THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

READY OR NOT
REFINING THE PROCESS
FOR ELECTION '93

REPORT ON THE CONDUCT OF
THE 1990 FEDERAL ELECTION, PART II
AND
PREPARATIONS FOR THE
NEXT FEDERAL ELECTION

DECEMBER 1992

CANBERRA

Parliament of the Commonwealth of Australia

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Joint Standing Committee on Electoral Matters

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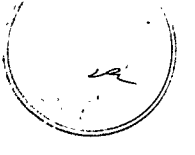

DECEMBER 1992

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FOREWORD

In December 1990 the Committee reported on the conduct of the 1990 election. In doing so it identified several problems which had arisen during the election period, and drew some conclusions about the management and operations of the Australian Electoral Commission. At the end of the report the Committee declared its intention of following up certain matters during the current Parliamentary term, so that it could satisfy itself that preparations for the next federal election could take account of difficulties encountered in the last one.

The following report is the result. In it the Committee revisits its report on the conduct of the 1990 election and takes the opportunity to comment on the AEC's actions in "refining the process" of managing elections. The Committee has confined its attention to the major issues of the 1990 election and those areas in which legislative or other changes required comment. One topic, counting the vote and transmitting the results on election night, was the subject of an interim report by the Committee, and the legislative changes which relate to that report are included in the current report.

The Committee's terms of reference required it to comment on any longer term issues relevant to the conduct of federal elections in general, rather than the 1990 election only. The most significant issue considered in this part of the report is the recent judgment of the High Court of Australia in *Sykes v. Cleary.* There has not been time since the decision was handed down for the Committee to consider the implications of the decision or to take evidence on the subject. Nevertheless the Committee has taken the opportunity to make some observations on the case.

There is no doubt that candidates intending to nominate for federal elections need to consider carefully the application of s. 44 of the Constitution to their individual circumstances. The problem is that a consideration of the section may not provide sufficient information. The AEC cannot take responsibility for the candidate's decision on his or her qualifications, but the Committee considers that the AEC should acknowledge its role as a provider of information on electoral matters, and act accordingly.

The judgment is reprinted in an appendix to the report for the convenience of readers who may not have ready access to it. The Committee is grateful for the High Court of Australia's permission to reprint the decision and reasons for judgment.

The Committee also wishes to thank the Australian Electoral Commission for permission to use the photographs on the cover, and the Printing Sections of both House of Representatives and Senate for their assistance.

Several operational and legislative changes which have occurred since the 1990 election, should facilitate the conduct of the next election. The Committee wishes to reaffirm its confidence in the administration of Australia's electoral system, which it considers to be of world class. Improvements really are "refining the process".

The Government's response to the *1990 Federal Election* was tabled in Parliament on 8 December – too late for the Committee to consider it in the context of the current inquiry.

Mr Arch Bevis, MP
Chairperson
Parliament House, Canberra
December 1992

TERMS OF REFERENCE

INQUIRY INTO THE CONDUCT OF THE
1990 FEDERAL ELECTION, PART II
AND
PREPARATIONS FOR THE NEXT FEDERAL ELECTION

To inquire into and report on:

(i) the progress the Australian Electoral Commission has made in rectifying the deficiencies in the conduct of the 1990 federal election which were identified in the Joint Standing Committee on Electoral Matters' report *1990 Federal Election* and any longer term issues relevant to the election which have emerged since the inquiry,

and

(ii) the preparedness of the Australian Electoral Commission to conduct the next federal election.

JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

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(National Party - New South Wales)

Mr D Melham MP
(ALP - New South Wales)

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ABBREVIATIONS:

AEC ..... Australian Electoral Commission
CBD ..... Central Business District
DRO ..... Divisional Returning Officer
JSCEM..... Joint Standing Committee on Electoral Matters
NTR..... National Tally Room
OIC ..... Officer in Charge
TENIS.....The Electoral Night Information System

KEY FINDINGS AND RECOMMENDATIONS

The report addresses three main issues: remedial action on problems identified in conducting the 1990 election; longer term issues; and the Australian Electoral Commission's preparedness to conduct the next federal election.

Problems Identified in the 1990 Report

The Government has not tabled a formal response to the report on the conduct of the 1990 election. The Committee recognises that there have been practical responses to that report, both by way of operational adjustments within the AEC and through several legislative amendments. Further amendments to the *Commonwealth Electoral Act* are currently being considered by the Parliament. While the Government's attitudes and intentions are revealed through such changes, they are no substitute for a formal response.

Recommendation 1

That the Government respond to the Report on the 1990 Federal Election.

The Committee was selective in revisiting issues raised in the 1990 Report. Only topics which were considered major problems in the 1990 election period, or which attracted a high level of interest in the current inquiry, were selected. Of these, the subject which attracted the most criticism in the 1990 Report – queuing to vote – is dealt with in most detail.

The AEC has put considerable effort into improving its performance in relation to voter flow-through. Its revised National Polling Place Resources Policy provides more flexibility for polling staff to respond to problems in particular polling places. The Commission has set 10 minutes waiting time as a performance standard.

The Committee suggests that polling staff take practical steps where possible to offer shelter to those waiting. They should pay particular attention to ensuring that any inconvenience is minimised for voters with special needs.

Recommendation 2

The Committee recommends that the AEC instruct DROs and Polling Officials to arrange any queues which may form on polling day, so that as many voters as possible are provided with shelter, with particular consideration for those with special needs.

The Committee has continued this theme in considering premises suitable for use as polling places, and suggested that access for people with disabilities be paid particular attention.

The Committee has again expressed concern about the use of dual polling places – that is, polling places offering ordinary votes for two divisions.

Recommendation 3

> **The Committee recommends that the AEC adjust its polling premises policy in order to minimise the use of dual polling places, and following the 1993 election, report to the JSCEM on the number of dual polling places used and any problems which may arise at such polling places.**

The report notes that the AEC intends extending its use of some city halls as ordinary polling places for the whole state. This is a convenient facility for those who need to be in central business districts on polling day. The benefit would be lessened if large numbers of people used city hall polling places. Advertising regarding the facility should focus on those who would find it difficult to vote outside the CBD.

During the 1990 inquiry a large number of submissions identified the volume of paper used at election time, both by political parties and the AEC, as an environmental problem. The current inquiry revealed that this concern remains uppermost in the minds of many people when they consider electoral period problems. The Committee reiterates its view that all concerned should be conservative in the use of paper, that recycled paper be used where possible and that electoral and campaign material itself be recycled.

The Committee's 1990 Report commented on the problem of possible misuse of the sections in the *Commonwealth Electoral Act* which are designed to save the votes of those making mistakes in filling in their ballot papers. In response to the report an amendment is now before the Parliament to make it an offence during an election period to encourage people to misuse the provision. The Committee considers that the amendment will assist in solving the problem.

Preferential voting and its consequences are complex and should be targeted in the AEC's education programs. The need for this is greater because voters in some states will have voted in optional preferential elections the last time they voted.

There was some discussion of certified lists and electoral rolls during both the 1990 and the current inquiries. Despite the availability of floppy disks the Committee believes that sitting Members and Senators continue to need three hard copies of the lists.

Longer Term Issues

The Committee considered the issue of qualification of candidates for federal elections was a significant longer term issue requiring its attention. The recent High Court

decision and reasons for judgment will be very useful for intending candidates and those advising them. With the High Court's permission the entire judgment has been reprinted as a service for those interested in the subject.

In the Committee's view the AEC has a role to play in providing information to intending candidates. This is a separate issue from taking responsibility for candidates being qualified for nomination. The Act quite correctly makes this the responsibility of the candidate.

The application of s. 44 of the Constitution remains complex, especially in relation to office of profit. The Committee is pleased to note that the Minister for Administrative Services has undertaken to approach the States Attorneys-General regarding the situation for public servants.

Recommendation 4

The Committee recommends that the Minister for Administrative Services seek an opinion from the Attorney-General on the application of s. 44(iv) of the Constitution to employees of government enterprises who are not employed under the *Public Service Act 1922*.

Recommendation 5

The Committee recommends that the proposed approach to the States Attorneys-General regarding uniform re-employment provisions for public servants resigning to contest federal elections, be made as a matter of urgency, and that the AEC make the responses available to intending candidates.

Recommendation 6

The Committee recommends that the AEC review its Candidates' Handbook and Nomination Checklist to include information on the implications of the recent High Court decision and the possible need to take steps to establish their eligibility under s. 44 of the Constitution.

The Committee notes that the amendments currently before the Parliament address the problem of evidence of authorship or authorisation of campaign material.

Recommendation 7

The Committee recommends that information about the proposed provisions on evidence of authorship or authorisation of material, if enacted by the Parliament, be included in the Candidates' Handbook.

The issue of enrolment of people in remote ares of Australia is a recurring problem. The matter was raised in the 1990 Report, during the Committee's resource sharing inquiry, and again during the current inquiry. The AEC has embarked on special programs to increase the level of enrolment of people in remote areas.

Recommendation 8

The Committee recommends that the AEC conduct an evaluation of its enrolment program in remote areas and provide a report on the evaluation to the Committee.

The AEC's Preparations for the Next Federal Election

The management and operations of the AEC were criticised in the 1990 Report. The Committee notes that the AEC has taken action to remedy some problems. One such action is the establishment of a Client Support Unit. The Committee will be interested in monitoring the performance of the Unit.

The AEC has also taken some, but insufficient action to consult with its own staff and client groups. This remains a difficult area for the AEC and it needs to evaluate its performance on a regular basis.

The Committee was concerned to learn that the AEC had reviewed its procedures for election night counting and transmitting the vote without consulting its main client groups. As amendments to the legislation permitting the implementation of the new procedures was before the Senate, the Committee tabled an interim report called *Counting the Vote on Election Night.*

The recommendations in that report have been supported by the Minister and further amendments to the Act are now before the Parliament. The recommendations are repeated in the current report for the sake of completeness. Readers wanting to study the argument will need to go to the interim report.

Recommendation 9

The Committee recommends that the AEC review the procedures required for finalising the Senate count, with view to having the writs returned at the earliest opportunity following the election.

Recommendation 10

The Committee recommends that divisional maps produced by the AEC name all streets and roads within the Division.

Recommendation 11 (recommendation 1 of the interim report)

The Committee recommends that the AEC identify the two candidates to whom preferences are to be provisionally distributed on election night using all relevant objective data including historical results.

Recommendation 12 (recommendation 2 of the interim report)

The Committee recommends that the names of the two candidates identified for receipt of provisionally distributed preferences be kept confidential until the close of poll. Each DRO should be informed in confidence so that the relevant checks can be made before polling day. An exception can be made for those individuals employed by the media to program their election night computer systems, in which case the names of the candidates can be divulged in strict confidence and on a need-to-know basis no earlier than the morning of the election. The names of the two candidates should be given to the OIC of each polling place in a secure manner in a sealed envelope. The envelope should be opened in the presence of scrutineers and polling staff.

Recommendation 13 (recommendation 3 of the interim report)

At all stages of the count full and reasonable access should be provided for scrutineers and all polling staff should be informed of the scrutineers' rights of access. The access should ensure adequate scrutiny of the formality of votes in the count of first preferences, opportunities to observe the preferences of minor candidates during the two-candidate preferred distribution, and opportunities to analyse all ballot papers as required after the results of the House of Representatives count have been transmitted. Access to the Senate count on election night should be adequate to monitor the formality of votes, with more comprehensive access to Senate papers being afforded to scrutineers in subsequent counting of the vote. The AEC should consult the political parties and candidates regarding access for scrutineers.

Recommendation 14 (recommendation 4 of the interim report)

The result of the first preference vote count should be transmitted immediately from each polling place to the Divisional Office, and from there immediately for each polling place to the National Tally Room.

Recommendation 15 (recommendation 5 of the interim report)

The result of the provisional two-candidate preferred distribution should be transmitted as soon as possible from each polling place, and transmitted in at least three batches from the Divisional Office to the National Tally Room with information about the polling places included when approximately 10 per cent, approximately 40 per cent and the final count for the night is collected by the DRO.

Recommendation 16 (recommendation 6 of the interim report)

The AEC should prepare an information kit for the use of media involved in broadcasting the election results. Opportunities should be provided to media representatives to discuss the procedures for transmitting election results.

CHAPTER ONE
INTRODUCTION

The introduction traces the genesis of this inquiry to the Report on the 1990 Federal Election and the Committee's decision to return to matters raised in that report before the next federal election. It notes that the response to that report has been by way of operational change within the AEC and legislative amendment. There is a recommendation for the Government to provide a formal response. The introduction concludes with a comment on the scope of the current inquiry, and the reasons for tabling an interim report on polling day procedures.

1.1 Background and History of the Inquiry

1.1.1 On 28 May 1990 the Joint Standing Committee on Electoral Matters (JSCEM) sought and received from Senator the Hon. Nick Bolkus, the Minister responsible for electoral matters, a reference on the conduct of the 1990 federal election. The inquiry represented an ongoing task which has been given to successive parliamentary electoral matters committees since 1983. The work of those committees initially resulted in a major overhaul of the *Commonwealth Electoral Act 1918*, including the establishment of the Australian Electoral Commission, and more recently fine tuning of both the Electoral and Referendum Acts.

1.1.2 In December 1990 the Committee presented its report on the 1990 federal election, hereafter called the 1990 Report. The report identified a number of inadequacies in the management of the election and foreshadowed the Committee's intention to re-examine the AEC in the current parliamentary term to ensure that the problems identified were remedied before the next federal election.

1.2 The Report on the 1990 Federal Election

1.2.1 The Committee found that the conduct of the 1990 federal election was marked by a number of problems, the major ones relating to polling day itself – queuing to vote, problems with polling premises, campaign material and delayed results. Other matters raised included voter education, candidates' qualifications for office, registration of parties, nominations, the electoral roll and certified lists and the management and operation of the AEC itself.

1.2.2 The Committee made twenty-nine recommendations addressing these issues. These recommendations are listed in Appendix 1 of this report, together with suggestions and comments from the 1990 Report which were not presented as formal recommendations. The recommendations broadly covered making voting easier for the public, knowing the election result on election night, campaign material, nomination and enrolment and management and operation of the AEC.

1.3 Response to the 1990 Report

1.3.1 While there has been no formal Government response, several of the recommendations have already been acted upon at the operational level within the AEC. These are summarised in Appendix 1, and are described in the extracts from submissions in Appendix 7. In the interests of brevity this report will not attempt to describe each individual response as the information is conveniently presented in these appendices. Instead particular matters will be highlighted and the report will focus on a number of AEC and/or legislative responses as they relate to the next federal election.

1.3.2 The Government has revealed its intentions regarding some recommendations in the 1990 Report by introducing legislation which responds to matters raised by the Committee. The Electoral and Referendum Amendment Bill 1992 was

introduced in the Senate on 15 October 1992[1], with further amendments introduced on 1 December. The Bill has been passed by the Senate and is expected to be considered by the House of Representatives shortly. The Bill is relevant to several matters raised in the 1990 Report and also addresses issues raised by other Parliamentary Committees.

1.3.3 While the Government has made its intentions clear in some areas, it has not yet responded formally to the 1990 Report. The Committee views this with some concern. The matters raised in the 1990 Report have a bearing on the next federal election. Political parties, candidates and the AEC would benefit from having the Government's response to all the matters raised.

> *Recommendation 1*
> The Committee recommends That the Government respond to the Report on the 1990 Federal Election.

1.4 Scope of the Current Inquiry

1.4.1 There are three main aspects of the current inquiry: progress in rectifying the deficiencies identified in the conduct of the 1990 federal election; longer term issues; and the AEC's preparedness to conduct the next federal election. These three aspects are interrelated, but for the sake of clarity in the report, they have been dealt with in separate chapters as set out in the terms of reference.

1.4.2 In relation to the first aspect, this report focuses on several areas in which the AEC has devised policies to overcome the problems of the 1990 election, including the problem of queuing, the adequacy of polling premises, recycling of campaign and

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1 E.g. Clause 9 of the Electoral and Referendum Amendment Bill 1992 deals with the provision of rolls and habitation indexes, Clause 17 deals with deregistration of political parties, Clause 20 with staffing arrangements for polling booths, and Clause 22 with the scrutiny of votes in House of Representative elections.

electoral paper, the time taken to provide a result of the election, questions relating to preferential voting and the production of certified lists.

1.4.3 The longer term issues canvassed in the report are not strictly limited to matters which have arisen since the 1990 inquiry. They include topics which have been further developed, or on which side issues have arisen, since the earlier report. Issues covered encompass qualifications of candidates, authorisation of campaign material, disclosure, the rights of scrutineers in polling places, voters with special needs (including the elderly frail voters), the availability of information for voters and candidates and enrolment in remote areas.

1.4.4 The third aspect dealt with in this report – the AEC's preparedness to conduct the next federal election – is related to the solution of the 1990 problems and the longer term issues outlined above. The topics covered under election preparations include management and operation within the AEC, computer hardware and software and the AEC's training programs. Election night plans including procedures for counting the vote, which were addressed in an interim report, will be summarised in the context of the AEC's preparations for the next federal election, in order to provide a more complete account of the preparations.

1.5 Interim Report on Counting the Vote

1.5.1 As noted previously, a particular problem considered in the 1990 Report – knowing the result on election night – was the subject of an interim report on the current inquiry, entitled *Counting the Vote on Election Night.* The Committee decided to table an interim report because it seemed likely that the Electoral and Referendum Amendment Bill 1992, which dealt, in clause 22, with the House of Representatives scrutiny, would be enacted before the Committee could complete its inquiry. The interim report was tabled on 24 November 1992.

1.5.2 The Bill which was introduced in the Senate on 15 October 1992, made provision for an indicative distribution of preferences on polling night, but gave no details

about how this might be effected. Details were provided in the AEC's original submission, and some of these aroused concerns which the Committee wished to address before the Bill was passed and the procedures put into operation.

1.5.3 These concerns were addressed in the interim report and have now been incorporated into the Bill through further amendments passed by the Senate on 1 December 1992 and shortly to be considered by the House of Representatives.

CHAPTER TWO
PROGRESS MADE IN RECTIFYING PROBLEMS OF THE 1990 ELECTION

A summary of responses to the 1990 Report is at Appendix 1. This chapter does not attempt to give a summary of all activities raised in the 1990 Report – rather it seeks to canvass a number of areas in which the AEC has devised policies to overcome the problems of the 1990 election. The particular matters analysed are queuing, polling premises, campaign and electoral material, preferential voting and the certified lists.

2.1 Queuing

Problems relating to Queuing identified in the 1990 Report

2.1.1 The 1990 Report identified queuing at many polling places as the most serious complaint of the 1990 election.[2] The extent of the problem varied in different areas of Australia, with the most serious difficulties being experienced in the Sydney and Melbourne metropolitan areas.[3] The Committee considered that the AEC should monitor queuing at future elections and set a performance standard to assist the process. It recommended:

- the Australian Electoral Commission develop a system, which should include reports from all presiding officers on queuing and any other delays, to provide it with reliable data of voter turnout patterns and any queues at each polling place at future federal elections

and

- the Australian Electoral Commission set a formal performance standard for the length of time that it is reasonable for a voter to wait to cast a vote, and use that standard as the criterion against which the Australian Electoral Commission's level of service can be measured at the next election.[4]

2 The 1990 Report, p. 7.
3 ibid., p. 11.
4 ibid., pp. 12–13.

2.1.2 The Committee went on to make more specific recommendations aimed at reducing queuing:

> The Committee recommends that to alleviate queuing problems at future elections the Australian Electoral Commission:
>
> - employ additional staff where necessary to ensure that the ratio of ordinary vote issuing staff to potential voters is at a realistic level
> - revise its National Polling Place Resources Policy to provide flexibility in the staffing and resourcing of polling places
> - print the certified lists in a larger type size to facilitate the process of striking the voter's name from the list
> - ensure Divisional Returning Officers review polling premises and their management on a regular basis

and

> - improve training for Divisional Office and polling place staff to ensure that they have all the knowledge and skills necessary to perform more effectively their tasks on polling day.[5]

The AEC's Response

2.1.3 The AEC supported these recommendations with the exception of the type size for the certified lists, and pointed out that some were already practised.[6]

2.1.4 The Commission has set 10 minutes as a performance standard to be aimed at.[7] In relation to monitoring queuing, new systems were devised and tested at the Menzies and Wills by-elections and the election for the ACT Legislative Assembly.[8] The AEC stated that:

> Trialling of the revised policy at the Menzies and Wills by-elections and the Australian Capital Territory Legislative Assembly election has been positive and encouraging. [9]

2.1.5 While by-elections are not the best testing ground – they have a slightly lower turnout and voters are not required to cast a Senate and House of Representatives

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5 ibid., pp. 27–28.
6 Evidence, pp. S36–39.
7 Evidence, p. S37.
8 Evidence, p. S36.
9 Evidence, p. S37.

vote at the same time – the AEC considers that the ACT election was a fair test and concluded:

> The experience of these elections indicates that the new procedures were effective. Where queues that may inconvenience voters do occur (and it is likely they will at certain unpredictable times) the procedures are such that polling place OICs now have the flexibility to be able to service substantially more voters where peaks occur. Exit polls conducted by an independent agency in both the by-elections and the ACT election indicated a high level of voter satisfaction at the service provided by the Commission.[10]

2.1.6 Other plans directed at minimising queuing include the provision of an additional certified list to each polling place for use if queues become excessive[11], and an emphasis on voter service and throughput in the polling staff training package.[12]

2.1.7 The AEC has revised its National Polling Place Resources Policy in response to both the queuing problem itself and the Committee's comments on it. A legislative amendment is required to give the required flexibility to polling staff and this has been included in the Electoral and Referendum Amendment Bill 1992 at clause 20. The Explanatory Memorandum to the Bill notes:

> This clause [20] deletes subsection 203(6) of the Principal Act to remove the restriction on the Electoral Commission appointing any deputy presiding officers for a polling place at which there will be fewer than 6 issuing points at any time during the hours of polling on polling day.
>
> The Joint Standing Committee on Electoral Matters, in its December 1990 Report on the 1990 Federal Election, recommended that, in order to alleviate queuing problems at future elections the Australia Electoral Commission employ additional staff where necessary to ensure that the ratio of ordinary vote issuing staff to potential voters is at a realistic level, and recommended that the Commission revise its National Polling Place Resources Policy to provide flexibility in the staffing and resourcing of polling places.[13]

2.1.8 The revised National Polling Place Resources Policy was compiled following consultation and review involving staff from Divisional, State and Central Offices.[14] The

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10 Evidence, p. S38.
11 Evidence, p. S37.
12 ibid.
13 Electoral and Referendum Amendment Bill 1992, Explanatory Memorandum, p. 8.
14 Evidence, p. S38.

Management Board devised the final policy having taken note of a working party of DROs from around Australia.[15]

2.1.9 The policy reduces maximum table loadings in polling booths; allows more flexibility in the deployment of staff; recognises the importance of the queue controller and therefore the training of queue controllers; allows for organising the current bank-style queues into mini-queues (of say 4–5 electors) at each issuing point; focuses OIC/2IC training on polling place management and effective voter flow; increases the flexibility of State managers to vary resources where particular needs are expected; and gives priority to refining procedures to estimate voter turnout.[16]

2.1.10 Despite these changes the AEC recognises that 'there can be no iron-clad guarantee that undue queuing will never occur' and that there may be delay on some occasions.[17] The Commissioner told the Committee:

> We would rather see no queues at all, or course. However, we recognise the realities of life. These things can and will occur from time to time. We are hopeful that the resetting of the polling place arrangements will result in a first-class overall service to members of the public in their voting.[18]

2.1.11 In addition there is a cost involved in minimising queuing. In the attempt to have the optimum number of polling staff the AEC must take into account the cost and the possibility of having underemployed staff.[19]

The Committee's View of the AEC's Queuing Strategy

2.1.12 The Committee recognises the complexity of the task faced by the AEC in minimising voter inconvenience. Procedures devised for the management of polling places have to be standardised and capable of being implemented by 8500 OICs and their staff throughout Australia. Too much flexibility at the polling place level could

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15 Evidence, p. 145.
16 Evidence, p. S39.
17 Evidence, p. S39.
18 Evidence, pp. 143–44.
19 Evidence, p. S37.

present administrative problems, but without this flexibility difficulties can only be overcome if they are identified before polling day and arrangements are agreed between the DRO and the relevant Australian Electoral Officer for the State.

2.1.13 DROs are able to request extra resources for particular polling places:

> State managers [are] to be given the flexibility to approve variations to the resourcing schedules to cater for special circumstances such as high concentrations of non-literate or non-English speaking voters by approving additional staff, certified lists, screens etc where the DRO can justify the need for such variations. These variations to the resourcing schedules will include the use of part-time morning staff to help overcome the expected morning peaks in polling places where this is deemed desirable.[20]

2.1.14 The comprehensive local knowledge of DROs and OICs is the most valuable input in identifying areas requiring extra resources. In addition it has been suggested that the *Atlas of the Australian People* and the Australian Bureau of Statistics would be useful sources of information for identifying areas likely to need extra resources of polling places.[21] The same sources could help identify booths needing polling staff able to speak particular languages where language problems are a factor in slow flow-through of voters.[22]

2.1.15 The AEC has recognised the need for flexibility and has attempted to encompass it in its training:

> Certainly [there is] much more flexibility. Our training is to impress upon staff, 'If a queue does form, do not just sit there and look at it: take some action, close down another table perhaps. Someone issuing absent votes may not be busy: take any steps to get rid of that queue as fast as you can'.[23]

2.1.16 It remains to be seen whether this will be enough. As D Murphy has pointed out, queuing is not just something that happens close to the tables where the polling officials tend to be:

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20 Evidence, p. S39.
21 Evidence, p. S93.
22 *ibid.*
23 Evidence, p. 146.

