinion of the Presiding Officer, the formal language in which the sections are framed is beyond the understanding of the person seeking to vote, in my view, it is his obligation to re-phrase the questions in more simple language.

or to seek the assistance of an interpreter to ensure that the questions are properly understood, before he excludes that person from voting. Knowledge of the English language is not one of the qualifications of an elector laid down by the Act. Moreover, it seems to me, that s.125(1) of the Act is expressed in terms which in the circumstances outlined would make it obligatory upon the Presiding Officer to afford the person who, in his opinion, has not refused to submit to the questions an opportunity of making the declaration referred to in s.119(4) before he excludes that person from voting.

Another question which arose in relation to these sections, was whether it was open to the Presiding Officer to put the questions prescribed in s.119 to a would be elector after his name had been struck through on the roll, or after he had been handed ballot papers. The section is silent as to when the request may be made by the scrutineer. Prima facie it would seem the request should be made when the person presents himself to vote and clearly it must be made before that person has marked the ballot paper and deposited it in the ballot box, as the person has then voted and is no longer "a person claiming to vote" (s.119(2)). The answer to the question, I think, lies in the change of status of an individual when he has received the ballot papers. As I have said in s.119, he is "a person claiming to vote" but under s.125(1), he becomes an elector "if the name under which the elector claims to vote is upon the copy of the roll and his right to vote is not challenged, or, if challenged, he makes the necessary declaration or answers the prescribed questions satisfactorily". In any of these events, the Presiding Officer is directed to deliver to him a ballot paper and thereafter the individual who entered the polling place as a person claiming to vote is referred to as an "elector": see ss. 127 to 129. Observations which are apposite to the circumstance of a person claiming to vote who has been handed ballot papers are those of Montague J.A. in Duclos v. Pritchett (1952) 3 D.L.R. 261. In that case, Montague J.A. was a

dissentient but the Court was concerned with legislation, which while not having a provision similar to s.125 (1) of our Act, did contain a section conforming in most respects to s.127 of our Act. In relation to the role of such an elector, Montague J.A. had this to say at p.267:

"Again, after the individual has, by the delivery to him of the ballot paper, become recognized as an elector, he has in a sense become an automaton. The word "shall" is used throughout the section and is to be construed as imperative. He is to forthwith proceed to the compartment, mark his ballot paper, fold it, leave the compartment, deliver the ballot paper to the deputy returning officer and leave. The language used throughout the section does not countenance the suggestion that there can be any objection or interference during his completion of the full procedure laid down. The receipt by him of the ballot paper constitutes his ticket; he takes off on a through trip which ends only with him stepping out of the polling place. "

In my opinion it is mandatory for the Presiding Officer to put the questions prescribed in s.119, if the request so to do is made before the person claiming to vote is handed ballot papers, but that once this is done the questions should not thereafter be put. Delivery of ballot papers by a Presiding Officer to a person claiming to vote is recognition by the Presiding Officer of the entitlement of that person to vote.

SECTION VOTES - SECTION 122A

This is one of the sections in the Act designed to facilitate the exercise of the franchise and it makes provision for the recording of what has become known as a "section vote" in a number of different circumstances. The only circumstance relevant to these proceedings was that occasion when a would be elector presented himself for voting, claiming to be enrolled but whose name could not be found on the roll by the Presiding Officer. The question which arose was whether in such a circumstance the Act imposed an obligation on the Presiding Officer to inform the person claiming to vote of his entitlement

to record a section vote. So far as it is relevant to such a circumstance, the section is in the following terms:

" 122A. (1) Notwithstanding anything contained in this Act....where any person who is so enrolled so claims to vote at such a polling place and his name cannot be found on the roll by the presiding officer...may subject to this Act and the regulations, be permitted to vote if -
.....

(c) in the case of a person whose name is on the roll for a province or district as the case may be but cannot be found by the presiding officer, he claims that his name appears or should appear on the roll; and if, in every such case, such person makes a declaration in the prescribed form before the presiding officer at the polling place. "

Provisions conforming to this section in legislation in other States have been subjected to judicial scrutiny on a number of occasions. Cuthbertson v. Tyler (1943) Tas. S.R. 59 is authority for the proposition that an approach to the Presiding Officer, or his poll clerk, to vote and withdrawing when not found on the roll, is a sufficient claim to vote. In Kean v. Kirby (supra.) Isaacs J. was concerned with the interpretation of a like Commonwealth provision (s.121). In circumstances similar to those outlined, he had this to say at p.456:

"The evidence makes very evident to me the great desirability in cases arising under s.121 that presiding officers should inform intending voters that a declaration is necessary and not trust to the voter knowing this requirement of the law. The voter may not be aware of it, and consequently omit to comply with it, thus losing the vote. "

In Cuthbertson v. Tyler (1943) Tas. S.R. 59 Morris C.J. applied this dicta and held that a voter in similar circumstances had been wrongly deprived of his vote and speaking of the dicta of Isaacs J. in Pell v. Vale (No. 2) 1974 V.R. 134 at 137, Gowans J. said:

"It was to the effect that a person offering to vote and faced with an assertion that he is not enrolled or is struck off the roll has done all that he need do under the provision and that it is the presiding officer's duty to inform him of his rights. "

Gowans J. went on to point out that the effect of this decision had been neutralized by the insertion in the Commonwealth Act in 1922 of s.194A which provides that on the trial of any petition, the Court of Disputed Returns shall not admit evidence of any witness that he was not permitted to vote in any election, unless the witness satisfies the Court, not only that he claimed a vote but also that he complied with the Act and regulations. There is no similar provision in our Act and therefore it seems to me that the application of the dicta cited is not open to question. Indeed I understood Mr. O'Dea, counsel for the Chief Electoral Officer, in his final address to concede this to be so. It follows therefore that if the Presiding Officer is unable to find the name of a would be voter who claims to be enrolled on the roll, then there is a duty on him to inform such person of his right to claim a section vote.

ASSISTANCE TO ILLITERATE ELECTORS - SECTION 129

This section makes provision for assistance to be given to physically handicapped and illiterate electors. As the franchise is conferred absolutely and all persons enrolled are required by the Act to vote, the need for such a provision is patent. The section deals separately with physically handicapped and illiterate electors, and in so far as it is relevant to the latter the section is in the following terms:

" (3) If any elector satisfies the presiding officer that he is so illiterate that he is unable to vote without assistance, the presiding officer, in the presence of such scrutineers as are present, or, if there are no scrutineers present, then in the presence of -

- (a) another electoral officer; or
- (b) if the elector so desires, in the presence of a person, other than an electoral officer, appointed by such elector,

shall mark the elector's ballot paper according to the instructions of the elector, and fold and deposit the ballot paper for him, after which the elector and any person appointed by him, shall quit the polling place."

The questions which arose during the hearing in relation to this section were twofold. The first was whether the section imposes any obligation on a presiding officer to proffer assistance to a person whom he knows to be illiterate, without that person first seeking assistance from him. The contention of counsel for the respondent was that on its proper construction, the section imposes an obligation on the handicapped person to seek assistance and that it is not open to the Presiding Officer to give assistance unless his aid has been sought. It may well be that in many situations an elector, as a prerequisite to his right to assistance, would be required to establish the existence of the handicap to which the section refers. The section, however, speaks only of the satisfaction of the Presiding Officer as to the existence of the handicap. If he is so satisfied, whatever the reason - for example prior acquaintance with the elector or observation of his actions in the polling place - then the obligation to give the assistance for which the Act makes provision arises. To paraphrase what was said by Isaacs J. in Kean v. Kirby (supra.) in relation to section 121 of the Commonwealth Act, "the voter may not be aware of the provision in the Act and may not seek assistance, thus losing the vote". If the Act imposes an obligation on a Presiding Officer to inform an elector, literate or not, of his entitlement to record a section vote, a fortiori, is it his duty to inform a person known by him to be illiterate, of his entitlement to assistance in recording his vote.

The second question related to the sufficiency of the instruction given by the illiterate elector to the Presiding Officer and in particular whether the presentation by the illiterate elector of a How To Vote card was an instruction which would enable the Presiding Office to complete a formal

ballot paper on the elector's behalf. To my mind this is not a question which may be answered by construction of the section. Not surprisingly, the section does not attempt to define the form the direction to the Presiding Officer shall take, nor is there any reference therein to the use to be made of How To Vote cards in this regard. The question of whether an illiterate elector has given or attempted to give a direction to the Presiding Officer which was, or should have been, sufficient to enable the Presiding Officer to complete a formal ballot paper on behalf of the elector, must remain one of fact in any given instance.

APPOINTMENT OF SCRUTINEERS - SECTION 114

Scrutineers are the only persons permitted to remain in the polling place on polling day, other than the electoral officers, policemen on duty and an elector while he is voting (s.115). Provision for the appointment of scrutineers is made in s.114. Sub-section 2 of that section provides that such an appointment shall be made by written notice to the Returning or Presiding Officer, signed by the candidate or without such notice by permission of either officer. Sub-section (3) provides "every scrutineer shall, upon his appointment, make and subscribe a declaration in the prescribed form" in the presence of one or other of such officers. The question which was debated during the hearing was whether the appointment of a scrutineer was complete when the notice referred to in sub-section (2) was delivered to the appropriate officer, or whether the making of the declaration referred to in sub-section (3) was a pre-requisite to the appointment of a person as a scrutineer. The answer to this question turns upon the meaning to be given to the words "upon his appointment" in sub-s. (3).

That the meaning of the words "on" or "upon" varies with reference to the context in which such words appear in the statute, was long ago made clear by Denman C.J. in R. v. Arkwright 12 Q.B. 970, when he said:

" The words 'on' or 'upon', it has been decided, may either mean 'before' the act done to which it relates, or 'simultaneously with' the act done or 'after' the act done according as reason and good sense require, with reference to the context and subject matter of the enactment. "

When considering which of the meanings discussed by Denman C.J. is applicable to the word "upon" in this instance, one must remember that secrecy is one of the paramount principles of the Act "for the purpose of safeguarding the freedom of elections": cf Isaacs J. Kean v. Kirby (supra.) p.489. One need but refer to sections such as s.127 to which reference has already been made, and those sections of the Act which require all electoral officers to make declarations as to secrecy for confirmation of this. The importance of the principle of secrecy of the ballot was discussed by Kelly and Morton Js. in re South Waterloo Province Election - Mercer v. Homuth (1925) 55 O.L.R. 245. The Judges were speaking, of course, in relation to Canadian legislation, but what they had to say is equally applicable to our legislation. At p. 250 they said:

" The provisions of the Act which relate to secrecy of the ballot have been framed with care, not only to ensure secrecy, but also to afford the fullest opportunity to each voter to record his wishes deliberately and without interference and free from publicity and from conditions which might operate as an embarrassment or intimidation in the free exercise of his judgment. One can conceive of cases where, if secrecy in voting is not assured, a voter may be influenced, by one consideration or another, against recording his vote in accordance with his real wishes and intention. "

In the context of legislation framed to incorporate this principle, it seems to me that reason and good sense require that the word "upon" in s.114 should be construed to mean "simultaneously with" and therefore that the appointment of a person as a scrutineer does not take effect unless and until he makes the declaration prescribed in sub-s. (3) of s.114. The section of the Act providing for assistance to illiterate electors in its recently amended form, may be said to invade

to an extent the privacy of an illiterate elector in that he is required to give his instructions to the presiding officer, as to the marking of the ballot paper in the presence of all scrutineers. However, it cannot have been the intention of the legislature when making this provision to undermine the principle of secrecy. This would be the outcome if scrutineers could lawfully remain within the polling place without first making the prescribed declaration.

OBJECTIONS RAISED IN PETITION

An understanding of the course which the evidence took during the hearing and the issues which ultimately fell for determination by the Court, makes it necessary to refer again in some detail to the pleadings filed by the parties and the amendments made thereto during the hearing.

