



Appendix E – Mr Jeff Egan Court Judgement



LOCAL COURT
New South Wales

Citation: Commonwealth Director of Public Prosecutions
v
Egan

Hearing dates: 31/10/2008, 03/11/2008, 25/03/2009, 26/03/2009

Date of Decision: 29/04/2009

Jurisdiction: Criminal

Place of Decision: Downing Centre

Judgment of: Magistrate G Bradd

Decision: Not Guilty

Catchwords: Distribution of unauthorised electoral matter –

Legislation Cited: Commonwealth Electoral Act 1918; Criminal Code Act
1995.

Representation:

Mr O'Donnell and Mr Crowley representing
Commonwealth Director of Public Prosecutions

Mr Levitt representing Mr Egan

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Background

- 1 Mr Egan has been charged with distributing an electoral pamphlet, which did not contain the name and address of the person who authorised the electoral pamphlet and the name and place of business of the printer of the electoral pamphlet. The offence is charged under the Commonwealth Electoral Act.
- 2 The offence is alleged to have occurred between 9:30 pm and 10:30 pm on 20/11/2007 at St Mary's.
- 3 St Mary's is within the Federal Electorate of Lindsay. A General Election had been called for Saturday the 24/11/2007. At the time of the alleged offence Mr Egan was a member of the New South Wales State Executive of the Liberal Party.
- 4 Persons connected with the Australian Labour Party became aware of the possibility that certain persons connected with the Liberal Party were going to distribute unauthorised electoral matter within the Federal Electorate of Lindsay.
- 5 The persons connected with the Australian Labour Party followed six persons connected with the Liberal Party to St Mary's. The six persons were seen to split into three groups of two. Mr Egan was seen to be distributing a pamphlet. One of the pamphlet's distributed by Mr Egan has been tendered in court. The pamphlet does not contain the name and address of the person who authorised the electoral pamphlet and the name and place of business of the printer of the electoral pamphlet.
- 6 Mr Egan agrees that he distributed the pamphlet, but says that he did not know that the pamphlet did not contain the name and address of the person who authorised the electoral pamphlet and the name and place of business of the printer of the electoral pamphlet.
- 7 Mr Egan is a person of good character, which evidence is used to prove that he is unlikely to lie about his involvement in this incident, and is unlikely to have committed the offence.
- 8 *Mr Egan gave evidence. His evidence was consistent. He presented the evidence as a person telling the truth. His emotions were consistent with his testimony, particularly*

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when he testified of his anger about the persons involved in distributing the pamphlet, whom he says did not tell him that the pamphlet was not authorised; and about Mr Jaeschke and Mr Hall, whom he says have told lies to the court about what he said to them after the incident.

Evidence

The Events of 20 November 2007

- 9 Mr Egan met the other persons involved in the distribution of the pamphlet at the residence of Mr Clark. Mr Gilchrist saw three vehicles arrive. Six people got out of the vehicles and went into 6 Ladbury Avenue. After about fifteen minutes the group went into 3 Ladbury Avenue for about five minutes. They then returned to their vehicles, congregated around the vehicles, when Mr Egan appeared to address the others. After a short time the vehicles were driven away.
- 10 Mr Foley says he saw a man, later identified as Mr Egan, walking in Magnolia Street distributing pamphlets. He says Mr Egan was carrying a bag with folded pamphlets protruding from it, he could see that the pamphlet was coloured blue and white and had "Australian Islamic Federation Australia" writing on it. He later retrieved a bundle of pamphlets from the bag being carried by Mr Egan, and says the pamphlets were folded ready for distribution and the words "Australian Islamic Federation Australia" were visible.
- 11 A photograph was taken of Mr Egan about ten minutes after an alleged altercation with some of the persons connected with the Australian Labour Party. On 24/03/2008, the photograph was published in a newspaper. The relevant page of the newspaper is exhibit 2. The image is of the right side of a person, who is walking with a mobile phone to his right ear. He is holding a bag in his left hand by gripping the cloth material of the bag below the handles. The manner in which Mr Egan is holding the bag would not be possible if the bag was full, with pamphlets protruding from it.
- 12 Mr Wayne Forno says that he saw a person, who it is agreed was Mr Egan. Mr Forno says that the bag had a flap and he could not see the contents. Mr Forno says that he asked Mr Egan to give him a leaflet, and Mr Egan said "No". After the exchange, Mr