> Queuing will be inevitable at peak times but the problem will be minimised if voters can gain easy access to the Polling Stations. At the 1990 election, entry to the Polling Station where I voted was single file and it rained during the day. The door custodian, whose English was poor, did not make allowance for the weather and the elderly, infirm etc had to endure unnecessary delays standing out in the open before being allowed to enter the hall.[24]

2.1.17 This scenario is unacceptable. While the AEC has taken action to avoid queuing at the next election, it is highly likely that some queues will form and that in some places voters may be required to wait in bad weather conditions. Every attempt should be made to prevent queuing in such conditions.

2.1.18 While some may have to queue outdoors, it should be possible to protect those in special need from waiting to vote in inclement weather. The OIC of the polling booth could make room within the polling place for a small queue for those in need, and could direct polling staff to monitor the queue to offer this courtesy where necessary. In many polling places a few chairs could be provided for the use of these voters. Polling staff would need to exercise discretion regarding the need for the special facilities, but most people with special needs would probably fall into the classifications of frail elderly, injured, unwell or parents nursing infants.

Recommendation 2

The Committee recommends that the AEC instruct DROs and Polling Officials to arrange any queues which may form on polling day, so that as many voters as possible are provided with shelter, with particular consideration for those with special needs.

[24] Evidence, p. S10.

2.2 Polling Places

Polling Places and the 1990 Report

2.2.1 The 1990 Report expressed three areas of concern in relation to polling places: ease of access for voters with special needs, visibility from the street and problems posed by composite polling places. The report made no recommendations about polling places as such, although it addressed resources and procedures for polling places in the context of queuing.

2.2.2 The Committee addressed the topic of polling places in its Resource Sharing inquiry and recommended consistency in the use of polling places for Federal and State elections where possible. This remains an important principle for the convenience of the public.

Access for Voters with Special Needs

2.2.3 The 1990 Report noted that although 76 per cent of Members of Parliament who responded to the Committee's survey expressed satisfaction with the premises used, problems of access were raised in a number of submissions. The Committee suggested that:

> ...care should be taken by District Returning Officers to ensure, where possible, that polling places selected facilitate easy access by voters who are elderly, invalid, disabled or pushing strollers..

and

> Where possible the availability of parking facilities for those voters also should be considered.[25]

2.2.4 In its submission the AEC addressed only formal recommendations, so no response to this suggestion has been received. The need for special facilities has obviously not lessened.

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[25] The 1990 Report, p. 30.

2.2.5 The Council on the Ageing has commented on access for voters with special needs, drawing the Committee's attention to the fact that older people have problems getting to polling booths and require assistance with transport.[26] In addition, the Council has requested more publicity about which polling booths are physically accessible to people with disabilities.[27]

2.2.6 The Committee notes that the *Divisional Office Procedures Election Manual*[28], directs DROs to consider 'access/physically incapacitated access' in determining the suitability of polling premises. No figures have been received by the Committee regarding how many polling places have access facilities for people with disabilities, but it is desirable that all have such access provided.

Dual Polling Places

2.2.7 Composite or dual polling places are those in which a booth is registered as a polling place for two Divisions. The 1990 Report noted such polling places were a problem which could lead to confusion for some voters. As such they should be kept to a minimum.

2.2.8 The AEC appears not to have addressed this problem. The Electoral Commissioner has informed the Committee that the effect of redistributions in four States since the last election means that there will be 'quite a few'[29] dual polling places in use for the 1993 election. The Committee believes there is no reason why new boundaries of themselves should generate a need for dual booths. Typically dual booths in provincial districts and capital cities should occur only on boundary roads between divisions. Only in exceptional circumstances should polling places be located within a neighbouring division or clearly in a suburb outside a division.

2.2.9 The AEC has undertaken to consider the number of voters attending polling places in a neighbouring electorate in reviewing the election, and take note of any

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[26] Evidence, p. S182.
[27] ibid.
[28] Part 1, Subpart 2, paragraph 2.2.
[29] Evidence, p. 146.

problems for the next election.[30] Unfortunately this will not minimise confusion for the 1993 election. There is a need to ensure that information programs adequately convey information regarding dual polling places to the public. This can only be achieved through pre-election day information programs in divisions using dual polling places and by displaying large signs outside the dual polling places informing voters of the divisions being serviced by the premises.

> *Recommendation 3*
>
> The Committee recommends that the AEC adjust its polling premises policy in order to minimise the use of dual polling places, and following the 1993 election, report to the JSCEM on the number of dual polling places used and any problems which may arise at such polling places.

City Halls as Polling Places

2.2.10 The Committee notes that the AEC intends following a practice used at the Queensland State election -- using city halls as ordinary polling places for the whole State. The benefits are expected to be a faster voting process for those using the facility, greater convenience for the public, administrative efficiency and faster transmission of results.[31]

2.2.11 This innovation will be useful to many people absent from their own electorates on polling day, especially those having to work in the Central Business District (CBD) on the day. Not only will they be able to vote at a convenient location, but they will not have to spend the additional time taken to cast a declaration vote.

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30 ibid.
31 Evidence, p. 147.

2.2.12 Again, the maximum benefit from the facility will be made available to the public only if there is an effective information campaign which targets those who might need to use a CBD polling place. The benefits of a CBD ordinary polling place will be diminished if too many people try to cast their votes. Instead of offering a convenient way for CBD workers and visitors to vote, it could be a recipe for large crowds and long delays. The way to avoid this is to target the groups who might benefit from the facility, but not encourage ordinary voters to vote out of their electorates. This could be done through taking out advertisements in newspapers circulated in the CBDs, or even by writing to employers in the cities who would require staff to be at work on polling day.

2.3 Campaign and Electoral Material

2.3.1 The enormous volumes of paper used by the AEC and the political parties during the campaign period and on election day was again the cause of complaints and suggestions through submissions made to the Committee. The 1990 Report commented on the number of submissions advocating the banning of the distribution of how-to-vote cards, and the increase in the number of people expressing this viewpoint after succeeding elections.

2.3.2 While some proposals to ban how-to-vote cards stem from objections to the behaviour of candidates' representatives and the economic cost of campaign material, most focus on the waste of paper as an environmental concern. Submissions to the current inquiry reveal similar concerns. A typical view is:

> The appalling waste of paper disturbed me, and I can only hope that plans for recycling will be implemented at any future election.[32]

2.3.3 A contribution from a polling booth worker for more than a decade was uncompromising:

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[32] Evidence, p. S1.

> ... I know how exasperated many voters feel when they are bombarded with so many people approaching them as they enter the voting area, with all different "How to Vote" leaflets.
>
> It seems to me that there is terrible waste of paper and manpower. A letter box drop should be sufficient and a manned table provided where people can pick up the necessary information, if needed ..
>
> All paper used should be recycled and no colour used.[33]

2.3.4 Just as the submissions in favour of limiting or banning the distribution of how-to-vote material come mainly from private citizens and members of small political parties, adverse comments on the Committee's view expressed in the 1990 Report tend to come from the same source.[34]

2.3.5 In the 1990 Report the Committee considered banning the distribution of how-to-vote cards but decided against this – a view not shared by the Australian Democrat member of the Committee. Instead the Committee recommended procedures for collecting and recycling campaign and electoral material. It also recommended the use of recycled paper for the production of the AEC's election material wherever practicable.[35]

2.3.6 The AEC supported these recommendations; indeed a considerable amount of recycling was practised at the 1990 election. However, the AEC pointed out that it is not always practical to collect used paper and transport it to recycling centres, especially in remote areas. The Committee accepts that the cost to the public of recycling electoral and campaign material has to be balanced against the environmental cost of wasting, rather than recycling paper.

2.3.7 It is recognised that how-to-vote material is not generated by the AEC, but there is no practical alternative to the collection and recycling of the material other than

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33 Evidence, p. S25.

34 For example Your decision to not ban the distribution of How-to-vote cards, would it is believed be rejected by majority opinion by Referendum, as the tremendous cost of materials, printing & distribution, paid in most part from the public purse, destined for waste-paper baskets, is considered to be not only a disgraceful exercise in economics, but also a preferential tool of persuasion, for the financial resources of the major parties. Evidence, p. S68.

35 The 1990 Report, pp. 57–8.

making it an AEC responsibility. It should be seen as part of the cost of running elections. Judging from the responses to the Committee's inquiries, it seems that the taxpayer is happy to have the public purse take responsibility for this.

2.3.8 The Committee has no new recommendations to make regarding campaign and electoral materials, but it felt obliged to reiterate its views on the subject, recognising the public interest aroused by the enormous use of paper during elections.

2.3.9 The AEC, political parties and individual candidates should maintain an acute awareness of the environmental and economic cost of paper usage at election time. All those concerned should make every effort to conserve paper and to use *recycled* paper wherever possible.

2.4 Preferential Voting

The 1990 Report

2.4.1 The 1990 Report considered the matter of encouraging electors to record their votes in a manner which would have the same effect as optional preferential voting. The possibility was created by the safety net provisions of s. 270 of the *Commonwealth Electoral Act 1918*, which were designed to save the votes of electors making unintentional errors in entering the numbers on the ballot paper. The safety net could validate the vote up until an elector repeated a number on the ballot paper. By the same token, an elector could use this provision to ensure that only one or a particular number of candidates could benefit from his/her vote, by deliberately repeating a number. The ballot paper itself would be valid so long as all squares (or all minus one) contained a number.

2.4.2 At the time of the 1990 inquiry the AEC advised that it was difficult to see how s. 270 could be amended to disbar de facto optional preferential voting, without risking the safety net intention of the section. The Committee therefore looked to penalties for those promoting misuse of s. 270. It recommended that s. 329(3) of the

Commonwealth Electoral Act 1918 be amended to include a general prohibition on the distribution of any material which discouraged electors from numbering ballot papers consecutively and fully.

2.4.3 The Committee also asked the AEC to consider possible changes to the Electoral Act which would minimise the incidence of optional preferential voting.[36]

2.4.4 The Committee notes that the recommendation in the 1990 Report concerned some writers of submissions. One considered that if the loophole existed it should not be an offence to take advantage of it.[37] Another thought the penalty suggestion was an infringement of civil liberties.[38] One submission put a series of questions to the Committee regarding optional preferential voting.[39]

2.4.5 The Committee's response to these people is that the system of voting used for House of Representatives elections is fully preferential. If another system is favoured, it is for the Parliament to legislate to change the *Commonwealth Electoral Act*. The Committee makes no recommendation regarding such a change.

The AEC Response

2.4.6 In response the AEC supported the recommendation relating to the general prohibition on distributing material discouraging electors from numbering ballot papers consecutively and fully.[40] An amendment addressing the recommendation was passed by the Senate on 1 December 1992. If the Electoral and Referendum Amendment Act 1992 is passed by the House of Representatives s. 329 will be amended as follows:

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36 The 1990 Report, pp. 41–2.
37 Evidence, p. S10.
38 Evidence, p. S11.
39 Evidence, pp. S141–42.
40 Evidence, p. S45.

After section 329 of the Principal Act, the following section is inserted:

Encouraging persons to mark ballot papers otherwise than in accordance with the Act

"329A. (1) A person must not, during the relevant period in relation to a House of Representatives election under this Act, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240.

Penalty: Imprisonment for 6 months.

'(2) In this section:
'publish' includes publish by radio or television."

2.4.7 The supplementary explanatory memorandum to the Bill notes that the new clause will create an offence during an election period of intentionally encouraging electors to mark their ballot papers ... other than consecutively and fully. The Bill does not impose a penalty for actions outside the election period. The Committee's amendment will assist in solving the problem identified in the 1990 Report.

The Need for Education about Preferential Voting

2.4.8 The submissions received by the Committee reveal a need for better educating the public about preferential voting. Education and information is needed about the reasons for the preferential system, including the extent to which all electors influence the outcome of such an election, and the effects of preferential voting. This matter was addressed by the National Party of Australia (W.A.) when the current inquiry was raised at the June 1992 State Council meeting:

> The only area raised as a matter of concern was the lack of understanding by the public of preferential voting and it was considered the Electoral Commission should educate the public more about the concept of preferential voting and the effect preferential votes can have on elections.
>
> One suggestion was that the Electoral Commission produce a video suitable for use in Years 11 and 12 of High School, explaining and demonstrating to students how the preferential system works so that the younger generation is well aware of the system before they become eligible to vote.[41]

[41] Evidence, p. S7.

2.4.9 The Committee commends this suggestion to the AEC.

2.4.10 Information about preferential voting is all the more necessary because some States permit optional preferential voting. The AEC will need to take care, especially in New South Wales and Queensland, to ensure that all voters are aware of the different requirements for marking the ballot papers in State and federal elections.

2.5 The Certified Lists

2.5.1 Various issues concerned with the certified lists were addressed during this inquiry. The typeface used and the possibility that a larger typeface might facilitate the process of striking off voters' names was raised by the Committee in the 1990 Report.[42] This elicited a submission from a retired graphic artist who suggested that a better alternative would be to have a one point space between the lines which would not only accomplish the Committee's purpose but would also improve the legibility of the lists.

2.5.2 Unfortunately it would add approximately 100 column-centimetres for each 3000 voters.[43] The added size of the list which would follow implementation of the Committee's recommendation was noted in another submission which inquired:

> What do people have against trees?[44]

2.5.3 The AEC did not support this suggestion and advised the Committee of the consequences of changing the size of the type.[45]

2.5.4 The issue of the availability of lists of electors was also raised in the 1990 Report. The Committee recommended that the *Commonwealth Electoral Act* be amended to provide for the distribution to each candidate as soon as practicable after the close of rolls, and at least one week prior to polling day.

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42 The 1990 Report, p. 28.
43 Evidence, p. S9.
44 Evidence, p. S76.
45 Evidence, p. S39.

2.5.5 This recommendation has been overtaken by changes to the AEC's procedures. Section 91 of the Act deals with the provision of and use of lists. It is amended by clause 9 of the Electoral and Referendum Amendment Bill 1992 and further amended by the additional amendments introduced on 1 December 1992. The changes in the original Bill:

> ...provide for the regular provision of information in computer format on changes to the Electoral Roll to registered political parties, Senators and Members of the House of Representatives and other persons or organisations as the Australian Electoral Commission determines are appropriate; provision of such information is to be free of charge to Senators, Members and those registered political parties which have *Parliamentary representation*;[46]

2.5.6 The additional amendments deal with the privacy implications of computer format rolls and ensure that:

> ...persons or organisations receiving personal enrolment information in computer format from the Australian Electoral Commission will only be able to use information for permitted purposes ..

and

> limit access to personal electoral roll information under the *Freedom of Information Act 1982*, by creating a new class of exempt document ...[47]

2.5.7 The AEC suggested that the availability of floppy disks would lessen the need for three hard copies to be provided to members as specified in the *Commonwealth Electoral Act*.[48] The Committee does not support this view and believes that the existing entitlement of three hard copies should be maintained.

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[46] Electoral and Referendum Amendment Bill 1992, Explanatory Memorandum, p. 2.
[47] Electoral and Referendum Amendment Bill 1992, *Supplementary Explanatory Memorandum*, p. 2.
[48] Evidence, pp. 166-167.

CHAPTER THREE
LONGER TERM ISSUES

The terms of reference direct the Committee to consider 'any longer term issues relevant to the election which have emerged since the inquiry'. Several of the issues covered in this chapter were relevant to the 1990 election, but have been considered in the context of their longer term relevance because the nature of the issues demands such analysis. The topics addressed in this chapter are: qualifications of candidates; authorisation of campaign material; the rights of scrutineers in polling places; the time taken to complete the count of Senate votes and electorate maps.

3.1 Qualifications of Candidates

Section 44

3.1.1 The intricacies of s. 44 of the Australian Constitution,[49] dealing with the capacity to be chosen or to sit as a member of the House of Representatives or the

[49] s. 44 states: Any person who:

(i) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or

(ii) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; or

(iii) Is an undischarged bankrupt or insolvent; or

(iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

(v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons;

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section iv does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

Senate, regularly cause problems for candidates at federal elections.[50] Three problems relating to 'office of profit' at the 1990 election were considered by the Committee: the status of State public servants; the status of employees of Commonwealth-funded bodies; and the status of parliamentary staff of Members of Parliament.[51]

The 1990 Report

3.1.2 The 1990 Report identified three areas of uncertainty regarding 'office of profit':

- what constitutes an office of profit?
- when does a candidate have to resign from such an office?
- whether an unsuccessful candidate's employment security will in any way be jeopardised by his/her standing as a candidate?

3.1.3 The report noted the need for a High Court ruling on what constitutes an office of profit under the Crown and when a candidate should resign from such an office.[52]

3.1.4 The 1990 Report dealt also with the matter of responsibility for ensuring that only qualified candidates nominated for elections. In this regard the report commented on the 1983 amendment to the *Commonwealth Electoral Act 1918* which made judgments on the eligibility for nomination the responsibility of candidates. The AEC was of the view in 1990, and no doubt remains of the view, that candidates should seek legal opinion if they require clarification of their status.

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50 See for example *The 1987 Federal Election*, Report No. 3 of the Joint Standing Committee on Electoral Matters, May 1989, pp. 25–30.

51 The 1990 Report, p. 64.

52 The 1990 Report, p. 66. The wording of the recommendation implied, incorrectly, that the Minister for Administrative Services could seek a ruling from the High Court. By coincidence the High Court's views have now been received, although the medium was Mr Sykes rather than the Minister.

Office of Profit and the Wills By-Election Case

3.1.5 This report is not the place for a thorough analysis of the recent High Court case, *Sykes v. Cleary*. The judgment is very recent[53] and there has not been sufficient time for the Committee to hear evidence on, and properly consider the implications of, the case. However the relevance of the case to the current inquiry is such that some aspects of it must be included in this report.

3.1.6 The case was brought by Mr Sykes to the High Court sitting as the Court of Disputed Returns. Mr Sykes was an unsuccessful candidate for the Wills by-election, which was held on 11 April. The successful candidate was Mr Cleary. Mr Sykes claimed that Mr Cleary was disqualified from being a Member of Parliament because he held an office of profit under the Crown at the time of his nomination. The relevant dates were:

for the close of rolls	16 March 1992
for nomination	20 March 1992
for the election	11 April 1992
return of the writ	23 April 1992

3.1.7 Mr Cleary resigned his office as school teacher on 16 April 1992.

3.1.8 *Sykes v. Cleary* addressed 'office of profit under the Crown', the time at which s. 44 is to be applied to test the qualification of candidates, and the application of s. 44(i) relating to attachments to foreign powers – all matters which have arisen at many elections over a great many years.

3.1.9 The first two questions posed in the 1990 Report have been clarified in the reasons for judgment in *Sykes v. Cleary*. The case revealed that an office of profit under the Crown would, in any future decision by the High Court, be construed to apply far beyond an unattached Victorian school teacher, on leave without pay. A copy of the decision and reasons for judgment are included as Appendix 5 of this report because of

[53] The decision was handed down on 25 November 1992, five days before the drafting of this report.

their relevance to the matters raised in the 1990 Report as well as to the next federal election.

Position of State and Commonwealth Public Servants

3.1.10 The implied breadth of the office of profit concept is of little consequence to Commonwealth public servants employed in Government departments. Section 47C (1) of the *Public Service Act 1922* provides for the re-appointment of unsuccessful election candidates in the following terms:

> (1) Where the Board is satisfied that:
> (a) a person who was an officer:
> (i) resigned in order to become a candidate for election as a member of a House of the Parliament of the Commonwealth or of a State, of the Legislative Assembly for the Australian Capital Territory, of the Legislative Assembly for the Northern Territory or of a prescribed legislative or advisory body for another Territory;
> (ii) was a candidate at the election; and
> (iii) failed to be elected; and
> (b) the resignation took effect not earlier than 6 months before the date on which nominations for the election closed;
> the Board shall, upon application by the person within 2 months after the declaration of the result of the election, re-appoint the person to the Service to fill the office occupied by the person immediately before resigning or an equivalent office or, if such an office is not available, as an unattached officer having the same classification as the person had immediately before resigning.

3.1.11 The position for State public servants varies in the different jurisdictions. It is not necessary to canvass all the relevant Acts here, but a reading of the Victorian provisions is instructive because of the Wills by-election case. *The Constitution Act Amendment Act 1958*, (No. 6224/1958) makes provisions for the re-employment of public servants which are similar to those of the Commonwealth, except that a discretion to re-employ may be exercised by the Governor in Council.[54]

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[54] s. 49 **Return to employment of certain unsuccessful candidates**
(1) If the Governor in Council is satisfied that any person employed in the public service or the teaching service or the railway service or the police force has (whether before or after the commencement of this Act)–
(a) resigned from the service or the force in order to contest any Commonwealth election for the Senate or the House of Representatives;
(b) contested such election; and
(c) failed to be elected thereat–
the Governor in Council notwithstanding anything in the **Public Service Act 1974** or the **Teaching Service Act 1981** or the **Railways Act 1958** or the **Police Regulation Act 1958**

3.1.12 The position for officers on the Commonwealth payroll but not employed under the provisions of the *Public Service Act 1922* is more problematic. The growth of government business enterprises in recent years makes the position even more unclear by creating a great variety of connections with the Government.

3.1.13 The 1981 Senate inquiry on the qualifications of Members of Parliament[55] looked to the nature of the association with a government body for guidance and reported:

> It is significant that at present the following public authorities have Commonwealth parliamentarians among their membership: Advisory Council for Inter-Governmental Relations, Advisory Council of the CSIRO, Council of the Australian National University, Council of the National Library of Australia and Parliamentary Retiring Allowances Trust. These are all of a research or advisory nature, and it may be that those public authorities engaged in operations of a commercial character would be considered too politically sensitive to permit of representation from the Parliament.[56]

3.1.14 During the committee stages of the Senate consideration of the Electoral and Referendum Amendment Bill 1992 on 1 December 1992, the Minister for Administrative Services, the Honourable Nick Bolkus, implied that Commonwealth employees had some certainty in this matter, unlike State public servants. However, anecdotes supplied by Senators in the Chamber at the time revealed how widespread the uncertainty for intending candidates has been – and not only for those associated with State bodies.

3.1.15 The Minister undertook to contact the Attorney- General as a matter of urgency, to request that he consult with the States Attorneys-General about the matter. The Minister was of the view that the Attorneys-General should consider amendments to the relevant State legislation to offer similar protection to State public servants as that afforded by the *Public Service Act 1922*.

> may, within two months after the declaration of the poll at such election, ... appoint such person to an office in the public service or the teaching service ...

55 *The Constitutional Qualifications of Members of Parliament*, Report by the Senate Standing Committee on Constitutional and Legal Affairs, 1981.

56 ibid., p. 52.

3.1.16 The Committee supports this initiative, but urges the Minister to seek clarification from the Commonwealth Attorney-General on the status of employees of Commonwealth bodies, who are not employed under the Public Service Act. This is the more urgent because of the breadth of the majority decision in *Sykes v. Cleary*, and the need for clarification, or at least guidance, before the close of nominations for the 1993 election. It may be that the Commonwealth legislation needs amendment to cover a wider range of employees, before the discussions on possible uniform legislation with the States can be pursued.

3.1.17 The advice from the Attorney-General should cover distinctions between offices attracting remuneration, those offering expenses only and those involving no remuneration at all.

Recommendation 4

The Committee recommends that the Minister for Administrative Services seek an opinion from the Attorney-General on the application of s. 44(iv) of the Constitution to employees of government enterprises who are not employed under the *Public Service Act 1922*.

Recommendation 5

The Committee recommends that the proposed approach to the States Attorneys-General regarding uniform re-employment provisions for public servants resigning to contest federal elections, be made as a matter of urgency, and that the AEC make the responses available to intending candidates.

The Time of Qualification and the Wills By-election Case

3.1.18 In the matter of the relevant time in which the disqualifications come into effect, the High Court found that the date of nomination is the date at which the candidate had to be qualified.[57] Various public policy and practical reasons are given for this decision.