PLEADINGS

As I have said, the claim in the petition was that the vote loss on the basis of which the petitioner sought the declaration that the election be declared void, occurred at the polling stations at Kununurra, Turkey Creek, Halls Creek, Fitzroy Crossing, Go-Go Station, Mowanjum and Derby, being seven of the twenty-one polling stations within the electorate. As filed it was alleged in the petition that errors of electoral officials at these nominated polling stations, coupled with the actions of Sergeant Corker in the proximity of the Kununurra polling station and the activities of one Dixon at Derby and one Rowell at Mowanjum, resulted in large numbers of illiterate Aboriginal electors being prevented from recording their votes, either with effect or at all, whereby votes were lost to the petitioner sufficient in number to have affected the result. In abbreviated form the errors of the electoral officials were said to be :

- (i) failure to mark ballot papers of illiterate electors in accordance with the instructions of such electors;
- (ii) failure to put the questions prescribed by s.119 in a manner which illiterate electors could understand;

- (iii) failure to inform electors who were enrolled, but whose names could not be found on the electoral roll of their entitlement to record a section vote;
- (iv) the marking of two completed ballot papers with the words "objection" by the presiding officer at Kununurra.

The errors of these officers, it was alleged, were contributed to by the failure of the Chief Electoral Officer to instruct his officers comprehensively and in a uniform manner as to their powers and obligations pursuant to ss.119, 122A and 129 of the Electoral Act and the failure of that officer to make proper arrangements for the conduct of the election.

Following inspection of ballot papers and other electoral documents deposited by the Chief Electoral Officer with the Master of the Court, pursuant to my order, the petition was amended to include a claim for the loss of additional votes. These votes fell into a different category, in that the amended claim related to specific ballot papers which were said to have been either wrongly rejected from, or not admitted to, the count. Further, prior to the filing of an answer by the Chief Electoral Officer, the petitioner with leave, expanded the allegations in relation to the Chief Electoral Officer's administration of the Act.

The respondent and the Chief Electoral Officer, by their respective answers, each made limited admissions, but in effect joined issue with the petitioner on the issues in the petition and Sergeant Corker denied that any action by him had resulted in the loss of votes to the petitioner. In his answer the respondent did not seek to assert that he had suffered any loss of votes by reason of acts or omissions of the electoral officers or other persons.

On the 2nd day of August 1977, as I have said, the petition was amended to incorporate the allegation which became known as G.16. This amendment imported a shift in emphasis in the allegations in the petition, in that the alternative plea

was that the conduct of the respondent and his agents, caused or contributed to the commission of those errors relating to ss.119 and 129 of the Act, of which complaint was made in the petition and the consequent disfranchisement of aboriginal electors.

On the 17th August 1977, the respondent filed an amendment to his answer in which he denied the existence of the plan alleged and the adoption by him of that or any other plan to deprive aboriginal electors of a fair and free opportunity of voting for the candidate of their choice.

This denial revived the question of discovery, it being asserted by the petitioner that there were documents in the possession of persons whom he said were agents of the respondent, which became relevant to the matters in issue, by reason of the denials in the respondent's amended answer. The application for further and better discovery was resisted by the respondent on the ground that the persons named were not his agents and in order to resolve this conflict, on the 8th September 1977, I ordered pursuant to O.26 r. 3 of the Supreme Court Rules that an issue in the following terms be tried:

"were Robert Mitford Rowell, David Forster, the Liberal Party of W.A.Inc., or any of them either individually or in association with a committee or committees, the agent or agents of the elected candidate during their electoral campaign for the seat of Kimberley for the election held on the 19th February 1977. "

On the following day counsel for the respondent informed me that he had instructions to make certain admissions in relation to the allegations in the amendment G.16, which he said would obviate the need for the trial of this issue. The nature of the proposed admissions was then outlined. Counsel for the petitioner agreed that in such circumstances, he would not press his application for further and better discovery and it became unnecessary for me to rule on the issue. In due course, the respondent amended his answer to incorporate these admissions. In the amendment, the respondent admitted the adoption of a plan which was contained

in the document and annexures entitled "Instructions to Legal Scrutineers in Kimberley Electorate", and that the means to give the plan effect was the despatch to the Kimberley District of five solicitors who (as at all material times the respondent well knew) put the plan into effect at the polling station nominated in the amendment to the petition. The respondent further admitted that such solicitors were acting in the execution of the plan on election day, but he maintained his earlier denial that the intent of the plan was to deprive illiterate electors at the nominated polling stations of a fair and free opportunity of voting for the candidate of their choice.

These admissions were made at a late stage of the hearing, but nevertheless in conjunction with the abandonment by the petitioner of some allegations in the petition, they served to reduce the issues requiring determination. Apart from the amendment thus made to his answer, the respondent also had amended his answer to make allegations as to the conduct of the petitioner's agents at the Derby polling station. This amendment was to the effect that the actions of such agents led to the confusion of aboriginal electors at that polling station, rather than a loss of votes to the respondent and it was a matter which fell for determination when considering events on polling day at that polling place. At the conclusion of the evidence, the substantive issues were:-

- (a) were specific ballot papers and sealed envelopes containing postal ballot papers respectively, wrongly rejected from the count or wrongly not admitted to the count;
- (b) was the Chief Electoral Officer in error in his administration of the Act
 - (i) in failing to provide sufficient polling places and electoral staff in the electorate, or
 - (ii) in failing to instruct his electoral officers adequately and sufficiently in the performance of their duties on polling day, and

did such error or errors result in illiterate aboriginal electors at the nominated polling stations being prevented from recording their votes with effect or at all;

- (c) did errors by electoral officials at the nominated polling stations prevent aboriginal electors from recording their votes with effect or at all;
- (d) did the conduct of the respondent's agents at the nominated polling stations cause or contribute to the commission by electoral officers at such polling places;
- (e) did the actions of Sergeant Corker in the proximity of the Kununurra polling station deter aboriginal electors who would have cast votes in favour of the petitioner from seeking to record their votes;
- (f) did Haydn Dixon commit an illegal practice at the Derby polling station and was the outcome the loss of votes to the petitioner;
- (g) was the proven accumulated vote loss to the petitioner sufficient to have affected the result of the election.

STANDARD OF PERSUASION

The resolution of these issues involves different approaches and exercises by the Court. Allegations which relate to the rejection of specified ballot papers by the Returning Officer, or the failure of the Chief Electoral Officer to admit to the count specified postal votes, require the Court to make decisions either on the validity or invalidity of such ballot papers or the correctness of the decision of the Chief Electoral Officer to reject identified ballot papers to the count. In neither instance is the Court involved in any enquiry as to the intention of the elector. The votes are recorded in writing and that writing is the proper evidence of the way the elector intended to vote.

Allegations asserting irregularities at polling stations, the outcome of which, it was said, was that electors attending to

vote either were prevented from voting or recorded informal votes, involve different considerations and a different approach. In such circumstances the intention of the person seeking to vote becomes paramount, bearing in mind the need for the Court to be satisfied that the result of the election has been affected by the matters of which complaint is made. Evidence as to intention is admissible "to conserve the right of franchise of an elector who has endeavoured to exert it": c.f. Isaacs J. Kean v. Kirby (Supra.) at 461. Evidence of the way in which an elector intended to vote may come from the elector himself; again Kean v. Kirby affords a precedent for this course, but in that event it should be subject to the critical scrutiny and safeguards of which Isaacs J. speaks in that case at p.462. Evidence as to intention may also come, in my view, from contemporaneous evidence of the way in which persons who cast informal votes in fact attempted to vote as revealed by ballot papers recording a first preference in the manner provided in s.128 and oral testimony of the elector or others present at the time the ballot paper was marked as to the circumstances which led to such ballot paper being deposited in the ballot box marked only with a single numeral.

Generally, it seems to me, that standard of persuasion applicable to proceedings of this type, is that which applies in civil proceedings, save in the case of an allegation of an illegal practice, in which event, it would appear that the criminal standard is more probably applicable: c.f. observations Starke J. Perkins v. Cusack 43 C.L.R. 70 at 73. However, before reaching a conclusion establishing the affirmative of any issue, I have borne in mind what was said by Willes J. in relation to electoral cases in Tamworth Election Petition (1869) 1 O.M. & H. 84, that a finding in favour of a particular proposition ought to be made only upon evidence "proving the probability of the affirmative to be so much stronger than that of the negative, that a rational mind would adopt the affirmative in preference to the negative. "

POSTAL BALLOT PAPERS

At or about the time the taking of evidence concluded,

I ruled that five specified postal ballot papers rejected by the Chief Electoral Officer should have been accepted for scrutiny and I directed that my Associate open the envelopes containing the ballot papers so that the scrutiny could take place in the presence of counsel. The scrutiny thus directed, showed that all five votes were formal and cast in favour of the petitioner. It is convenient that consideration of the issues should commence with the recording of my reasons for so ruling and that I should also deal with other disputed ballot papers in relation to which evidence adduced at the hearing was not relevant.

It was established in evidence that five electors, William Gogee, Billy Nick, Ginger Miller, Billy Brown and Tarco Pindan had each made prior to polling day written application pursuant to s.90 of the Act for a postal ballot paper. Subsection 3 of s.90 provides that the application shall be signed by the elector, but provision is made for an elector who is unable to write, to make his distinguishing mark on the application. In each instance but one, namely, William Gogee, the elector's name was printed in one form or another in the space provided for the signature of the elector on the application form. In the case of William Gogee the signature was written. In due course postal ballot papers were issued to each elector. Each of them being illiterate was unable to vote without assistance and pursuant to subs.(5)(a) of s.92, each of them appointed one Peter Ross of Fitzroy Crossing to mark their ballot paper. The directions prescribed by s.92 for regulating voting by means of postal ballot papers were followed and sealed envelopes containing the ballot papers with the prescribed declarations attached, were duly posted to and received by the Chief Electoral Officer. In each instance again with the exception of William Gogee, the declarations had been completed by the affixing of a mark for which subs.(5)(a) again makes provision in the case of a person who is unable to write. In the case of William Gogee, his signature on the declaration was printed and not written.

The Chief Electoral Officer upon carrying out the scrutiny of the declarations as required by subs.(8) of s.92, rejected each ballot paper pursuant to r.27K(d) of the Electoral Act Regulations 1949 on the grounds that the signature of the elector did not compare with the signature on the declaration. The purport of r.27K(d) is that the officer conducting the scrutiny must be satisfied that prima facie the signature on the application and on the declaration are one and the same.

The petitioner sought the review of this decision pursuant to subs.(11) of s.92 which provides that the decision of the Chief Electoral Office as to the rejection or admission of any ballot paper "is subject to review only by the Court of Disputed Returns". Kean v. Kirby (Supra.) again is a precedent for the proposition that the re-examination by the Court of the decision of the Chief Electoral Officer in such circumstances is to be made not on the material before that officer at the time of the scrutiny, but on the basis of evidence adduced before the Court.

Each of the electors gave evidence before me, which satisfied me as to their illiteracy and with the exception of William Gogee, that each signed his or her name either by printing such name or by making a cross as a distinguishing mark. William Gogee, although illiterate, was able, with difficulty, either to write or to print his name. Each of the electors identified the distinguishing marks on the applications and the declarations and William Gogee deposed to the fact that by error he had printed his name in lieu of writing it when making the declaration. It seemed to me that in these circumstances the requirement of subs.(9) of s.92, namely, that the declaration relating to a ballot paper be signed by the elector to whom it was issued, had been met. I am fortified in this conclusion by s.211 of the Act, to the provisions of which my attention had not been drawn at the time I made my ruling, which provides that the distinguishing mark of a person unable to write shall, for the purposes of the Act, be deemed to be the personal signature of that person.

DISPUTED BALLOT PAPERS

Eight ordinary ballot papers were brought into question by the allegations in the petition. Of these disputed ballot papers, five emanated from two specified polling stations, Mowanjum and Kununurra. These ballot papers were marked in the manner prescribed in s.128 of the Act, but in each instance bore endorsements made by the respective presiding officers at these polling places and these markings led to the ultimate rejection by the returning officer of the ballot papers from the count. In each instance the respective presiding officers gave evidence as to the circumstances in which the endorsement was made and therefore, the question of the propriety of the rejection of these ballot papers from the count, I think, more properly falls for consideration when dealing with events occurring at those particular polling places. Of the remaining ballot papers, I agree that two were correctly rejected from the count, but I consider that one should have been admitted.