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Foley arrived within 30-60 seconds, and Senator Hutchins arrived within seconds of Mr Foley arriving. Mr Forno says that Mr Foley asked for the bag, but Mr Egan would not give it up. He then tried to take the bag from Mr Egan.

- 13 Mr Shane Forno, the son of Wayne was with his father, and said to Mr Egan; "We've got you, you've been caught." Then Senator Hutchins and Mr Foley arrived. His father and Mr Egan then became involved in a tug-of-war with the bag. Mr Forno then saw leaflets folded with writing on them. Mr Forno says he tried to take a photograph of Mr Egan, but Mr Egan buried his head, and his face was not visible. He was later travelling in a vehicle and saw Mr Egan walking beside the road, so he stopped the vehicle adjacent to the position of Mr Egan and took a photograph. The photograph has been tendered as an image published in a newspaper.
- 14 Mr Shane Forno says his father did not get the bag from Mr Egan, but the bag was open and he saw that it was full, with leaflets visible.
- 15 Mr Egan says that Mr Chijoff asked him to assist with a letterbox drop. He agreed to meet him at 6 Ladbury Avenue, the residence of Mr Clark. He went into the residence where Mr Clark and Mr Chijoff conducted a briefing. He did not know the designated place, so he followed the others. When he arrived at St Mary's he was given a hessian bag containing pamphlets. By this time it was dark, and he did not look inside the bag. When he proceeded to distribute the pamphlets he found that they had already been folded, and he did not look at them. After he had distributed two or three pamphlets, a vehicle stopped near him, someone from the vehicle approached him and said: "Give me a copy of what you're handing out", and grabbed him by the right wrist. Mr Egan said something, but the person did not let go. Then two other persons arrived, one being Senator Hutchins. Mr Egan said to the Senator; "Tell him to let me go, I did nothing." Mr Egan then said to the person holding his wrist; "This is assault please let me go." Mr Egan says another vehicle arrived and two persons got out of the vehicle. Someone grabbed his left arm. Someone said; "We're going to call the Police." Someone then tried to take the bag. Mr Egan says he resisted because he was concerned about his arm. Mr Egan said; "Go ahead call them." A struggle then ensued, but he was able to break free. He walked towards his vehicle, holding the bag. *He says no pamphlets were taken from his bag and he had not seen the pamphlets. He met the other person he was paired*

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with, and then a vehicle drove passed, with someone taking photographs. He called Mr Chijoff by telephone and others asking for assistance. He then called triple "0", but did not complete the call, because he was almost hit by another vehicle. His partner arranged for someone to pick them up, and that person took him to his vehicle. He left the bag in the person's vehicle. He drove to his office and took photographs of his injuries. He then spoke to Mr Chijoff on the telephone, and Mr Chijoff told him about the general content of the pamphlet. He says he was "bloody annoyed."

16 Mr Egan says he then called Mr Hall by telephone, because Mr Chijoff had asked him to do so. He says that he explained to Mr Hall that persons got out of vehicles, and one person grabbed him by the arm, and then continued to re-count the assault upon him.

17 Mr Hall, who was at the relevant time the Liberal Party Campaign Manager for the Federal seat of Lindsay, says that he received a telephone call from Mr Egan on the night of the incident. He says that Mr Egan said:

I was letterboxing with the other guys, and was astonished how quickly we got caught. I had only done a few letterboxes when they came out of cars with cameras rolling. I've been assaulted and pushed against a telephone pole. They tried twice to get the material from me. Should I go back and distribute anti-union material?

