The House Legal and Constitutional Affairs Committee
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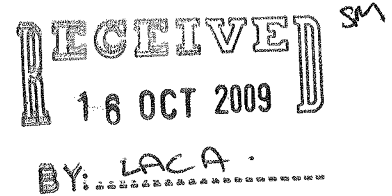
Submission No 022



15 October 2009

Dear Committee,

SUBMISSION TO RULES FOR REFERENDUMS INQUIRY

My submission addresses the terms of reference for the inquiry as follows:

Summary

This submission recommends that the *Referendum (Machinery Provisions) Act 1984* ("the Act") should not be amended if the effect of any amendments were to restrict relevant information to voters about proposed changes to the Australian Constitution. In particular, it would not be appropriate for the Parliament to reduce expenditure upon the production and distribution to voters of materials relating to the 'Yes' and 'No' cases, as well as materials containing the text of any proposed changes to the Constitution, in respect of referendum campaigns and/or indicative plebiscites.

Submission 1: Processes for preparing the Yes and No cases for referendum questions

The Act, s 11 (1)(b)(i), (ii), (2) (b)(i), (ii), provides that there be forwarded to the Electoral Commissioner "arguments" in favour of and against the proposed law to change the Constitution, each consisting of not more than 2000 words, authorised by a majority of Members of Parliament who voted for and against the proposed law and who "desire to forward such an argument". The respective arguments for and against may exceed 2,000 words if there are referendums on more than one proposed law on the same day: s 11 (3)(b).

The processes established by the Act for preparing the "Yes" and "No" case for referendums have undoubtedly proved successful in providing dissemination of relevant information to voters. The Parliament has the capacity to appoint a committees to manage the respective "Yes" and "No" case campaigns. Such committees were appointed by the Government in the lead-up to the 1999 'Republic' Referendum. Those Committees ensured the participation by the wider community in the debate surrounding that Referendum. That arrangement worked efficiently and successfully in preparing the "Yes" and "No" case for that referendum.

I therefore submit that the Commonwealth Government continues to fund adequately those processes in respect of preparation of the 'Yes' and 'No' cases.

Submission 2: Provisions providing for the public dissemination of the Yes and No cases

The Act s 11 (1), (2), (3) (a), (c) provides that the Electoral Commissioner, no later than 14 days before the voting day, prints and posts to each elector a pamphlet containing the 'Yes' and 'No' cases and the proposed textual changes and additions to the Constitution. Those provisions are vital to providing a mechanism for informing the voters of 2 important matters:

1. the arguments for and against the proposed law/s and
2. the details of the proposed changes.

It is essential that the Act retain the provisions in respect of distributing printed materials provided for by the Act, s 11. There is sufficient flexibility to expand the publication of the materials in other media (eg. official websites and possibly interactive on-line sites) through regulation.

The fact that many Australians have access to information on-line does not justify restricting the distribution of printed materials. Even the Senate Legal and Constitutional References Committee recognised the importance of ensuring that information (in the context of a Constitutional education and awareness program) "reaches the full range of people in the Australian community."[1] There are many Australians who do not have on-line access or who are more likely to read the material if it is sent to them in hard-copy form directly by post.

My recommendation to the Committee is to reject any proposal to restrict the distribution of printed material by post to voters. Any such proposal would be unacceptable as it would be likely to discriminate against a significant body of Australian voters (eg. those without access to the internet) and unfairly deprive them of access to vital information in order to cast an informed vote.

If the Parliament were to enact legislation to restrict information about a matter so important and far-reaching as proposed laws to change the Australian Constitution and, potentially, Australia's stable and highly successful system of government, such action could infringes the civil right of free political discussion and communication open to all Australians. A similar implied constitutional right has been recognised in the past by the High Court of Australia.[2] The Committee should also heed carefully the following comment by the Joint Select Committee on the Republic Referendum:[3]

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[1] The Senate Legal and Constitutional References Committee, *The Road to a Republic*, (Canberra, 2004), par. 8.13, p. 135.

[2] See *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520. If a proposed law burdened freedom of communication about government or political matters in its terms, operation or effect, and is not reasonably appropriate to achieve a legitimate objective that is compatible with the system of government established by the Constitution, such a law might potentially infringe the implied freedom.

