

**AFTER THE ‘HURLY-BURLY HAS DIMMED OUTSIDE’:  
MISLEADING AND DECEPTIVE CORFLUTES IN  
*GARBETT V LIU* (2019) 375 ALR 117**

I INTRODUCTION

Throughout the 2019 Australian federal election campaign, the Australian Electoral Commission (‘AEC’) received over 500 complaints regarding election advertising, spanning unauthorised mass robocalls, fake eviction notices and unofficial how-to-vote cards.<sup>1</sup> On 18 May 2019 — election day — 22 complaints flowed from the hotly-contested federal electorates of Chisholm and Kooyong, where Liberal Party corflutes designed to look like AEC signs appeared across polling stations (‘the corflutes’).<sup>2</sup> The text — written in both traditional and simplified Chinese script — stated that the ‘correct way’ or ‘right way’ to vote was to place a ‘1’ next to the Liberal Party candidate on the ballot paper.<sup>3</sup>

Liberal Party candidates Gladys Liu and Josh Frydenberg (‘candidates’) won the seats of Chisholm and Kooyong, respectively. Chisholm constituent Vanessa Garbett and unsuccessful Kooyong candidate Oliver Tennant Yates (‘applicants’) challenged the candidates’ elections under s 329(1) of the *Commonwealth Electoral Act 1918* (Cth) (‘*Electoral Act*’).<sup>4</sup> The applicants submitted that the printing and distribution of the corflutes showed that the candidates committed an illegal practice and sought ‘declarations and orders that [they] were not duly elected’.<sup>5</sup> Using its jurisdiction as the Court of Disputed Returns (‘CDR’),<sup>6</sup> the High Court of Australia (‘HCA’) referred the petitions for trial to the Federal Court of Australia (‘Court’).<sup>7</sup> Sitting as the CDR, the Court determined in the joint judgment of Allsop CJ, Greenwood and Besanko JJ that the corflutes were ‘likely to mislead or deceive an elector in relation to the casting of a vote’ in contravention of s 329(1)<sup>8</sup>. Displaying the corflutes therefore

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<sup>1</sup> Christopher Knaus and Paul Karp, ‘Australian Electoral Commission Finds 87 Cases of Election Ads Breaching Law’, *The Guardian* (online, 22 May 2019) <<https://www.theguardian.com/australia-news/2019/may/22/australian-electoral-commission-finds-87-cases-of-election-ads-breaching-law>>.

<sup>2</sup> *Garbett v Liu* (2019) 375 ALR 117, 144 [108] (Allsop CJ, Greenwood and Besanko JJ) (‘*Garbett*’).

<sup>3</sup> *Ibid* 119 [3].

<sup>4</sup> *Commonwealth Electoral Act 1918* (Cth) s 329(1) (‘*Electoral Act*’).

<sup>5</sup> *Garbett* (n 2) 119 [8].

<sup>6</sup> *Electoral Act* (n 4) s 354(1).

<sup>7</sup> *Garbett* (n 2) 119–20 [9].

<sup>8</sup> *Ibid* 153 [153]; *Electoral Act* (n 4) s 329(1).

constituted an illegal practice.<sup>9</sup> However, the Court confirmed that the elections of the candidates could not be declared void under s 360 as it was unlikely that the overall results were affected.<sup>10</sup> The petitions were therefore dismissed.<sup>11</sup>

*Garbett v Liu*<sup>12</sup> (*‘Garbett’*) offers a thorough blueprint for distinguishing between conduct that influences a voter’s (‘elector’s’) choice of candidate, and conduct that interferes with the casting of the elector’s vote. The former is characterised memorably by the Court as the ‘political hurly-burly in which robust debate takes place’,<sup>13</sup> and remains free of the operation of s 329(1). The Court is clear, however, that once the ‘hurly-burly has dimmed outside’,<sup>14</sup> actions interfering with an elector ‘giving effect’ to their choice fall within the section’s purview.<sup>15</sup> Sections 329(1) and 362(3) of the *Electoral Act* create a legislative framework in which these considerations are protected.<sup>16</sup> This case note considers that the Court discharged its obligations under ss 329(1) and 362(3), by distinguishing the implied freedom of political communication<sup>17</sup> from conduct that infringes on the casting of a vote,<sup>18</sup> while safeguarding and respecting the overall will of the majority in regard to their selection of a candidate. Nevertheless, I note that the potential interference with an albeit small group of electors and the casting of their votes is a disturbing revelation. Due to a lack of repercussions for the individual who authorised the corflutes, it is one which this determination is unlikely to deter in future.