Exhibit No. 10E has numbers marked on the back of the ballot paper. Numbers 1, 2 and 3 show through the paper onto the front and appear within the squares opposite the names of the candidates. In my view, s.128 of the Act which is cast in imperical terms, requires that there should be a substantially distinct marking of numbers and that the marking must be on the face of the ballot paper. In my opinion this vote was properly rejected from the count.

Exhibit No. 26 has the numerals 1 and 3 in two squares, and in the third square there is a symbol which was said to be a poor attempt at the numeral 2. In my view, it is not possible to identify this marking either as a Roman or Arabic numeral and the vote was properly rejected from the count, by reason that it does not comply with s.128 of the Act.

Exhibit No. 10E. The elector clearly indicated his first and second preferences by marking numerals in the appropriate

square. The marking in the square opposite the name of the respondent represents either the numeral 3 written in reverse fashion of the letter E. What appears to be the letter D has also been printed adjacent to the name of the respondent. In this instance the markings in question relate only to the elector's third preference. If this square had been left blank, the elector would have cast a valid vote by reason of the proviso to s.139 (d) which provides that if numerals in arithmetical sequence are placed opposite the names of all candidates but one, the next following numeral shall be deemed to be placed opposite the name of the remaining candidate. The markings made by the elector create no confusion as to his first or second preference, nor do they serve to identify him and hence render the ballot paper informal pursuant to s.139(c). In my view this ballot paper should have been admitted to the count as a vote in favour of the petitioner.

ELECTORAL ARRANGEMENTS

It is convenient to commence consideration of those objections in the petition which relate to the question of whether aboriginal electors were prevented from recording their votes with effect or at all, with the arrangements made for the conduct of the election.

The allegations in the petition, that the Chief Electoral Officer in the administration of the Act failed to provide sufficient polling places and electoral officials to ensure that aboriginal people duly enrolled, could fully and freely exercise their right to vote in the event that scrutineers demanded that each of such electors be asked all of the questions prescribed in s.119 and that the electoral personnel in the polling stations were insufficient in number, were not pressed by counsel for the petitioner in his final address on the basis that the Chief Electoral Officer could not reasonably have foreseen the use which the respondent's scrutineers would seek to make of s.119.

The evidence of the present incumbent of the office of the Chief Electoral Officer, Mr. MacIntyre, was that never before, during his long career in the Electoral Office, had it been brought to his attention that blanket questioning of would be electors had been demanded by scrutineers and that he had no reason to anticipate that such a request would be made in the Kimberley province on election day. Mr. Monger the Returning Officer for the province and other persons with experience as Presiding Officers, also gave like evidence and therefore there can be no doubt as to the propriety of the concession made by counsel for the petitioner. The evidence of these persons also satisfied me that other allegations in the petition touching upon the adequacy of polling stations and the staffing of them had not been made out. Mr. Monger, following a survey of the area in 1976, had recommended that the number of polling stations be increased from thirteen to twenty-one to take account of increases in enrolment in the electorate and this recommendation had been implemented by Mr. MacIntyre. It was also clear from Mr. Monger's evidence that he had been careful in the choice of electoral staff. Being aware that a not insignificant number of the electors enrolled were unsophisticated aboriginals with little or no formal education and being mindful of the communication problems experienced by such people not only by reason of their limited knowledge of English, but also by reason of their characteristics of timidity and shyness, he had ensured that at each polling station there was an officer accustomed to dealing with them. It was not suggested that at each polling place there was an officer sufficiently familiar with the various dialects of these people to be able to act in the capacity of an interpreter. In Mr. Monger's view, the provision of staff with such an ability was both impractical and unnecessary so long as an officer experienced in communicating with them by means of the use of simple or creole type English was present at each polling station. Having observed a large number of these unsophisticated aboriginal persons giving evidence during the course of the hearing, I have no doubt that this was a correct assessment.

The remaining live issue as to the administration of the Chief Electoral Officer, related to certain of the instructions issued by him to Presiding Officers. The instructions, the subject of complaint, were contained in two documents. One of such documents was the booklet entitled "Instructions to Presiding Officers", copies of the 12th. edition of which were issued to all presiding officers at the nominated polling stations, approximately one week before polling day. The other was a telegram despatched by the Chief Electoral Officer to presiding officers in the Kimberley and three other electorates on the eve of the election.

The criticism of the booklet was that except in relation to domestic matters, such as the internal layout and furnishing of polling places, the booklet gave little or no guidance to presiding officers as to the performance of their duties. It was said that the presiding officers invariably were "ad hoc" personnel drawn from various walks of life, who not infrequently were unfamiliar with the conduct of elections and usually had limited experience in the interpretation of statutes. Therefore, it was contended, it was the duty of the Chief Electoral Officer to give clear and explicit directions as to the obligations imposed on presiding officers by the Act, and that the issue by the Chief Electoral Officer of a booklet which did no more than repeat verbatim those sections of the Act, relating to their duties without guidelines as to the performance of their tasks was not a proper exercise by the Chief Electoral Officer of his powers under the Act.

The power conferred on the Chief Electoral Officer by s.102 (a) (2) is discretionary "to give such directions as he may consider necessary or expedient to implement the provisions of this Act for the proper and efficient conduct of any election". It is a well accepted principle of law that a discretion allowed by statute to the holder of an office is intended to be exercised "according to the rules of reason and justice. It is to be not

arbitrary, vague and fanciful but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office, ought to confine himself:" c.f. Lord Halsbury L.C. Sharp v. Wakefield (1891) A.C. 173 at p.179.

It is not open to question that presiding officers have important responsibilities and functions on polling day, but whether directions to them as to the manner in which they are to carry out their duties should contain advice which involves either construction or interpretation of the sections of the Act laying down those duties, raises a very debatable question. It seems to me that if the duties of presiding officers are not spelt out clearly in the Act, then it is a matter which calls for the attention of the legislature. To my mind the contents of the booklet issued by the Chief Electoral Officer do not in any way offend the cited dicta of Lord Halsbury.

My conclusion is otherwise in relation to the telegram. In my opinion its despatch by the Chief Electoral Officer on the eve of polling day was not, in the circumstances, a due exercise of his discretion. Likewise, in my view, its text does not come within the confines of those rules which the holder of a statutory office should observe when exercising the discretion conferred by the statute.

The telegram purported to give guidance to presiding officers as to matters which such officers should avoid when accepting instructions from illiterate electors, as to the marking of their ballot papers - guidance which the Crown Solicitor who drafted the text of the telegram referred to in evidence as "advice in a negative form", rather than "guidelines" or "instructions". It was advice or guidance for which there was no authority in the statute. The text of the telegram was as follows:

"TO ALL PRESIDING OFFICERS IN THE KIMBERLEY, PILBARA,
GASCOYNE AND MURCHISON-EYRE ELECTORATES:

Because of the recent amendments to Section 129 of the Electoral Act it is suggested that when taking instructions from illiterate electors it would be advisable to avoid -

1. Asking the elector to indicate his preference by reference to a party named by you.
2. Asking the elector whether he desires to vote for a particular candidate named by you.
3. Marking on the Ballot Paper any preference not specifically indicated by the elector. "

The evidence disclosed that the Hon. the Attorney General instructed the Crown Solicitor to draft the telegram and that its text was settled jointly by them. The text of the settled draft was then forwarded to the Chief Electoral Officer by the Hon. the Minister for Justice, being the Minister to whom the Chief Electoral Officer was responsible, undercover of a memo in the following terms:

"CHIEF ELECTORAL OFFICER:

I am attaching a form of advice addressed to all Presiding Officers in the Kimberley, Gascoyne, Pilbara and Murchison-Eyre electorates.

This has been examined by the Crown Solicitor, and I request that this be conveyed to all appropriate officers prior to the commencement of the Poll on Saturday, 19th. February.

MINISTER FOR JUSTICE

18th February, 1977. "

The draft was received by the Chief Electoral Officer at approximately 9.30am on the 18th. February 1977, i.e. the day preceding the election. Mr. MacIntyre was opposed to the despatch of the telegram, being apprehensive of the possible confusion which its contents would cause presiding officers.

He sought advice from the Crown Solicitor, as to whether he was obliged to send it. He was advised that he had no alternative other than to obey the instruction of the Minister, and the telegram was sent at approximately 11.00 a.m. on that day. To my mind it was not only an instruction which Mr. MacIntyre was not obliged to obey but one with which, in the circumstances, he should not have complied. It was no part of the Minister's function to usurp the exercise of the statutory discretion which the legislature had vested in the Chief Electoral Officer (cf Lynskey J. Simms Motor Units Ltd. v. Minister of Labour and National Service (1946) 2 A.E.R. 201 at p.205). Therefore, the resultant despatch of the telegram by Mr. MacIntyre, cannot be said to be a proper exercise of that discretion.

Mr. MacIntyre recorded, in part, his misgivings in relation to the contents of the telegram in a letter which he wrote to the Minister for Justice on the day the telegram was sent, the last paragraph of which letter reads as follows:

" I have despatched the telegrams as requested. My own view is that the telegrams may cause some uncertainty among the Presiding Officers, particularly with regard to the second paragraph which may be interpreted by Presiding Officers to mean that they cannot read out to the elector the names of all the Candidates in the order in which those names appear on the ballot paper. "

However, the letter by no means expressed the totality of Mr. MacIntyre's concern. His evidence was that in December 1976, having taken advice from the Crown Solicitor, he had decided that he should not give any instructions to presiding officers in relation to the manner in which the obligations imposed on them when s.129 was repealed and re-enacted in that month, should be carried out. The stand which he then adopted, he thereafter maintained, despite pressure from various quarters to issue an instruction as to the use to be made by illiterate electors of "How to Vote" cards as a medium of instruction to presiding officers, when requesting them to mark their ballot papers. When he received the instruction to send

the telegram, not only was he reluctant to depart from the stand which he had taken, but also he was concerned as to the misleading nature of its contents. He considered that the second item might be interpreted by illiterate electors in the manner set out in his letter to the Minister, but also he felt the lack of any reference in the third item of the telegram to How To Vote cards, might lead presiding officers to conclude that the presentation of a How To Vote card could never amount to an acceptable form of instruction as to the recording of the illiterate elector's first or subsequent preferences.

The use to be made by illiterate electors of these cards, was a matter concerning which he had received correspondence from a Mr. Broomhall, the President of the Derby branch of the Liberal Party of W.A., in August 1976 and it was also a subject on which he had had discussions in the following month with the Returning Officer, Mr. Monger. As I understood Mr. MacIntyre, in his view, there was nothing novel about the use of How To Vote cards as a medium of instruction by an illiterate elector, as to the manner in which he desired both his first and subsequent preferences to be recorded. His view that such a card presented by an illiterate elector was an adequate and proper mode of instruction as to the marking of his ballot paper, was shared by Mr. Monger, but he had expressed concern to Mr. MacIntyre that in prior elections there had been some laxity by presiding officers in ensuring that the card was properly presented and that it represented the wishes of the elector. Mr. Broomhall's assertion, both in his correspondence with the Chief Electoral Officer and subsequently when giving evidence, was that an illiterate elector could not read and therefore presentation of a How To Vote card could not of itself constitute a sufficient instruction to enable a presiding officer to complete a formal ballot paper on behalf of an illiterate voter.