3.1.19 The relevant legislation for candidates at State elections in Victoria takes a different approach:

> ... the election and return of any such person shall not be or be declared void by reason only of his holding such an office or place of profit under the Crown or being so employed; and on the election of any such person to be a member of the Council or the Assembly he shall cease to hold that office of place of profit under the Crown or to be so employed.[58]

3.1.20 This solution was favoured by the Senate Committee for public servants contesting federal elections.[59] It is also in keeping with the minority judgment of Deane J in *Sykes v. Cleary*, who considered the declaration of the poll should be the time at which Constitutional incapacity should be decided. This would have the effect, in most cases, of allowing candidates to wait until shortly before the declaration of the poll, but at a time when they were reasonably certain of success, before having to resign an office of profit under the Crown. It should be noted that the majority judgment argued the adverse effects of such a situation, stating that:

> The inclusion in the list of candidates on polling day of a candidate who may opt for disqualification may well constitute an additional and unnecessary complication in the making by electors of their choice.[60]

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[57] Deane J dissented from this view, holding that the relevant date is when the candidate becomes elected at the declaration of the poll, *Sykes v. Cleary*, 1992, p. 37. Deane J gave no decision on the citizenship qualifications because he found Mr Cleary duly elected, but his comments support the eligibility of both Mr Kardamitsis, the ALP candidate and Mr Delacretaz, the Liberal candidate.

[58] *Constitution Act 1975* (Vic) No. 8750/1975, clause 61.

[59] *The Constitutional Qualifications of Members of Parliament*, 1981, p. 49. The report proposed that several specified classes, including State public servants, who are elected to the Commonwealth Parliament, be deemed to have ceased their employment at the time they became entitled to an allowance under s. 48 of the Constitution.

[60] *Sykes v. Cleary*, p. 9.

Citizenship and Qualification

3.1.21 While the decision in *Sykes v. Cleary* has thrown some light on the situation regarding the eligibility of government employees to be chosen for and take a seat in Parliament, the reasons for judgment regarding citizenship qualifications have created as many questions as they have answered. The confusion is exacerbated by the dissenting judgments of Deane and Gaudron JJ. Many people, including a number of sitting Members and Senators, were surprised to find that unless they had taken deliberate action (as defined) to divest themselves of an attachment to another country, they may not be eligible to sit in the Parliament of Australia.

3.1.22 The extent of the application of s. 44(i) may have taken people by surprise, but problems caused by the section have arisen at most, if not all, federal elections since the Commonwealth was founded. If, as the majority in the recent case found, Mr Kardamitsis and Mr Delacretaz were ineligible to contest the by-election, many past and present Members of Parliament may have been ineligible to be elected.

3.1.23 The situation of those holding dual Australian and British citizenship is particularly likely to cause confusion. Before 1984, British subjects who had migrated to Australia did not need to be Australian citizens to stand for Parliament. Australian citizens with British connections have been long used to considering their Constitutional position different from those migrating from, or descendants of migrants from, other countries. As Mr Wood, a candidate for the Senate from New South Wales, discovered at the 1987 election, this is likely to lead to confusion.[61]

3.1.24 All Australian citizens intending to nominate for the 1993 election, would be well advised to consult their family tree and if necessary seek advice before assuming they are eligible.

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[61] *The 1987 Federal Election*, Report No. 3 of the Joint Standing Committee on Electoral Matters, p. 27.

Other Guidance on the Questions of Qualification

3.1.25 The point at which the Constitutional qualification applies has been decided by the High Court, as the point of nomination.

3.1.26 The 1990 Report noted that the AEC had received extensive legal opinion from the Attorney-General's Department over many years which confirmed nomination as the critical time for the assessment of a candidate's qualifications:

> This opinion states that, to satisfy the provisions of the Act, the candidate should resign before nomination. The basis for that is that it is possible, in the case of only one candidate having nominated for an election, for the election to occur at the point of nomination.[62]

3.1.27 This Committee's predecessor tabled a report on the 1987 election which considered matters of qualification in some depth.[63]

3.1.28 Reference has been made to the 1981 Senate Standing Committee on Constitutional and Legal Affairs report, *The Constitutional Qualifications of Members of Parliament*. That report covered the Constitutional provisions and their application to various categories of potential candidates in detail. If the many recommendations of that report had been acted on much of the confusion regarding qualifications would have been avoided.

The Role of the AEC in Matters of Qualification

3.1.29 Given that the information relevant to the qualifications of candidates has been freely available, albeit without testing by the courts until *Sykes v. Cleary*, it is pertinent to ask why the candidates in the Wills by-election, and the many other candidates who have discovered, too late, that they were incapable of being elected, have not been aware of this vital information. In most cases which have arisen in recent years,

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62 The 1990 Report, p. 65.

63 *The 1987 Federal Election*, Report No 3 of the Joint Standing Committee on Electoral Matters, May 1989, pp. 25–30.

disqualified candidates could have taken simple steps to regularise their positions had they been correctly advised.

3.1.30 It would be sensible for political parties to offer more guidance to candidates who intend standing for the parties, and presumably they will make greater efforts in this regard following the remarks in *Sykes v. Cleary* on the second and third respondents.[64]

3.1.31 This avenue of information is clearly not readily available to independents or candidates of small parties. One solution would be for the AEC to take some responsibility in the matter of educating candidates about s. 44. This view found its way into letter to *The Age* newspaper on 27 November 1992:

> **System at fault?**
> Is there no interrogation by any authority of any candidate wishing to stand for election to Parliament? Is there no requirement to fill out a questionnaire? Does the fault lie in the system?

3.1.32 *The Age* editorial on the same day suggested that the AEC should bear some responsibility for the Wills predicament, in addition to that borne by Mr Cleary:

> If any other party was remiss it may have been the Electoral Commission for accepting his nomination.

3.1.33 This suggestion was countered on 28 November in a letter to the editor by Dr D Muffet, the Australian Electoral Officer for Victoria, who wrote:

> The Commonwealth Electoral Act required all candidates to declare in writing that they are qualified under the Constitution to be members of the Commonwealth parliament. Mr Cleary signed such a declaration. The Electoral Act explicitly prohibits officers of the Australian Electoral Commission from investigating the truth or otherwise of the declarations. Under the electoral law as it stands, there is nothing further that the commission could have done to prevent the present situation arising in Wills.

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[64] The second respondent, Mr Delacretaz of the Liberal Party, would have been disqualified because of his entitlement to Swiss citizenship, and the third respondent, Mr Kardamitsis of the ALP, would have been disqualified because of Greek citizenship.

3.1.34 This overstates the case. The Act does not explicitly prohibit officers from investigating the truth. However, the Act states that a nomination shall be rejected '...if, an only if, the provisions...have not been complied with in relation to the nomination.[65]

3.1.35 Part XIV of the *Commonwealth Electoral Act 1918* deals with nomination, and at s. 170(1)(b) requires a candidate to declare that:

> (i) the person is qualified under the Constitution and the laws of the Commonwealth to be elected as a Senator or a member of the House of Representatives, as the case may be;

3.1.36 There is nothing in the Act which places an onus on the AEC to advise the candidate about the Constitutional provisions. There is certainly no obligation for the AEC to ensure that candidates are duly qualified. A new section (s. 172) was added in 1983 which provides for the rejection of a nomination only if the formal requirements for nomination as set out in sections 166, 167, 170 and 171, were not complied with.

Possible Role for the AEC in Matters Relating to Qualification

3.1.37 Any suggestion that the AEC should take some sort of responsibility for ensuring that candidates are properly qualified would be impractical and unworkable. The report on the 1987 election noted the improvements occasioned by the 1983 amendments and the unsatisfactory situation before that time:

> Up until 1983 it was not uncommon for DROs and the various Australian Electoral Officers to receive complaints about the failure of individual candidates to meet the qualifications for candidates contained in the Electoral Act or the Constitution. The complaints created problems for the AEC's officers in that they were not qualified to resolve what often amounted to complex legal questions and nor were they able to resolve questions of fact in the limited period of an election.[66]

3.1.38 It would not be in the best interests of public administration or of the candidates themselves to return to a system of uncertainty. But there is a position

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[65] *Commonwealth Electoral Act 1918* s. 172(1).

[66] *The 1987 Federal Election*, Report No. 3 of the Joint Standing Committee on Electoral Matters, p. 26.

somewhere between this extreme, and merely telling candidates to seek legal advice if in doubt about s. 44. The 1990 Report noted that although questions of eligibility were the responsibility of the candidates, information continues to be sought from Divisional Returning Officers. The report recommended that the AEC produce a nominations 'checklist' to be given to each candidate and to Divisional Returning Officers.[67]

3.1.39 The AEC has now produced a nomination checklist. It is reprinted in Appendix 6. The Committee regards it as inadequate. It offers no guidance other than reproducing s. 44 of the Constitution. Further information for candidates is available in the Candidates' Handbook. This information is very brief.

3.1.40 The AEC is currently considering how, if at all, it can provide information on qualification to candidates. While the recent High Court decision has clarified several matters, the AEC will understandably wish to exercise caution in explaining the consequences of the decision to candidates. Any attempt to 'package' or summarise the judgment will have the potential to mislead because of the intricacies of the case and the almost infinite variety of individual circumstances which might arise.

3.1.41 The Committee believes that the onus must remain on individual candidates to ensure that they are qualified under the provisions of the Electoral Act, the Constitution and any other legislation which is relevant to their several situations.

3.1.42 Nevertheless the AEC should recognise that it has a role in providing information and support to candidates and the public. This role is entirely consistent with the obligations of the AEC. In fact it provides the only practical means by which intending candidates can have access to information. It should be possible for the AEC to include in its Candidates' Handbook and its nominations checklist, information which could at least alert candidates to the level of care they must devote to ensuring their eligibility.

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[67] The 1990 Report, pp. 66–7.

Recommendation 6

The Committee recommends that the AEC review its Candidates' Handbook and Nomination Checklist to include information on the implications of the recent High Court decision and the possible need for candidates to take steps to establish their eligibility under s. 44 of the Constitution.

3.2 Authorisation of Campaign Material

3.2.1 In May 1991 the AEC provided the Committee with a submission addressing the evidential effect of authorisations borne by electoral material.[68] The submission proposed an amendment to s. 329 to provide a remedy for a situation which arose after the 1990 election. A number of complaints were made to the AEC about a particular how-to-vote card, which appeared to breach s. 329(1) of the Act which deals with printing, publishing or distributing any matter or thing likely to mislead or deceive an elector in relation to the casting of a vote.

3.2.2 It was not possible to bring criminal proceedings against any person because it could not be shown by admissible evidence that any particular person was responsible for publishing or distributing the card.

3.2.3 The AEC point out that the proposed amendment to section 329 was consistent with a related recommendation made by the Committee's predecessor in the *Report on the Conduct of the 1987 Federal Election and the 1988 Referendums.*

3.2.4 The proposed amendment was included in the Electoral and Referendum Bill at clause 23. It inserts a new section 385A in the Principal Act to provide that where a person has been named on electoral material that fact can be used as prima facie evidence in proceedings against that person for an offence against the Act.[69]

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[68] Evidence, pp. S158–61.
[69] *Electoral and Referendum Amendment Bill 1992*, Explanatory Memorandum, p. 8.

3.2.5 The Committee supports this amendment. Its potential for ensuring that only truthful campaign material is circulated will depend on informing candidates and their supporters of the change. Those appending their names to electoral material should be aware of this added responsibility.

> *Recommendation 7*
> **The Committee recommends that information about the proposed provisions on evidence of authorship or authorisation of material, if enacted by the Parliament, be included in the Candidates' Handbook.**

3.3 Enrolment in Remote Areas

3.3.1 The issue of enrolment of people in remote ares of Australia seems to be a perennial problem. The matter was raised in the 1990 Report, having been addressed by Mr Tom Stephens MLC, from Western Australia. Mr Stephens made some suggestions for streamlining enrolment procedures in remote areas and these were commended to the AEC but not formulated as recommendations.[70]

3.3.2 The topic was raised during the Committee's resource sharing inquiry, particularly in relation to enrolment before the Ashburton by-election.

3.3.3 Mr Stephens has written again to the Committee expressing his concern that:

> ... I can see little evidence on the ground in many of the remote Aboriginal communities and smaller population centres of parts of my electorate of an adequate penetration of electoral enrolment activity.
>
> I hold these concerns in particular for the Pilbara, Gascoyne and Murchison regions of Western Australia.[71]

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[70] The 1990 Report, p. 70.
[71] Evidence, p. S13.

3.3.4 The matter was discussed at a public hearing. Mr Anderson, the AEC's Director of Education told the Committee that efforts to enrol people in small Aboriginal communities had been made during the past 12 months.[72] The electoral roll review in the Northern Territory had included work in the smallest Aboriginal communities, with the help of the Aboriginal and Islander Electoral Information Service. A similar program was almost complete in the Kimberley Region.

3.3.5 The AEC reported that a roll review was expected to commence in the Pilbara-Gascoyne area in November 1992. An attempt to improve enrolment levels had also been made in the Pitjantjatjara homelands of South Australia. Activity in Queensland had been adversely affected by staffing problems.

3.3.6 The Committee is concerned about the level of enrolment in remote communities and wishes to monitor the success of the AEC's programs in this area.

Recommendation 8

The Committee recommends that the AEC conduct an evaluation of its enrolment program in remote areas and provide a report on the evaluation to the Committee.

3.4 Counting the Senate Vote

3.4.1 While the Committee's main concern has been the need to provide a result for the House of Representatives election at the earliest possible time, it also has some concerns about the time taken to complete the Senate count. A list of times taken to conduct the Senate scrutinies since 1961 is at Appendix 8.

3.4.2 A study of this list reveals that the length of time taken to conduct the Senate count has not been shortened by the introduction of above the line voting. Nor

[72] Evidence, p. 161.

is there a marked correlation with population numbers. For example in 1990 the return of writs in Queensland was twelve days after the return of writs in Victoria.

3.4.3 This matter was explored at a public hearing and the AEC was unable to provide a satisfactory explanation for the failure of above the line voting to lower the time taken for the count.[73] Comments made in relation to the length of the count did not adequately account for the time taken. The Electoral Commissioner pointed to the possibility of recounts in the Senate and the need to allow a margin for this.[74]

3.4.4 The Committee's view is that the AEC's requirement for 55 days to complete the Senate count is a conservative estimate which appears to be based on the longest time taken to conduct a Senate scrutiny since 1961 in any State (54 days for NSW in 1975) plus one day. The AEC informed the Committee that a computerised system to run the Senate scrutiny sheets would be trialled at the next election, but no commitments about the system were available until it was fully tested.[75]

> ***Recommendation 9***
>
> **The Committee recommends that the AEC review the procedures required for finalising the Senate count, with a view to having the writs returned at the earliest opportunity following the election.**

3.5 Electorate Maps

3.5.1 The Electoral Act requires the AEC to provide maps of electorates. Some States have adopted the practice of producing maps which show only the boundaries of Divisions and significant or arterial roads. They name fewer streets than the maps produced in previous years.

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[73] Evidence, p. 178.
[74] ibid.
[75] ibid., pp. 178–179.

3.5.2 In the Committee's view the point of having a map is to identify locations within a particular area, not merely to locate the boundaries of an area. The intention of the Act is not served by maps which do not identify streets as part of a particular Division.

> ***Recommendation 10***
>
> The Committee recommends that divisional maps produced by the AEC name all streets and roads within the Division.

CHAPTER FOUR
THE AEC'S PREPAREDNESS TO CONDUCT THE NEXT FEDERAL ELECTION

In this report the topics covered under election preparations include management and operation within the AEC, impact of the resource sharing inquiry – client support unit, consultation on corporate plan, a summary of election night plans (covered in more detail in the November 1992 interim report), computer equipment – testing of the new computerisation of divisional offices and upgraded SEQUENT and the AEC's training programs. The area of counting the vote on election night has already been covered in an interim report which was tabled on 23 November. The main points of that report, and the recommendations made will be summarised in order to provide a more complete account of the AEC's preparations – [include also the comments re three cornered contests].

4.1 Management and Operation of the AEC

4.1.1 The 1990 Report was critical of the AEC's management and commented on the apparent lack of a corporate sense of service to the public, candidates and politicians. Problems such as excessive queuing at the 1990 election and unresponsiveness to suggestions for improvements in election night counting and tally room procedures were seen to be related to the AEC's corporate ethos.

4.1.2 In recent years the AEC has undergone a change of personnel in senior management. The Commissioner commenced his appointment shortly before the 1990 election and the Deputy Commissioner in late 1991. The difficulties faced by management were revealed during the Committee's inquiry into resource sharing in the conduct of elections.[76] During that inquiry evidence was given by the State Electoral Commissioners regarding their roles as clients of the AEC. In several cases the AEC was criticised for failing to provide satisfactory services.

[76] The report of that inquiry, *The Conduct of Elections: New Boundaries for Cooperation*, was tabled in September 1992.

4.1.3 During the course of that inquiry the AEC made changes to its organisational structure to improve the level of service to clients, including the establishment of a Client Services Unit within the enrolment section. The 1991-92 Annual Report of the AEC comments on the role of the unit:

> A Client Services Unit has been established to facilitate the provision of enrolment products to State electoral offices, local government and federal agencies. As well, the unit processes and assigns priorities to all requests from users for support of and enhancements to the RMANS system.[77]

4.1.4 The Committee notes with approval the establishment of the unit and is keen to monitor its performance in meeting client needs in the future.

4.2 Client Support and Consultation

4.2.1 AEC management has been active in incorporating consultation with clients into its overall client service ethos. In March 1992 a wide range of clients including representatives of community groups, political parties and politicians, State Electoral Commissioners, unions, journalists and senior public servants met to discuss the AEC's Corporate Plan.[78]

4.2.2 The Committee commends the AEC's moves to be more open to the needs of its clients, but notes that vigilance is needed to translate management objectives regarding a service ethos into practical responsiveness at the operational level. An organisation such as the AEC needs to monitor continually the effectiveness of its consultation with clients in order to fulfil its obligations as a service body.

4.2.3 The Committee found the AEC wanting in relation to consultation both with its client group and its own officers regarding the development of an election night computer system. The main users of the system, the media, political parties and

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[77] *Australian Electoral Commission Annual Report 1991–92*, p. 9. This excerpt is from a pre-publication version of the Annual Report, made available by the AEC.

[78] The list of guest speakers at the workshop appears at Appendix M of the 1991–92 Annual Report.

members of Parliament, had not been consulted about their needs for information on election night, and deficiencies in meeting their needs were discovered after the system had been designed. As noted in the interim report, the arrangements had been introduced some time ago. The Committee hopes that the practice of openness and consultation will become more entrenched in the AEC and considers that it has made a good start in this regard.

4.3 Preparations for Election Night

Recommendations on Counting the Vote

4.3.1 The Committee tabled an interim report, *Counting the Vote on Election Night*, on 24 November 1992. The reasons for dealing with this topic before tabling the main report were addressed in Chapter 1 of the introduction to this report.

4.3.2 The recommendations for counting the vote which were made by the Committee in the interim report, will be incorporated into this report so that it addresses all those matters relating to preparations for the next federal election which the Committee has decided to comment on. They are:

> ***Recommendation 11*** **(recommendation 1 of the interim report)**
> **The Committee recommends that the AEC identify the two candidates to whom preferences are to be provisionally distributed on election night using all relevant objective data including historical results.**

Recommendation 12 (recommendation 2 of the interim report)
The Committee recommends that the names of the two candidates identified for receipt of provisionally distributed preferences be kept confidential until the close of poll. Each DRO should be informed in confidence so that the relevant checks can be made before polling day. An exception can be made for those individuals employed by the media to program their election night computer systems, in which case the names of the candidates can be divulged in strict confidence and on a need-to-know basis no earlier than the morning of the election. The names of the two candidates should be given to the OIC of each polling place in a secure manner in a sealed envelope. The envelope should be opened in the presence of scrutineers and polling staff.

Recommendation 13 (recommendation 3 of the interim report)
At all stages of the count full and reasonable access should be provided for scrutineers and all polling staff should be informed of the scrutineers' rights of access. The access should ensure adequate scrutiny of the formality of votes in the count of first preferences, opportunities to observe the preferences of minor candidates during the two-candidate preferred distribution, and opportunities to analyse all ballot papers as required after the results of the House of Representatives count have been transmitted. Access to the Senate count on election night should be adequate to monitor the formality of votes, with more comprehensive access to Senate papers being afforded to scrutineers in subsequent counting of the vote. The AEC should consult the political parties and candidates regarding access for scrutineers.

> *Recommendation 14* (recommendation 4 of the interim report)
> The result of the first preference vote count should be transmitted immediately from each polling place to the Divisional Office, and from there immediately for each polling place to the National Tally Room.

> *Recommendation 15* (recommendation 5 of the interim report)
> The result of the provisional two-candidate preferred distribution should be transmitted as soon as possible from each polling place, and transmitted in at least three batches from the Divisional Office to the National Tally Room with information about the polling places included when approximately 10 per cent, approximately 40 per cent and the final count for the night is collected by the DRO.

> *Recommendation 16* (recommendation 6 of the interim report)
> The AEC should prepare an information kit for the use of media involved in broadcasting the election results. Opportunities should be provided to media representatives to discuss the procedures for transmitting election results.

Responses to the Committee's Interim Report

4.3.3 Both the AEC and the Government have been responsive to the Committee's concerns, which resulted in recommendations 12 to 17 (numbered 1 to 6 in the interim report). The Government had already introduced its Electoral and Referendum Amendment Bill 1992 at the time the interim report was tabled, but new amendments were introduced on 1 December 1992, some of which covered matters raised by the Committee. Amendments relating to the polling day recommendations

were passed by the Senate, and will shortly be considered by the House of Representatives.

Rights of Scrutineers

4.3.4 Access by scrutineers caused many problems during the 1990 and previous elections. The Committee was not satisfied to have the ability of scrutineers to observe the counting made conditional on the goodwill of polling officials. A further difficulty is that some scrutineers are unaware of the access available to them. One common fallacy is the belief that a scrutineer who leaves the polling place after 6.00 pm, cannot be re-admitted later in the evening. This is not so – scrutineers may leave the polling place and be re-admitted at any time.

4.3.5 Clause 21A of the additional amendments covers recommendation 14 (no. 3 in the interim report) and satisfies the Committee's concerns about access for scrutineers:

> **Scrutiny, how conducted**
> "21A. Section 265 of the Principal Act is amended by adding at the end the following subsection:
>
> '(2) *During a scrutiny, the scrutineers must be allowed to inspect, in addition to* the preference votes being counted in the scrutiny, any other preference vote given for a candidate unless, in the opinion of the Assistant Returning Officer or DRO, as the case may be, this would unreasonably delay the scrutiny.'.".[79]

Counting the House of Representatives Vote

4.3.6 The additional amendment passed by the Senate on 1 December addresses the Committee's concern about the lack of detail provided in the original amendment introduced on 15 October 1992. This new amendment also removes the discretion to

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[79] The Supplementary Explanatory Memorandum provided with the Bill noted that the amendments were designed to:

> ...give scrutineers, in addition to their existing rights, an explicit right to observe *preferences indicated on ballot papers during the scrutiny (in addition to preference votes* being counted), provided that the scrutiny is not unreasonably delayed (this amendment gives effect to recommendation 3 of the Joint Standing Committee on Electoral Matters in its interim report on Counting the Vote on Election Night).

conduct an indicative two-candidate preferred distribution of preferences. Such a distribution will definitely now be conducted on polling night 1993. The amendment is as follows:

> **Scrutiny of votes in House of Representatives elections**
> "22. Section 274 of the Principal Act is amended by inserting after subsection (2) the following subsections:
>
> '(2A) If, in a House of Representatives election, there are more than 2 candidates for a Division, the Australian Electoral Officer for the State or Territory that includes the Division must, in writing, direct the Assistant Returning Officers for the Division also to count such preference votes (other than first preference votes), on such of the ballot papers, as, in the opinion of the Australian Electoral Officer, will provide an indication of which candidate is most likely to be elected for the Division.
>
> '(2B) An Assistant Returning Officer to whom a direction is given under subsection (2A) must:
> (a) count the preference votes in accordance with the direction; and
> (b) transmit to the Divisional Returning Officer any information required by the direction;
> in the manner specified in the direction.'.".[80]

Other Matters Relevant to the Interim Report

4.3.7 The Committee believes that the recommendations it made regarding procedures for polling day, and the amendments now before the Parliament, will achieve the aims of providing more certainty about the result of the House of Representatives election at an earlier time than was possible at previous elections.

4.3.8 In considering procedures for conducting the election, the Committee had concerns about the identification of the two candidates to receive the provisionally distributed votes. Recommendations 12 and 13 (Nos. 1 and 2 in the interim report) provide the Committee's solutions to the problems which could have arisen from the

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[80] The Explanatory Memorandum notes in its Outline that the amendment is designed to: ...provide that the Australian Electoral Officer for each State or Territory must direct an indicative distribution of second and later preference votes at a House of Representatives election for those Divisions in which three or more candidates are standing, to provide an indication on polling night of which candidate is likely to be elected in each Division (this amendment gives effect to the recommendations of the Joint Standing Committee on Electoral Matters in its interim report on *Counting the Vote on Election Night*).

procedure. During the debate following the tabling of the interim report, this matter was raised by the Member for Moncrieff, Mrs Sullivan MP.[81]

4.3.9 Mrs Sullivan raised the problem of electorates in which three, rather than two, candidates might be considered the front runners and the impossibility of the AEC identifying the 'two most likely' with any certainty. Mrs Sullivan noted that the debate related to an interim report and expressed the wish that a further report would pay attention to the problem of three-party electorates.