## II BACKGROUND

### A *The Electorates*

Chisholm and Kooyong are neighbouring electorates in Melbourne’s eastern suburbs. Both have a considerable number of electors who speak Mandarin and Cantonese and are able, presumably, to read Chinese script.<sup>19</sup> Ms Liu and the Australian Labor Party’s (‘ALP’) Chisholm candidate Ms Jennifer Yang both campaigned and debated partially in Mandarin and Cantonese.<sup>20</sup>

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<sup>9</sup> *Electoral Act* (n 4) s 352(1).

<sup>10</sup> *Ibid* s 362(3)(a); *Garbett* (n 2) 157 [175].

<sup>11</sup> *Garbett* (n 2) 157 [176].

<sup>12</sup> *Ibid*.

<sup>13</sup> *Ibid* 152 [152].

<sup>14</sup> *Ibid* 128 [43].

<sup>15</sup> *Ibid* 152 [152].

<sup>16</sup> *Electoral Act* (n 4) ss 329(1), s 362(3).

<sup>17</sup> See generally *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. Most recently, see *Comcare v Banerji* (2019) 372 ALR 42.

<sup>18</sup> *Garbett* (n 2) 128 [43].

<sup>19</sup> *Ibid* 142 [97].

<sup>20</sup> *Ibid* 142 [98].

### B *Authorisation of the Corflutes*

The corflutes were drafted and printed on the instructions of Mr Simon Frost, then Acting State Director of the Victorian division of the Liberal Party, now senior advisor to Mr Frydenberg.<sup>21</sup> Mr Frost had experience in 15 previous elections as a volunteer for the Liberal Party.<sup>22</sup> In cross-examination, he admitted that it was his intention to ‘convey the impression’ that the corflutes were AEC corflutes.<sup>23</sup> Mr Frost approved an early draft of the corflute text that read ‘to make your vote count [Vote 1 Liberal]’.<sup>24</sup> He gave permission for the text to be altered but did not check the new translation.<sup>25</sup> There are three similar English translations for the version that appeared on election day. The first variation stated:

Correct voting method

On the green ballot paper, put 1 next to the Liberal Party candidate

And in the other boxes, fill in the numbers in sequence, from small to big ...<sup>26</sup>

There is no compelling evidence to suggest that either candidate knew of, or authorised, the corflutes prior to election day.<sup>27</sup> As Mr Frost authorised the corflutes but was not a party to the proceeding, he was without legal representation.<sup>28</sup> Furthermore, despite his admission under cross-examination of his intention to make the corflutes look like AEC signs, his evidence that he did *not* intend to mislead any voters was not specifically tested in cross-examination.<sup>29</sup> However, the Court was presented with evidence that the corflutes were placed adjacent to AEC signage at multiple polling places in Chisholm and Kooyong (see Figure 1)<sup>30</sup> and accepted that ‘[i]t would be logical and reasonable to expect that if Mr Frost’s intention [to make the signs look like AEC corflutes] were ... understood by volunteers, then this would be done if possible’.<sup>31</sup>

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<sup>21</sup> Josh Taylor, ‘Liberal Official Admits Chinese Language Signs Were Meant to Look like They Came from the AEC’, *The Guardian* (online, 6 November 2019) <<https://www.theguardian.com/australia-news/2019/nov/06/liberal-official-admits-chinese-language-signs-were-meant-to-look-like-they-came-from-aec>>.

<sup>22</sup> *Garbett* (n 2) 143 [102], 156 [170].

<sup>23</sup> *Ibid* 144–5 [108].

<sup>24</sup> *Ibid* 145 [112].

<sup>25</sup> *Ibid* 146 [119].

<sup>26</sup> *Ibid* 119 [3].