With these matters in mind, when in December 1976 s.129 of the

Act was repealed and re-enacted in a form which imposed on presiding officers the obligation of marking ballot papers "according to the instruction of the elector", he drafted an amendment to the booklet "Instructions to Presiding Officers" incorporating the safeguards which he considered desirable. The draft amendment was based upon instruction contained in a similar booklet issued by his Federal counterpart, The Chief Australian Electoral Officer. The section in the Commonwealth Act providing for assistance to illiterate voters conformed to s.129 as re-enacted and the substance of the instruction in the Commonwealth booklet was that if the voter presents a How To Vote card, the presiding officer should read out the names on the card in the order shown and ensure that the list accorded with the voter's wishes. If the answer of the voter satisfied the presiding officer, then he was to mark the ballot paper in the manner indicated by the card. It was Mr. MacIntyre's view that as an added safeguard the presiding officer, before reading out the name of the candidates in the order shown on the card, should first read out such names in the order shown on the ballot paper. He prepared the draft instruction in this form, but having doubts as to whether he could issue such an instruction, consulted the Crown Solicitor. The advice he was given was that the proposed instruction could be interpreted as limiting the powers of the presiding officer and that it should not be given. This advice, I think, was correct. In any event, Mr. MacIntyre acted upon it and re-drafted and submitted to the Minister for Justice for approval, an amendment to the booklet which apart from pointing up the difference in the marking of ballot papers on behalf of physically handicapped electors and illiterate electors, did no more than set out verbatim s.129 as re-enacted. The Minister approved this draft and the amended instruction was incorporated into the booklet and issued to the presiding officers in that form before the election.

Mr. MacIntyre had further discussions with Mr. Monger in that month and subsequent thereto in which he confirmed his

views as to the use to be made of How To Vote cards, but no written instruction was issued by him. Approximately two or three weeks before the election, Mr. Monger informed both the petitioner and on a different occasion, a Mr. Kel MacKenzie, whom he understood to be closely associated with the respondent's candidature of his view of the use which could be made by an illiterate elector of such a card and of the type of advice that he as Returning Officer would be giving to the presiding officers within the electorate.

On the 11th February 1977, the Minister for Justice sent to Mr. MacIntyre a copy of a letter the Minister had received from Mr. R. M. Rowell, the Chairman of the Liberal Party Campaign Committee who, it would seem, also was actively campaigning for the respondent in the Kimberley electorate. In this letter Mr. Rowell drew attention to what he described as the "confusion still existing in the Kimberley regarding illiterate voting". His letter was, in effect, a request that an instruction be issued by the Chief Electoral Officer informing presiding officers that a How To Vote card in the hands of an illiterate was "only to be taken as an indication that he wants to vote, but not necessarily how". Mr. Rowell's view, as expressed in this letter was that "if the illiterate can't remember the names and the order he wants them in, he obviously can't record a formal vote".

Mr. Rowell was not called to give evidence at the hearing and no other evidence was adduced as to the existence of the alleged confusion prior to polling day. When he received the letter, Mr. MacIntyre had no knowledge of the confusion said to exist and not surprisingly he declined to issue the instruction requested.

Mr. MacIntyre drafted a reply to Mr. Rowell's letter, which was forwarded to the Minister on the 17th February 1977, the substance of which was that legal advice was to the effect

that specific instructions to presiding officers as to how the presiding officer was to ascertain the instructions of the elector, to mark the elector's ballot paper for him should not be issued. On the 16th February 1977, before this draft had been sent to the Minister, Mr. MacIntyre received a message from the Minister in the following terms:

**"INSTRUCTIONS FOR PRESIDING OFFICERS REGARDING
ILLITERATE VOTERS**

Presiding Officers to be informed that when having satisfied themselves that an elector is illiterate, that they shall mark ballot papers for such voters according to the voter's instructions as provided in the relevant section of the Electoral Act.

Irrespective of whether the elector presents a candidate's How-to-vote card, the Presiding Officer shall state the names of the candidates to the elector, following which the elector shall be required to indicate the candidates for whom he or she wishes to vote in the order of his or her preference. Failure or inability of an elector to indicate his preference must result in an informal vote.

Please ensure that Presiding Officers are instructed accordingly.

16th February 1977. " "

Upon receipt of this message, Mr. MacIntyre had a discussion with the Minister in which he reminded the Minister of the advice given by the Crown Solicitor in December 1976, and of his memo dated 8th December 1976 to the Minister informing him of that advice. Mr. MacIntyre informed the Minister that in his view it was then too late for any instruction to be given. Shortly after this discussion and on the same day, Mr. MacIntyre received a further message to the effect that he, the Minister, believed that "Presiding Officers might be given suggested 'guidance' of some form of procedure they may adopt". It would seem, Mr. MacIntyre then sought further advice from the Crown Solicitor, who reiterated his earlier statement that he did not think any instruction should be given. Another discussion then

took place between the Minister and Mr. MacIntyre, in which Mr. MacIntyre informed the Minister that he could not give any form of guidance to presiding officers. The next morning the text of the telegram was received by Mr. MacIntyre, undercover of the memo from the Minister, and this was despatched by him in the circumstances which have already been outlined.

I should hasten to say that Mr. MacIntyre's integrity in the matter was not in any way impugned. He found himself in a difficult situation and did what he thought he had to do, which was to obey the instructions of the Minister to whom he was responsible. Nevertheless, in my opinion, it was an instruction with which in the circumstances, he should not have complied and in despatching the telegram he acted in error.

On the evidence, there was little doubt that Mr. MacIntyre's apprehensions as to the effect the receipt of the telegram might have on the minds of presiding officers, were borne out. His letter of the 18th February 1977 to the Minister, bears a notation which Mr. MacIntyre identified as being in the handwriting of the Minister:

"Subsequently advised by C.E.O. that the above telegram was well received by P.O.'s and was of assistance to them."

Mr. MacIntyre could not recall advising the Minister in these terms. When giving evidence, Mr. MacIntyre's recollection was that he said "I haven't had any complaints regarding it" (T.2151). The notation does not reflect the reaction of such of those presiding officers who received the telegram and gave evidence before me, in relation to the effect of the receipt of the telegram upon them. Mr. Dedman at Kununurra said, "the telegram didn't help" (T. 634). The comment of Mr. Webb at Go-Go Station was "the telegram made me uneasy. I wasn't quite sure what was going on". (T. 1288). Mr. Heise at Mowanjumb said "it (the telegram) certainly did not make things easier" (T.1966). Mr. Heise said in evidence that he interpreted the telegram to mean that he could not read out the names of the

candidates to illiterate electors. The presiding officer at Derby, Mr. Ferguson, did not give evidence but the testimony of the scrutineers of both parties at that polling place, was to the effect that throughout the greater part of polling day Mr. Ferguson would not permit any use to be made by illiterate electors of How To Vote cards.

THE PLAN AND ITS IMPLEMENTATION

The adoption by the respondent of a plan which the respondent conceded was contained in a document entitled "Instructions to Legal Scrutineers in the Kimberley District" and the implementation of that plan by five lawyers at the seven named polling stations was admitted in the respondent's amended answer, but in that pleading the respondent denied that the purpose of the plan was to deprive illiterate aboriginal electors of a fair and free opportunity of voting for the petitioner. Notwithstanding this denial, the respondent did not seek to explain in evidence why he adopted the plan or the reason for its implementation. The person responsible for drawing up the plan was not called to give evidence and two only of the five lawyers who participated in its implementation went into the witness box, namely, Messrs. J. M. Chaney and Haydn Dixon. Neither had any knowledge of the plan or any association with the respondent's candidature for the Kimberley seat prior to the 18th February 1977, on which day each of them was approached and asked to travel to the Kimberleys to act as a scrutineer for the respondent. Each was handed a folder containing the document to which I have referred and other documents including a copy of the telegram sent to all presiding officers by the Chief Electoral Officer at approximately 11.00am. on that day. Mr. Chaney was handed the documents at a briefing which took place at the Liberal Party headquarters in West Perth, at which other lawyers who ultimately travelled to the Kimberleys on polling day, with the exception of Mr. Dixon, were also present. Those who attended this briefing included Mr. R. M. Rowell and Mr. Chilla Porter an organiser for the Liberal Party. Mr. Dixon,

who was not contacted in regard to going to the Kimberleys until later on that day, was handed a like folder of documents by Mr. Peter Kyle, a member of the Liberal Party Campaign Committee, at the Perth Airport immediately prior to his departure. When these lawyers were handed these documents, each was told of certain alleged improper practices in relation to the marshalling of illiterate aboriginal voters in the Kimberley electorate. In the document there is reference to these alleged malpractices, and it is stated that "it is to counter these tactics that you are being sent to the Kimberleys".

It is of importance to emphasise that in his pleadings the respondent did not allege any malpractice by the petitioner or his agents during the electoral campaign or any manipulation of electors literate or otherwise and that throughout the protracted hearing, no evidence was adduced which would in any way support the suggestions of malpractice referred to in the documents handed to the lawyers.

The evidence did not disclose who drew up the instructions to the lawyers, but there is little doubt that the genesis of the document lay in instructions prepared by Mr. Broomhall, the President of the Derby Branch of the Liberal Party, for distribution to Liberal Party scrutineers in Derby and surrounding districts. When giving evidence, Mr. Broomhall said this document reflected both his views and the views of the branch as to the operation of s.129. The portions of that document relating to that section of the Act are as follows:

" INFORMATION FOR SCRUTINEERS

2. The Act states "If any elector satisfies the Presiding Officer he is so illiterate that he is unable to vote without assistance, the Presiding Officer shall mark his ballot paper for him in presence of scrutineers."

NOTE : (1) That only the P.O. and his assistants can mark the ballot paper and then only according to the instructions of voter.

If the voter says "I want to vote for Bridge" for example, the P.O. should mark 1 against that candidate.

The P.O. can not and must not prompt! If the illiterate voter is unable to instruct the P.O. how he wishes his ballot paper marked without prompting then that person is unable to record a formal vote.

3. The onus is on the illiterate voter to satisfy the P.O. he is so illiterate etc. therefore P.O.'s cannot ask likely voters whether they can read and write or in any way endeavour to establish literacy!
6. Efforts are being made to have P.O.'s instructed not to accept "How to Vote" cards as the voting instructions from illiterate voters - the illiterate voter cannot read the card and there is no provision for voting by photograph. In fact one How to Vote card has no photograph!

If a card is presented once the illiterate voter satisfies the P.O. he needs assistance, the P.O. can only ask him how he wants to vote - NO PROMPTING!! and the ballot paper must be marked exactly in accordance with the voters instructions even if it means only one square is marked for example. Object if How to Vote cards are accepted as the illiterate voters instructions. "

The evidence satisfied me that at the time of the distribution of this document, the instruction which Mr. Monger, the Returning Officer, had given to presiding officers in relation to the use to be made of How To Vote cards when marking the ballot papers of illiterate electors, was well known to the respondent's campaign organisers. Also, I am satisfied, that at this time the respondent who on the evidence, had been campaigning personally in the area during the fortnight preceding polling day, was well aware that he could anticipate little support from aboriginal electors resident in that part of the electorate coming within the sphere of influence of the Derby branch of the Liberal Party and who were likely to vote at the seven polling stations to which the legal scrutineers were ultimately posted. The guidelines which the legal scrutineers were instructed to follow reflected the abovementioned views of the Derby branch of the Liberal Party as to the role of presiding officers in marking the ballot papers of illiterate electors and the use to be made of How to Vote cards. In summary form these guidelines were:

- (a) To ensure that their legal qualifications were made known to Presiding Officers, so that their views would be accorded respect.
- (b) If the illiterate voter had no How to Vote card, ensure that the Presiding Officer asked the voter in what order he wants to vote for the candidate. If the voter is unable to specify who he wants for either his first or second preference, intervene and demand that the vote be made invalid.
- (c) If the voter has a How to Vote card, which he presents to the Presiding Officer as a general instruction, intervene and demand that the voter be questioned to find out whether he knows what a How to Vote card is. If he does not, then his instructions should be sought as if he did not have a How to Vote card.
- (d) If the Presiding Officer is allowing improper procedures in respect of the illiterate elector (i.e. accepting How to Vote cards as an instruction as to first and subsequent preferences) inform him you require the letter of the law to be carried out in respect of voting and require him to carry out the procedures laid down by s.119 (2). If any answer is unsatisfactory, demand immediately that the entitlement to vote be refused. If the voter does not understand and cannot answer any question he is not entitled to vote. If he answers any question 'No' when it should be 'Yes' or vice versa, then his vote should be refused. Assistance by the Presiding Officer should be objected to.

The full text of the "Instructions to Legal Scrutineers" is annexed.