4.3.10 Before tabling the interim report the Committee gave a great deal of attention to the problem of three-cornered contests. Indeed, the first two recommendations, addressing the criteria to be used in selecting the two candidates and the need to keep the identities of the candidates secret, were designed to deal with just that situation. The Committee's main concern with three-cornered contests was not with the distribution itself, but with the possible consequences of the AEC's appearing to select two candidates. The Committee decided that the main problems would be avoided if the identity of the candidates were kept confidential until the close of voting.

4.3.11 This is not to deny that the wrong selection of the two candidates will cause great difficulty on polling night. It will probably happen in some seats. It was partly for this reason that the Committee argued for the immediate transmission of first preference results. At least those trying to 'pick' the result will have this result and be able to interpret it according to information from scrutineers.

4.3.12 Having recognised the problem the Committee made recommendations and is pleased to see these acted on in the new amendments. These guarantee scrutineers the opportunity to peruse all ballot papers so that the preferences of any candidate can be checked. In this way candidates in three-cornered contests will have the AEC-conducted indicative distribution and scrutineers' advice of the preferences of other candidates if required.

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[81] House of Representatives *Hansard*, 26 November 1992, p. 3635.

4.3.13 On balance, the indicative two–candidate preferred distribution will give an earlier result than if no distribution were conducted. It is an improvement on the notional distribution conducted by the AEC in previous elections. Those distributions were based on a computer program rather than a real count. Only a crystal ball would guarantee the correct identification of the two candidates in every seat.

4.3.14 The Committee believes that the AEC is on target with its preparations for the next federal election. The information the AEC intends displaying on election night has the capacity to provide comprehensive information on each division. When the training of polling staff is completed, the AEC should be equipped to cope with election '93.

Arch Bevis, MP
Chairperson

APPENDIX 1

THE 1990 REPORT AND RESPONSES

In the outline which follows formal recommendations are numbered. Comments and suggestions made in the 1990 Report, but not set out as formal recommendations, are also included, together with brief notes where necessary. These are in *italics*. The page numbers in the left hand column refer to the 1990 Report, those in the right hand column refer to the submissions volume or transcripts of evidence.

Recommendations and Comments from the 1990 Report	Responses
RESPONSE TO THE 1987 REPORT	
1. (Para 1.13) The Committee recommends that as a matter or urgency the Government respond to Report No. 3 of the Joint Standing Committee on Electoral Matters, *The 1987 Federal Election: Inquiry into the Conduct of the 1987 Federal Election and the 1988 Referendums*, May 1989 and priority be given to the introduction of any resultant amending legislation. (p. 4).	The Government responded in May 1992 and amending legislation has been enacted. (AEC Submission p. S36).
QUEUING	
The Committee considered that queuing at polling booths was the main problem with the conduct of the 1990 election.	
2. (Para 2.18) The Committee recommends that the Australian Electoral Commission develop a system, which should include reports from all presiding officers on queuing and any other delays, to provide it with reliable data of voter turnout patterns and any queues at each polling place in future federal elections	The AEC supports the recommendation and has tested appropriate systems at the Menzies and Wills by-elections. For further details see AEC submission p. S36. See Chapter 2 of this report for further details.
3. (Para 2.18) The Australian Electoral Commission set a formal performance standard for the length of time that it is reasonable for a voter to wait to cast a	Supported by the AEC (pp. S36-37). The AEC has revised its National Polling Place Resources Policy following extensive research on queuing, aiming

vote, and then use that standard for the length of time that it is reasonable for a voter to wait to cast a vote, and use that standard as the criterion against which the Australian Electoral Commission's level of service can be measured at the next election. (p. 13)

for the best balance between cost-effectiveness and service to the voting public.

The risk of queuing has lessened but has not been eliminated. The new procedures were successfully tested at the Menzies and Wills by-elections. The response to Recommendation 4 is relevant.

MANAGEMENT OF POLLING PLACES AND QUEUING

4. (Para 2.52) The Committee recommends that to alleviate queuing problems at future elections the AEC:

   - employ additional staff where necessary to ensure that the ratio of ordinary vote issuing staff to potential voters is at a realistic level
   - revise its National Polling Place Resources Policy to provide flexibility in the staffing and resourcing of polling places

The AEC supports this recommendation. pp. S37-39 gives details of the new policy.

The response notes that no guarantees can be given and that the new measures have important cost implications.

5. Print the certified lists in a larger type size to facilitate the process of striking the voter's name from the list

The AEC does not support changing the typeface of the certified list on the grounds that the current system is the best available, larger type means more pages which could increase rather than decrease the time taken to search for a name, and the computer programs producing and reformatting the lists would need to be rewritten.

Submission 4 from E Goode (a retired graphic artist with typography experience) says a one point pace between the lines would make the lists more easily readable but would add approximately 100 column-centimetres per 3000 voters. See 2.5 of this report.

6.

	Ensure Divisional Returning Officers review polling premises and their management on a regular basis	Supported (already accepted practice). p. S40.
7.	Improve training for Divisional Office and polling place staff to ensure that they have all the knowledge and skills necessary to perform more effectively their tasks on polling day. (p. 28)	Supported by the AEC. Details of training are provided at p. S40.
8.	(Para 2.53) The Committee recommends that prior to polling day the Australian Electoral Commission advise polling place staff that disciplinary action will be taken if staff engage in unacceptable political activity at polling places. (p. 28)	The 1990 Report does not give any context for this recommendation. The AEC supports it (p. S41) and states that it already happens.
	Care should be taken to ensure that polling places selected facilitate easy access by voters who are elderly, invalid, disabled or pushing strollers. (p. 30)	No response from the AEC. Submission 28 from the Council on the Ageing refers to this issue. See Recommendation 2 of this report.
	Care should be taken to ensure that polling places are visible from the street or are well sign-posted. (p. 30)	No AEC response.
	TYPEFACE ON SENATE BALLOT PAPERS	
9.	(Para 3.7) The Committee recommends that as part of the Australian Electoral Commission's consideration of the redesign of the Senate ballot paper the typeface used to designate Senate groupings be reviewed to ensure that there is no potential confusion of the alphabetical 'I' with the numeral '1'.	Supported in the AEC's submission. The final design for the list will be made by mid-August 1992 (p. S41). The AEC reported in a public hearing that testing continues but the results do not point to a better Senate ballot paper [Evidence p. 148. The AEC intends changing the letter "I", but not the whole typeface.]
	INFORMATION AND EDUCATION	
10.	(Para 3.23) The Committee recommends that the AEC:	
	Improve its newspaper and other advertisements to inform the public on polling place, pre-poll and mobile poll	Supported. (p. S41)

	general polling places in newspapers on the day before polling day	
11.	Develop an information and education program to assist electors who are blind, visually impaired, and/or print handicapped	Supported. (p. S41)
12.	Develop an information and education program to assist electors with lower literacy skills	Supported and already practised. Special programs used in the Wills by-election were successful. (p. S42)
13.	Improve its information and education program on declaration voting issues and procedures	Supported and already practised. (p. S42) The issue of the possible misuse of declaration voting was raised in the context of the Resource Sharing Inquiry and also at the recent meeting of Estimates Committee D. It appears that there is very little fraudulent misuse of declaration voting.
14.	Give a higher priority to reaching young adults approaching voting age through *school visits and distribution of* enrolment cards relative to tother components of the youth enrolment campaign	Supported with a pilot scheme already underway. (p. S43)
15.	Conduct an information campaign to remind aged electors of their right to vote	The AEC handles informing aged voters in its general information program. It does not consider that there should be a special campaign aimed at aged electors. (p. S43)
16.	Review its voter information and education program giving close attention to: - the balance of use between print media and radio and television advertising in the information and education program - the value of continuing with the elector pamphlet distributed to all Australian households prior to the election. (p. 37)	Supported and already practised. The *Political Broadcasts and Political Disclosures Act* which was relevant to this recommendation was disallowed after the AEC had prepared its submission. (p. S44)

	LEAVE OF ABSENCE TO VOTE	
17.	(Para 3.26) The Committee recommends that the AEC co-operate with the trade union movement and employer groups to ensure that both employers and employees are fully aware of their obligations and entitlements under sections 183 and 345 of the *Commonwealth Electoral Act 1918.* (p. 37)	Supported. The AEC undertook to write to the relevant peak councils about the matter. (p. S44)
	The Committee is concerned about postal delays affecting general postal voters in rural areas and negotiations between Australia Post and the AEC. It wishes to be kept informed of the progress of negotiations. (p. 38)	No response.
	OVERSEAS POSTAL VOTING	
18.	(Para 3.31) The Committee recommends that the Australian Electoral Commission investigate the performance of overseas posts in undertaking electoral responsibilities and implement procedures to ensure that overseas declaration votes are returned prior to the election date, and that all relevant AEC and candidates' how-to-vote material is prominently displayed and freely available at overseas posts. (p. 39)	Not supported on the grounds of impracticality. (pp. S44-45)
	The question of provisional voting and the potential for fraud was addressed, the Committee was satisfied with the current precautions, mainly on the grounds that there had been few, if any, complaints. (p. 39)	No response. See response to Recommendation 13.
	MOBILE POLLING	
19.	(3.37) The Committee recommends that section 226 of the *Commonwealth Electoral Act 1918* be amended so that the presiding officer or electoral visitor who visits a patient for the purposes of a mobile poll should display how-to-vote	Not supported on the grounds of impracticality. The AEC considers that s. 226(A) is adequate as it stands. (p. S45)

cards made available for the purpose by candidates in the election. (p. 41)

MISUSE OF SECTION 270 (ALLOWING OPTIONAL PREFERENTIAL VOTING)

20. (3.42) The Committee recommends that section 329(3) of the *Commonwealth Electoral Act 1918* be amended to include a general prohibition on the distribution of any material which discourages electors from numbering their ballot paper consecutively and fully.

Supported but with no details provided. (p. S45). A later submission from the AEC, relying on advice from the Attorney-General's Department, thought such a general prohibition difficult. The AEC agreed to provide further information on this point. The *Electoral and Referendum Amendment Bill 1992* incorporates the Committee's recommendation. See 2.4 of this report.

21. (Para 3.43) The Committee recommends that the Australian Electoral Commission report to the Joint Standing Committee on Electoral Matters on possible changes to the *Commonwealth Electoral Act 1918* that would have the effect of minimising the incidence of optional preferential voting.

The AEC does not consider there is any practical solution to closing this loophole provided by s. 270. (p. S46) A later submission (No. 24) confirmed this opinion which was reiterated at a public hearing. (Evidence p. 154).

KNOWING THE RESULT ON ELECTION NIGHT

22. (4.21) The Committee recommends that the *Commonwealth Electoral Act 1918* be amended to add a new step to the House of Representatives scrutiny process to guarantee that scrutineers would have the opportunity to readily observe a 'two-candidate preferred vote' in each polling place on election night.

Supported with variation. The AEC proposes that polling place staff distribute the preferences on a two-candidate preferred basis in each polling place on election night.

The AEC will identify the two candidates and keep the information confidential until the close of polls.

Detail is provided in Evidence pp. S46–49 and S168–173. Evidence pp. 1–143 is relevant.

Because of the need to respond to the AEC's proposals before certain legislative amendments were considered by the Parliament, the Committee tabled

		an Interim Report, *Counting the Vote on Election Night* on 24 November 1992. The recommendations from the interim report are reprinted in the current report.
		The new procedures are provided for in the *Electoral and Referendum Amendment Bill 1992.* See 4.3 of this report.
	The AEC used a new centralised computer system for the 1990 election. Technical problems delayed posting results. (p. 48)	
23.	(Para 4.24) The Committee recommends that the Australian Electoral Commission ensure that it has in place frontline and backup systems to record, process, transmit and publicly display House of Representatives results as soon as they are available on election night.	Supported. Existing backups will be supplemented by the inclusion of emergency generators in the AEC Central Office and the NTR.
	While the AEC did not think a decrease in the number of scrutiny assistants of 5695 contributed to delays in reporting results, the Committee was unconvinced. (p. 51)	
24.	(Para 4.30) The Committee recommends that the AEC review its overall procedures for conducting and reporting the Senate count, particularly its data input procedures, to ensure an improved performance in the percentage of the Senate vote counted and publicly announced for every State on election night at future elections.	Procedures for counting the vote have been amended. See 4.3 of this report which reprints the recommendations made in the interim report on counting the vote. The Senate vote is addressed at 3.4 of this report.
	NATIONAL TALLY ROOM	
	No individual offices were provided to political parties in the national Tally Room on election night 1990 (unlike 1987). This was unsatisfactory. p. 51.	

25.	(Para 4.32) The Committee recommends that the AEC review the layout of the National Tally Room for future elections and provide suitable office accommodation for political parties as was provided during the 1987 election and previous elections.	*Supported. Political parties will have offices in the tally room for the next election. (p. S50)*
	The Committee congratulated the AEC on TENIS (the Election Night Information System). The same system will be used for the next election. (p. 52).	
	CAMPAIGN/ELECTION MATERIAL	
	Submissions calling for a ban on the distribution of how-to-vote cards were received by previous parliamentary committees reviewing the 1983, 1984 and 1987 elections. They increased to 20% of the total number of submissions in the review of the 1990 election. Environmental and cost benefits were cited.	
	The Committee considered several alternatives to how-to-vote cards but found them unacceptable for various reasons. The AEC's policy of recycling how-to-vote cards was supported.	
26.	(Para 5.13) The Committee recommends that the Australian Electoral Commission ensure that cardboard litter bins are provided at all polling places for the disposal of waste paper generated from elections, including how-to-vote cards, and that all bins are subsequently collected by recycling firms for the recycling of that paper.	Supported and already practised. Some practical difficulties continue to preclude complete recycling. The Committee makes further observations on this matter at 2.3 of this report.
	The Committee encouraged political parties, candidates and the AEC to use recycled material wherever possible.	
27.	(Para 5.16) The Committee recommends that the AEC use recycled paper for the production of all its election material wherever practicable.	Supported and already practised. the AEC will continue its efforts to make further use of recycled paper.

MISLEADING AND DECEPTIVE PUBLICATIONS

The Committee considered the increasing incidence of misleading and deceptive publications, including how-to-vote cards and lack of authorisation of publications. It considered the steps taken by Victoria and New South Wales to remedy this, but considered that they were too restrictive. The Committee recommended harsher penalties for electoral offences.

'The Committee supports the general recommendations made by the previous committee that the penalties for electoral offences under the Commonwealth Electoral Act 1918 be substantially increased with those penalties currently set at $1000 or six months imprisonment being increased to $12,000 or imprisonment for not more than two years'. (p. 58)

The AEC wrote to the Committee in May 1991 recommending changes to the Act dealing with evidence of authorship or publication of misleading material.

The *Electoral and Referendum Amendment Bill 1992*, addresses this problem. If enacted, authorising a publication will be legal evidence of authorship or publication.

The AEC has not responded to the Committee's suggestions regarding penalties.

NOMINATION AND ENROLMENT

Registering Political Party Names:
In 1989 the AEC registered the Rex Connor (Snr) Labor Party, a decision which was the subject of an appeal by the Australian Labor Party. The Committee was critical of the AEC's interpretation of S129 of the Electoral Act relating to the registration of a party name, and undertook to review the situation following the announcement of the Administrative Appeal Tribunal's decision on the ALP's appeal.

Deregistration of Political Parties:
The Committee was concerned that Sections 136 and 137 of the Electoral Act which provide for the deregistration of parties when they cease to have a member in Parliament, may not give sufficient support to the constitutional provision for filling casual vacancies.

The AEC has taken no action to date.

28. (Para 6.8) The Committee recommends that the *Commonwealth Electoral Act 1918* be amended so that proceedings for the deregistration of a political party that is a parliamentary party be not undertaken until after the next election for the relevant House subsequent to the political party becoming liable to deregistration.

Supported in part the AEC sees no problems in filling a Senate casual vacancy. Some modification may be needed for House of Representatives vacancies.

OFFICE OF PROFIT UNDER THE CROWN

Qualifications for nomination as candidates are addressed in Section 44 of the Constitution and Part XIV of the Electoral Act. Section 44(iv) of the Constitution states that any person who holds an office of profit under the Crown shall be incapable of being chosen or sitting as a Member of Parliament.

Three 1990 'office of profit' cases were brought to the Committee's attention. The Committee expressed concern about the lack of certainty in the matter.

29. (Para 6.18) The Committee recommends that the Minister for Administrative Services seek a ruling from the High Court on what constitutes an office of profit under the Crown and when a candidate has to resign from such an office.

It is doubtful whether the Minister can seek a ruling from the High Court, as he could from the Attorney-General but as a case was brought before the High Court this is academic.

The matter arose during the by-election for Wills. The outcome of the by-election was challenged by one of the candidates, Mr Sykes, in the High Court. The court handed down its decision on 25 November 1992. The matter is dealt with in more detail in the body of the current report. The judgment is reprinted in Appendix 5.

AEC ASSISTANCE TO CANDIDATES

30. (Para 6.21) The Committee recommends that the AEC produce a nominations 'checklist' to be given to each candidate, and a copy to be held at each Divisional Returning Office, to assist both candidates and DRO staff in ensuring that all relevant nomination procedures are complete.

Supported. The requirements for nomination will be included in the revised Candidates Handbook. (p. S52)

The nominations checklist is reprinted at Appendix 6.

The report referred to some dissatisfaction with the service provided to parties and candidates by the AEC. No details were provided.

31. (Para 6.24) The Committee recommends that the Australian Electoral Commission improve the level of service and advice provided to all candidates and political parties in the lead-up. to federal elections.

Supported and already practised.

THE ELECTORAL ROLL

Roll inaccuracies were criticised. The AECs new RMANS system would help to overcome problems and was expected to be installed soon.

32. (Para 6.27) The Committee recommends that the AEC extend its online Roll Management System to all Divisional Offices in the eastern States as an immediate priority.

Supported and already in operation. The AEC lists the benefits to be expected from the extension of RMANS at p. S53.

RMANS is now 'online' to all Divisional Offices (except in South Australia). The Committee's report on resource sharing investigated roll quality in some depth.

Access to Enrolment Information:

The Committee addressed privacy issues arising from the electoral roll. Precautions to safeguard privacy are in accordance with the Privacy Act 1988 and no recommendations were made. (p. 69).

The issue of privacy and the electoral roll was discussed at Estimates Committee D in September 1992. Dr Bell, the Deputy Electoral Commissioner, made some observations on the matter. The matter has also been addressed by the House of

		Representatives Standing Committee on Legal and Constitutional Affairs. The *Electoral and Referendum Amendment Bill 1992* addresses the matter.
	Enrolment in Remote Areas:	
	The Committee commended three suggestions to facilitate enrolment and voting in remote areas, to the AEC. (p. 70).	The AEC provided details of its programs in the Northern Territory and Western Australia at the public hearing on 9 November.
33.	(Para 6.38) The Committee recommends that the AEC report to the Joint Standing Committee on Electoral Matters on the current round of habitation reviews when those reviews are complete and that the report include an evaluation of the adequacy of procedures used for dealing with eligible non-English speaking, aged, infirm and Aboriginal voters.	Supported. The report requested by the Committee will by submitted later this year. (p. S53) The Committee's report on resource sharing made several recommendations relating to habitation reviews.
	The Committee urged the AEC to use information arising from the returned correspondence from Members of Parliament, to upgrade the electoral roll. (p. 72).	
	The 1990 election aroused the usual number of complaints about roll and certified list availability. Difficulties included uncertainties on the part of candidates, parties and sitting Members and Senators regarding their entitlement to copies of the roll.	New sections of the *Commonwealth Electoral Act 1918* provide for copies of the roll. Lists are now available on floppy disks but the Committee considers that three hard copies of the roll are still required by sitting Members.
34.	(Para 6.47) The Committee recommends that the *Commonwealth Electoral Act 1918* be amended to include a provision that House of Representatives and Senate candidates are entitled to purchase one copy of the latest print of the Divisional or State roll (respectively) for the electorate for which they have	Response to Recommendations 34 and 35: Supported in part. Since June 1992 Mps have been provided with roll information on floppy disks. This service will be

nominated in accordance with the rolls that are being made available to Members of the House of Representatives and the Senate under section 91 of the *Commonwealth Electoral Act 1918* and, if requested the copy of the roll should be made available in tape or disk form.

The Electoral Act should be amended to ensure that candidates receive their certified lists before the election.

35. (Para 6.49) The Committee recommends that the *Commonwealth Electoral Act 1918* be amended to provide for the distribution to each candidate, as soon as practicable after the close of rolls, and at least one week prior to polling day, one copy of the certified list of voters for the Division in which the candidate seeks election.

extended to all candidates at election time if the Amendment Bill is enacted.

The difficulty of providing the lists is such that if the Act is amended the amendment should include a provision that failure to provide a certified list at least a week before polling day shall not be a ground for setting aside the result of an election. (p. S54)
s. 91C of the *Commonwealth Electoral Act 1918* provides for the provision of a list for each candidate in a House of Representatives election as soon as practicable after the close of Rolls.

MULTIPLE VOTING

Allegations of multiple voting were made in relation to the 1990 election. In the absence of evidence the Committee concluded that the incidence of multiple voting at the 1990 election remained low. (p. 75)

The Committee asked questions about fraudulent voting (particularly in relation to declaration votes) during the resource sharing inquiry, and was assured that the practice was difficult and presumably infrequent.

MANAGEMENT AND OPERATION OF THE AUSTRALIAN ELECTORAL COMMISSION

The Committee was very critical of the AEC stating that 'The 1990 election highlighted a number of management and operational problems within the AEC which the Committee considers require urgent attention'. (p. 79).

The Committee considered that there was an inappropriate balance between

centralised control and devolution of financial and management responsibility to Divisional Returning Officers. It considered the issue of devolution should be examined further. (p. 79).

36. (Para 7.7) The Committee recommends that the Australian Electoral Commission investigate the extent to which it can devolve financial and management responsibility to Divisional Returning Officers and, where this is appropriate, does so with concomitant reporting and accountability practices.

Not supported. For explanation see p. S55.

TECHNOLOGY IN DIVISIONAL OFFICES

The Committee was critical of the AEC's automation of the Divisional Offices, stating that the need extended beyond on-line access to RMANS. (p. 81).

37. (Para 7.14) The Committee recommends that the Australian Electoral Commission extend its online information network to all Divisional Offices as an immediate priority.

Supported and already in operation except for SA.

ATTITUDE OF THE AEC TO ITS TASK

The AEC was criticised for its approach to service – "Rarely has the AEC sought to review its systems based on the views of its clients on service delivery".

Supported. However, the Commission does not agree that it has not in the past been service oriented. The Commission continues to seek ways and means of improving its service delivery.

38. (Para 7.18) The Committee recommends that the Australian Electoral Commission take urgent steps to guarantee a more service orientated approach to its task of conducting federal elections.

The AEC held a seminar earlier this year at which "client" including the Chairperson of the Joint Standing Committee, were invited to contribute to the corporate plan. See Chapter 4 of this report for further details.

SUMMARY

The 1990 election is noted for its queues and the unprecedented delay in posting the election result. These two problems alone are bad enough, but when added to the problems that candidates and parties continue to experience in relation to registering parties, nomination procedures and advice, lack of assistance from the AEC and the difficulties of obtaining the electoral roll as well as the operational, management and attitudinal shortcomings that the Committee identified within the AEC, this Committee can only conclude that the 1990 election was not as well managed as it should have been and there are serious deficiencies in the management of the AEC.

The Committee regards these matters very seriously and is not prepared to wait until after the 1993 election in order to see that they are not repeated. Accordingly, the Committee has determined that it will re-examine the AEC in the current parliamentary term to see what progress the AEC has made in rectifying the identified deficiencies. The Committee considers that the AEC should take immediate steps to address the matters of concern raised in this report.