<sup>27</sup> *Ibid* 149–50 [141], 155 [161]–[162].

<sup>28</sup> *Ibid* 157–8 [177].

<sup>29</sup> *Garbett v Liu [No 2]* (2020) 376 ALR 504, 509 [23] (Allsop CJ, Greenwood and Besanko JJ) (*‘Garbett [No 2]’*).

<sup>30</sup> *Garbett* (n 2) 146–7 [128].

<sup>31</sup> *Ibid* 147 [129].



**Figure 1: A Liberal Party Corflute (Left) and Official AEC Signage (Right) at a Polling Station in Chisholm<sup>32</sup>**

### C *The Petitions*

While the corflutes appeared in five other electorates, the two petitions concerned only Ms Liu and Mr Frydenberg’s elections. The applicants argued that the corflutes contravened s 329(1) of the *Electoral Act* as they were likely to mislead or deceive an elector into believing they were official AEC publications,<sup>33</sup> and that a ‘1’ had to be placed next to the Liberal candidate in order for the elector’s vote to be valid.<sup>34</sup> If the Court were to establish a contravention of s 329(1), the applicants sought a declaration of the Court under s 360 that the candidates were not duly elected<sup>35</sup> or that the two elections were absolutely void.<sup>36</sup>

### D *Applicable Legislation*

Section 329 of the *Electoral Act* provides:

- (1) A person shall not, during the relevant period in relation to an election under this Act, print, publish or distribute, or cause, permit or authorize

<sup>32</sup> @lhilakari (Luke Hilakari) (Twitter, 18 May 2019, 8:48am AEST) <<https://twitter.com/lhilakari/status/1129526632245411841>>.

<sup>33</sup> *Garbett* (n 2) 150–1 [144].

<sup>34</sup> *Ibid.*

<sup>35</sup> *Electoral Act* (n 4) s 360(1)(v).

<sup>36</sup> *Ibid* s 360(1)(vii).

to be printed, published or distributed, any matter or thing that is likely to mislead or deceive an elector *in relation to the casting of a vote*.

- (4) A person who contravenes subsection (1) commits an offence punishable on conviction:
- (a) if the offender is a natural person—by imprisonment for a period not exceeding 6 months or a fine not exceeding 10 penalty units, or both ...<sup>37</sup>

An action contravening s 329(1) also constitutes an ‘illegal practice’, engaging ss 360, 362 and 363 of the *Electoral Act*.<sup>38</sup> Under s 360, the CDR is empowered to declare any election absolutely void,<sup>39</sup> or declare that any person who was returned as elected was not duly elected.<sup>40</sup>

Section 362(3) of the *Electoral Act* constrains the CDR’s powers under s 360, and provides:

- (3) The Court of Disputed Returns shall not declare that any person returned as elected was not duly elected, or declare any election void:
- (a) on the ground of any illegal practice committed by any person other than the candidate and without the knowledge or authority of the candidate; or
- (b) on the ground of any illegal practice other than bribery or corruption or attempted bribery or corruption;

unless the Court is satisfied that the result of the election was *likely to be affected*, and that it is just that the candidate should be declared not to be duly elected or that the election should be declared void.<sup>41</sup>

When the CDR finds that a person has committed an illegal practice, s 363 requires the Chief Executive and Principal Registrar of the HCA to report the person who had committed an illegal practice under the *Electoral Act* to the Minister.<sup>42</sup>

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<sup>37</sup> Ibid s 329(1)–(4)(a) (emphasis added). There is no subsection (2) or (3); *Electoral and Referendum Amendment Act 1998* (Cth) sch 1 item 159; *Electoral and Referendum Amendment Act 1984* (Cth) pt II item 5(a).

<sup>38</sup> *Garbett* (n 2) 123 [27].

<sup>39</sup> *Electoral Act* (n 4) s 360(1)(vii).

<sup>40</sup> Ibid s 360(1)(v).

<sup>41</sup> Ibid s 362(3) (emphasis added).

<sup>42</sup> Ibid s 363.