In the absence of explanation from the respondent as to his reasons for the adoption of this plan, it seems to me that the only inference open on the evidence is that the intention was to stultify the use by illiterate electors of How to Vote cards as a medium of instruction in an area in which it was known that a large number of illiterate electors were enrolled who were unlikely to support his candidature and by that means to

circumvent the instruction which was known by the respondent's campaign organisers to have been given by the Returning Officer to the presiding officers as to the use illiterate electors were entitled to make of such cards.

There can be no doubt that the implementation of the plan in association with the telegram which had been despatched on the eve of the election by the Chief Electoral Officer, created confusion in the minds of the presiding officers at no less than six of the nominated polling stations, as to the performance of their duties when dealing with illiterate electors. The outcome was the commission of numerous errors by such officers and the effective disfranchisement of a large number of illiterate voters.

The instruction which Mr. Monger had given to presiding officers as to the attitude which such officers were to adopt when an illiterate elector presented the How to Vote card as the medium of his instruction, met with the prior approval of the Chief Electoral Officer. To my mind, the presentation of a list or a How to Vote card by an illiterate elector, is a proper direction by such an elector, both as to the marking of his first and his subsequent preferences, provided that the presiding officer takes the precaution of reading what is written on the list or card to the elector and by that or other means satisfies himself that the card reflects the wishes of the elector before he marks the ballot paper. The ability to read or indeed a full and complete knowledge of the preferential voting system, are not among the qualifications of electors. It is trite to observe that a literate voter is at liberty to take the How to Vote card of the candidate of his choice with him to the polling booth when he or she is marking the ballot paper to ensure that he or she completes a formal vote. It is worthy of note that polling booth workers for the respondent were enjoined to ensure that every voter had the respondent's How to Vote card when he entered the polling place in the following terms:

There is only one way to simplify the issue; by getting our supporters to follow the how-to-vote card EXACTLY.

So please, take the trouble to greet every voter, and then ask the voter to follow the card -

e.g. "Good morning. To vote Liberal, please follow this card exactly".

I can see no reason in logic why a like privilege should not be afforded to an illiterate elector, provided that the safeguards of which I have spoken are observed.

POLLING DAY

In connection with that branch of the case which relates to the issues of whether illiterate aboriginal electors were prevented from voting with effect or at all, at the nominated polling stations, by reason of the conduct of the polling, it is convenient to deal with events at each polling place separately. The irregularities upon which the petitioner relied, were not uniform throughout the polling stations, nor was the mode of proof of vote loss adopted by the petitioner, similar at each place. In some instances the petitioner sought to establish vote loss by calling enrolled electors who claimed to have attempted to exercise the franchise and either had been denied the right to vote, or had not been given the assistance for which the Act makes provision in the completion of a formal ballot paper. At some polling stations the petitioner relied upon ballot papers marked with a first preference only and evidence of persons other than the elector as to events surrounding the marking of the ballot paper in that manner. In relation to the majority of the polling stations evidence was called from the petitioner's scrutineers as to events occurring within each polling station, and by and large I found them to be accurate and truthful witnesses. The presiding officers at five of the polling stations gave evidence, the exceptions being the presiding officers at Derby and Fitzroy Crossing. Again a similar comment applies to their evidence. Evidence called by the respondent

related only to events at Kununurra, Derby and Turkey Creek polling stations. In the end result, save for events which occurred in the precincts of the polling station at Kununurra and which involved Sergeant Corker, the conflict of testimony was limited in relation to matters relevant to the determination of these issues and it is not my intention to traverse the evidence in detail. I will deal with the vote loss which the evidence satisfies me that the petitioner suffered, commencing with the Turkey Creek polling station, as this was the only polling place concerning which there was no evidence that the actions of the respondent's agents played any significant part in the loss of votes of which the petitioner complained.

Speaking generally, I should record that almost without exception, I impressed on each witness who was called to give evidence as to voting intention, the freedom to decline to state his or her intention, even though it was as to the past. In so doing I was following the dicta of Isaacs J. in Kean v. Kirby (Supra.). The rare occasions on which this advice was not given, came about as the result of the eagerness of the particular witness to inform me of that intention. In the case of two witnesses only, unwillingness to disclose their voting intention was expressed, and no further evidence was led from either of them and such evidence as they had given played no part in my deliberations. I also subjected the evidence as to voting intention, to the critical scrutiny of which Isaacs J. speaks in the case to which I have referred.

It is also of importance, I think, to emphasise that it was never any part of the petitioner's case that the presiding officers and other electoral staff in the nominated polling stations, did other than their best in difficult and trying circumstances. Some of these officers were completely new to the task and all were officiating in rather remote areas with limited means of communication with their superiors. They were required to deal with an unexpectedly large turn-out of illiterate

electors and were called upon to administer a new section in relation to the assistance of such electors. With the exception of the polling station at Turkey Creek, their duties were performed in an atmosphere of tension, stemming either from constant wrangling between scrutineers as to the sufficiency of the instruction given by an illiterate elector to the presiding officer as to the marking of his ballot paper, or from unexpected and unprecedented requests to put the prolix questions prescribed in s.119 to would-be aboriginal electors. In the polling stations where the demand that these questions be put was made, the officers were required to ask questions in the terms of the Act when they well knew that the persons being questioned had little or no understanding of such formal language, with consequent distress to themselves and the would-be electors. Without exception, those presiding officers who gave evidence at the hearing, impressed me as honest and competent persons, some perhaps more resourceful than others, but all doing their best within their capabilities to perform the task which they had undertaken. It is not surprising that in the circumstances which prevailed at most of these polling places throughout the day, irregularities occurred and equally it came as no surprise to hear the majority of them say that they would not volunteer for the job again. The observations which I have made as to the integrity and competency of these officers, apply with equal force to Mr. Monger. The electorate was fortunate to have a man of his calibre serving in the capacity of returning officer.

TURKEY CREEK

Turkey Creek comprises a community of about 90 aboriginal people, the residents primarily being retired stockmen and their wives. It is a settlement which lies approximately half-way between Kununurra and Halls Creek. The evidence was that the older members of the community have had little formal education but having worked on cattle stations in the area, they have acquired a limited knowledge of the English language and western ways. The

settlement, in effect, serves as a retirement village, but there are no permanent buildings other than a Telegraph Repeater Station which is located there. Mr. Monger's survey of the electorate revealed that there were in excess of 60 people living in the area who were enrolled and the decision to establish a polling station there was made following this survey. Mr. Monger approached the officer in charge of the Telegraph Repeater Station, Mr. E.T. Voce, who had lived in the area for approximately two years, and requested him to act as presiding officer at the election. Mr. Voce was reluctant to accept the job as he had no prior experience in electoral matters, but ultimately agreed to do so provided he was given an experienced assistant. Arrangements to this end were made, but due to the onset of the wet season and heavy rains immediately prior to polling day, the assistant was unable to travel to Turkey Creek on that day. The outcome was that the assistant returning officer instructed Mr. Voce to appoint his wife as assistant presiding officer, approximately 10 minutes before the poll opened. On polling day ballot papers were issued to 62 electors at this polling station, and 45 informal votes were recorded.

The complaints in the petition in relation to this polling station were the failure of the presiding officer

- (i) to give assistance to illiterate electors in the marking of their ballot papers; and
- (ii) to inform electors who claimed to be enrolled but whose names were not found on the roll, of their entitlement to record a section vote.

Issue was joined on these pleas by the Chief Electoral Officer and the respondent but there was a shift in emphasis of the matters in dispute after Mr. Voce had given evidence. In the course of his evidence in chief, Mr. Voce exhibited emotional distress and stated that he was well acquainted with the majority of the Turkey Creek residents and was aware at all times that the majority of the electors to whom he had issued ballot papers, were

unable to read and write. He stated that he had not offered to give them assistance in marking the ballot papers because none of them had requested assistance. He said that having read the booklet "Instructions to Presiding Officers", he had come to the conclusion that he could give assistance only if the elector sought assistance. The impression I had gained from other evidence was that the electors were given little opportunity to voice their need for assistance and that he had declined to give assistance when requested by a scrutineer to do so, but he that as it may, there could be no doubt on Mr. Voce's own testimony that he was satisfied as to the need of the majority of these electors for assistance in recording their votes at the time he handed them ballot papers. This was acknowledged by counsel for the Chief Electoral Officer and the matter which remained for determination was whether the evidence established that the illiterate electors would, in any event, have been able to give an instruction which would have enabled the presiding officer to complete a formal vote for them. It remained the contention of counsel for the respondent, that Mr. Voce's interpretation of the section was correct. I have already expressed earlier in these reasons, my view as to the obligation of a presiding officer in the circumstances outlined.

Thirty-four members of the community gave evidence before me, some of whom were literate and had no problem in recording formal votes. From the totality of this evidence, it was apparent that the whole community had given careful consideration to the question of voting at the election. Members of the community had attended when each of the candidates came to the area to address them and a meeting of the whole community had taken place in the lough shed, which served as the community meeting place, shortly prior to the election, at which the question of which candidate the community should vote for was fully discussed. At this meeting it was resolved that the community would vote for the petitioner, who was well-known to them, as he had been brought up in the area and the petitioner's "How to Vote" cards were distributed to each person who was on the roll.

The desire of the members of the community to record their votes is demonstrable from the efforts which they made on polling day to attend the polling place. As I have said, the election was held in the wet season. It had rained heavily during preceding days and the creek was in flood. To attend at the polling place it was necessary for the majority of the members of the community to ford a flowing stretch of water in excess of 20 metres wide and at least one metre in depth. The majority of the electors were elderly people and many of them were frail, but nevertheless they crossed the creek carrying their "How to Vote" cards aloft so that the cards would not get wet. The evidence was that with one exception, they entered the polling place displaying these cards, which in fact almost all of them had preserved since election day and which the majority of them produced when giving evidence to demonstrate for whom they had wished to vote. The impression I gained of their evidence was of a simple, but sensible and sincere people who were anxious to exercise the franchise which the Act confers. There is little doubt in my mind, that if they had been afforded the assistance for which the Act makes provision, many more formal votes would have been recorded. Of the persons who gave evidence, twenty-five were patently illiterate and incapable of recording a formal vote without assistance. However, each of those persons had equipped themselves with a "How to Vote" card which they were carrying when they entered the polling place. Each of the persons satisfied me that if given assistance, each with the aid of the card they were carrying, would have cast a valid vote for the petitioner. Two of these persons were not given ballot papers because their names could not be found on the roll by the presiding officer. Each of them satisfied me that they made authentic claims to vote and that they were not informed of their entitlement to record a section vote. A loss of twenty-five valid votes to the petitioner was thus established at this polling station. The names of the persons whose evidence satisfied me that they would have recorded formal votes, appear in the second schedule to these reasons.

HALLS CREEK

The irregularities at this polling station were said to be:

- (i) the failure of the presiding officer to mark ballot papers in accordance with the instructions of the illiterate electors;
- (ii) the failure of the poll clerk and/or the presiding officer to inform would-be electors whose names were not found on the roll, of their entitlement to record a section vote;
- (iii) the refusal of the presiding officer to permit ballot papers to be delivered to would-be electors whose names had been found on the roll when the presiding officer was not satisfied as to one or more of the matters referred to in s.123 of the Act.

There was no complaint that illiterate electors were not offered assistance. As each elector was marked off the roll, enquiry was made as to the need for assistance. If the elector required assistance, he or she was referred to the presiding officer.

Arguments between the scrutineers for the candidates, as to the use to be made by illiterate electors of "How to Vote" cards as a medium of instruction, occurred shortly after polling commenced. To resolve this dispute, Mr. Moon, the presiding officer, closed the polling station within half an hour of the commencement of polling and telephoned the returning officer, Mr. Monger. The ruling given by Mr. Monger, as Mr. Moon recalled it, was that if the illiterate elector presented the "How to Vote" card in a positive manner, this was to be read to the elector, who was to be asked if that was the way he wished to vote. If the reply of the elector was in the affirmative, the card was to be accepted as an instruction and the ballot paper marked accordingly. If the answer was "no", verbal answers were to be sought.