APPENDIX 2

LIST OF SUBMISSIONS

Submission Number	Individual/Organisation
1	Submission from Mrs D Blackman undated
2	Submission from Mr S Zaczek dated 16 June 1992
3	Submission from Mr P Bradbrook, State Director, National Party of Australia (WA) dated 16 June 1992
4	Submission from Mr E Goode dated 21 June 1992
5	Submission from D Murphy dated 20 June 1992
6	Submission from Mr B Zammit dated 15 June 1992
7	Submission from Mr T Stephens, MLC Member for the Mining and Pastoral Region dated 10 June 1992
8	Submission from Mr I Cook, Director of News, Nine Network Australia dated 10 June 1992
9	Submission from Mr G Goode, National President, Proportional Representation Society of Australia dated 25 June 1992

10	Submission from Ms D Appelbee, Divisional Returning Officer for the Division of Corinella, Australian Electoral Commission, (with covering letter from Mr R Broadbent MP, Member for Corinella) dated 24 June 1992
11	Submission from Mrs M Mason dated 24 June 1992
12	Submission from Mr T Barker dated 25 June 1992
13	Submission from the Australian Electoral Commission dated 26 June 1992
14	Submission from Mr P Manning, Controller, ABC TV News, dated 29 May 1992
15	Submission from Miss M Tilmouth dated 25 June 1992
16	Submission from Mr N McKay, Registered Officer, CIR Alliance dated 25 June 1992
17	Submission from Mr P Morgan dated 25 June 1992
18	Submission from Mr A Cirulis dated 21 July 1992
19	Submission from Mr R Finney dated 23 July 1992
20	Supplementary submission from Mr R Finney dated July 1992
21	Submission from Mr P Worthing dated 31 July 1992

22	Submission from Mr S Davis dated 21 July 1991 (formerly Submission No. 91 from the 1990 Federal Election Part I Inquiry)
23	Submission from the Australian Electoral Commission dated 22 May 1991
24	Submission from the Australian Electoral Commission dated 3 November 1992
25	Submission from the Australian Electoral Commission dated 10 November 1992
26	Submission from the Australian Electoral Commission dated 12 November 1992
27	Submission from Mr Rick Finney dated 10 November 1992
28	Submission from Council on the Ageing (Australia) dated 19 November 1992

APPENDIX 3

LIST OF EXHIBITS

Exhibit Number	
1	Letters to Mr A Green from the Western Australian Electoral Commission and the State Electoral Department, South Australia Provided by Mr A Green ABC Television, 16 October 1992

APPENDIX 4

a. PUBLIC HEARINGS

CANBERRA — 16 October 1992
9 November 1992

b. WITNESSES

CANBERRA 16 OCTOBER 1992

Australian Electoral Commission:
Mr B Cox, Australian Electoral Commissioner
Mr P Dacey, Assistant Commissioner, Development and Research
Mr P Green, Director, Research, Legislative Projects and FOI
Mr R Medew, Director, Applications Development

ABC Television:
Mr A Green, Election Analyst
Mr P Manning, Controller, ABC Television News and Current Affairs

Nine Network Australia:
Mr I Cook, Director of News
Mr D Quinn, Election Project Manager

CANBERRA 9 NOVEMBER 1992

Australian Electoral Commission:
Dr R Bell, Deputy Electoral Commissioner
Mr B Cox, Australian Electoral Commissioner
Mr P Dacey, Assistant Commissioner, Development and Research
Mrs E Gladwin, Director, Funding and Disclosure Section, Corporate Services
Mr P Green, Director, Research, Legislative Projects and FOI
Mr R Medew, Director, Applications Development
Mr A Moyes, Director, Computer Services Section, Development and Research
Mr T Pickering, Director, Enrolment Section, Development and Research

APPENDIX 5

HIGH COURT OF AUSTRALIA

DECISION AND REASON FOR JUDGMENT

Sykes v. Cleary

HIGH COURT OF AUSTRALIA

MASON C.J.
BRENNAN, DEANE, DAWSON, TOOHEY, GAUDRON AND McHUGH J.

IAN GRANT SYKES — PETITIONER

AND

PHILIP RONALD Cleary AND ORS — RESPONDENTS

[NO.2]

O R D E R

Answer the questions reserved for the consideration of the Full Court as follows:

(a) Was the first respondent duly elected at the election?

Answer: No.

(b) If no to (a), was the election absolutely void?

Answer: Yes.

(c) If no to (b), was any and which candidate duly elected who was not returned as elected?

Answer: Does not arise.

(d) Who should pay the costs of the petition?

Answer: By consent there should be no order for costs.

25 November 1992
F.C. 92/046

Solicitors for the Petitioner:	*Minter Ellison Morris Fletcher*
Solicitors for the First Respondent:	*Maurice Blackburn & Co.*
Solicitors for the Third Respondent:	*Holding Redlich*
Solicitors for the Fifth Respondent:	*Freehill Hollingdale & Page*
Solicitor for the Intervener:	*Australian Government Solicitor*

MASON C.J., TOOHEY AND McHUGH JJ. This is a case stated by Dawson J. pursuant to s.18 of the *Judiciary Act* 1903 (Cth). The case arises out of a by-election for the Electoral Division of Wills in the House of Representatives, as a result of which the first respondent, Philip Ronald Cleary, was declared to be elected. The case was stated in proceedings commenced by petition by Ian Grant Sykes ("the petitioner") invoking the jurisdiction of this Court sitting as the Court of Disputed Returns under the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act"). The petitioner disputed the poll on the ground that the first respondent held an office of profit under the Crown by reason, inter alia, of his being an officer of the Education Department of Victoria ("the Education Department") and therefore was incapable of being elected under s.44(iv) of the Constitution. The petitioner also alleged that other candidates, the second, third and fourth respondents, were ineligible for election. The petitioner claimed that each of the second and third respondents, though a naturalized Australian citizen, was a subject or citizen or entitled to the rights or privileges of a subject or citizen of a foreign power and was therefore under acknowledgment of allegiance to a foreign power within the meaning of s.44(i) of the Constitution. It is not necessary to consider the eligibility of the fourth respondent as no argument in support of ineligibility was presented to the Court.

According to the facts recited in the case stated, a writ for the by-election was issued and the following dates were specified in it for the purposes of the election:

For the CLOSE OF THE ROLLS:	16 March 1992
For NOMINATION:	20 March 1992
For TAKING THE POLL:	11 April 1992
For the RETURN OF THE WRIT:	on or before 17 June 1992

The first respondent lodged his nomination on 20 March 1992. It was accepted by the Acting Divisional Returning Officer for the Electoral Division of Wills on that day. The poll was held on 11 April 1992. The total number of first preference votes cast in favour of the candidates in the election was as follows:

SAVAGE, Katheryne Jeanette	1,660
KARDAMITSIS, Bill (the third respondent)	18,784
KUHNE, Otto Ernst August	35
PHILLIPS, Richard Frank	136
KAPPHAN, Wilhelm	34
RAWSON, Geraldine Mae (the fourth respondent)	453
DELACRETAZ, John Charles (the second respondent)	17,582
POULOS, Patricia	61
DROULERS, Julien Paul	68
FRENCH, William Leonard	90
POTTER, Felicia Cecilia	30
MURRAY, John	54
VASSIS, Chrisostomos	43
Cleary, Philip Ronald	21,391

FERRARO, Salvatore	221
GERMAINE, Stanley Arthur	280
WALKER, Angela Howard	577
MACKAY, David Ewan	1,383
LEWIS, Robert John	216
SYKES, Ian Grant	364
KYROU, Kon	81
MURGATROYD, Cecil Godfrey	258
TOTAL	63,801

After the distribution of the preference votes of all of the candidates except those of the first and third respondents, the first respondent had an absolute majority of votes, having a total of 41,708 votes (65.7 per cent). The third respondent had a total of 21,772 votes (34.3 per cent). Without a special count, it is not known what number of second and subsequent preference votes were cast in favour of the other candidates by voters who cast their first preference vote in favour of the first or the third respondent. Further, without a special count, it is not known what number of subsequent preference votes were cast in favour of the other candidates by voters who cast their first preference vote in favour of any candidate other than the first or third respondent and their second preference vote in favour of the first or third respondent.

The questions reserved in the case stated are:

(a) Was the first respondent duly elected at the election?

(b) If no to (a), was the election absolutely void?

(c) If no to (b), was any and which candidate duly elected who was not returned as elected?

(d) Who should pay the costs of the petition?

Question (a): Was the first respondent duly elected at the election?

Section 44 of the Constitution relevantly provides:

> "Any person who -
>
> ...
>
> (iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth:
>
> ...
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State".

Before considering the meaning of this section and its application to the first respondent, it is necessary to consider the history of his service with the Education Department.

The history of the first respondent's service with the Education Department

The first respondent was appointed to the teaching service as a teacher in the Education Department by the Teachers Tribunal pursuant to s.46 of the *Teaching Service Act* 1958 (Vict.) ("the 1958 Act") on 1 January 1975. He thereupon became entitled to a salary and conditions of work determined pursuant to that Act. The 1958 Act was replaced by the *Education Service Act* 1981 (Vict.) ("the 1981 Act") which in turn was amended and renamed the *Teaching Service Act* 1981 (Vict.) by the *Teaching Service Act* 1983 (Vict.) ("the 1983 Act"). At all times from his appointment on 1 January 1975 until his resignation was tendered and accepted as effective on 16 April 1992, the first respondent was an officer in the teaching service. That service was known as the education service during the currency of the 1981 Act before it was amended by the 1983 Act. His appointment was as a permanent teacher. He was not appointed for a specific term; nor was he appointed on probation. He served as a secondary teacher.

Persons employed in the teaching service pursuant to s.3 of the 1981 Act in the classification held by the first respondent are not attached or appointed to any particular position. They have no entitlement to remain in any particular position.

From 1 February 1990 to 27 January 1992 inclusive, the first respondent was granted leave without pay by the Director-General of Education(1) pursuant to s.35 of the 1981 Act. On 28 and 29 January 1992, he performed the duties of a teacher in the teaching service at Hoppers Crossing secondary College and was paid $290.17. On 30 January 1992, he commenced leave without pay for the remainder of the school year, that is, until 24 January 1993. This leave ceased on 16 April 1992 when his resignation became effective. At no time on or after 30 January 1992 was he attached to, nor did he have any entitlement to, any particular or designated position. During this time, he was described by the employer as an "unattached" but "allocated" officer.

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(1) From 26 November 1991, the Chief General Manager, Department of School Education: see *Teaching Service (Further Amendment) Act* 1991 (Vict.) ("the 1991 Act"), s.6(1) (b).

Some time during April 1992 but prior to 11 April 1992, he applied for long service leave with full pay for the fourth term of the school year from 5 October 1992 to 18 December 1992 pursuant to s.37 of the 1981 Act. This application was cancelled when he resigned from the teaching service. The Ministry of Education subsequently forwarded to him payment in lieu of long service leave pursuant to s.38 of the 1981 Act. The Ministry of Education does not permit permanent teachers to take long service leave while on leave without pay. The leave without pay must first be terminated.

Interpretation of s.44(iv)

The disqualification of a person who holds an office of profit under the Crown has its *origins in the law which developed in England in relation to disqualification of the members of* the House of Commons. Section 44(iv) is modelled on a provision of the *Act of Settlement* 1701(2) , which was repealed(3) and replaced by provisions of the *Succession to the Crown Act* 1707(4). It has been said that the English provisions give effect to three main considerations or policies. They are(5):

(1) the incompatibility of certain non-ministerial offices under the Crown with membership in the House of Commons (here, membership must be taken to cover questions of a member's relations with, and duties to, his or her constituents);

(2) the need to limit the control or influence of the executive government over the House by means of an undue proportion of office-holders being members of the House; and

(3) the essential condition of a certain number of Ministers being members of the House for the purpose of ensuring control of the executive by Parliament.

The meaning of the expression "office of profit under the Crown" is obscure. Blackstone defined an "office" as "a right to exercise a public or private employment" and to take the "fees and emoluments

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(2) 12 & 13 Wm.III c.2.

(3) 4 & 5 Anne c.20, s.28.

(4) 6 Anne c.41, ss.24 and 25.

(5) *Report from the Select committee on Offices or Places of Profit under the Crown*, House of Commons, (1941), par. 19, pp.xiii-xiv; Erskine May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 16th ed. (1957), p.200.

thereunto belonging" (6). Blackstone had in mind offices to which particular duties were attached and which entitled the holder to charge and retain fees for the performance of the services rendered by the office-holder.

It has been accepted in England that the disqualification of the holder of an "office of profit under the Crown" excludes permanent public servants, being officers of the departments of government, from membership of the House of Commons(7). Likewise, it has been accepted in Australia that a provision for disqualification expressed in the same terms excludes public servants, who are officers of the departments of government, from membership of the legislature(8). The exclusion of public servants from membership of the House contributes to their exclusion from active and public participation in party politics(9). In this way, the disqualification played an important part in the development of the old tradition of a politically neutral public service.

The exclusion of permanent officers of the executive government from the House was a recognition of the incompatibility of a person at the one time holding such an office and being a member of the House. There are three factors that give rise to that incompatibility. First, performance by a public servant of his or her public service duties would impair his or her capacity to attend to the duties of a member of the House. Secondly, there is a very considerable risk that a public servant would share the political opinions of the Minister of his or her department and would not bring to bear as a member of the House a free and independent judgment(10). Thirdly, membership of the House would detract from the performance of the relevant public service duty.

The first respondent contends that the objects sought to be achieved by the disqualification of the holder of an "office of profit under the Crown" would sufficiently be served by confining the

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(6) *Commentaries*, 1st ed. (1766), vol.2, p.36.

(7) Maitland, *The Constitutional History of England*, (1955), p.369; *Report from the Select Committee*, op.cit., par.29, p.xx; Erskine May, op.cit., p.206.

(8) *Inquiry into the conduct of the 1987 Federal Election and 1988 Referendums*, Report No.3 of the Joint Standing Committee on Electoral Matters, (May 1989), par.3.53; cf. *Clydesdale v. Hughes* (1934) 36 W.A.L.R. 73.

(9) Erskine May, op.cit., p.206.

(10) ibid.

category of office-holders disqualified to that consisting of those who hold important or senior positions in government. History provides no support for this interpretation which would, in any event, fail to give effect to all the considerations or policies said to underlie the disqualification. In order to give effect to those considerations, the disqualification must be understood as embracing at least those persons who are permanently employed by government.

The first respondent seeks to find support for the interpretation for which he contends in judicial decisions relating to the word "office" in the context of revenue legislation. Thus, in *Grealy v. Commissioner of Taxation*(11) the Full Court of the Federal Court said the word:

> "usually connotes a position of defined authority in an organisation, such as director of a company or tertiary educational body, president of a club or holder of a position with statutory powers".

In other cases, it has been held that the word signifies a subsisting permanent substantive position which exists independently of the person who fills it from time to time(12). However, the meaning of "office" turns largely on the context in which it is found and, in the light of the principal mischief which s.44(iv) and its predecessors were directed at eliminating or reducing, namely, Crown or executive influence over the House, such a restricted meaning cannot be given to "office" in s.44(iv).

Although a teacher is not an instance of the archetypical public servant at whom the disqualification was primarily aimed, a permanent public servant who is a teacher falls within the categories of public servants whose public service duties are incompatible, on the three grounds mentioned previously, with the duties of a member of the House of Representatives or of a senator. In this respect, the first respondent was a person who came within the statutory definition of "teachers", i.e., "permanent officers employed in the [teaching] service" (13). As such a permanent officer in the teaching service,

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(11) (1989) 24 F.C.R. 405, at p.411.

(12) *Great Western Railway Co. v. Bater* [1922] 2 A.C. 1.
At first instance, Rowlatt J. distinguished occupancy of an office from the case of a person engaged to do any duties which may be assigned to him or her: *Great Western Railway Co. v. Bater* [1920] 3 K.B. 266, at p.274. See also *Mitchell and Edon v. Ross* [1960] Ch. 498, at pp.522-523, 532.

(13) The 1981 Act, s.2.

he held an "office"(14). So much may be deduced from the statutory definitions of "officer" and "employe", the latter connoting a temporary employee. Indeed, this was conceded in argument by counsel for the first respondent.

Where an office in the teaching service is abolished, the holder of the office becomes an "unattached officer" and shall be deployed by the Chief General Manager(15) to any other office which the Chief General Manager deems appropriate(16) but, because "officer" is defined as meaning any person who holds an office, this does not mean that an "unattached" officer holds no office. And, even if the effect of the legislation is that an unattached officer ceases to hold an office within the meaning of the 1981 Act, the officer nonetheless remains a permanent employee of the Crown and is, for the purposes of s.44(iv), the holder of an office of profit under the Crown.

The taking of leave without pay by a person who holds an office of profit under the Crown does not alter the character of the office which he or she holds. The person remains the holder of an office, notwithstanding that he or she is not in receipt of pay during the period of leave(17).

Application to office of profit under the Crown in right of a State

The reference in s.44(iv) to "*any* office of profit under the Crown" (emphasis added) is apt to include an office of profit under the Crown in right of a State. Not only are the words wide enough to achieve this result but also the last paragraph of the section

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(14) "officer" means any person holding an office in the teaching service: see the 1981 Act, s.2 and the 1983 Act, ss.6(1), 7(3) and 7(4). By an instrument dated 22 February 1984, the Minister of Education determined, in accordance with s.6(1) of the 1983 Act, that the office of teacher in the education service was to be an office in the teaching service. On the commencement of s.7 of the 1983 Act, this determination took effect (s.7(3)(a) of the 1983 Act) and all persons who, immediately before that time, had held the office of teacher in the education service were deemed to be officers in the teaching service (s.7(4) of the 1983 Act).

(15) Formerly the Director-General: see the 1991 Act, s.6(1)(b).

(16) The 1981 Act, s.4(4).

(17) Erskine May, op.cit., pp.214-215; *Harvey's Case* House of Commons Parliamentary Debates *(Hansard)*, 15 February 1839, cols 446-466; ibid., 21 February 1839, cols 715-720.

proceeds on the footing that, but for that paragraph, a State Minister would hold an office of profit under the Crown in right of a State and be disqualified. If such an office of profit in a State stood outside s.44(iv), there would have been no need to exclude State Ministers from the disqualification. The Convention Debates reveal that the exclusion of State Ministers from the disqualification was put forward because it was believed that State Ministers otherwise would be disqualified because each of them was relevantly the holder of an office of profit under the Crown(18). The exclusion of State Ministers from the disqualification was designed to ensure their availability for election at the inception of the Commonwealth Parliament. The exclusion in the last paragraph of s.44 of those receiving certain payments as officers or members of the Queen's navy or army proceeded likewise on the footing that otherwise s.44(iv) would disqualify such persons. Both the text of s.44(iv) and the reason for the inclusion of the last paragraph in the section support the opinion of the commentators that the disqualification extends to State officers(19).

Moreover, the long-standing reasons for disqualifying Commonwealth public servants from membership of the Houses of Parliament have similar force in relation to State public servants. The risk of a conflict between their obligations to their State and their duties as members of the House to which they belong is a further incident of the incompatibility of being, at the same time, a State public servant and a member of the Parliament.

It follows that the first respondent, as the holder of an office of profit under the Crown, fell within s.44(iv) until he resigned that office on 16 April 1992.

At what time does the disqualification operate?

The case for disqualification rests on that part of s.44 which provides that any person who falls within par. (iv) "shall be incapable of being chosen ... as a ... member of the House of Representatives". The petitioner submits that the word "chosen" extends to incorporate all the procedural steps necessarily involving the candidate in the electoral process so that the disqualification precludes participation in that process, including the step of nomination. On the other hand,

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(18) *Official Report of the National Australasian Convention Debates*, Adelaide, 22 April 1897, p.1198; Melbourne, 7 March 1898, pp.1941-1942.

(19) Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, (1901), pp. 492-493; Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed. (1910), p.128.

the first respondent and the Attorney-General submit that a member is "chosen" when the member is declared to be elected, that is, when the poll is declared. On this interpretation of the provision, a candidate is disqualified only in the event that the disqualifying characteristic is in existence when the poll is declared. If this interpretation is accepted, the first respondent was not disqualified because his resignation took effect on 16 April 1992, before the declaration of the poll on 22 April 1992.

However, this interpretation must be rejected. As a matter of language, the disqualifying characteristics set out in s.44 are related to "being chosen". Whether those words refer to the act of choice or the process of being chosen is a question to be determined. Even on the narrower of the alternatives, namely, that the words refer to the act of choice, the outcome would be unfavourable to the first respondent. The people exercise their choice by voting(20), so that it is the polling day rather than the day on which the poll is declared that marks the time when a candidate is chosen by the people. Of course, an absentee or postal vote may be cast before the polling day and, in situations of emergency, arrangements may be made for the casting of votes after the polling day(21). But these characteristics of the polling do not justify the conclusion that the declaration of the poll, which is the formal announcement of the result of the poll, amounts to, or even coincides with, the choosing by the electors of the member for the relevant electoral division. The declaration of the poll is the announcement of the choice made; it is not the making of the choice.

The interpretation just rejected would, if it were upheld, enable a public servant who falls within par. (iv) in s.44 to avoid disqualification by resigning from the relevant office of profit after the polling day but before the declaration of the poll. The public servant could be nominated and stand for election and, if he or she secured a majority of votes, have an option to resign and be declared elected or not to resign and be disqualified. The adverse consequences this would have for the electoral process are an additional reason for rejecting the suggested interpretation. The inclusion in the list of candidates on polling day of a candidate who may opt for disqualification may well constitute an additional and unnecessary complication in the making by the electors of their choice. Furthermore, it is hardly conducive to certainty and speed in the ascertainment of the result of the election that it should depend upon a decision to be made by a candidate on or after polling day. Speed and certainty in the ascertainment of the result of the

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(20) So much is implied from s.24 of the Constitution, read in conjunction with ss.7, 30 and 41.

(21) The Electoral Act, s.241.

first election to the Parliament of the Commonwealth were enhanced by the fact that in 1901, in all the Australian colonies other than Queensland and parts of Tasmania, the "first past the post" *system of electoral voting prevailed in lower House elections*(22).

Reflection on these considerations persuades us that the words "shall be incapable of being chosen" refer to the process of being chosen, of which nomination is an essential part (23). That interpretation is supported by s.43 of the Constitution which provides:

> "A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House."

In that context, the words "shall be incapable of being chosen" must refer to the *process* of being chosen. It can scarcely have been intended that a member of Parliament could, while holding that office, stand for election for the other House of Parliament and, after the counting of the votes but before the declaration of the poll, resign the office which he or she then held, thereby ensuring *his or her eligibility to be declared elected as a member of the other House.*

It is to be noted that, under the Electoral Act, if only one candidate is nominated, the Divisional Returning Officer is required by the Electoral Act to declare that candidate duly elected(24) and that declaration may be made in advance of the polling day. The fact that, in such a case, the "choice" *is made by reference to the state of affairs existing on nomination day* may well be a reason for concluding that, if a candidate is not qualified on nomination day, he or she is incapable of being chosen. However, as s.44 of the Constitution does not necessarily require that, in such a case, the "choice" be made in the manner dictated by s.179(2), the question may be put to one side(25).

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(22) See Constitution, s.31, which provided for the application of State laws in relation to the election of members of the House of Representatives.

(23) See *Harford v. Linskey* (1899] 1 Q.B. 852, at p.858.

(24) s.179(2).

(25) However, *a provision corresponding to s.179(2) of the* Electoral Act was in force in England and in each of the Australian colonies prior to federation - England: *Ballot Act* 1872 (35 & 36 Vict. c.33), s.1; New South Wales: *Parliamentary Electorates*

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This interpretation of s.44(iv), because it has the effect of discouraging public servants from standing for election to the Parliament, has been criticized. There is force in the view that the field of potential candidates for election should be as wide as possible, having due regard to the provisions of s.44. However, once it is accepted, as in our view it must be, that nomination is an essential element in the process of choice that is the electoral process, the answer to the question becomes inevitable.

It follows that the first respondent was incapable of being chosen as a member of the House of Representatives.

Question (b): If no to (a), was the election absolutely void?

Counsel for the third respondent submits that the Court should order a special count to be taken so that the preference votes on the elimination of the first respondent may be distributed. The decision in *re Wood*(26), so it is said, supports this approach. That case decided that the election and return of an unqualified candidate are wholly ineffective to fill a vacant Senate place, that *the election is not completed when an unqualified candidate is returned and that the purpose* of the poll is to choose preferred candidates. In particular, *In re Wood* decided that a primary vote for an unqualified candidate does not destroy the voter's indication of his or her subsequent preferences(27). Although an indication of a voter's preference for an unqualified candidate is a nullity and the indication of preference for that candidate cannot be treated as effective, the ballot paper is not informal. It was held that "[t]he vote is valid except to the extent that the want of qualification makes the particular indication of preference a nullity" (28) and that there is no reason for

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(Footnote continued from previous page)
and Elections Act 1893 (56 Vict. No. 38), s.66; Queensland: *Elections Act* 1885 (49 Vict. No. 13), s.52; South Australia: *Electoral code* 1896 (59 & 60 Vict. No. 667), s.97; Tasmania: *Electoral Act* 1896 (60 Vict. No. 49) , s.91; Victoria: *Constitution Act Amendment Act* 1890 (54 Vict. No. 1075), S.224 (re-enacting Electoral Act 1865 (29 Vict. No. 279) , s.86); Western Australia: *Electoral Act* 1899 (63 Vict. No. 20), s.83 - and was present in the *Commonwealth Electoral Act* 1902 (Cth), s.106.

(26) (1988) 167 C.L.R. 145.

(27) ibid., at pp.165-166.

(28) ibid., at p.166.

disregarding the other indications of the voter's preference(29). The Court likened the position to that which arises when the candidate dies. Then, pursuant to s.273(27) of the Electoral Act, a vote indicated on the ballot paper for the deceased candidate is counted to the candidate next in the voter's indicated order of preference and the numbers indicating subsequent preferences are treated as altered accordingly. In these circumstances, the situation in *re Wood* was such as to warrant the conclusion that the special count would reflect the voters' "true legal intent"(30). Furthermore, in the light of the group system of voting which applies in Senate elections, it was highly probable, if not virtually certain, that a person who voted for Mr Wood would have voted for another member of his group, had the voter known that Mr Wood was ineligible. The same comment cannot be made in the present case. Here a special count could result in a distortion of the voters' real intentions because the voters' preferences were expressed within the framework of a larger field of candidates presented to the voters by reason of the inclusion of the first respondent.