### E *The Issues*

The Court separated its determination into four issues:

- (1) Were the corflutes likely to mislead or deceive an elector in relation to the casting of a vote?
- (2) Was anyone, and if so who, responsible for ... printing, publishing or distributing or causing, permitting or authorising the printing, publishing or distributing of the corflute?
- (3) Was the result of the election likely to be affected? and
- (4) Is it just to order the relief sought, if otherwise available?<sup>43</sup>

Issues one, three and four will be discussed below as issue two is discussed in Part II (B) above.

## III DECISION

### A *Likely to Mislead or Deceive in Relation to the Casting of a Vote?*

The Court provided an interpretation of the terms ‘likely’ and ‘the casting of a vote’.

First, in the context of s 329(1), the Court distinguished between a likelihood to mislead or deceive in trade and commerce and the differing standards that apply in political discourse. While in the former case, misleading and deceptive conduct is legislatively prohibited,<sup>44</sup> a similar prohibition in the latter may impede the implied freedom of political communication in a robust democracy home to a range of political views and ideas.<sup>45</sup> The level of probability necessary to engage s 329(1) was defined with reference to *Goss v Swan*: ‘there must be a likelihood of misleading, not a mere possibility of it’.<sup>46</sup> The plurality was clear that the threshold did not reach a likelihood of ‘more probable than not’ nor one ‘on the balance of probabilities’;<sup>47</sup> instead, it was confirmed that s 329(1) would be engaged if ‘there is a *real* chance that an elector will be misled or deceived’.<sup>48</sup>

Second, the Court distinguished the formation of a political view from the casting of a vote to give effect to that political view. In confirming that s 329(1) only applies to

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<sup>43</sup> *Garbett* (n 2) 123 [28].

<sup>44</sup> *Competition and Consumer Act 2010* (Cth) sch 2 s 18.

<sup>45</sup> *Garbett* (n 2) 126 [37].

<sup>46</sup> [1994] 1 Qd R 40, 41 (Derrington J).

<sup>47</sup> *Garbett* (n 2) 126 [40].

<sup>48</sup> *Ibid* 128 [43] (emphasis added).

the latter in order to preserve the robust and unconstrained level of debate democracies enjoy, the Court referred extensively to the HCA's judgment in *Evans v Crichton-Browne*.<sup>49</sup> There, three applicants challenged the election of the successful candidates under s 161(e), the precursor to s 329(1),<sup>50</sup> in relation to allegedly 'untrue or incorrect statements ... published in newspapers and telecast[s]' claiming that a vote for the Australian Democrats was effectively one for the ALP.<sup>51</sup> The HCA confirmed that the operation of s 161(e) was to protect electors when they seek to 'record and give effect to the judgment which [they have] formed as to the candidate for whom [they intend] to vote, rather than with statements which might affect the formation of that judgment'.<sup>52</sup> The advertisements fell into the second category, and were not constrained by s 161(e) as they did not interfere with the act of 'recording or expressing ... political judgment'.<sup>53</sup>

To reach the determination that the corflutes were misleading and deceptive in contravention of s 329(1), the Court considered four factors.

First, the 'identical colour match'<sup>54</sup> and lack of factors to distinguish the corflutes as a Liberal Party sign gave the 'reasonable' impression that the corflutes were AEC signage.<sup>55</sup>

Second, where the corflutes were adjacent to official AEC signage, the text implied that the AEC as an 'independent government agency' was directing electors to place a '1' next to the Liberal candidate as the 'way to cast a valid vote'.<sup>56</sup>

Third, the plurality acknowledged that while it is 'difficult to imagine anyone who thought it was necessary to vote only for one specific candidate or party in order to cast a valid vote',<sup>57</sup> there was the potential for there to be a 'small group of electors who had a lack of interest or naivety, or lack of intelligence ... and whose choice of party was, by [the corflutes] ... influenced or changed'.<sup>58</sup> The Court made it clear that it was not connecting naivety or a lack of intelligence with the ability to read Chinese script, and that this ability was certainly not a 'mark of vulnerability'.<sup>59</sup>

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<sup>49</sup> (1981) 147 CLR 169 ('*Evans*').

<sup>50</sup> *Commonwealth Electoral Act 1918* (Cth) s 161(e), as amended by *Commonwealth Electoral Legislation Amendment Act 1984* (Cth).