Shortly after the polling station re-opened, Mr. Lloyd, the lawyer whom the respondent in his amended answer admitted was acting as his agent at this polling place, arrived and immediately demanded that the questions prescribed by s.119 be asked by Mr. Moon of aboriginal electors. Neither Mr. Moon nor his assistant, both of whom had little prior electoral experience, had ever heard of the section and consideration of this request led to further disruption of the polling. At first Mr. Moon declined to put the questions on the basis that the electors had been identified and received ballot papers by the time they reached his table. Mr. Lloyd insisted that the questions be asked and that the proceedings within the polling station be conducted in accordance with the Act. He continued to insist that Mr. Moon himself put the questions to the electors. Mr. Moon was adamant that he would not, as he was too busy assisting illiterate electors and ultimately Mr. Lloyd agreed that Mr. Williams, the assistant presiding officer, could put the questions. Thereafter throughout the day and until late afternoon, a blanket type of questioning of illiterate aboriginal electors took place. It was clear from Mr. Williams' evidence that he found this task distasteful as he was aware that the aboriginals could not understand the formal language in which the questions were framed. When he tried to rephrase the questions in more simple language, on many occasions Mr. Lloyd would require that the questions be put in the terms prescribed by the Act. If an elector gave an incorrect answer to any question, Mr. Lloyd would demand that the elector be denied ballot papers. At the same time as these questions were being asked, there was constant wrangling between other scrutineers as to whether or not the instruction given by a voter was sufficient to enable Mr. Moon to complete a formal ballot paper on the elector's behalf. It is not surprising that in these circumstances, one scrutineer likened the atmosphere in this polling station to a Police or Criminal Court, while Mr. Lloyd was present.

The number of electors who were refused ballot papers by reason of incorrect answers to the prescribed questions or failure to answer such questions, was difficult to determine. Section 119(3) of the Act makes it mandatory that a list of persons to whom the questions are put, be kept by the presiding officer. Mr. Moon had no knowledge of this requirement and a list was not maintained until some twenty-five electors had been questioned. The list which Mr. Williams subsequently kept was not able to be found in the Electoral Office records. So far as Mr. Williams could recall, about another 45 electors had the questions put to them. He said that a minimum of four and possibly six electors were objected to by Mr. Lloyd and that on each occasion Mr. Moon, who was usually otherwise engaged while the questions were being put to the electors, upheld that objection. It was clear from Mr. Moon's evidence that before excluding the electors from voting, he did not give any consideration to the matters spoken of in s.123 of the Act.

It was also apparent from the evidence that certain electors' names were not found on the roll by the poll clerk when they presented themselves to vote. The system in operation at this polling station in relation to identification was that with the consent of scrutineers for both parties, aboriginal electors were checked by party workers as to enrolment prior to entering the polling place and if found to be enrolled, were given a name tag which was affixed to their clothing to assist the poll clerk in identifying them when they presented themselves to vote. In these circumstances there can be no doubt that the persons presenting themselves to vote, made an authentic claim to vote and when he was unable to find these persons on the roll, it was the duty of the poll clerk to inform them of their entitlement to record a section vote.

A total of six electors, whose names appeared on the roll, satisfied me that they presented themselves for voting and that by reason of incorrect answers to the prescribed questions or the failure of the poll clerk to locate their names on the roll,

each of them was not given ballot papers. The evidence of each of these persons also satisfied me that each of them intended to vote for the petitioner, that each had the petitioner's How to Vote card in his or her possession and that with the aid of this card and appropriate assistance, each would have recorded a valid vote for the petitioner.

It was in the tense atmosphere which I have described and in circumstances in which he was subjected to repeated interruptions, that Mr. Moon was endeavouring to assist illiterate electors. Mr. Moon identified in evidence, nine ballot papers marked with the numeral one in the square opposite the name of the petitioner, bearing no other markings, as being ballot papers marked by him. He agreed with the petitioner's counsel that in each instance the elector had nominated the petitioner as his first preference and had either handed to him or displayed prominently the petitioner's How to Vote card. His evidence and the evidence of scrutineers present at the time when these ballot papers were marked, led me to the conclusion that there had been an adequate instruction given by the voter in each instance and that the abnormal circumstances prevailing caused Mr. Moon to place too literal an interpretation on the instruction of Mr. Monger.

Evidence adduced at Halls Creek satisfied me that a proven vote loss to the petitioner at this polling station of not less than fifteen votes, had been established.

GO-GO STATION

The substantive complaint at this polling station was the failure of the presiding officer to mark ballot papers in accordance with the instructions of electors and the key witness in establishing the vote loss, was that officer. In relation to events at this polling station, the petitioner's scrutineer and a large number of aboriginal electors also gave evidence.

The presiding officer, Mr. S.J. Webb, was not only an experienced electoral officer, but he had also had a long association with the aboriginal people, having lived in the Fitzroy area for approximately twenty-three years. Over a period of seven or eight years, he had acted as a poll clerk and presiding officer on six or seven occasions and presided at both State and Federal elections. The aboriginal electors who usually vote at Go-Go Station were all known to him and it had been his practice for many years to accept How to Vote cards tendered to him by illiterate electors as an instruction as to the manner in which their ballot papers were to be marked. For reasons for which no clear explanation was given in evidence, a few days prior to polling day, he rang Mr. Monger to ascertain whether there was to be any change in this procedure at the coming election. He received advice similar in terms to that given to Mr. Moon, which conformed to the procedure which he had followed previously. At about 4.30 p.m. on the eve of the election, he received the telegram from the Chief Electoral Officer. To use his expression, "it (the telegram) threw me out a little". He found item 3 particularly confusing and said "it was only advising us. I thought this was a rather roundabout way of saying not to use any particular guidance such as a placard or paper such as a How to Vote card". There can be little doubt that the receipt of the telegram affected his subsequent actions in relation to the use of How to Vote cards as a medium of instruction.

The scrutineers present at the commencement of polling, were Mr. J. O'Driscoll who was authorised to act as a scrutineer by Mr. W.R. Withers, Mr. T. McAuliffe, a lawyer and the admitted agent of the respondent, and Mr. Boedeker who was authorised by the petitioner. Among the early voters was a man whom Mr. Webb knew to be illiterate and in need of assistance to vote. When he offered to help him, Mr. McAuliffe protested and Mr. Webb's recollection of what he said was "If you consider this man is in need of assistance I suggest you put the questions of s.119 to him because it is a means of assessing whether he is

literate or not". This request bewildered Mr. Webb and the asking of the questions had a like effect upon the elector. In the end result, notwithstanding the elector's failure to answer the questions, Mr. Webb was permitted to assist him and after a second voter had been questioned in a like manner, Mr. McAuliffe agreed that assistance could be given without the questions being asked.

Initially, assistance given by Mr. Webb took the form of reading the How to Vote card to the elector and asking him if that was the way he wished to vote. If the elector gave a suitable acknowledgment, Mr. Webb would complete the ballot paper as formal in accordance with the directions on the card. The evidence of Mr. Boedeker was that while this system was operating, the voting went smoothly and many formal votes were cast for the petitioner. After voting had been in progress for approximately 2 hours, the other scrutineers, and in particular Mr. O'Driscoll, objected and demanded that the form of assistance be modified. Mr. O'Driscoll insisted that the electors be required to nominate preferences. Mr. Boedeker objected to the change but he was a young man with no experience in electoral matters, and his objections were overruled. Thereafter the system was that the names were read from the How to Vote card, to the elector who was required to nominate preferences. This system operated until lunchtime and during this period there were constant interjections, again from Mr. O'Driscoll, if the electors were having difficulty in naming their preferences and complaints that Mr. Webb was prompting if he read the names more than once. Mr. Boedeker said that some informal votes bearing only the numeral one in the square opposite the name of the petitioner were cast during this period, but Mr. Webb was able to complete formal ballot papers on behalf of the majority of electors during the time that this second system was in operation.

At about noon, Mr. O'Driscoll sought Mr. Webb's permission to use the telephone at the Go-Go Station homestead

and Mr. Webb directed him to the telephone, which was some distance away. Mr. Webb said that when Mr. O'Driscoll returned, he informed him that in addition to speaking to some friends, he had rung the returning officer. This upset Mr. Webb and he told Mr. O'Driscoll that he was the only person who should speak to that officer. Mr. O'Driscoll then said that the returning officer had advised Fitzroy of a change of procedure in relation to How to Vote cards. He said they had gone away from How to Vote cards and were now working directly from the ballot paper, reading the names from the ballot paper in the order shown thereon. He also told Mr. Webb that the returning officer would like to speak to him and that the postmaster was prepared to keep the exchange open for a few minutes after the official closing time of noon, to enable him to do so.

Mr. Webb then closed the polling place and attempted to telephone the returning officer. He found the exchange was closed. At the time it was raining heavily, and if he had gone into Fitzroy Crossing to ring, there was a high risk that his car would become bogged.

He returned to the polling place and a discussion ensued between Mr. Webb and the scrutineers, as a result of which Mr. Webb decided to read directly from the ballot papers, reading out the names once only and informing the electors they were required to name "two men" and that they must tell him their first and second choice. This was the system of assistance which was implemented when the polling station re-opened after lunch. It was then that the main body of electors attended. Illiterate electors invariably carried How to Vote cards and although Mr. Webb permitted them to retain these cards "as their assurance", as he put it, no use was made of them. Mr. Webb identified twenty-nine ballot papers marked with the numeral one in the square opposite the name of the petitioner and bearing no other marking, as being marked by him. He told counsel for the petitioner that if he had been left to his own way of doing things,

then these twenty-nine electors would have cast valid votes for the petitioner. He also agreed that at least one-half of ten unmarked ballot papers would also have been formal votes in favour of the petitioner. The polling at Go-Go was higher than normal by reason Mr. Webb said, "of an influx of voters from Fitzroy Crossing". A total of 135 votes were cast and forty-four of such votes were informal.

At the conclusion of polling, Mr. Webb was able to travel to Fitzroy. He then rang Mr. Monger and told him that he had a large number of electors seeking to vote when he got his message and that heavy rain was a deterrent to getting to a telephone. Mr. Webb said that Mr. Monger was not "very happy" when he told him of the changes of procedure in relation to the use of How to Vote cards.

Mr. Monger in his evidence said that he did not know Mr. O'Driscoll and that so far as he could recall, he had never had any conversation with a person of that name on polling day. He was quite clear that throughout polling day he had never varied his advice in relation to the use which he considered it proper for illiterate electors to make of How to Vote cards. Mr. Monger also said that he would not have accepted a reverse charge call on that day from anyone, except an electoral officer.

Mr. Johansson, the officer in charge of the Derby Telephone Exchange which covers Fitzroy Crossing, said in evidence that there was no record of any trunk call being placed from Go-Go Station to any other place on election day, but that his records would not encompass a reverse charge call or a credit card call. He said that he knew Mr. O'Driscoll and that to his knowledge he had never used a credit card for the purpose of making a phone call and that his enquiries revealed that there was no credit card held against his telephone number. Mr. O'Driscoll was not called to give evidence. Mr. Boedeker corroborated Mr. Webb's evidence as to the conversations which took place with Mr. O'Driscoll.

I have no doubt that Mr. O'Driscoll concocted the story which he told Mr. Webb of the returning officer's change in procedure in regard to the use of How to Vote cards as a medium of instruction. Equally, I have no doubt that his deception of Mr. Webb in this regard was to further the scheme to stultify the use of such cards. It is not without significance that the persons whom the respondent admitted acted as his agents in relation to the implementation of the plan, were variously authorised to act as scrutineers by the respondent himself, Mr. Withers and Mr. Rees. The evidence did not disclose whether the respondent had any knowledge of Mr. O'Driscoll's intention to play such a trick. A letter written by the respondent to Mr. O'Driscoll subsequent to the election, a copy of which was adduced in evidence, gives the impression that Mr. O'Driscoll's actions received his sanction.