The Next Day

18 Mr Egan says he spoke to Mr Jaeschke the next morning, and responded to his questions. Mr Egan says he wanted to talk about the assault and Mr Jaeschke wanted to ask him questions regarding the incident of the previous evening being linked to the Liberal Party. He wanted to know whether any photographs were taken of Mr Egan distributing the pamphlet, and whether there was anything to tie me to the incident. Mr Egan says he told Mr Jaeschke that he was not photographed distributing a pamphlet, but a photograph was taken of him against a telegraph pole.

19 Mr Jaeschke, who at the relevant time was the State Director of the Liberal Party and the Liberal Party Campaign Director for New South Wales called Mr Egan on the telephone on the morning after the incident. *When he telephoned Mr Egan at 7:00 am, he asked Mr Egan if he was involved, and Mr Egan said:*

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I was there, I leaflet dropped two letterboxes and Labour stopped me on the third letterbox. Labour ruffed me up. There is no proof. Labour didn't take the leaflets from me or the bag from me. I was photographed at the scene only when I was ruffed up.

20 Mr Jaeschke telephoned Mr Egan at 9:00 am to ask him to resign. Mr Egan said: "to resign would be to admit guilt". Mr Jaeschke said: "Jeff, I'll be releasing a brief to the press and referring the matter to the Electoral Commission. Mr Jaeschke says that Mr Egan asked him to insert the word "illegible".

21 Mr Jaeschke concedes that Mr Egan did not say that he knew of the contents of the pamphlet, and that he was concerned about being assaulted.

22 Mr Hall says that Mr Egan had trained booth volunteers the previous weekend, and that he would call him from time to time, and offer suggestions.

23 Mr Hall confirms that Mr Egan was concerned about being assaulted.

Issues Arising from the Evidence

24 The evidence is not sufficient to conclude that Mr Egan was talking to the others about the distribution of the pamphlet when they were in Ladbury Avenue. The sequence of events appears to be that Mr Clark and Mr Chijoff had briefed the group before they were seen by Mr Gilchrist to gather around the vehicles. As Mr Egan was a member of the New South Wales State Executive of the Liberal Party, it is possible he addressed the others, but the conversation could have been about any subject.

25 The first issue is whether Mr Egan saw the pamphlet before or when he distributed it. There is no evidence he saw the material before he began to distribute it. Mr Foley says he saw the pamphlets protruding from the bag, Mr Wayne Forno says the bag had a flap and he could not see the pamphlets. Mr Shane Forno says he saw a pamphlet in the bag when his father was trying to take the bag from Mr Egan. Senator Hutchins gives no evidence about seeing a pamphlet in the bag. There is a photograph taken of Mr Egan shortly after Mr Forno tried to take the bag, holding the bag in one hand below the handles. The evidence of whether it was possible for Mr Egan to see the pamphlet while

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carrying the bag is unsatisfactory and insufficient to draw a conclusion that Mr Egan saw the pamphlet while distributing it. It cannot be assumed that when he took the pamphlet(s) from the bag in the course of distribution he saw the pamphlet, because it was nighttime, and it may be true that he just presumed it was ordinary electoral material. By way of analogy, a person delivering newspapers cannot be presumed to look at the headlines on the front page of a newspaper because he has the opportunity to do so while delivering the newspapers. Distributing pamphlets for the Liberal Party was not a novel event for Mr Egan, and like the person who delivers newspapers, it would not evince any particular excitement or inquisitiveness

26 The next issue is the evidence of Mr Hall. The words attributed to Mr Egan, being; "I was letterboxing with the other guys, and was astonished how quickly we got caught tend to prove that Egan knew he was doing something wrong. Mr Egan denies saying those words, but is unable to say what he said to Mr Hall, except in broad terms.

27 The context in which Mr Egan says he called Mr Chijoff is remarkable. According to Mr Egan he called Mr Chijoff because he had no knowledge of the contents of the pamphlets, and when Mr Chijoff told him he was "bloody angry", however he then called Mr Hall because Mr Chijoff asked him to. It is possible that Mr Hall who spoke to Mr Chijoff on the night asked him to have Mr Egan call him. If Mr Hall did so that explains why Mr Egan called him and told Mr Hall about being assaulted. Mr Hall says he does not recall whether he asked Mr Chijoff to have Mr Egan call him.