<sup>51</sup> *Evans* (n 49) 199 (Gibbs CJ, Stephen, Mason, Murphy, Aickin, Wilson and Brennan JJ).

<sup>52</sup> *Ibid* 204.

<sup>53</sup> *Ibid* 207.

<sup>54</sup> *Garbett* (n 2) 150 [142].

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid* 150 [144].

<sup>57</sup> *Ibid* 151 [148].

<sup>58</sup> *Ibid*.

<sup>59</sup> *Ibid* 151 [147].

Fourth, the Court determined that corflutes adjacent to AEC signage were misleading and deceptive as to the casting of a vote, rather than in influencing an elector’s political judgment.<sup>60</sup> This was contrary to the submission that the corflutes’ ‘highly partisan message’<sup>61</sup> lent itself to the latter category rather than the former.<sup>62</sup> If the corflutes were branded as Liberal Party publications, it is likely that they would fall within the ‘political hurly-burly’ and therefore the latter category. The fact that they appeared as official signage from an independent government agency and directed electors to vote ‘1’ Liberal was

so utterly foreign and antithetical to the Australian electoral and political systems that [the text could not] be characterised as a statement in relation to the formation of a political judgment, but only as an interference in relation to the casting of the vote.<sup>63</sup>

### *B Was the Election Result Affected?*

The Court can only order an election void under s 360 following a contravention of s 329(1) if satisfied that the result of the election was likely to be affected.<sup>64</sup>

The term ‘likely’ was considered by the Court in this context. Clearly, the standard is below that of definite ‘proof ... that the election was affected’,<sup>65</sup> and instead, that there was a ‘real chance that the result would be or was affected’.<sup>66</sup> The Court acknowledged that while it was impossible to be precise, ‘there was only a real chance of a handful of people being influenced’ by the text on the corflutes,<sup>67</sup> and certainly not enough to make a difference to the candidate elected: Ms Liu won the two candidate preferred result by 1,090 votes,<sup>68</sup> and Mr Frydenberg by over 11,000 votes.<sup>69</sup>

### *C Relief*

As the election results were unlikely to have been affected by the corflutes, it was inappropriate to void the elections of either candidate.<sup>70</sup> Mr Frost was directed to submit why the Principal Registrar of the HCA should not be informed of his role

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<sup>60</sup> Ibid 153 [153].

<sup>61</sup> Ibid 152 [149].

<sup>62</sup> Ibid 152 [151].

<sup>63</sup> Ibid 152–3 [152].

<sup>64</sup> *Electoral Act* (n 4) s 362(3).

<sup>65</sup> *Garbett* (n 2) 131 [55].

<sup>66</sup> Ibid 140–1 [92].

<sup>67</sup> Ibid 156 [171].

<sup>68</sup> Ibid 155 [167].

<sup>69</sup> Ibid 156 [168].

<sup>70</sup> Ibid 157 [175].



in the illegal practice thus engaging s 363.<sup>71</sup> In its February 2020 determination, *Garbett [No 2]*, the Court found a lack of evidence to ‘draw ... conclusion[s] about Mr Frost’s state of mind and knowledge’ regarding the relevant fault element of the offence,<sup>72</sup> and the Principal Registrar was not informed.<sup>73</sup>

#### IV COMMENT

##### A *A Robust Democracy*

In its judgment, the Court balances and protects the competing interests of three key concepts all crucial to a robust democracy: the implied freedom of political communication; the protection of the individual casting of a vote; and, the will of the majority.

The facts of *Garbett* occurred in an environment where over 60% of Australians believe that politicians have low honesty and integrity.<sup>74</sup> The Liberal Party’s 2019 ‘Death Tax’ and the ALP’s 2016 ‘Medi-scare’ campaigns had questionable levels of factual content and aimed to influence an elector’s choice of candidate.<sup>75</sup> Billionaire Clive Palmer’s 2019 ‘Shifty Shorten’ campaign (at a cost of \$60 million) was allegedly invested with the intention of swinging electors in the direction of the Liberal Party.<sup>76</sup> While these are examples of conduct taken to win or sway the elector’s vote in the political ‘hurly-burly’ and are not constrained by s 329(1), their misleading nature has the potential to decrease public trust in political advertising and institutions. *Garbett* acknowledges that campaigns of this nature are an element of the implied

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<sup>71</sup> Ibid 157–8 [177]; *Electoral Act* (n 4) s 363.