The evidence adduced at Fitzroy Crossing in relation to the events at the Go-Go polling station, satisfied me that the vote loss to the petitioner at that polling place was not less than twenty-nine. The petitioner sought to claim additional votes and called a large number of illiterate electors, who had attended at this polling station and endeavoured to vote. It was not possible to determine with any accuracy from this evidence, whether any marking had been made on the individuals' ballot papers. Bearing in mind the onus of proof, I concluded that the proven vote loss should be restricted to the number established by other evidence.

FITZROY CROSSING

The petitioner did not claim any specific vote loss at this polling station. Evidence was adduced to the effect that the plan was implemented at this polling place in that the questions prescribed by s.119 were put to illiterate electors in the terms of the Act and that by reason of the time taken in putting such questions, the voting process was much delayed.

Again there was confusion as to the use to be made of How to Vote cards, resulting in Constable Ullrich, who was the presiding officer, contacting Mr. Monger in regard to this matter, not long after the commencement of polling. Mr. Monger stated that Mr. Ullrich informed him that a scrutineer was insisting that the acceptance of How to Vote cards was wrong. The evidence was that in the result, many aboriginals left the polling place without attempting to vote. It was apparent, however, from Mr. Webb's evidence, that some at least of these electors probably voted at Go-Go.

MOWANJUM

Specific vote loss claimed by the petitioner at this polling place was three formal ballot papers which were rejected from the count by the Returning Officer because they bore the endorsement "invalid", which it was common ground had been made by the presiding officer. However, Mowanjum was a polling station at which the conduct of the polling was affected to a marked extent, both by the telegram sent by the Chief Electoral Officer and the implementation of the plan. The presiding officer, Mr. Heise, a bank officer with limited electoral experience, gave evidence that upon receipt of the telegram on the day prior to the election, he spoke to Mr. Ferguson the presiding officer at Derby, as to the interpretation of the telegram. When asked what he had discussed with Mr. Ferguson, Mr. Heise said: "to make sure I was interpreting it correctly (and I thought I had a fairly good grasp of it) I just did clarify with Mr. Ferguson that at no stage were we to mention the names of any candidate". He said Mr. Ferguson's reply was that that was the way the poll was to be conducted.

The system adopted by Mr. Heise was to ask illiterate electors for the names of the candidates in the order of their preference, without reading out the names of such candidates. He did not permit any use to be made of How to Vote cards because to his mind, the telegram forbade the use of such cards.

At about 8.30a.m., Mr. Haydn Dixon, the lawyer whom the respondent in his answer admitted acted as his agent at this polling station, arrived at the polling place and presented an authority to act as a scrutineer, signed by the independent candidate Mr. Rees. Mr. Heise required him to make the declaration prescribed by the Act and Mr. Dixon then informed him that he required the questions prescribed by s.119 put to all electors. Mr. Heise had no knowledge of this section, but having read it and the instruction booklet, he then put the questions in the terms of the Act. In most instances, however, he did not put the questions until he had identified the voter satisfactorily, marked him off the roll and handed him ballot papers. In evidence, Mr. Heise said, that in the three instances in which he wrote the word "invalid" on the ballot papers, the electors had each given an incorrect answer to the question relating to whether or not they had voted before. Mr. Heise was familiar with the Mowanjam people through his banking activities and he said that although this question was answered in the affirmative, he was very sure that none of them had voted before on that day. Nevertheless, he felt that they were ineligible to vote, but having given them ballot papers, he either allowed the electors to complete them, or completed the ballot papers on their behalf and then wrote the word "invalid" on the ballot paper, after it had been completed.

In my view, there are a number of reasons why these ballot papers should not have been rejected from the count. Firstly, it was quite clear from the evidence, that Mr. Heise did not address his mind to the provisions of s.123 of the Act when coming to the conclusion that the electors were not entitled to vote. Secondly, as I have said earlier in these reasons, to my mind the delivery of ballot papers to an elector is recognition of their entitlement to vote and the questions should not have been put after this had been done. The petitioner's claim to these three votes is made out.

Mention should also be made of the evidence led as to the effect of the blanket questioning of aboriginal electors. Before Mr. Dixon arrived at the polling station, a crowd of voters estimated to be between eighty and one hundred, had collected inside and outside the polling station. Mr. Heise's description of the effect of the questions on the aboriginal electors was that "they were all pretty shaken up by the fact that the questions were being asked" and "it made things pretty difficult for them".

There was no dispute on the evidence that from noon onwards on polling day, there was little or no activity at this polling station. A total of only twenty-nine votes was recorded throughout the day and I have no doubt that a large number of aboriginals were deterred from voting by reason that the prescribed questions were being put in the terms of the Act. The evidence showed that some of the electors went to the Derby polling station approximately 6 miles away and sought to vote there. What the evidence did not disclose was how many of those who had gathered earlier in the day at Mowanjuma did not seek to record a vote.

DERBY

The Derby polling station, I was informed, is normally a busy place on polling day and for this reason it has an electoral staff of nine persons. By reason of the issues raised by the parties it proved to be the only place at which evidence was adduced from all the scrutineers for both candidates present at different periods of the day. The petitioner's substantive claim was the loss of nine votes by reason of the failure of the presiding officer to mark ballot papers in accordance with the instructions of electors. It was at this polling place, also, that the petitioner alleged that Mr. Dixon had been guilty of an illegal practice. Again it was here that the respondent alleged that conduct of the petitioner's polling booth helpers in removing Liberal How to Vote cards from aboriginal electors prior to such electors entering the polling station, caused such electors to become bewildered.

To my mind, this last mentioned issue had barely marginal relevance. No vote loss to the respondent was alleged as a result of the conduct pleaded. The factual issues were of minor significance but in respect of those issues, the respondent bore the onus of proof. I found the evidence to be quite equivocal and in such circumstances of course, I must hold that the respondent has failed to discharge the onus. A number of people living in the Derby area gave evidence on behalf of both parties, but I do not consider any good purpose would be served by commenting upon the evidence.

Likewise, I did not consider that the petitioner had discharged the onus of proof in relation to the allegation against Mr. Dixon. I have expressed earlier in these reasons, my view as to the necessary pre-requisites for the appointment of a person as a scrutineer. Mr. Dixon did not make the prescribed declaration as to secrecy and therefore, to my mind, he was not a scrutineer within the meaning of the Act. This comment however, applies to all the scrutineers at the Derby polling station, as it would seem that the presiding officer was not aware of the requirement. Although Mr. Dixon remained within the polling station without lawful entitlement for some hours, this of itself does not mean that he has been guilty of an illegal practice. It was said by the petitioner's counsel that in requiring the questions prescribed by s.119 to be put when not a scrutineer within the meaning of the Act, Mr. Dixon was in breach of ss.179 and 183(3) of the Act. I think, however, the submission of Mr. French was correct when he said that s.183, which is declaratory of what constitutes an illegal practice, is directed at influence or attempt to influence the mind of the persons of whom it speaks. It is also extremely doubtful in my view whether a request to ask questions, is publication within the meaning of that section. This allegation fails.

The remaining allegation related to the actions of the presiding officer when dealing with illiterate electors. In this instance, I had the advantage of the evidence of all scrutineers as to events occurring within the polling station and in particular, in relation to Mr. Ferguson's attitude towards the use of How to Vote cards as a medium of instruction by an illiterate elector. On this aspect, there was little, if any, conflict of testimony. Clearly throughout the greater part of the day, he did not permit the use of such cards in any way by illiterate electors. Mr. Ferguson did not enter the witness box to tell me why he adopted this attitude. Another feature of his administration of the polling place which was unusual and which was not explained, was that no provision was made to ascertain by enquiry from the elector when presenting himself to vote, as to whether or not he required assistance. Turkey Creek apart, this was established to be the practice at all other polling stations from which evidence was taken.

Mr. Monger in the course of his evidence, told me that he had discussed the use of How to Vote cards as a medium of instruction, with Mr. Ferguson shortly before polling day, the advice given by him being in the terms previously outlined. The explanation of Mr. Ferguson's administration of the polling place, is I think, to be found in the telegram from the Chief Electoral Officer and the evidence of Mr. Broomhall. It will be recalled that Mr. Meise had said that Mr. Ferguson shared his interpretation of the telegram when he spoke to him on the afternoon of the day preceding the election. Mr. Broomhall said that he discussed the document prepared by him, entitled "Information for Scrutineers", the relevant portions of which are set out earlier in these reasons and that Mr. Ferguson agreed that the polling booth should be conducted in the manner outlined.

There was an abundance of evidence from the scrutineers for both parties, that illiterate electors throughout polling day, when informing Mr. Ferguson that they wished to vote for

the petitioner, also sought to proffer or handed to him the petitioner's How to Vote card. I am satisfied in the absence of explanation from Mr. Ferguson, that his failure to accept instruction in this form was an error and that the petitioner has made out his claim to the nine votes in issue.

Although I did not consider that Mr. Dixon had been guilty of an illegal practice, I feel I should make some mention of his actions at the Derby polling station and their outcome. Until his arrival at or about 1.00 p.m. on polling day, at the Derby polling station, nobody had sought to put the questions prescribed by s.119 to any elector. The evidence satisfied me that Mr. Dixon's arrival at the Derby polling station was occasioned by the fact that he followed a vehicle which he saw departing from Mowanjum with a number of aboriginals aboard and which he correctly anticipated was taking them to Derby to vote. When he arrived at the Derby polling place, he presented an authority to act as a scrutineer to Mr. Ferguson, on this occasion signed by the respondent, and immediately requested that the prescribed questions be put to aboriginal electors. His motive for so doing is expressed, I think, in the conversation which I am satisfied he had shortly after his arrival, at which, unknown to him, a Labour scrutineer, Mrs. G. B. Eliot, was present. Mrs. Eliot said that the conversation was to this effect. Upon his arrival, Mr. Dixon walked up to a group of Liberal scrutineers, to whom Mrs. Eliot was then talking. He said "They'd really managed to fix things at Mowanjum". When Mrs. Eliot asked what he meant, he said "We were asking them the questions", pointing to s.119 in the Act and later in relation to question (h) of that section said, "This is the one we got them on at Mowanjum".

Following upon his arrival, the questions were put to the majority of aboriginal electors who presented themselves for voting. The evidence was that as many as four assistant presiding officers at the one time were asking the questions,

and that until about mid afternoon, when Mr. Ferguson instructed his assistants that they were entitled to simplify the language of the questions, an incorrect answer meant automatic refusal of ballot papers. The evidence did not disclose how many would be electors were refused ballot papers, or how many were deterred from seeking to vote by reason that when the questions were being asked, there can be little doubt that the numbers were substantial.

KUNUNURRA

There were two separate and distinct issues at this polling place, one involving events within the polling station and the other events occurring within its precincts. This segment deals only with the first issue.

At the conclusion of the hearing at this polling station, the vote loss claimed by the petitioner by reason of the irregularities in the conduct of the polling, fell into three categories.

- (i) Two formal ballot papers, each of which bore an endorsement made by the presiding officer "objection" which led to the ballot papers being rejected from the count.
- (ii) Failure to inform the would-be electors of their entitlement to a section vote when their names had not been found on the roll by the poll clerk.
- (iii) Failure of the presiding officer to accept instructions from illiterate electors as to the marking of ballot papers.

This polling station was well organised and well staffed. Enquiry was made of electors as they entered the booth as to their need for assistance and two of the staff were acquainted with many of the illiterate voters, one of these persons being assigned the task of dealing with persons claiming section votes.