As Mr Rose Q.C. for the Australian Electoral Commission points out, the Electoral Act draws a distinction between House of Representatives and Senate elections in the case of the death of a candidate. Section 180(2) provides that, if a candidate in a House of Representatives election dies between the declaration of the nominations and polling day, the election wholly fails, whereas, in the case of the death of a candidate in a Senate election between those days, s.273(27) provides that the votes should be counted with the preferences adjusted accordingly. The reasons which lie behind the drawing of that distinction have equal application to the drawing of a like distinction between the election to the House of Representatives and to the Senate of candidates who are disqualified under s.44.

Accordingly, we would declare the election void and refuse to order a special count.

Question (c): If no to (b), was any and which candidate duly elected who was not returned as elected?

As the second and third respondents may wish to stand for the next election for the Electoral Division of Wills, the Court should answer this question. The eligibility of the two respondents turns on that part of s.44 which provides:

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(29) ibid., at pp.165-166.

(30) ibid.

"Any person who -

(i) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power:...

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives".

Second respondent: facts

The second respondent, Mr Delacretaz, was born in Switzerland on 15 December 1923 and, from the time of his birth, was a Swiss citizen. He migrated to Australia on 13 June 1951 and has lived in Australia since then. on 20 April 1960 he became naturalized as an Australian citizen pursuant to Div.3 of Pt III of the *Nationality and Citizenship Act* 1948 (Cth). In so doing, he renounced all allegiance to any sovereign or State of whom or of which he was a subject or citizen and took an oath of allegiance to Her Majesty the Queen, by which he swore to "be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors according to law" and "faithfully [to] observe the laws of Australia and fulfil [his] duties as an Australian Citizen".

However, he did not at any time make application to the Government of Switzerland to renounce or otherwise terminate his Swiss citizenship. He has held an Australian passport since 1960 and it is still current. He holds no other passport.

Under the law of Switzerland, a Swiss citizen will be released from his or her citizenship upon his or her demand if he or she has no residence in Switzerland and has acquired another nationality. The second respondent has made no such demand and is and was at all material times under the law of Switzerland a Swiss citizen and entitled to a Swiss passport to enter Switzerland without restriction and to reside in that country.

Third respondent: facts

The third respondent, Mr Kardamitsis, was born in Greece on 2 July 1952 and, from the time of his birth, was a Greek citizen. He came to Australia in 1969 as a migrant sponsored by his brother and has lived in Australia since then.

On 12 March 1915, he became an Australian citizen pursuant to Div.2 of Pt III of the *Australian Citizenship Act* 1948 (Cth). In so doing, he renounced all other allegiance and swore the oath of allegiance in a form similar to, but not identical with, that sworn by the second respondent. He did not at any time make application to the Government of Greece to discharge his Greek nationality.

When he became an Australian citizen, he surrendered a Greek passport which he then held. It had expired one or two years after he had migrated to Australia. Between 1969 and 1978, he did not travel out of Australia. He was issued with an Australian passport on 24 April 1978, which was valid for five years, and a further Australian passport on 21 May 1987, which wag valid for ten years and is still current. He entered Greece on his Australian passport for a holiday in 1978 and in 1987, and for the funeral of his mother in 1979 and of his father in 1990.

He has never received any social security or other like benefits from the Government of Greece. He has never stood for office in Greece or voted or been recorded as a voter in an election in Greece.

Since leaving Greece, he has not, to his knowledge, done any act, made any statement or acted in any manner which would place him under any acknowledgment of allegiance, obedience or adherence to Greece or any other foreign power. In becoming an Australian citizen, he took a conscious and serious step which he believed involved his breaking his bond of allegiance with Greece and his establishing a new bond of allegiance with Australia. He has habitually resided in Australia since leaving Greece. The centre of his interests is Australia, not Greece. His principal family ties are with Australia, not Greece. He has participated in public life in Australia and seeks further such participation. He has had no such participation in Greece and seeks none. He has a bond of attachment with Australia and not with Greece (except that Greece is part of his personal history), and he has inculcated the same bond in his children. Save that he has visited Greece on several occasions and that he has some family and friends in Greece, he has severed his links with Greece to the extent that any citizen of Greece can without applying to discharge his or her Greek citizenship.

Under the law of Greece, a Greek national will have his or her Greek nationality discharged if (a) he or she has acquired the nationality of another country with the permission of the appropriate Greek Minister; or (b) he or she has acquired the nationality of another country and later obtains the approval of the appropriate Greek Minister for the discharge of his or her Greek nationality. In the latter case, the discharge of Greek nationality becomes effective as from the date of the Greek Minister's approval and not from the date of the acquisition of foreign nationality. The third respondent has not sought to have his Greek nationality discharged and, accordingly, under the law of Greece, he is and was at all material times a Greek national. As a result, he is and was at all material times entitled to apply for a Greek passport and, using that passport, to enter Greece and stay in Greece without time restrictions and without permission.

It was first brought to the attention of the third respondent that he might not be qualified to be a member of the House of Representatives by reason of s.44(i) of the Constitution after he

was nominated. Until then he did not know that he might not be so qualified, despite being an Australian citizen, and that he might, according to the laws of Greece, still be a citizen of that country. He did not know that there were procedures available in Greece by which Greek nationals can terminate their Greek nationality until he was so informed after the petition was issued.

In 1972, he and his wife, a naturalized Australian citizen, were married in Melbourne. They have three children, who were born in Australia and are Australian citizens.

He was elected as a councillor for the Coburg City Council in 1989 and 1991 pursuant to Pt 3 of the *Local Government Act* 1989 (Vict.). Following each of these elections, he took an oath of allegiance as a councillor pursuant to s.63 of the *Local Government Act.* He resigned from his position as a councillor effective as from 18 March 1992.

On or about 5 July 1990, he was appointed as a Justice of the Peace for the State of Victoria pursuant to Pt III of the Magistrates' courts Act 1971 (Vict.). On 18 July 1990, he swore an oath of office and an oath of allegiance pursuant to s.12 and Sched.2 of the *Magistrates' Courts Act.* By virtue of Div.1 of Pt 6 of that Act, he continues to be a Justice of the Peace for the State of Victoria.

Interpretation of s.44(i)

The petitioner submits that each of the second and third respondents is "a subject or citizen or is entitled to the privileges of a subject or citizen of a foreign power" within the meaning of s.44(i). In support of this submission, the petitioner argues that the respondents' assumption of Australian citizenship did not entail a renunciation of their antecedent citizenship or nationality and that, in order to achieve such a renunciation, it was necessary for them to comply with the requirements with respect to renunciation of citizenship or nationality of the law of Switzerland or Greece, as the case may be.

The common law recognizes the concept of dual nationality, so that, for example, it may regard a person as being at the same time a citizen or national of both Australia and Germany(31). At common law, the question of whether a person is a citizen or national of a particular foreign State is determined according to the law of that foreign State(32). This latter principle is, in part, a recognition

(31) *Oppenheimer v. Cattermole* [1976) A.C. 249, at pp.263-264, 278.

(32) *R. v. Burgess; Ex parte Henry* (1936) 55 C.L.R. 608, per Latham C.J. at p.649; Dixon J. at p.673.

of the principle of international law, restated in the *Nottebohm case*(33), that:

> "it is for every sovereign State ... to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation".

This rule finds expression in Art.2 of the Hague Convention of 1930(34), to which Australia is a party:

> "Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State."

And Art.3 of that Convention acknowledges that a person having two or more nationalities may be regarded as its national by each of the States whose nationality he or she possesses.

In the *Nottebohm Case*, Liechtenstein sought to exercise its right of diplomatic protection(35) in respect of acts of Guatemala with respect to the person and property of Nottebohm, a naturalized Liechtenstein citizen. The question considered was whether the naturalization conferred on Nottebohm by and under the law of Liechtenstein could successfully be invoked against Guatemala. The International Court of Justice pointed out that, where the question had arisen with regard to the exercise of diplomatic protection, international arbitrators had recognized the "real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved" as that which gave rise to a right to exercise diplomatic protection. The majority went on to say that, in determining the real and effective nationality(36):

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(33) *(Liechtenstein v. Guatemala)* [1955] I.C.J. 4, at p.20.

(34) Convention on Certain Questions Relating to the Conflict of Nationality Laws, 12 April 1930, 179 *League of Nations Treaty Series* 89.

(35) That is, the right of a State, a national of which has suffered a wrong at the hands of another State, to bring a claim before an international tribunal in respect of that wrong: see Brownlie, *Principles of Public International Law*, 4th ed. (1990), pp.480-494, and see generally pp.381-420.

(36) [1955] I.C.J., at p.22.

> "[d]ifferent factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc."

They said(37):

> "[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than that with that of any other State. conferred by a State, it only entitles that State to exercise protection vis-a-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national."

However, the critical words in s.44(i) do not permit this Court to adopt the approach which has been taken by international law. Here the question is different: is the candidate a subject or citizen or entitled to the rights or privileges of a subject or citizen of a foreign power? And, as already stated, at common law, as in international law, that question is to be determined according to the law of the foreign State concerned.

But, there is no reason why s.44(i) should be read as if it were intended to give unqualified effect to that rule of international law. To do so might well result in the disqualification of Australian citizens on whom there was imposed involuntarily by operation of foreign law a continuing foreign nationality, notwithstanding that they had taken reasonable steps to renounce that foreign nationality. It would be wrong to interpret the constitutional provision in such a way as to disbar an Australian citizen who had taken all reasonable steps to divest himself or herself of any conflicting allegiance. It has been said(38) that the provision was designed to ensure:

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(37) ibid., at p.23.

(38) *The Constitutional Qualifications of Members of Parliament*, Report by the Senate Standing Committee on Constitutional and Legal Affairs, (1981), par.2.14.

> "that members of Parliament did not have a split allegiance and were not, as far as possible, subject to any improper influence from foreign governments".

What is more, s.44(i) finds its place in a Constitution which was enacted at a time, like the present, when a high proportion of Australians, though born overseas, had adopted this country as their home. In that setting, it could scarcely have been intended to disqualify an Australian citizen for election to Parliament on account of his or her continuing to possess a foreign nationality, notwithstanding that he or she had taken reasonable steps to renounce that nationality. In this respect it is significant that s.42 of the Constitution requires a member of Parliament to take an oath or affirmation of allegiance in the form set out in the schedule to the Constitution.

What amounts to the taking of reasonable steps to renounce foreign nationality must *depend upon the circumstances of the particular case.* What is reasonable will turn on the situation of the individual, the requirements of the foreign law and the extent of the connection between the individual and the foreign State of which he or she is alleged to be a subject or citizen. And it is relevant to bear in mind that a person who has participated in an Australian naturalization ceremony in which he or she has expressly renounced his or her foreign allegiance may well believe that, by becoming an Australian citizen, he or she has effectively renounced any foreign nationality.

Application of s.44(i) to the second respondent

The second respondent omitted to make a demand for release from Swiss citizenship which would have been granted automatically as he has no residence in Switzerland and has been an Australian citizen for thirty-two years. Because he has failed to make such a demand, it cannot be said that he has taken reasonable steps to divest himself of Swiss citizenship and the rights and privileges of such a citizen.

Application of s.44(i) to the third respondent

The third respondent has omitted to seek the approval of the appropriate Greek Minister for the discharge of his Greek nationality. Whether the grant of that approval is a matter of discretion or is automatic is not altogether clear. Presumably it is the former. But, in the absence of an application for the exercise of the discretion in favour of releasing the third respondent from his Greek citizenship, it cannot be said that he has taken reasonable steps to divest himself of Greek citizenship and the rights and privileges of such a citizen.

We would answer the questions reserved for the consideration of the Full Court as follows:

(a) No.
(b) Yes.
(c) Does not arise.
(d) By consent there should be no order for costs.

BRENNAN J. For the reasons stated by Mason C.J., Toohey and McHugh JJ., I agree that s.44(iv) of the Constitution rendered the first respondent incapable of being chosen as a member of the House of Representatives. Accordingly, I agree that he was not duly elected. I agree also with their Honours' reasons for concluding that the election was void and that a special count should not be ordered.

There remains the challenge based on s.44(i) of the Constitution to the respective capacities of the second and the third respondents to be chosen as a member of the House of Representatives. Section 44(i) reads as follows:

> " Any person who -
>
> (i) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power ...
>
> ...
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives."

The purpose of this sub-section is to ensure that no candidate, senator or member of the House of Representatives owes allegiance or obedience to a foreign power or adheres to a foreign power. Putting acknowledgment of adherence to a foreign power to one side, the sub-section contains three categories of disqualification, each of them being descriptive of a source of a duty of allegiance or obedience to a foreign power. The first category covers the case where such a duty arises from an acknowledgement of the duty by the candidate, senator or member. The second category covers the case where the duty is reciprocal to the status conferred by the law of a foreign power. The third category covers the case where the duty is reciprocal to the rights or privileges conferred by the law of a foreign power.

The second category refers to subjects or citizens of a foreign power - subject being a term appropriate when the foreign power is a monarch of feudal origin; citizen when the foreign power is a republic(39). In the United Kingdom, by the common law, allegiance is owed to the Sovereign "by ... natural born subjects [and] by those who, being aliens, become ... subjects by denization or naturalization", as Lord Jowitt L.C. said in *Joyce v. Director of*

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(39) Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901), par. 144, pp.491-492.

Public Prosecutions(40). At common law, the status of a subject was coincident with the owing of allegiance(41). A similar rule is adopted by other legal systems with respect to their nationals. In the *Nottebohm case*(42), the judgment of the International Court of Justice noted that:

> "Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights *and is bound by the obligations* which the law of the State in question grants to or imposes on its nationals." (Emphasis added.)

Nationality has sometimes been regarded as an international law attribute of subjects or citizens (43) but, for the purposes of construing s.44(i), it is not necessary to draw any distinction between a person who is a national of a foreign power and a person who is a subject or citizen of a foreign power(44). The second category covers persons who, by reason of their status as subjects or citizens (or nationals) of a foreign power, owe a duty of allegiance or obedience to the foreign power according to the law of the foreign power.

The third category mentioned in s.44(i) covers those who, though not foreign nationals, are under the protection of a foreign power as though they were subjects or citizens of the foreign power. Where non-nationals are under the protection of a foreign power, they may owe a duty of allegiance or obedience to the foreign power by the law of that power. Thus, in *Joyce v. Director of Public Prosecutions*, it was held that a non-subject owed allegiance to the Sovereign by reason of the protection afforded him by the issue of a British passport.

The first category applies when, as a matter of fact, the person has acknowledged allegiance, obedience or adherence to a foreign power. The second and the third categories apply when, under the law of a foreign power, the person owes allegiance or obedience to the foreign power by reason of his or her status, rights or privileges. Although s.44(i) is part of the municipal law of Australia, the

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(40) (1946] A.C.347, at p.366.

(41) *Reg. v. Immigration Officer*; Ex parte Thakrar (1974] Q.B.684, at pp.709-710.

(42) (1955) I.C.J.4, at p.20.

(43) See *Iran-United States Claims Tribunal: Decision in Case No. A/18* (6 April 1984) 23 I.L.M.489, at p.494.

(44) See per Latham C.J. in *R. v. Burgess; Ex parte Henry* (1936) 55 C.L.R.608, at pp.648, 649.

status, rights or privileges mentioned in the second and third categories are generally ascertained by reference to the municipal law of the foreign power. Lord Cross of Chelsea in *Oppenheimer v. Cattermole*(45) stated the law in these terms:

> "Our law is, of course, familiar with the concept of dual nationality ... and the English law which is to be applied in deciding whether or not Mr. Oppenheimer was a German national at the relevant time is not simply our municipal law but includes the rule which refers the question whether a man is a German national to the municipal law of Germany."

Our law runs parallel with the law of England in this respect(46). *Nottebohm's Case*, though it was invoked to avoid this conclusion, in truth confirms it. The International Court of Justice had to determine whether Guatemala was obliged by international law to recognize that Liechtenstein had conferred nationality on Nottebohm so as to entitle Liechtenstein to assert the right of diplomatic protection of Nottebohm by taking international judicial proceedings against Guatemala(47). The Court acknowledged that nationality is to be settled for the purposes of each State by its own municipal law(48). However, the Court was not determining an issue under municipal law. Liechtenstein's entitlement to exercise protection had to be determined by international law. In that context, the Court observed that international tribunals, when confronted with competing claims made under the respective municipal laws of two States -

> "have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc. "(49)

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(45) (1976] A.C.249, at pp.278-279; see also pp.261, 263-264, 267.

(46) *R. v. Burgess; Ex parte Henry* (1936) 55 C.L.R., at pp.649, 673.

(47) [1955] I.C.J., at pp.13, 17.

(48) ibid., at p.20.

(49) ibid., at p.22.

The doctrine of "real and effective nationality" is a doctrine of international law, not municipal law, though it may be imported into municipal law when an issue in the municipal courts makes it necessary to choose between the competing claims of two other States asserting the nationality of an individual (50). The opinion of the International Court in *Nottebohm's case* accords with the provisions of the *Convention on Certain Questions Relating to the Conflict of Nationality Laws*(51), which read relevantly as follows:

> *Article 1.*
>
> It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.
>
> *Article 2.*
>
> Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.
>
> *Article 3.*
>
> Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses."

When the issue in an Australian court is simply whether an individual is a national of a foreign power, that issue is ordinarily determined by reference to the municipal law of the foreign power(52). The general rule, however, is subject to qualifications, one of which is stated by Lord Cross in *Oppenheimer v. Cattermole*(53):

> "If a foreign country purported to confer the benefit of its protection on and to exact a duty of allegiance from persons who had no connection or only a very slender connection with it our courts would be entitled to pay

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(50) ibid.

(51) Signed at The Hague, 12 April 1930, 179 *League of Nations Treaty Series* 89, at pp.99, 101.

(52) R. v. Burgess; Ex parte Henry (1936) 55 C.L.R., at p.649.

(53) [1976] A.C., at p.277.

> no regard to such legislation on the ground that the country in question was acting beyond the bounds of any jurisdiction in matters of nationality which international law would recognise. In this respect I think that our law is the same as that of the United States as stated by the Circuit Court of Appeals, Second Circuit, in *United States ex rel. Schwarzkopf v. Uhl*(54)."

That qualification has no application either to the second or to the third respondent. Each was born and grew up as a citizen of a foreign power before coming to live in Australia. Each, by the respective laws of those foreign powers, remains a citizen of that power. Each, by those respective laws, owes allegiance to a foreign power. True it is that each purported to renounce his citizenship of, and allegiance to, his native country when he became an Australian citizen but that renunciation was ineffective to alter his status and obligations under the law of his native country. There is no reason to hold that the application of the laws of the second and third respondents' respective native countries exceeds the jurisdiction in matters of nationality which international law would recognize.

However, recognition by our municipal law of the effect of foreign law on status and allegiance is subject to a further qualification. In times of war, common law courts have refused to recognize changes in the status either of British subjects(55) or of enemy aliens(56) under the law of the foreign hostile power. In these cases, non-recognition has been justified on the ground of public policy(57). But there is no reason why the doctrine of public policy should be confined to that situation. If recognition of status, rights or privileges under foreign law would extend the operation of s.44(i) of the Constitution to cases which it was not intended to cover, that section should be construed as requiring recognition of foreign law only in those situations where recognition fulfils the purpose of s.44(1). To take an extreme example, if a foreign power were mischievously to confer its nationality on members of the Parliament so as to disqualify them all, it would be absurd to recognize the foreign law conferring foreign nationality. Section 44(i) is concerned to ensure that foreign powers command no allegiance from or obedience by candidates, senators and members of the House of Representatives; it is not concerned with the operation of foreign

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(54) (1943) 137 F. 2d 898.

(55) See *R. v. Lynch* [1903] 1 K.B.444.

(56) *R. v. The Home Secretary; Ex parte L.* [1945] K.B.7; *Lowenthal v. Attorney General* (1948) 1 All E.R.295.

(57) *Oppenheimer v. Cattermole* [1976] A.C., at p.275.

law that is incapable in fact of creating any sense of duty, or of enforcing any duty, of allegiance or obedience to a foreign power. It accords both with public policy and with the proper construction of s.44(i) to deny recognition to foreign law in these situations. If foreign law were recognized in these situations, some Australian citizens would be needlessly deprived of the capacity to seek election to the Parliament and other Australians would be needlessly deprived of the right to choose the disqualified citizens to represent them. However, there are few situations in which a foreign law, conferring foreign nationality or the rights and privileges of a foreign national, is incapable in fact of creating a sense of duty, or is incapable of enforcing a duty, of allegiance or obedience to a foreign power. One such situation does occur when the foreign law, purporting to affect nationality of persons who have had no connection or only a very slender connection with the foreign power, exceeds the jurisdiction recognized by international law. That is the situation described by Lord Cross(58) in which international law does not recognize the jurisdiction of the foreign power. A second situation occurs when an Australian citizen has done all that lies reasonably within his or her power (i) to renounce the status or the rights or privileges conferred by the foreign law carrying a reciprocal duty of allegiance or obedience to the foreign power and (ii) to obtain a release from any such duty. It is not sufficient, in the second situation, for a person holding dual citizenship to make a unilateral declaration renouncing foreign citizenship when some further step can reasonably be taken which will be effective under the relevant foreign law to release that person from the duty of allegiance or obedience. So long as that duty remains under the foreign law, its enforcement - perhaps extending to foreign military service - is a threatened impediment to the giving of unqualified allegiance to Australia. It is only after all reasonable steps have been taken under the relevant foreign law to renounce the status, rights and privileges carrying the duty of allegiance or obedience and to obtain a release from that duty that it is possible to say that the purpose of s.44(i) would not be fulfilled by recognition of the foreign law.

The second and third respondents each failed to take steps reasonably open under the relevant laws of his native country - Switzerland in one case, Greece in the other - to renounce his status as a citizen of that country and to obtain his release from the duties of allegiance and obedience imposed on citizens by the laws of that country. Accordingly, neither the second nor the third respondent was capable of being chosen as a member of the House of Representatives.

I agree with the answers proposed by Mason C.J., Toohey and McHugh JJ. to the questions in the stated case.

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(58) supra, fn.(53).

DEANE J. This is a case stated in proceedings instituted in the Court as the Court of Disputed Returns under the *commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act"). The petitioner, Mr Sykes, challenges the validity of the declaration on 23 April 1992 of the poll for a by-election held to elect the member of the Commonwealth House of Representatives for the Electoral Division of Wills in the State of Victoria ("the by-election") . The first respondent, Mr Cleary, is the person who was declared to be the successful candidate in that by-election. There were twenty-one unsuccessful candidates. They included the petitioner, the second respondent (Mr Delacretaz), the third respondent (Mr Kardamitsis) and the fourth respondent (Ms Rawson). The fifth respondent, the Australian Electoral Commission, was given leave to appear and is deemed to be a respondent under s.359 of the Electoral Act.

In the petition, the petitioner challenged the validity of the declaration of the poll on the ground that he and the first four respondents had each been "incapable of being chosen" as a member of the House of Representatives. The substantive questions raised for the opinion of the Full Court are:

"(a) Was the First Respondent duly elected at the [by-election]?

(b) If no to (a), was the [by-election] absolutely void?

(c) If no to (b), was any and which candidate duly elected who was not returned as elected?"

The argument of those questions has been confined to the status of Mr Cleary, Mr Delacretaz and Mr Kardamitsis. It has been argued, on behalf of the petitioner, that those three candidates had each been disqualified from being chosen as a member of the House of Representatives by the provisions of s.44 of the Constitution and that, since they were the three candidates who had obtained the highest number of first preference votes (more than ninety per cent between them), the appropriate order to be made is that the by-election was absolutely void.

THE CONSTITUTION

Section 44 of the Constitution provides:

"Any person who --

(i) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or

(ii) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any

offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or

(iii) Is an undischarged bankrupt or insolvent: or

(iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

(v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth."

Section 44 should be read in the context of s.46 which provides:

"Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction."

That constitutional provision, which has now been effectively replaced by a similar but less harsh statutory provision(59), added penal consequences to disregard of s.44's declaration that a person is "incapable of ... sitting". In *re Webster*(60), Barwick C.J., speaking of par. (v) of s.44, said that the effect of those penal consequences was that "the paragraph should receive a strict construction". I respectfully agree with that comment. It is true

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(59) See *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth), ss.3, 4.

(60) (1975) 132 C.L.R. 270, at p.279.

that those penal consequences only attach if the person concerned purports to sit as a member of the Parliament. As the present case demonstrates, however, the question whether the person is "incapable of ... sitting" will commonly depend upon whether he or she was "incapable of being chosen" by reason of the provisions of s.44.

THE STATUS OF MR Cleary

The basis of the argument that Mr Cleary was disqualified is the fact that, up until 16 April 1992, he held a permanent appointment as a teacher with the Education Department of Victoria. The petitioner contends that, by reason of that appointment, Mr Cleary was, at relevant times, the holder of an "office of profit under the Crown" for the purposes of s.44(iv) and was accordingly "incapable of being chosen" as a member of the House of Representatives. Counsel for Mr Cleary sought to meet that argument at three distinct levels. First, it was submitted that, in all the circumstances of the case, Mr Cleary had not held an office of profit under the Crown at any relevant time. Next, it was submitted that, even if Mr Cleary had held an office of profit under the Crown, s.44(iv) of the Constitution should be construed as referring only to an office of profit held under the Crown in right of the Commonwealth whereas any office of profit held by Mr Cleary had been under the Crown in right of the State of Victoria. Finally, it was submitted that any office of profit under the Crown held by Mr Cleary had been relinquished by the time that he was, for the purposes of s.44(iv), "chosen ... as ... a member of the House of Representatives". It is convenient to consider those submissions in the order in which I have mentioned them.