<sup>72</sup> *Garbett [No 2]* (n 29) 510 [29].

<sup>73</sup> Ibid 510 [30]. See also Luke Henriques-Gomes, ‘Former Liberal Party State Director Won’t Be Referred to High Court over Chinese Election Signs’, *The Guardian* (online, 20 February 2020) <<https://www.theguardian.com/australia-news/2020/feb/20/former-liberal-party-state-director-simon-frost-not-referred-high-court-chinese-election-signs>>.

<sup>74</sup> Gerry Stoker, Mark Evans and Max Halupka, *Trust and Democracy in Australia* (Report No 1, Independent Commissioner Against Corruption New South Wales, December 2018) 10.

<sup>75</sup> Danny Tran, Michael Workman and Lachlan Moffet Gray, ‘Federal Election 2019: “Death Taxes” Scare Campaign Continues to Be Promoted, but Labor Says It’s Fake News’, *ABC News* (online, 9 May 2019) <<https://www.abc.net.au/news/2019-05-09/money-pumped-into-federal-election-death-tax-scare-campaign/11092802?nw=0>>; ‘Election 2016: George Brandis Attacks Labor’s “Disgraceful” Medicare Campaign’, *ABC News* (online, 3 July 2016) <<https://www.abc.net.au/news/2016-07-03/george-brandis-attacks-labor-medicare-scare-campaign/7565244>>.

<sup>76</sup> ‘Election 2019: Clive Palmer Says Scott Morrison Can Thank UAP’s Anti-Labor Ads for Result’, *ABC News* (online, 19 May 2019) <<https://www.abc.net.au/news/2019-05-19/election-2019-clive-palmer-says-uap-ads-gave-coalition-win/11128160>>.

freedom of political communication that features within a robust democracy; it is not the judiciary’s role to interfere here.

However, when conduct goes beyond a disingenuous approach and becomes deception that potentially affects the casting of an elector’s vote, the Court drew a strong line. Their Honours’ consideration shifted from respect for the implied freedom of political communication to one of ‘protection [of] the conclusory casting of the vote’.<sup>77</sup> In this respect, the corflutes adjacent to AEC signage were likely to have a misleading or deceptive effect on a ‘gullible or unintelligent’ elector under s 329(1): the elector may have arrived at the polling station intending to vote for an Independent candidate, for example, and upon seeing the corflute adjacent to the AEC signage, have placed the Liberal candidate first in order to ensure their vote was valid and the Independent second (perhaps assuming that the second preference would be the one counted as their intended vote). The Court’s finding that the corflutes fell within the purview of s 329(1) protects the right of electors to give effect to their political judgment.

In the second limb of the judgment the consideration shifts again. Given the secrecy of the individual ballot and the relatively small group that may have been duped by the sign, the Court’s dismissal of the petitions protected the will of the majority of Chisholm and Kooyong constituents to be represented by their elected candidate.

### B *The Fate of Mr Frost*

The lack of repercussions — legal or reputational — for Mr Frost suggest that the Court’s decision may be unlikely to deter similar incidents in the future. Without impugning the Court’s legal reasoning, we are still left with the disquieting actions of an experienced political campaigner targeting a specific group of people and attempting to interfere with their political choice being given effect at the ballot box. The fact that it was done bespeaks the likelihood that there was some anticipated ‘advantage in doing so’.<sup>78</sup> In the tight contests that Chisholm and Kooyong were anticipated to be,<sup>79</sup> the votes of a small group of people could have made all the difference.<sup>80</sup> The fact that they *probably* did not is no real consolation.

Electoral advertising is often created, organised and authorised by individuals within a party’s operating division and not the candidates themselves. Here, the applicants brought the petitions against the candidates of both Chisholm and Kooyong, but not against Mr Frost. The applicants did not address the Court on ‘the engagement

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<sup>77</sup> *Garbett* (n 2) 128 [43].