It was clear from the evidence that within the polling place, the atmosphere throughout polling day was tense and much as I have described the atmosphere at Halls Creek. From the commencement of polling, scrutineers for both parties were vocal in their protests about the use being made or not being made of How to Vote cards in relation to the assistance of would-be electors. There was one difference between this polling place and Halls Creek, namely that the questions prescribed by s.119 were not required to be put to would-be electors. Mr. J.M. Chaney, the respondent's admitted agent at this polling place, found that aspect of his instructions, he said, to be distasteful and did not request that the questions be put. However, as at Halls Creek, the arguments as to the use to be made of How to Vote cards caused the presiding officer, Mr. Dedman, who impressed me as an efficient and resourceful person, to close the polling booth within half an hour of the commencement of polling to seek instructions. He said that he rang Mr. Bradley, the assistant returning officer at Wyndham, who in turn contacted Mr. Monger, and ultimately Mr. Dedman was advised, as he recalled it "that if the How to Vote card was presented in a positive manner and accompanied by words like this 'or even a grunt' then the card was to be accepted". When the booth re-opened and polling recommenced, wrangling then ensued between opposing scrutineers as to what amounted to a positive presentation or whether the accompanying words of the elector were sufficient to enable the card to be accepted as an instruction. At times the disputation became such that Mr. Dedman threatened to eject all the scrutineers from the polling station. Almost without exception the disputes related to electors seeking to vote for the petitioner. It was the frustration arising from this situation which caused Mr. Dedman to endorse on two formal ballot papers which he had completed on behalf of two illiterate electors, the word "objection", when Mr. Chaney who contended there had not been an adequate presentation of the card by the elector, insisted that he do so. Mr. Dedman agreed that he should not have made the endorsements.

Again, as at Halls Creek, the evidence satisfied me that the tension within the polling booth throughout the day and the constant interjections of scrutineers while Mr. Dedman was endeavouring to obtain the directions of the elector, caused him at times to place an interpretation on the instruction he had been given, which I am satisfied was too limited. Evidence was given that if the elector displayed the card in a manner that would enable Mr. Dedman to read it but did not thrust the card forward positively, notwithstanding that the voter said "I want to vote for Bridge", he would not mark the card as to preferences without further oral directions from the elector. Mr. Dedman agreed that eleven ballot papers on which the numeral one was written in the square opposite the petitioner's name, were in his hand writing and that in the great majority of cases, such electors were displaying the petitioner's How to Vote card in a manner that made the instructions thereon visible to him when they told him that they wanted to vote for the petitioner. Four of these electors gave evidence as to the circumstances surrounding the marking of their ballot papers in this manner. This evidence was corroborated by scrutineers present at the time, and these scrutineers also spoke as to the circumstances surrounding the marking of other ballot papers in this manner by Mr. Dedman. In the result I was satisfied that in eight instances the direction given by the elector was sufficient to warrant the marking of the ballot paper as formal in the manner shown on the card.

Counsel for the parties did not seriously dispute that two ballot papers endorsed by Mr. Dedman should have been admitted to the count, if in each instance the elector had given a direction which was sufficient to enable him to complete a formal vote. As to this I have no doubt on the evidence.

The evidence in relation to the failure of the poll clerk to inform two electors of their entitlement to record a section vote was equivocal. The petitioner having failed to discharge the onus on this issue, the claim for an additional

two votes fails.

The total loss of votes established at Kununurra therefore was ten.

SUMMARY OF VOTE LOSS

A summary of the vote loss established therefore is:-

POSTAL BALLOTS	5
DISPUTED BALLOTS	1
TURKEY CREEK	25
HALLS CREEK	15
GO-GO STATION	29
FITZROY CROSSING	-
MOWANJUM	3
DERBY	9
KUNUNURRA	10
	<hr/>
	97
	<hr/>

The respondent was declared elected by a majority of 93 votes. It follows that without reference to any loss of votes occurring as the result of the incident in which Sergeant Corker was involved at Kununurra the petitioner has accomplished the task which the Electoral Act imposes of satisfying the Court that the result of the election has been affected. There is also no doubt in my mind that apart from electors who gave evidence at the hearing many aboriginal electors presented themselves for voting at a number of the polling stations but were deterred from recording their votes by reason of the happenings which I have outlined. The evidence, of course, does not disclose in whose favour such electors would have cast their votes. However, in all the circumstances the petitioner's entitlement to the relief which he claims is beyond question. Notwithstanding this conclusion, I feel that I should make some general

findings in relation to the issue involving Sergeant Corker.

SERGEANT CORKER

As nothing now turns on this issue, I do not propose traversing the evidence in detail. Sergeant Corker, in evidence, agreed that as a result of a complaint received he stopped Mrs. Jessie Callaghan from filling in enrolment cards on behalf of would-be aboriginal electors - a task in which she was engaged at about 9.30 a.m. on polling day in the undercroft of the building at Kunumurra, in which polling was taking place. Although he did not appreciate it at the time, he realised when he was giving evidence that he had no authority to take this step. I am satisfied that the words he used when telling Mrs. Callaghan to stop were as detailed by her in evidence and that Sergeant Corker spoke in a raised tone of voice when ordering her to cease this activity. At the time there were a substantial number of aboriginals in the vicinity and I have no doubt that by reason of the position which Sergeant Corker held in the community, his tone of voice and the words used, a number of them departed and that some of them did not return. The evidence did not disclose in any precise way the number who departed or how many of them were on the electoral roll. That votes were lost to the petitioner as the result of this incident is clear, but on the evidence the number of votes would not reach double figures. In the events as they happened, the vote loss from this incident played no part in my conclusion.

ORDERS

There will be a declaration in the terms of the prayer in the petition. I will hear counsel as to any additional orders. The question of orders as to costs will be reserved until counsel for the parties have had an opportunity to read these reasons.

FIRST SCHEDULE

INSTRUCTIONS TO LEGAL SCRUTINEERS IN KIMBERLEY ELECTORATE

INTRODUCTION

Your function is to ensure that every vote cast in the polling place to which you are allocated is a valid vote.

You will be allocated to a particular polling place from the commencement of polling to the close.

You will be appointed by one of the candidates for the area. Other local party workers may also be appointed as scrutineers. Their presence in the polling place does not allow you to leave your post. Your legal qualification gives you a status by reason of the respect which will be accorded to your views by the polling officers. This is the reason for your presence. Ensure that you use this advantage to the maximum.

The enrollment of large numbers of aboriginals as voters in the Kimberley will mean that a substantial proportion of voters in the electorate may be either illiterate or unable to understand what they are supposed to be doing when they go to vote. It is likely that they will be subjected to undue influence. This will probably take the form of persuasion and threats prior to entering the polling place and will be followed up by ensuring that they only possess one "how to vote" card when they enter the polling place. It is to counter these tactics that you are being sent to the Kimberley. The result of the election may well depend on a few votes and it is essential that all those votes are valid.

The advice to scrutineers attached is general advice for all scrutineers. You should follow them to the letter except where they conflict with these instructions.

As a scrutineer you should at the opening of polling identify yourself to the presiding officer, letting him know that you are a lawyer.

IDENTIFICATION

Every aboriginal voter must be carefully watched. Section 118 and Section 119 (1) of the Electoral Act sets out the requirements relating to identification. Make sure these are carried out to the letter. If they are not and there is any doubt in your mind about the identity of the voter or his enrollment object to the vote at that stage.

ILLITERACY

Once the voter has been identified if either he claims or the polling officer decides that he is illiterate Section 129 (3) lays down the procedure to be followed.

The presiding officer has received instructions from the Chief Electoral Officer a copy of the relevant parts of which is enclosed. Those instructions are no more explicit than the Act itself and merely require the presiding officer to mark the voter's ballot paper in accordance with the voter's instructions.

The following rules are guidelines as to the attitude to be adopted by the scrutineer. They are based on our contention as to the proper procedures to be followed by the presiding officers.

They cannot cater for every situation that may arise and are not intended to be comprehensive. You are expected to use your initiative to the fullest. If in your mind there is any reason for a vote being declared invalid you should use whatever arguments may achieve that result.

Please follow these guidelines closely. once a voter has been found to be illiterate.

1. If the voter has no how to vote card or does not use one then ensure that the presiding officer asks the voter in what order he wants to vote for the candidates. He may say "Who do you want to vote for first" or words to that effect and after the voter has indicated or said who he wants as his first preference the presiding officer may say "Who next" or words to that effect. If the voter is unable to specify who he wants for either his first or second preference intervene and demand that the vote be made invalid. The voter must instruct the presiding officer (without prompting) as to the identity of his first and second preferences. The third preference does not matter.
2. If the voter has a how to vote card and (without prompting) wants to use it to indicate his preferences he may do so but must do so individually. He may point to a name or photograph on the card to indicate his first preference and that is an acceptable instruction but he must do the same for his second preference. He may not simply hand over his how to vote card to the presiding officer as a general instruction. If he does and the presiding officer accepts it as such intervene and demand that the voter be questioned to find out whether he knows what a how to vote card is. If he does not then his instructions should be sought as if he did not have a how to vote card. Basically the voter should know what he is instructing the presiding officer and if he does not then his vote should be invalid.

3. If the voter has more than one how to vote card in his hand ensure that any use of one of the cards is entirely voluntary by the voter and not prompted by the presiding officer.

If the presiding officer is overriding your objections to the procedure he is following in respect of illiterate votes ask him to check with the Chief Electoral Officer for clarification of the procedure. If after that your objections continue to be overruled continue with them in each case and note on the attached forms the procedure adopted in each case together with the actual words used by the presiding officer and the voter. In the case of a blatant abuse of procedure by the presiding officer such as prompting the voter, taking a how to vote card from the voter's hand and using it as his instruction or other similar actions you should take the first opportunity to leave the polling place and telephone the Liberal Party Headquarters in Perth on 21 4711. Ask for the General Secretary, inform him of the situation and seek his advice. He would then attempt to persuade the Chief Electoral Officer to instruct the presiding officer to change his methods.

ADDITIONAL QUESTIONS - SECTION 119 (2)

If it is clear that the presiding officer is allowing improper procedures in respect of illiterate votes you should inform him that in these circumstances you propose to require the letter of the law to be carried out in respect of voting and to require him to carry out the procedures laid down by Section 119 (2). If the presiding officer is acting properly in respect of illiterate votes then this Section may be disregarded. However if there is any doubt in your mind about the procedures being used you should use the technicalities of the law to the fullest extent.

Section 119 (2) questions must be asked and answered immediately after the identity of the voter has been established. As a result you will have to determine whether there is a trend by the presiding officer to disregard the proper procedures in respect of illiteracy and at that stage which you should be able to see after an hour or less of polling you may assume that it is going to continue throughout the day and that therefore Section 119 (2) questions should be asked.

As a scrutineer you are entitled to require the presiding officer to ask all the questions of the voter and you are also required to be present when the questions are asked and answered. Note the answers on the form attached. If any answer is unsatisfactory demand immediately that the entitlement to vote be refused.

For instance if the voter does not understand and cannot answer any question he is not entitled to vote. If he answers any question "No" when it should be "Yes" or vice versa then his vote should be refused. Assistance by the presiding officer in answering the questions should be objected to. Refer him to Sections 120 and 121. It is quite likely that many voters faced with the questions set out in Section 119 (2) which require the answer "Yes" to the first five questions and then "No" to the next three questions will answer "Yes" to all of the questions simply because they do not understand what the questions mean and are prepared to say "Yes" to anything.

If the presiding officer allows the vote contrary to these provisions make your objection forceful but do not argue in the face of a flat refusal to change his decision. Continue to require the questions to be asked in the case

of every aboriginal voter and note the answers and the presiding officer's ruling in each case.

RECORDS

If the election result is extremely close as may well be the case then whether it is possible to appeal to a Court of Disputed Returns may depend on how accurate and comprehensive the notes relating to invalid votes are. It is unlikely that anyone else will record the actions or words used to the extent you will and accordingly your record should provide the best evidence of the validity or otherwise of a vote. Sign and date your record of each vote cast. If you have insufficient space on the forms provided for the record make a note separately and identify to which voter the note refers.

SECOND SCHEDULE

Paddy Patrick
Paddy Djumgee
Bob Nyulga
Peter Nipper Rosewood
Queenie McKenzie
Charlie McKenzie
Jacko Texas
June Mudgee
Rover Thomas
Freddy Mugmorra
Paddy William
Dianna Nookayah
Topsy Chugara
Mabel Julie
Snowy Tyson
Symond Drill
Daisy Drill
Ivy Drill
Barney Carrington
Bessie Wallaby
Roy Barratt
Paddy Rhatigan
Willy Mungmung
Jackie Gilmarri
Raymond Wallaby

THIRD SCHEDULE

HALL'S CREEK

Spider Goodeding

Elsie Kunbich

Rosie Breel

Munga Youndiga

Barbara Cox

Saturday Yoogie