Was Mr Cleary's appointment as a teacher an office of profit under the crown.'

It is not disputed that Mr Cleary held a permanent appointment as a teacher with the Education Department of Victoria for a number of years prior to his resignation with effect from 16 April 1992. He had, however, been "on leave without pay" from 30 January 1992, which was before the issue of the writ for the by-election. During that period of leave without pay, Mr Cleary received no salary or allowances and, while formally allocated to Hoppers Crossing Secondary College, did not hold any particular or designated position in the Department. Nor was that period of leave without pay counted as service for the purposes of calculating long service leave, sick leave or recreation leave. During it, neither Mr Cleary nor the Department made any contributions to the relevant superannuation fund for his benefit.

Mr Cleary's permanent appointment as a teacher existed under the provisions of the *Teaching Service Act* 1981 (Vict.) ("the 1981 Act"). An examination of those provisions makes clear that the appointment continued while Mr Cleary was on leave without pay and that it was and remained, for so long as it subsisted, an office of profit under the Crown. Section 2 defines "[t]eachers" as "permanent *officers* employed

in the teaching service for teaching in State schools" (61). Section 3 provides that "*there shall be employed by Her Majesty in the teaching service* teachers and principals and such other persons as are necessary for the purposes of this Act" (62). The 1981 Act refers, on a number of occasions(63), to persons in the position of Mr Cleary (i.e. without any particular or designated position) as "*unattached officer[s]*"(64). It also expressly refers to "[f]orfeiture of office in certain cases" none of which was applicable to him(65). Clearly, the permanent appointment as a teacher under the 1981 Act which Mr Cleary continued to hold while on leave without pay was "an office ... under the Crown". Equally clearly, in a context where the conditions applying generally to the office of teacher included entitlement to remuneration(66), the fact that the holder of such an office is temporarily on leave without pay or other emoluments does not deprive the office itself of its character as an office of profit(67).

It follows that the submission that Mr Cleary did not, while he was on leave without pay, hold an office of profit under the Crown must be rejected.

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(61) Emphasis added.

(62) Emphasis added.

(63) See, e.g., ss.4(4), 8A(3) (b), 12, 36(2), 62A(3).

(64) Emphasis added.

(65) See the heading to s.75 which is made part of the Act by s.36(1) of the *Interpretation of Legislation Act* 1984 (Vict.).

(66) See *Teachers (Government Teaching Service) Award* (No. 1 of 1990), Pt 2, Div. 1 and Sched. 1, as amended by *Teachers (Government Teaching Service) Award* (No. 2 of 1991).

(67) See, e.g., *In re The Warrego Election Petition (Bowman v. Hood)* (1899) 9 Q.L.J. 272, at p.278; Delane v. Hillcoat (1829) 9 B. & C.310, at p.313 (109 E.R. 115, at p.116]; Erskine May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 16th ed. (1957), p.214.

Does s.44(iv) of the Constitution refer only to an office of profit under the Crown in right of the Commonwealth?

At the time of the adoption of the Constitution, the British Crown was generally perceived to be one and indivisible(68). This perception was reflected in s.2 of the *Commonwealth of Australia Constitution Act* 1900 (Imp.) which expressly provided that the "provisions of this Act" - which included a section(69) setting out the Constitution - "shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom". In the context of that perception of the unity and indivisibility of the British Crown, the phrase "office of profit under the Crown" in s.44(iv) of the Constitution would have been understood, at the time of the establishment of the Commonwealth, as referring to any office of profit under the British Crown regardless of geographical location or distinctions between different governments within the then British Empire.

The words of par. (iv) of s.44 and of the final qualifying paragraph of the section (which relates to par.44(iv)) confirm that the reference to "the Crown" was intended to be understood in that broad general sense. If, for example, the reference to "the Crown" in s.44(iv) was intended to be read as a reference to the Crown in right of the Commonwealth only, the words "out of any of the revenues of the Commonwealth" in the sub-section would be surplusage. More important, the express provision in the final paragraph that par. (iv) "does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State" makes plain that the relevant words of par. (iv) were intended to be construed as prima facie applicable to an office of profit under the Crown regardless of whether the office in question related to the government of the Commonwealth or to the government of a State.

The development of the full independence and sovereignty of nations such as Australia, Canada and New Zealand which maintained their allegiance to the personal embodiment of the Crown of the United Kingdom made it inevitable that the common law recognize that the British Crown has a "distinct and independent" capacity in each of its relationships with the different polities which make up the Commonwealth(70). That development also compels the adjustment of

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(68) See, e.g., *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* ("the *Engineers' Case*") (1920) 28 C.L.R. 129, at p.152.

(69) s.9.

(70) See, e.g., *Reg. v. Foreign Secretary; Ex parte Indian Association of Alberta* (1982] Q.B. 892, at pp.928-935.

the content or operation of some of the provisions of the Constitution so that they accord with the realities of contemporary national sovereignty and international relationships(71). It is, however, unnecessary to pursue that subject for the purposes of the present case since it is apparent that no such adjustment could legitimately transform s.44(iv) from a provision which was clearly intended to encompass the holding of an office of profit under the Crown in right of either the Commonwealth or a State into one which applied only to the holding of an office of profit under the Crown in right of the Commonwealth.

Accordingly, the second submission advanced on behalf of Mr Cleary fails.

Did Mr Cleary hold an office of profit at the relevant time?

The writ for the by-election was issued by the Speaker of the House of Representatives(72) on 9 March 1992. Its command was addressed to Brian Field Cox, the Electoral Commissioner(73), and specified the following dates:

For the CLOSE OF THE ROLLS:	16 March 1992
For NOMINATION:	20 March 1992
For TAKING THE POLL:	11 April 1992
For the RETURN OF THE WRIT:	on or before 17 June 1992

In the event, those dates were all observed. The scrutiny and counting of votes commenced after the close of the poll on 11 April 1992. The counting of votes was completed on 22 April 1992 with the distribution of preferences to the stage where all candidates other than Mr Cleary and Mr Kardamitsis had been excluded(74). At that stage, Mr Cleary had a total of 41,708 votes which represented 65. 7% of the total number of unrejected or valid ballot-papers. On 23 April 1992, the Acting Divisional Returning Officer declared Mr Cleary to be elected as the member of the House of Representatives

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(71) See, e.g., *Nolan v. Minister for Immigration and Ethnic Affairs* (1988) 165 C.L.R. 178, at pp.185-186; *Street v. Queensland Bar Association* (1989) 168 C.L.R. 461, at pp.505, 525, 541, 554, 572.

(72) See Constitution, s.33.

(73) See the Electoral Act, ss.18, 21.

(74) See, generally, ibid., s.274(7).

for the Division of Wills(75). On the same day, the Acting Electoral Commissioner certified in writing on the writ the name of Mr Cleary as the elected candidate and returned the writ to the Speaker(76).

As has been mentioned, Mr Cleary resigned from the Victorian Education Department effective as from 16 April 1992. That means that he held an office of profit under the Crown at the time the writ for the by-election issued, at the time he was nominated as a candidate and at the times when voting in the by-election took place, when the poll closed and when the scrutiny and counting of votes commenced. On the other hand, he had relinquished any office of profit under the Crown a week before counting was completed by the distribution of preferences. The question arises whether, in those circumstances, s.44(iv)'s provision that a person who holds an office of profit under the Crown "shall be incapable of being chosen" as a member of the House of Representatives precluded Mr Cleary from being validly declared to be elected as such a member.

It is argued on behalf of the petitioner that the process of "being chosen" to which s.44(iv) refers is an ongoing one which commences with the nomination of candidates and finishes either when all votes have been cast on the day the poll is held or when the result of an election is declared and the writ is returned. Disqualification is incurred, so the argument proceeds, if a person holds an office of profit under the Crown at any time during the course of that process. In contrast, it is argued on behalf of Mr Cleary that the words "being chosen" are, in their context in s.44, synonymous with "being elected" and that, for the purposes of the section, a person is chosen or elected as a member of the House of Representatives only when counting is completed, the poll declared and the writ returned. Obviously, there is considerable force in each of those contending arguments. Ultimately, I have come to the conclusion that the words "incapable of being chosen" in s.44 should be construed as meaning not capable of becoming the chosen member by being declared elected at the termination of the election process. I turn to explain my reasons for that conclusion.

As a matter of mere language, the words "being chosen" are clearly capable of referring to the whole process of election commencing with nomination and finishing with either the declaration of the poll or the return of the writ ("the wide construction"). They are, however, also capable of being construed as referring to the declaration of the poll which represents the final step in the procedure for choosing the particular member of the Parliament ("the narrow construction"). Until that stage is reached and that final

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(75) ibid., s.284.

(76) See ibid., s.284(4).

step is taken, events can intervene which preclude the candidate who will, when counting is completed and preferences are (to the extent necessary) distributed, have an absolute majority of votes from ever being actually elected as a member of the House of Representatives. Most obviously, he or she can die. Alternatively, if a disqualifying event under s.44 of the Constitution intervenes, the disqualified person cannot be validly declared duly elected at a time when he or she is disqualified(77).

Considerations of content and of context seem to me to favour the narrow construction. The provisions of s.44 do not represent a code determining which citizens are and which citizens are not qualified to be elected to the Parliament. Legislative power to determine the qualifications of members of the Parliament is conferred upon the Parliament itself by virtue of the combined operation of ss.34, 51(xxxvi) and 16 of the Constitution. What s.44 does is to impose an overriding disqualification of any person who comes within its terms regardless of whether the Parliament thinks (or seeks to enact), in the context of contemporary circumstances and standards, *that disqualification is unjustified. Such an overriding disqualification provision should, in my* view, be construed as depriving a citizen of the democratic right to seek to participate directly in the deliberations and decisions of the national Parliament only to the extent that its words clearly and unambiguously require.

Moreover, in the construction of a constitutional provision such as s.44, "the purpose it seeks to attain must always be kept in mind" (78). That purpose is essentially to ensure that the composition of the Parliament is appropriate for the discharge in the national interest of its functions as the legislature of a free and independent nation under a Constitution which adopts the Cabinet or Westminster system of parliamentary democracy but is otherwise structured upon the doctrine of a separation of legislative, executive and judicial powers. As one would expect in the Constitution of a country whose population consisted (by 1900) largely of immigrants or the descendants of immigrants, the disqualification provisions of s.44 look solely to present allegiance, status and interests. Subject to one exception, the verbs of the section are all in the present tense: "is", "holds", "has", "does not". The exception is the critical verbal phrase which is in the future tense: "shall be incapable". Clearly, the section is directed to the imposition of minimum requirements which, regardless of the views of the Parliament, a citizen must satisfy during the period in which he or she is actually a senator or a member of the House of Representatives.

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(77) See, e.g., Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901), at p.491.

(78) *In re Webster* (1975) 132 C.L.R., per Barwick C.J. at p.278.

The rationale of the disqualification of a person from membership of the Commonwealth Parliament by reason of the holding of an office of profit under the Crown itself supports the narrow construction of the relevant words of s.44(iv). That rationale is that, subject to the important qualifications flowing from the adoption of the Cabinet system of government (79) , it is undesirable that a person be subjected to the possibly conflicting responsibilities and loyalties and the potential for abuse of power or opportunity which may be involved in, or flow from, concurrent membership of the national Parliament and the holding of an office of profit under the Crown. Implicit in it is a perception of the need to preserve the freedom and independence of the Parliament and to limit the control or influence of the executive government(80). None of those potential disadvantages or dangers arises until a person actually holds both positions, that is to say, until after he or she is declared elected as a member of the Parliament.

There are, of course, practical considerations which favour the preclusion of a person who is disqualified from becoming, or sitting as, a member of the Parliament from nominating as a candidate or having his or her name included on the ballot paper. It is however, arguable in relation to some of the disqualifying provisions of 5.44, that the preferable approach would be to permit nomination or even participation in the poll at least in circumstances where it is plain, or where it lies within the competence of the particular person to ensure, that a candidate will not be disqualified from being chosen as a member of the Parliament at the time when he or she will, if successful on the poll, be declared to be elected. Thus, as regards disqualification under 5.44 by reason of the holding of an office of profit under the Crown, it has long been recognized that it would be against the national interest and unfair, if the comparatively large percentage of the total employed population employed in the commonwealth or State Public Services(81) were able to stand as candidates for election to the national Parliament only if they completely forfeit the security and seniority of their respective appointments. Accordingly, one finds provision in both Commonwealth and State legislation aimed at enabling a public servant to resign his or her office to stand for Parliament while being assured that, in the event of not being elected, he or she will be entitled to(82), or

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(79) See Constitution, s.64.

(80) See, e.g., Erskine May, op.cit., pp.200-202.

(81) Currently, more than 10%: See Australian Bureau of Statistics, Canberra, March quarter 1992, ABS catalogue Nos 3101.0, 6248.0.

(82) See, e.g., *Public Service Act* 1922 (Cth), ss.47C, 82B.

entitled to seek(83), full reinstatement. There is surely much to be said for the view that a procedure such as the taking of leave without pay or other emoluments followed by resignation when it is apparent that the person concerned will ultimately be elected is a preferable one to the rather devious procedure of an ostensible termination of appointment in the context of a persisting relationship and entitlement to resume the appointment if unsuccessful at the poll(84). Certainly, it appears to me that, within the context of 5.44's disqualification of a person actually becoming, or sitting as, a member of the Parliament while holding an office of profit under the Crown, it should be competent for the Parliament to determine whether, and if so on what terms, a person holding such an office should be allowed to participate at all as a candidate in the electoral process. In that regard, it is relevant to note that the first Parliament of the Commonwealth considered it to be its function to address and determine the question whether a candidate should, at the time of nomination, be qualified under the Constitution to be actually elected as a member of the Parliament. Sections 94 and 95 of the *Commonwealth Electoral Act* of 1902 provided:

> "94. No person shall be capable of being elected as a Senator or a Member of the House of Representatives unless duly nominated.
>
> 95. To entitle a person to be nominated as a Senator or a Member of the House of Representatives he must be qualified under the Constitution to be elected as a Senator or a Member of the House of Representatives."

Section 162 of the current Electoral Act reproduces the old s.94. The old s.95 is not reproduced in the current legislation.

It should be mentioned that counsel for the petitioner placed considerable reliance upon the decision of the Queen's Bench Division (Wright and Bruce JJ.) in *Harford v. Linskey*(85). That case concerned a local election under the *Municipal Corporations Act* 1882 (U.K.) which provided in s.12 that a person interested in a contract with the corporation of the borough "shall be disqualified for being elected and for being a councillor". After the candidates had been

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(83) See, e.g., *The Constitution Act Amendment Act* 1958 (Vict.), 5.49.

(84) A procedure such as the latter one is arguably more objectionable in a case where the entitlement to resume the appointment is, as in the case of the Victorian legislation, subject to a government discretion.

(85) [1899] 1 Q.B. 852.

nominated, and before the polling day, an objection was lodged to the petitioner's nomination on the grounds that he was interested in such a contract. Notwithstanding the fact that the petitioner could have assigned his interest in the contract to a third party before polling day, the court upheld the objection and subsequent disqualification, declaring that it was "safest to hold" that "a person, who at the time of nomination is disqualified for election ... is disqualified also for nomination" (86).

The decision in *Harford v. Linskey* seems to me, however, to be remote from, and quite unpersuasive in relation to, the question of the proper construction of 5.44 of the Australian Constitution. For one thing, the relevant words of s.44(iv) differ from those which were in issue in the English case. For another, the wording of 5.44 was settled by the framers of the Constitution before the decision of the English Divisional Court and was adopted by the people *of five of the six Australian Colonies before any report of that decision would have been available* in this country. More important, "no real analogy" (87) can be drawn between the purpose and intended operation of a provision such as 5.44 of the Australian Constitution and a statutory provision, such as that involved in *Harford v. Linskey*, intended to regulate the conduct of a local government election. As Sedgwick pointed out in his classic text on constitutional construction(88):

> "Another consideration will impress itself still more forcibly on the minds of those who are called to consider questions connected with the interpretation of constitutional law. Statutes can and do enter into the details of our daily transactions; they can and do prescribe minute directions for the control of those affected by them. Constitutions, on the other hand, from the nature and necessity of the case, in many instances go little beyond the mere enunciation of general principles; and it is impossible, and would lead to endless absurdity, to endeavour to apply to a declaration of principles the same rules of construction that are proper in regard to an enactment of details. In regard to a statute, the general duty of the judge is that of a subordinate power, to ascertain and to obey the will of a superior; in regard to a constitution, his functions are those of a co-ordinate

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(86) ibid., at p.858.

(87) See *In re Webster* (1975) 132 C.L.R., per Barwick C.J. at pp.278-279.

(88) *The Interpretation and Construction of Statutory and Constitutional Law*, 2nd ed. (1980), p.417.

authority, to ascertain the spirit of the fundamental law, and so to carry it out as to avoid a sacrifice of those interests which it is designed to protect."

A local government provision such as that involved in *Harford v. Linskey* performs the function of prescribing the detailed procedures to be followed in respect of the local elections to which it applies. In contrast, 5.44 is, as has been mentioned, an overriding disqualification provision in a national Constitution which envisages and empowers the future enactment by the Parliament of legislation settling such detailed procedures(89). The considerations of practical convenience and of what is "safest" which influenced the English Divisional Court in *Harford v. Linskey* are appropriate to be taken into account by the Parliament in enacting, and by the courts in construing, such legislation. They do not, however, provide any basis whatever for an expansive construction of an overriding constitutional provision whose operation is effectively to confine the democratic rights of many citizens and to restrict the legislative powers of the Parliament.

It follows from what has been said above that s.44(iv)'s provision that a person who holds an office of profit under the Crown shall be incapable of being chosen as a member of the House of Representatives should be construed as applicable only to the case where a person holds such an office at the time when he or she becomes elected by the declaration of the poll. Otherwise, the extent, if at all, to which the holding of an office of profit under the Crown should preclude a citizen from being nominated or participating as a candidate in the electoral process is a matter for the Parliament. That being so, Mr Cleary was not disqualified by the operation of 5.44 of the Constitution.

The Electoral Act, ss.162 and 170(1)

No direct reference was made in the argument of the present case to the provisions of either ss.162 or 170(1) of the Electoral Act. It appears to me, however, that the question whether Mr Cleary was "duly elected" cannot be answered without reference to them. Relevantly, they provide:

> "162. No person shall be capable of being elected as a Senator or a Member of the *House of Representatives unless duly nominated.*
>
> ...

(89) See, e.g., Constitution, ss.29, 30, 31, 34.

170. (1) A nomination is not valid unless, in the nomination paper, the person nominated:

...

(b) declares that:

(i) the person *is* qualified under the Constitution ... to be elected as ... a member of the House of Representatives". (emphasis added)

The case stated does not set out the details of what appeared in Mr Cleary's nomination paper. Presumably, at the time of nomination, he believed that he was qualified under the *Constitution to be elected as a member of the House of Representatives and declared to that* effect in the nomination paper. The effect of what has been written above, however, is that he was not so qualified until he resigned his permanent appointment with the Education Department. In these circumstances, a question obviously arises whether he was "duly nominated" for the purposes of s.162. The answer to that question would seem to depend upon whether the provisions of s.170(1) are formal only, in the sense that their requirements will be satisfied and a person will be "duly nominated" for the purposes of s.162 if the nomination papers contain the necessary declaration notwithstanding that, by reason of innocent mistake, the declaration is erroneous.

If the outcome of the case depended upon my conclusion about whether Mr Cleary's election was invalidated by the combined operation of ss.162 and 170(1) of the Electoral Act, I should have thought it necessary to extend to the parties the opportunity of making submissions about the effect of those provisions in the circumstances of this case. A majority of the Court is, however, of the view that Mr Cleary was disqualified by the direct operation of s.44(iv) of the Constitution in any event. In these circumstances, it would obviously be a waste of time and money to invite such submissions. It would, however, be inappropriate for me to express a conclusion about the effect of ss.162 and 170(1) in circumstances where that particular question was not addressed in the argument of the case.

THE STATUS OF MR DELACRETAZ AND MR KARDAMITSIS

The question whether Mr Delacretaz and Mr Kardamitsis were disqualified by 5.44 of the Constitution only arises if the question whether Mr Cleary was disqualified is answered in the affirmative. If Mr Cleary was not disqualified, the fact that either or both of Mr Delacretaz and Mr Kardamitsis were would not have the effect that Mr Cleary's election was invalidated. However, in a context where my conclusion that Mr Cleary was not disqualified is subject to the possible effect of ss.162 and 170(1) of the Electoral Act and is, in any event, a dissenting one, it is appropriate that I indicate my views in relation to the status of Mr Delacretaz and Mr Kardamitsis.

The petitioner contends that Mr Delacretaz and Mr Kardamitsis each came, at relevant times, within s.44(i)'s disqualification of any person who "is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power". Obviously, and this was not disputed, those words must be read down to some extent. Otherwise, to take an extreme hypothetical example, it would lie within the power of a foreign nation to disqualify the whole of the Australian Parliament by unilaterally conferring upon all of its members the rights and privileges of a citizen of that nation. The reason why that is so is that s.44(i) refers only to being "entitled" to the rights or privileges of a subject or a citizen of a foreign power and not to the assertion or acceptance of those rights. The real question on this aspect of the case is how the words of the sub-section should be read down to avoid such obviously objectionable and unintended consequences.

Section 44(i)'s whole purpose is to prevent persons with foreign loyalties or obligations from being members of the Australian Parliament. The first limb of the sub-section (i.e. "is under *any acknowledgment of allegiance, obedience, or adherence to a foreign power*") involves an element of acceptance or at least acquiescence on the part of the relevant person(90). In conformity with the purpose of the sub-section, the second limb (i.e. "is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power") should, in my view, be construed as impliedly containing a similar mental element with the result that it applies only to cases where the relevant status, rights or privileges have been sought, accepted, asserted or acquiesced in by the person concerned. The effect of that construction of the sub-section is that an Australian-born citizen is not disqualified by reason of the second limb of s.44(i) unless he or she has established, asserted, accepted, or acquiesced in, the relevant relationship with the foreign power. The position is more difficult in a case such as the present where the relationship with the foreign power existed before the acquisition (or re-acquisition) of Australian citizenship. In such a case, what will be involved is not the acquisition or establishment, for the purposes of 5.44, of the relevant relationship with the foreign power but the relinquishment or extinguishment of it. It does, however, seem to me that the purpose which 5.44 seeks to attain and which "must always be kept in mind" (91) would not have included the permanent exclusion from participation at the highest level in the political life of the nation of any Australian citizen whose origins lay in, or who has had some past association with, some foreign country which asserts an entitlement to refuse to allow or recognize his or her genuine and unconditional renunciation of past allegiance or citizenship.

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(90) See *Nile v. Wood* (1988) 167 C.L.R. 133, at p.140.

(91) *In re Webster* (1975) 132 C.L.R., at p.278.

Accordingly, and notwithstanding that citizenship of a country is ordinarily a matter determined by the law of that country(92), the qualifying element which must be read into the second limb of 9.44(i) extends not only to the acquisition of the disqualifying relationship by a person who is already an Australian citizen but also to the retention of that relationship by a person who has subsequently become an Australian citizen. A person who becomes an Australian citizen will not be within the second limb of s.44(i) if he or she has done all that can reasonably be expected of him or her to extinguish any former relationship with a foreign country to the extent that it involves the status, rights or privileges referred to in the sub-section.

Mr Kardamitsis has been an Australian citizen since 12 March 1975 upon which day he surrendered his Greek passport to the Australian government and took an oath of allegiance that included the words "renouncing all other allegiance". Since then he has taken three further oaths of allegiance to this country, twice as a councillor and once as a Justice of the Peace. *Nonetheless, he remains a Greek national under the law of Greece.* Under that law, his Greek nationality will only be discharged if, in the words of the case stated, "he obtains the approval of the appropriate Greek Minister". The case has been argued on the basis that, apart from applying for that "approval", Mr Kardamitsis had, at relevant times, done all that he could do to relinquish and extinguish his Greek nationality and allegiance and the rights and privileges flowing from such nationality and allegiance.

The formal ceremony which culminated in the grant of Australian citizenship to Mr Kardamitsis included, as has been indicated, a public renunciation of allegiance to any country other than Australia and an oath of allegiance to the sovereign of this country. Involved in it was a clear representation by the Australian Government and people that, provided it was made genuinely and without reservation, that public renunciation and oath of allegiance constituted, for the purposes of the Constitution and other laws of this country, the final severing of formal national ties and the compliance with whatever requirements were necessary to become a full and equal member of this nation. In the context of that clear representation and of Mr Kardamitsis' subsequent years of Australian citizenship, it would not be reasonable to expect him now to make an application to a Greek Minister for the exercise of what would appear to be a discretionary power to approve or disapprove the discharge of the Greek nationality which he had unreservedly renounced in the manner specified by this country at the time he became an Australian citizen. Implicit in such an application would be an assertion of the continued existence of

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(92) See, e.g., *R. v. Burgess; Ex parte Henry* (1936) 55 C.L.R. 608, at pp.649, 673.

that Greek nationality and, more importantly, an acknowledgment of, and submission to, the discretionary authority of the relevant Greek Minister to decide whether it should or should not be discharged. In my view, Mr Kardamitsis had, on the material before the Court, done all that he could reasonably be expected to do for the purposes of the Constitution and laws of this country to renounce and extinguish his Greek nationality and any rights or privileges flowing from it. Accordingly, on that material, he had, for the purposes of s.44(i) of the Constitution, relinquished and extinguished his relationship with Greece to the extent that it would represent a cause of disqualification.