28 The next issue is the evidence of Mr Jaeschke, who says Mr Egan told him; "There is no proof. Labour didn't take the leaflets from me, or the bag from me. I was photographed at the scene only when I was ruffed up." The conclusions that one can make from the conversation are equivocal. When it is remembered that the telephone call took place the following day, at a time when Mr Egan, on his own evidence, knew that the pamphlets were not authorised, the words alleged to be said by Mr Egan can be viewed as his conclusions based on the facts he knew at the time of the telephone call.

29 Why did Mr Egan not give hand over a pamphlet to Mr Wayne Forno? Mr Egan says the person said; "Give me a copy of what you're handing out", and grabbed him by the right wrist. Mr Forno says that he asked Mr Egan to give him a leaflet, and Mr Egan said

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"No". The question can be answered first; by addressing the temporal connection between the demand for the pamphlet and the physical contact by the person demanding it; and secondly, by considering the words and tone of voice of the person making the demand.

30 The article written in a magazine titled "Challenge" (exhibit 4) provides an insight into the frame of mind Luke Foley. The title of the article in the "Challenge" is "Inside the Lindsay Sting". Mr Foley writes in part;

Steve and I were cruising and we came across Jeff Egan and a young bloke. We pulled up, I jumped out and yelled: 'Gotcha!' Then Wayne Forno pulled up and jumped out with a camera.

31 One would expect the group connected with the Australian Labour Party to be excited about the prospect of catching the Liberal Party distributing non-authorized pamphlets. Senator Hutchins refers to it as a gift that does not come along very often. In the abovementioned article, Luke Foley refers to "a small team for the sting". The small group environment would have manifested in individual vigilance and tension. In the circumstances of the situation that the Australian Labour Party group were in it is highly unlikely that Wayne Forno would have asked Mr Egan for a pamphlet without exhibiting signs of excitement and tension. It is most likely that the version given by Mr Egan is correct, and that due the overbearing nature of the request followed shortly by a grabbing of the wrist of Mr Egan, he became defensive.

32 I find that the evidence of Mr Egan not wanting to give up the pamphlets, because of the circumstance outlined above, sheds no light on whether he knew that the pamphlets were unauthorised.

33 The next issue is the evidence of Wayne Forno that Mr Egan buried his head when Mr Forno tried to take a photograph of him. According to Mr Egan, he was at the time being assaulted, with more than one person holding him. Vehicles had arrived within seconds of one another. Four people surrounded Mr Egan, one of whom tried to take his bag. Mr denies he put his head down to avoid having his photograph taken. It would be quite natural in the circumstances that Mr Egan found himself in for him to lower his

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head. I find that the evidence about Mr Egan lowering his head is not evidence that can be taken into account to determine whether he knew the pamphlet was unauthorised.

34 Of the issues raised, the only ones needing further attention are; the telephone call to Mr Chijoff; and the telephone call to Mr Hall.

35 The Prosecutor submits that Mr Egan did not call Mr Chijoff. Mr Egan cannot recall the conversation, and it is not contained in his statement to the Police. Counsel for Mr Egan submits that the lapse of time between the hearing and the telephone call, as well as the assault are reasons for Mr Egan not being able to recall the conversation. Mr Egan was asked to recount the conversation on 30/03/2009, which is sixteen months after the telephone call. At the time Mr Egan could have been in a state of shock about the events of that night. Given the lapse of time, and the likely state of Mr Egan's emotions when he made the telephone call, and subsequently as he was faced with expulsion from the Liberal Party, and ramifications for his livelihood. I find that it is not remarkable that he can only say what was discussed rather than being able to recount the conversation.