[3] Joint Select Committee on the Republic Referendum, *Advisory Report on Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999* (Canberra, 1999), par. 7.17, p. 97.

> "Australians have the right, regardless of income, education, background or circumstances, to access meaningful information about their system of government."

It follows that legislation which effectively limited or restricted the distribution or dissemination of relevant information to electors in respect of a referendum proposal could be struck down by the High Court on the ground of infringing the implied constitutional freedom of political communication.

It is my submission that the Act should only be amended for allocating further funds, if necessary, for the provision of more information (not less information) detailing the 'Yes' and 'No' cases to electors. That information must include printed materials, in addition to electronic and other information. The information should also include the full description or "textual alterations and additions proposed to be made to the Constitution" (as set out in the Act, s 11), so that voters are fully informed of the details of the proposed laws. The foregoing submission also applies to any proposals for indicative plebiscites. There are no arguments in favour of denying that information to voters, particularly during referendum campaigns.

Submission 3: Limitations on the purposes for which money can be spent in relation to referendum questions

An argument that the cost of producing and distributing materials essential to voters in order to cast an informed vote is too high is indefensible. Such an argument would defeat the purpose of the legislation, which allows the Commonwealth Parliament the capacity to increase the financial allowance for the printing and distribution of materials relating to the 'Yes' and 'No' cases to the voters. That positive capacity was clearly demonstrated during the 1999 'Republic' Referendum, when $15million was allocated by the Government to the 'Yes' and "No' campaigns.

In my submission, the Government should continue to provide the necessary funding for the 'Yes' and 'No' case campaigns at a referendum (or for the purposes of any plebiscite). There are no plausible arguments to justify denying the necessary government expenditure on resources and printed materials in order for all Australians to be fully informed about the 'Yes' and 'No' cases, as well as the text of any proposed changes and additions to the Constitution. The Parliament should not thereby impose restrictions on the democratic right of citizens to detailed information about any proposed constitutional changes.

Conclusion

I submit that the Commonwealth Government continue to fund in respect of Referendums:

1. the 'Yes' and 'No' case campaigns;
2. the pamphlet and other materials for distribution to voters detailing the 'Yes' and 'No' cases, and
3. the pamphlet and other materials for distribution to voters containing the proposed textual alterations and proposed additions to the Constitution.

(The same applies to indicative plebiscites – the voters are entitled to the same detailed information to make an informed assessment about the 'Yes' and 'No' cases.) If necessary, regulations or additional legislation should provide for additional funds to meet those costs.

There is no suggestion that the procedure outlined in s 11 of the Act could be said to operate in a way that is somehow ineffective in informing voters of the alternative "Yes" and "No" cases in respect of a referendum proposal. It follows that the existing s 11 procedure is appropriate for the purpose of informing the voting public and should be retained in the Act.

The history of referendum outcomes in Australia (8 out of 44 referendum proposals have been carried) tends to show a strong desire by voters to retain the stability of their current constitutional arrangements, having considered the respective 'Yes' and 'No' cases for and against the proposed changes. If Australians are a conservative constitutional people, with the "innate wisdom" (as McGarvie maintains[4]) to preserve their system of government, it is strong evidence that the machinery provisions of s 11 of the Act have worked effectively in the past to provide the dissemination of relevant information to voters in Referendums, and there is no reason to propose that those arrangements will not work effectively in the future for the benefit of all Australian voters.

The Australian public could be forgiven for being sceptical of a government funded inquiry that appears to contemplate the limiting or restricting of access to information by the electors at a referendum. (This is so at a time when the Government's priorities should be focussed upon other areas of vital concern to the nation, such as responsible economic management, improving the nation's health and transport infrastructure as well as educational standards in literacy and numeracy.) It goes without saying that any Government which proposed to alter the machinery provisions for Referendums by limiting funds for the production and distribution of vital information for voters can expect to attract widespread community opprobrium for what would appear to be an attack on the fundamental democratic right to an informed vote.

Yours faithfully,

David Hull
Legal Practitioner

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[4] Richard E. McGarvie, *Democracy* (Carlton South, 1999), p. 15.