<sup>78</sup> *Ibid* 156 [170].

<sup>79</sup> ‘Liberals Close in on Victory in Chisholm, Morrison Secures Majority Government’, *SBS News* (online, 21 May 2019) <<https://www.sbs.com.au/news/liberals-close-in-on-victory-in-chisholm-morrison-secures-majority-government>>; Calla Wahlquist, ‘Kooyong: Climate Change Shakes Up the Election in Liberal Melbourne’, *The Guardian* (online, 10 April 2019) <<https://www.theguardian.com/australia-news/2019/apr/10/kooyong-climate-change-federl-election-melbourne-liberal-heartland>>.

<sup>80</sup> *Garbett* (n 2) 156 [170].

of the *Criminal Code* or ... [the] relevant fault element' of s 329(1).<sup>81</sup> This led to the Court recognising that there was a lack of evidence to infer the fault element of intention. After hearing Mr Frost's submissions on why he should not be referred to the Minister regarding the misleading and deceptive corflutes, the Court decided in his favour: their Honours noted that 'there were many loose ends in his evidence, to a degree favourable to him',<sup>82</sup> and that 'the proceeding [did not] ... allow any conclusion that Mr Frost acted in a way that may be said to amount to the committal of an offence'.<sup>83</sup>

In doing so, the CDR distinguished between its jurisdiction to act in response to a contravention of s 329(1) under s 360 in comparison to s 363. When deciding whether to void an election under s 360, the CDR is able to exercise its power 'without being persuaded that a person satisfied the relevant fault elements' of s 329(1).<sup>84</sup> When deciding whether to *refer* the individual responsible for the conduct that has the potential to mislead or deceive voters, however, the Court stated that it can only act 'when it is persuaded that there is material from which it can be concluded that a person not only was responsible for the physical elements of a contravention of s 329(1), but also that the relevant fault element was satisfied'.<sup>85</sup> With respect, this approach is puzzling. A referral to the Minister under s 363 is not synonymous with a charge and much less a conviction of the offence. It is therefore unclear why the CDR must be fully satisfied of the individual's intention to mislead or deceive before referring them.

I submit that this interpretation of s 363 sets an almost insurmountable threshold for referral to the Minister where the person responsible for the contravention of s 329(1) is not the respondent to proceedings related to the section, especially if they appear as witnesses and without representation. This threshold curtails the CDR's effectiveness in holistically 'vindicat[ing] the policy of the [*Electoral Act*] which is to protect the democratic franchise',<sup>86</sup> by restricting the circumstances in which it can refer individuals who authorise publications that contravene s 329(1) to the Minister. *Garbett* may therefore fail to deter similar incidents from occurring in the future. The result in *Garbett* will also likely influence the choice of parties if a similar case is brought again.

## V CONCLUSION

In *Garbett*, the Court made a two-limbed determination. First, it held that the corflutes when adjacent to official AEC signage were misleading and deceptive in relation to

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<sup>81</sup> *Garbett [No 2]* (n 29) 509 [22].

<sup>82</sup> *Ibid* 510 [24].

<sup>83</sup> *Ibid* 510 [25].

<sup>84</sup> *Ibid* 510 [27].

<sup>85</sup> *Ibid* 510 [28].

<sup>86</sup> *Ibid* 510 [27].

the casting of a vote, contravening s 329(1) of the *Electoral Act*. Second, the election results in Chisholm and Kooyong were unlikely to have been affected by the corflutes. In doing so, the Court balanced the implied freedom of political communication, the individual right to give effect to political judgment and the will of the majority as per the relevant sections of the *Electoral Act*.<sup>87</sup> The Court’s subsequent decision in *Garbett [No 2]* not to refer Mr Frost to the Minister is unlikely to deter similar incidents from occurring again, especially where respondents to proceedings are the candidates themselves, rather than the individuals who authorised the misleading and deceptive advertising. While voiding the elections would have been unwarranted on the facts, there remains the potential that a group of electors had their individual right to franchise interfered with by the machinations of political advertising. This remains a sobering concern in the lead up to the next federal election.

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<sup>87</sup> *Electoral Act* (n 4) ss 329, 362(3).