36 The statements made by Mr Egan are not in evidence, it is agreed that they do not mention the telephone call to Mr Chijoff. The telephone call was made after the events of the night. Mr Egan did not make the statement whilst being asked questions by Police. He was concerned about being assaulted. I find that nothing can be drawn from the omission in the statements of the telephone conversation, because Mr Egan was not directed to that area by questioning, and because he was more concerned with being assaulted.

37 The telephone call by Mr Egan to Mr Hall has been traversed earlier in the judgement. Mr Hall also says that Mr Egan said; "All the political journo's know me, what's my line going to be tomorrow?" Counsel for the Prosecutor submits that Mr Egan called Mr Hall in an endeavour to control any damage to himself. Thus, he sought guidance about what he should say to journalist the following day; and suggested an alibi by going back to distribute anti-union material. Counsel for Mr Egan says that; since he had been assaulted, it is unlikely that he suggested to Mr Hall that he go back to the area to distribute anti-union material; and it is unlikely that Mr Egan would have sought advice about what his line was going to be because Mr Egan was a principal of a Public

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Relations firm, and would be expected to keep his own counsel. Counsel for Mr Egan says that Mr Hall has a motive to lie about what Mr Egan said to him so as to avoid criticism of his management of the campaign in Lindsay.

- 38 It seems to me that Mr Hall could not be criticised for what he did not know. After the telephone calls with Mr Chijoff he briefed Mr Jaeschke by telephone. He spoke to Mr Egan. He obtained a copy of the pamphlet and sent it to the National Campaign Headquarters of the Liberal Party. I am unable to find any room for Mr Hall to be criticised, and hence no motivation to make a scapegoat of Mr Egan. There were after all others who were more blameworthy, being those who organised the distribution of the pamphlets and prepared the material.
- 39 Since Mr Egan has a background in public relations, it is likely that he would think along those lines, and be concerned that a uniform line should be used when speaking to journalists. Once again, coming from a public relations background one could envisage Mr Egan thinking along the lines of damage control by distributing other material in the area. At that stage it is unlikely that Mr Egan would have apprehended that the persons connected with the Australian Labour Party would be in the area. With his background, Mr Egan would have known that the persons would be preparing their own "line".
- 40 Mr Hall had been working twelve or more hours a day on a campaign that was in its last few days. Undoubtedly, he would have been tired. Is it possible that he is wrong about the conversation? Mr Hall agrees that Mr Egan was concerned about being assaulted. He says that when Mr Egan talked about a "line", he was not interested in that. Clearly, his role was to quickly gather the information about the event and pass it onto Mr Jaeschke. Mr Hall had spoken to Mr Chijoff before he spoke to Mr Egan. After speaking to Mr Egan, he spoke to Mr Jaeschke. He then went to see the girlfriend of Mr Holstein to collect a copy of the pamphlet. Later that night he had dinner, where he discussed what had happened. Before he made his statement, Mr Hall discussed the matter with Mr Holstein in order to prepare himself for the making of the statement. Is it possible that Mr Hall, having spoken to so many people about the incident on the night and subsequent to the night is confused about who said what?

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The Fault Element

41 The fault element in relation to the circumstances of the pamphlet being unauthorised is recklessness.¹ The relevant questions are whether Mr Egan was aware of a substantial risk the pamphlet was not authorised when he distributed the pamphlet, and having regard to the circumstance known to him, it is unjustifiable to take the risk.

42 Counsel for the Prosecutor submits that element is made out by the following:

- The group of persons met without knowledge of the Liberal Party campaign functionaries. If Mr Egan had not agreed to distribute the unauthorised pamphlet he would not have been invited to do so. The planners would not have taken the risk of inviting Mr Egan unless they knew he would accept, particularly as he was a member of the New South Wales State Executive of the Liberal Party.
- Volunteers normally distribute pamphlets. They usually distribute the pamphlets during the day. Persons of Mr Egan's then standing in the Liberal Party do not usually distribute pamphlets at night.
- Mr Egan knew that the pamphlet was folded, so it is highly likely he saw the words "Islamic Federation of Australia".
- When Mr Egan was accused of handing out "shit sheets" why did he not respond.
- When Senator Hutchins said to Mr Egan, "Jeff what are you doing here" why did Mr Egan not respond.
- There is a divergence in evidence about what was said to Mr Egan at St Mary's.
- Mr Egan did not deny knowledge to Mr Jaeschke, he only said; "there's no proof".
- Why did Mr Egan not keep a record of the telephone calls he made to Mr Chijoff, Mr Hall, and Mr Jaeschke?

¹ Criminal Code Act s 5.4

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- 43 The first point is a circular argument. Once someone asked Mr Egan to become involved in a distribution of unauthorised pamphlets he would have knowledge of the plan, and could inform Liberal Party campaign functionaries. So why take the risk of telling him?
- 44 Mr Egan was known as a person who was willing to help out. He trained the booth volunteers the previous weekend, and would call Mr Hall with suggestions about the campaign. He said that he had done a lot of pamphlet distributions, and they were usually done at night because volunteers worked during the day.
- 45 The issue about whether Mr Egan was highly likely to have seen the pamphlet has been dealt with earlier in the judgement.
- 46 The next two points have been covered earlier in the judgement. In the circumstances of Mr Egan being surrounded by four persons, and being held by two of them it is reasonable that Mr Egan should be non-responsive.
- 47 Mr Foley says he said to Mr Egan; "We know what you're up to, handing out shit sheets on the ALP are you, bogus leaflets. You're in big trouble. We've caught you red-handed." Mr Foley says that Senator Hutchins said to Mr Egan; "Jeff, Jeff, Jeff, what are you doing?" He cannot recall someone saying; "Give me a copy of what you're handing out." Senator Hutchins says he said to Mr Egan. "Jeff, what the fuck are you doing here? Just go home." Later he said; "Jeff, I know you got this from Jackie Kelly's place. Why don't you just go home." Mr Wayne Forno says he said to Mr Egan; "You are handing out shit sheets, can I have one?" Later he said; "You are handing out shit sheets, we've got you. I'm going to hand these across to police, you are fucked". He recalls Mr Forno saying; "Give me the bag, we've got you." Mr Shane Forno says that he heard his father say; "We've got you, you've been caught." Later he heard his father say; "We've got youse, you've been caught, caught red-handed." Mr Forno heard his father say; "We've got youse, you've been caught, caught red-handed." He heard Mr Egan say "Fuck off." And to Senator Hutchins; "Tell him to let me go." Mr Forno heard someone say; "We are going to call the police"
- 48 The conversation recalled by Mr Egan has been described earlier in the judgement. Conversation recalled by Mr Egan that is not recalled by one of the persons listed in the

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paragraph above is: "This is assault please let me go." The difference is so minor that no conclusion can be drawn.

49 The telephone call to Mr Jaeschke was made after Mr Egan had spoken to Mr Chijoff. The response of Mr Egan shows that he was focussed on potential damage to the Liberal Party, and realised that his own fate was tied to the damage done to the Liberal Party.

50 There is no evidence of Mr Egan keeping a record of the telephone conversations. There is no evidence about whether he usually does so. The circumstances were such that Mr Egan was probably in a heightened state during the telephone calls, making it less likely that he would have the presence of mind to keep a record.

Conclusion

51 There is insufficient evidence to conclude that Egan was aware of a substantial risk the pamphlet was not authorised when he distributed the pamphlet. The evidence trends to show that for Mr Egan it was just a routine "letterbox drop", similar to many others he had done for the Liberal Party.

52 If Mr Egan said to Mr Hall, "I was letterboxing with the other guys, and was astonished how quickly we got caught." the statement is an admission of knowledge, otherwise the words "astonished how quickly we got caught" do not make sense.

53 Given that Mr Egan, a person of good character, has denied saying "astonished how quickly we got caught"; and the possibility that Mr Hall has made an error, due to fatigue at the time, and because he spoke to so many people about the incident, I am not satisfied beyond a reasonable doubt that Mr Egan said, "astonished how quickly we got caught".

54 Mr Egan is not guilty of the offence.