The status of Mr Delacretaz is more difficult. If the matter had been for me alone, I would have preferred to refrain from expressing a concluded view about it in circumstances where the material before the Court is somewhat sketchy and where Mr Delacretaz was not represented at the hearing. Since the other members of the Court have dealt with the question, however, it is desirable that I indicate that, in a context where the onus of establishing that an Australian citizen is disqualified by s.44(i) from full participation in the national government clearly rests on the person who asserts it, I do not think that the material before the Court is adequate to found a conclusion that Mr Delacretaz has not taken all reasonable steps to extinguish his Swiss citizenship and allegiance and to renounce any rights and privileges flowing from that citizenship.

Mr Delacretaz has now been an Australian citizen for more than thirty years. It is not suggested that, in all that time, he has done anything which constituted an assertion or acknowledgment of Swiss citizenship or allegiance or that he has been otherwise than completely and solely loyal to Australia. Nor, subject to the qualification mentioned below, is it suggested that he has not done all that he could reasonably be expected to do to extinguish Swiss citizenship and allegiance and to renounce any rights or privileges flowing therefrom. The qualification is that, under Swiss law, Mr Delacretaz remains a Swiss citizen. He must make a formal demand or request to the Swiss government before his citizenship will be released or terminated under that law. This he has failed to do.

The case of Mr Delacretaz differs from that of Mr Kardamitsis in that the material before the Court indicates that Mr Delacretaz is, under Swiss law, entitled to be released from Swiss citizenship if, as is the case, he has no residence in Switzerland and has acquired another nationality. There is no ministerial discretion involved. That material does not, however, disclose the precise procedure to be followed in making the relevant demand or request for extinguishment of Swiss citizenship or whether that demand or request involves, as one would expect it to, an at least implicit assertion or acknowledgment of the continued existence of the obligations of that citizenship. Such an assertion or acknowledgment would, in my view, be inconsistent with the public and unqualified renunciation of allegiance to any country other than Australia which Mr Delacretaz

made as part of the formal ceremony pursuant to which he became an Australian citizen.

It must be stressed that the question whether Mr Delacretaz has taken all reasonable steps to terminate Swiss citizenship and allegiance is not being asked for the purposes of Swiss law. It is being asked for the purposes of the Australian Constitution. Nonetheless, if Mr Delacretaz had become an Australian citizen only yesterday, I would have been of the view that it was reasonable to expect that he take the formal steps necessary to terminate his Swiss citizenship under Swiss law. However, in a context where more than thirty years of Australian citizenship have followed a public renunciation of allegiance to any country other than Australia and the swearing of an unqualified oath of allegiance to the Sovereign of this country in full compliance with the procedures required by the Australian authorities, it appears to me that it would be quite wrong to conclude that, for the purposes of our law, Mr Delacretaz should now be expected to assert or acknowledge the existence of Swiss citizenship so that it can be terminated for the purposes of Swiss law. On the material before the court, Mr Delacretaz had, by the time of the by-election, done all that could reasonably be expected of him, for the purposes of the law of this country, to terminate any ties with any country other than Australia. Accordingly, he was not disqualified by s.44(i) of the Constitution.

CONCLUSION

I would answer question (a) of the case stated as follows:

Subject to the possible effect of ss.162 and 170(1) of the *Commonwealth Electoral Act* 1918 (Cth), the first respondent was duly elected at the by-election.

In view of the answer which I would give to question (a), it is inappropriate that I answer questions (b) and (c). The parties are agreed that question (d), which relates to costs, should not be answered.

DAWSON J. I agree with Mason, C.J., Toohey and McHugh JJ., for the reasons which they give, that the first respondent was, until he resigned his position as a teacher in the Victorian teaching service, the holder of an office of profit under the Crown within the meaning of s.44(iv) of the Constitution and that he was, therefore, incapable of being chosen as a member of the House of Representatives in the by-election for the Electoral Division of Wills. I also agree with Mason C.J., Toohey and McHugh JJ., for the reasons which they give, that, as a result, the by-election should be declared absolutely void under s.360(1) (vii) of the *Commonwealth Electoral Act* 1918 (Cth).

I desire only to add some comments on the position of the second and third respondents.

At common law, whether or not a person is a subject or citizen of a foreign State is a question that is generally to be determined by reference to the municipal law of that foreign State(93). The International Court of Justice held in the *Nottebohm Case*(94) that where there are competing claims made under different municipal laws, the nationality to be attributed to a person as a matter of international law is his "real and effective nationality", this being determined by the "stronger factual ties between the person concerned and one of the States whose nationality is involved" (95). The test under international law does not, however, assist in the present case which involves the proper construction of s.44(i) of the Constitution. I agree with Mason C.J., Toohey and McHugh JJ., and with Brennan J., that s.44(i) should not be given a construction that would unreasonably result in some Australian citizens being irremediably incapable of being elected to either House of the Commonwealth Parliament.

Putting to one side extreme examples of foreign nationality or citizenship being foisted upon persons against their will, a person who is a subject or citizen of a foreign State by virtue of the

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(93) See *R. v. Burgess; Ex parte Henry* (1936) 55 C.L.R. 608, per Latham C.J. at p.649, Dixon J. at p.673; *Oppenheimer v. Cattermole* (1976) A.C. 249, per Lord Hailsham of St. Marylebone at pp.261-262, Lord Pearson at p.265, Lord Cross of Chelsea at p.267, Lord Salmon at p.282; *Stoeck v. Public Trustee* [1921) 2 Ch. 67, per Russell J. at p.82. See also the *Nottebohm case (Liechtenstein v. Guatemala)* [1955) I.C.J. 4, at pp.20, 23; Art.2 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws, 12 April 1930, 179 *League of Nations Treaty Series* 89.

(94) [1955] I.C.J., at pp.22-24.

(95) ibid., at p.22.

municipal law of that State will not be incapable of being chosen or of sitting as a senator or a member of the House of Representatives if he has taken all steps that could reasonably be taken to renounce that foreign nationality or citizenship. What is reasonable will depend upon the circumstances of the case. It will depend upon such matters as the requirements of the foreign law for the renunciation of the foreign nationality, the person's knowledge of his foreign nationality and the circumstances in which the foreign nationality was accorded to that person. Thus the refusal of a foreign authority to exercise a discretion to allow a person to relinquish his foreign nationality need not necessarily preclude the person from being capable of being chosen or of sitting as a senator or a member of the House of Representatives. Further, if the foreign law does not permit a person to relinquish his foreign nationality then there are obviously no steps, save for unilateral renunciation, which that person can reasonably take to do so and, therefore, that person will not be precluded by reason only of that foreign nationality from being capable of being chosen or of sitting as a member of either House of the Commonwealth Parliament.

There is no dispute that, under Swiss law, the second respondent was at all relevant times a citizen of Switzerland or that, under Greek law, the third respondent was at all relevant times a Greek national. When the second and third respondents became Australian citizens they renounced their allegiance to their former countries but this did not result in their foreign nationality being relinquished under the law of those countries. There were steps which both the second and third respondents could reasonably have taken under the laws of those countries in order to relinquish their foreign nationality in accordance with those laws. I agree, therefore, that the second and third respondents were incapable of being chosen as members of the House of Representatives in the Wills by-election.

For these reasons I would answer the questions reserved in the manner proposed by Mason C.J., Toohey and McHugh JJ.

GAUDRON J. I agree with Mason C.J., Toohey and McHugh JJ., for the reasons that their Honours give, that the first respondent was incapable of being chosen as a member of the House of Representatives in the 1992 Wills by-election and that by-election should be declared absolutely void. Accordingly, I would answer the questions reserved in the case stated in the manner proposed by their Honours.

It is appropriate that I state my views as to s.44(i) of the Constitution in its application to the second and third respondents. That subsection prevents the election to either House of the Parliament of "[a]ny person who ... [i]s under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power". It is said that the second and third respondents are, respectively, citizens of Switzerland and of Greece or entitled to the rights and privileges of citizens of those countries because their laws recognize them as their citizens.

The facts concerning the second and third respondents are set out in the joint judgment of Mason C.J., Toohey and McHugh JJ. It is necessary only to observe that they are Australian citizens, each having been naturalized after migrating from the country of his birth: the second respondent, Mr Delacretaz, was naturalized on 20 April 1960 pursuant to the *Nationality and citizenship Act* 1948 (Cth) ("the 1948 Act") as it then stood; Mr Kardamitsis, the third respondent, was naturalized on 12 March 1975 pursuant to the *Australian citizenship Act* 1948 (Cth) ("the Citizenship Act") as the 1948 Act had then become.

It is convenient to turn first to the position of Mr Kardamitsis. In 1975, when he was naturalized, the Citizenship Act provided for the acquisition of Australian citizenship by naturalization, taking effect, in the case of those who were required to take an oath or make an affirmation of allegiance, from the taking of that oath or the making of that affirmation and, in other cases, from the date on which the Minister granted a certificate of Australian citizenship(96). Mr Kardamitsis fell into the first category and he swore or affirmed his allegiance - it is not clear which - as then required by the Citizenship Act.

When Mr Kardamitsis was naturalized, the oath of allegiance was to be sworn or the affirmation made "in the manner provided ... and

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(96) Section 15(1). The persons who were not required to take an oath or make an affirmation comprised children included on the certificate of naturalization of a parent or guardian, persons who were under sixteen years of age and those falling within s.14(2), namely persons whose parents were Australian citizens.

in accordance with the form contained in Schedule 2" (97). Nothing presently turns on the requirements as to the manner of taking the oath or making the affirmation. The oath and affirmation set out in Sched.2(98), commenced with these words:

> "I, A.B., renouncing all other allegiance, swear/solemnly and sincerely promise and declare

The form of oath and affirmation required by the citizenship Act, as it stood in 1975, was introduced in 1966 when s.11 of the *Nationality and Citizenship Act* 1966 (Cth) ("the 1966 Act") amended the Second Schedule to the 1948 Act "by inserting after the letters 'A. B. ... the words 'renouncing all other allegiance'". At the same time, s.12 of the 1966 Act introduced the Third schedule containing the form of oath and affirmation required in the case of women wishing to be registered as British subjects without citizenship(99). That also involved the renunciation of all other allegiance. The Second and Third Schedules which were then enacted were substantially re-enacted as Sched.2 and Sched.3 in 1973 when extensive amendments resulted in the transformation of the 1948 Act into the Citizenship Act. Schedule 3 was repealed in 1984(100). The renunciation of all other allegiance remained part of the oath and affirmation required for naturalization until 1986(101).

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(97) s.15(1) of the Citizenship Act.

(98) Note that, by s.13(2) of the *Acts Interpretation Act* 1901 (Cth), the Schedule is deemed to form part of the Act.

(99) Section 9 of that Act introduced s.26A which provided for the registration as a British subject without citizenship of the wife of such a subject.

(100) s.37 of the *Australian Citizenship Amendment Act* 1984 (Cth).

(101) s.11 of the *Australian Citizenship Amendment Act* 1986 (Cth).

As at 1975 - indeed, from the enactment of the 1948 Act - the Citizenship Act made provision for the renunciation of Australian citizenship(102). However, apart from the forms of oath and affirmation introduced in 1966 and substantially re-enacted in 1973, it was silent, as it had been since 1948, with respect to the renunciation by an Australian citizen of his or her allegiance to a foreign country.

One other feature should be observed with respect to the Citizenship Act as it stood in 1975. It provided, in s.17, that:

> "An Australian citizen of full age and of full capacity, who, whilst outside Australia and New Guinea, by some voluntary and formal act, other than marriage, acquires the nationality or citizenship of a Country other than Australia, shall thereupon cease to be an Australian citizen."

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(102) Section 18 provided for declarations renouncing Australian citizenship to be made in the following situations: where the person was a foreign national and that nationality was acquired at birth, before a particular age or by marriage (s.18(1)); where the person became an Australian citizen by reason of the inclusion of his or her name in the certificate of Australian citizenship of his or her parents or guardian (s.18(2)); where a woman acquired the foreign nationality of her husband after he had ceased to be an Australian citizen (s.18(3)); where a person was born or ordinarily resident in a foreign country and was not entitled under the law of that country to its citizenship by reason of his or her Australian citizenship (s.18(3A)). Subject to exceptions during wartime and to prevent statelessness (s.18(5), (6)), the Minister had to register a declaration and thereupon the person making it ceased to be an Australian citizen (s.18(4)). Section 18 of the 1948 Act was to similar effect. Section 18 of the Citizenship Act as it currently stands provides for a declaration of renunciation of citizenship where an Australian citizen over the age of 18 is also a foreign national or was born or is ordinarily resident in a foreign country and is not entitled under the law of that country to acquire its citizenship by reason of his or her Australian citizenship (s.18(1)). The Minister must, subject to subsections (5), (5A) and (6), register the declaration (s.18(4)). Subsection 5A provides that the Minister shall not register the declaration if she or he considers that it would not be in the best interests of Australia to do so.

The current position is much as it was in 1975, although it is not restricted to acts done outside Australia(103). And there has been provision to the same general effect at least since 1920 when the *Nationality Act* 1920 (Cth) provided, in s.21, that:

> "A British subject who, when in any foreign state and not under disability, by obtaining a certificate of naturalization or by any other voluntary and formal act, becomes naturalized therein, shall thenceforth be deemed to have ceased to be a British subject."

It is generally accepted that, at common law, a person could have dual citizenship or allegiance(104). Of course, the common law has been modified to the extent that statute law now provides and, at least since 1920, has provided for the loss of Australian citizenship (in which I include the status of British subject which we had prior to citizenship) by the acquisition of foreign citizenship.

It is also generally accepted that, at common law, the question whether, for the purposes of municipal law, a person is a citizen or subject of a foreign country (more precisely, whether he or she is to be treated as such) is, as a general rule, to be answered by reference to the law of the country concerned(105). That approach is understandable if foreign citizenship has no consequences for citizenship of the country whose courts are considering the matter or for the rights ordinarily attaching to citizenship of that country. But our legal system is not of that kind. As has been seen, it has been the case, at least since 1920, that Australian citizenship can be lost by the acquisition of foreign citizenship. And as appears from this case, it has been the position since 1901 that an Australian citizen (including a British subject as we used to be) has been incapable of being chosen or of sitting as a member of either House of the parliament if he or she is a citizen of a foreign country or otherwise comes within s.44(i) of the Constitution.

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(103) See s.17 of the Citizenship Act as it currently stands.

(104) See, with respect to the common law of England, *Oppenheimer v. Cattermole* [1976] A.c. 249, at pp.263-264, 278-279; *Kramer v. Attorney-General* [1923] A.C. 528, at p.537.

(105) See, as to the position in Australia, *R. v. Burgess; Ex parte Henry* (1936) 55 C.L.R. 608, at pp.649, 673; *Ex parte Korten* (1941) 59 W.N.(N.S.W.) 29, at p.30. See, as to the position in the United Kingdom, *Oppenheimer v. Cattermole* [1976] A.C., at pp.261-262, 266-267, 282; *Stoeck v. Public Trustee* [1921] 2 Ch. 67, at p.82.

There is nothing novel in the proposition that & municipal court may, on grounds of public policy, refuse to apply the law of another country, even in cases where, according to the municipal law, the matter in issue is governed by the law of that other country(106) Thus, it has been said, for example, that a court will not apply a foreign citizenship law which does not conform with established international norms(107) or which involves gross violation of human rights(108). And if the question be whether Australian citizenship has been lost or the rights ordinarily attaching to Australian citizenship have been excluded, every consideration of public policy and commonsense tells against the automatic recognition and application of foreign law as the sole determinant of that matter. However, that need not be considered in the case of Mr Kardamitsis. His position, in my view, is governed by the Citizenship Act, as it stood in 1975.

It cannot be supposed that, in enacting the form of oath and affirmation introduced in 1966 and in substantially re-enacting it in 1973, the Parliament intended that the formal renunciation of all other allegiance, notwithstanding that it was solemnly sworn or affirmed, should be entirely devoid of legal effect. Particularly is that so in a statutory context in which real limits were imposed on dual citizenship and a right to renounce Australian citizenship – albeit one that was circumscribed(109) – was expressly recognized.

Of course, an Australian naturalization law providing for the renunciation of foreign citizenship could not, of itself, affect the position of a naturalized Australian under the law of the

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(106) See, generally, *Attorney General (United Kingdom) v. Heinemann Publishers Australia Pty. Ltd.* (1988) 165 C.L.R. 30, at pp.49-50; *Vervaeke v. Smith* [1983] 1 A.C. 145, at p.164; *Settebello Ltd. v. Banco Totta and Acores* [1985] 1 W.L.R. 1050, at pp.1056-1057; *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.* [1986) A.C. 368, at p.434.

(107) *Oppenheimer v. Cattermole* [1976] A.C., at p.277.

(108) ibid., at pp.278, 282-283. See also, as to the circumstances in which a municipal court may refuse to apply a foreign citizenship law during wartime on the grounds of public policy, *R. v. The Home Secretary; Ex parte L.* [1945] K.S. 7, at p. 10; *Lowenthal v. Attorney General* (1948) 1 All E.R. 295, at p.299.

(109) See, supra, fn.(102).

country whose citizenship he or she renounced. And s.44(i) of the Constitution may impose limits on the power to legislate with respect to foreign citizenship. But putting the constitutional question aside for the moment, the Parliament could enact a law to the effect that foreign law should not be decisive of the question whether, for the purposes of Australian law, a naturalized Australian should be treated as a citizen of another country.

In a context in which the Citizenship Act, as it stood in 1975, made provision for the automatic loss of Australian citizenship on the acquisition of foreign citizenship in the circumstances set out in s.17 and for the effective renunciation of Australian citizenship, the requirement that an oath be sworn or an affirmation made renouncing all other allegiance necessarily carried, in my view, the implication that foreign law was not to be decisive of the question whether a naturalized Australian who had renounced foreign citizenship was to be treated as a citizen or as entitled to the rights and privileges of a citizen of the country then renounced. And, in my view, that same context disclosed, also as a matter of necessary implication, the extent to which regard was to be had to the law of that country if that question should arise.

Section 17 of the Citizenship Act, as it stood in 1975, placed real limits on, but by no means constituted a complete bar to, dual citizenship. It did not, for example, operate by reference to citizenship acquired by birth. There was, thus, nothing to preclude Mr Kardamitsis from being a Greek citizen by birth and an Australian citizen by naturalization. In that context and on the basis that the renunciation of his allegiance to Greece was intended to have some legal effect, the effect of the Citizenship Act, as it then stood, could only have been that the question of his Greek citizenship or his entitlement to the rights and privileges of a Greek citizen, if it arose under Australian law, was to be determined by reference to Greek law if, after renouncing that allegiance, he, in some way, reasserted citizenship of Greece, but otherwise was to be answered on the basis that it had been effectively renounced. Unless approached in that way, the oath and affirmation required by the Citizenship Act in 1975 (indeed, from 1966 to 1986) and which operated to confer Australian citizenship, was, to the extent that it involved renunciation of all other allegiance, but an empty gesture.

It is necessary to deal with two matters to which some reference has already been made. The first is the question whether, in the light of s.44(i) of the Constitution, Parliament may validly legislate to the effect that I have said is necessarily to be implied from the terms of the Citizenship Act, as it stood in 1975. It cannot be the case that, for the purpose of s.44(i), the question of foreign citizenship or entitlement to the rights and privileges of foreign citizenship is one that is invariably to be answered by the application of foreign law for, as Deane J. points out, in that event a foreign power could disable the Parliament by conferring citizenship

on all its members. But, in my view, the solution is not to be found in reading down s.44(i): rather, it lies in examination of the circumstances in which foreign law should be applied to determine questions arising under the subsection. And, on the same basis, the question of legislative power is one which requires identification of the circumstances in which foreign law may be disregarded. Whatever limits on legislative power are imported by s.44(i), it does not, in my view, limit the power of Parliament to provide to the effect that, if prior foreign citizenship has been renounced in compliance with Australian law, the law of the country concerned should not be applied for any purpose connected with Australian law, including the determination of any question arising under s.44(i) itself, unless that prior citizenship has been reasserted.

The second matter concerns the amendment of Sched.2 in 1986(110), removing the renunciation of other allegiance from the oath and affirmation of allegiance required for naturalization. once it is accepted that the Citizenship Act, as it stood in 1915, involved a directive to the effect already indicated, it follows that, for all purposes of Australian law, Mr Kardamitsis had a right to have any question of his Greek citizenship or his entitlement to the rights and privileges of a Greek citizen determined on the basis that citizenship was effectively renounced and that, only if he reasserted it in some way, would the question be answered by reference to Greek law. By virtue of s.8(c) (111) of the *Acts Interpretation Act* 1901 (Cth) that right was not affected by the amendment of Sched.2 in 1986.

The material does not reveal anything which suggests that Mr Kardamitsis has, in any way, reasserted citizenship of Greece. Given that what is at stake is the right to participate in the democratic process as a member of Parliament – a right ordinarily attaching to citizenship – the onus of establishing that he did anything of that kind must lie on the party asserting it (112).

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(110) See, supra, fn.(101).

(111) Section 8(c) provides that "[w]here an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not ... affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed". Also note that by s.13(2) the Schedule is deemed to be part of the Act.

(112) See, with respect to the onus and standard of proof in United States denaturalization proceedings, *Schneiderman v. United States* (1943) 320 U.S. 118; *Klaprott v. United States* (1949) 335 U.S. 601; *Kungys v. United States* (1988) 485 U.S. 759.

That being so, for the purposes of s.44(i) of the constitution, Mr Kardamitsis is neither a Greek citizen nor a person entitled to the rights and privileges of a Greek citizen.

The provisions of the 1948 Act under which Mr Delacretaz was naturalized were different in a number of respects from those in the *Citizenship Act*, as it stood in 1975. Importantly, and as already indicated, the oath or affirmation of allegiance required by the 1948 Act, as it stood in 1960, did not involve the renunciation of prior allegiance. Despite this, Mr Delacretaz, in fact, formally renounced all other allegiance as a preliminary to taking the oath which resulted in his naturalization(113).

It appears from the second reading speech for the *Nationality and Citizenship Act* 1966 (Cth) (which introduced the form of oath and affirmation involving renunciation of all other allegiance) that, for some time past, there had been a "practice of requiring applicants to renounce allegiance to their former countries" in "a prominent and separate part of the naturalisation ceremony" (114). *It is clear from Mr Delacretaz' naturalization certificate that is what happened* in his case.

As already indicated, the issue that arises with respect to s.44(i) is, in my view, whether and to what extent foreign law should determine its effect in any particular situation. Given its terms and purpose, regard must, I think, be had to foreign law in any case where nothing has been done to renounce foreign citizenship or, if renounced, it has, in some way, been reasserted. But, again because of its terms and purpose, regard should not be had to foreign law if reasonable steps have been taken to renounce other allegiance, save, of course, where reasserted. Leaving reassertion aside, where reasonable steps have been taken to renounce foreign allegiance, questions arising under s.44(i) should, in my view, be answered on the basis that those steps achieved their purpose. That approach involves no reading down of s.44(i), although it may have the same result: rather, it is to spell out the process involved in determining its effect in a particular case.

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(113) Under s. 16(1) of the 1948 Act, as it stood in 1960, naturalization took place as from the date of taking of the oath or affirmation in the case of persons over the age of sixteen unless they had been included on the naturalization certificate of a parent or guardian.

(114) House of Representatives, *Parliamentary Debates (Hansard)*, 31 March 1966, p.833.

Whether s.44(i) be read down or whether it be approached in the way that I favour, the question whether reasonable steps have been taken is a question for Australian law. It may involve some consideration of the content of the law of the country whose citizenship is in question, but the main consideration must be the circumstances of the person concerned.

As has already been mentioned, Mr Delacretaz formally renounced all other allegiance, having been required to do so as a condition of naturalization. Whether that condition was authorized by the 1948 Act, as it stood in 1960, need not be considered; it must be presumed that, in complying with that condition, Mr Delacretaz thought he was engaging in a meaningful act in the sense that, at least for the purposes of Australian law, that act would achieve its object. What he might have thought with respect to his position under Swiss law is not material, for this case is concerned only with his position under Australian law.

The material reveals that, under Swiss law, Mr Delacretaz will be released from Swiss citizenship if he so demands and if, as is the case, he has no residence in Switzerland and has acquired another nationality. The materials do not disclose whether that has always been the position. Nor do they reveal what, if anything, Mr Delacretaz knew or believed the position to be. But, even assuming that he could at any stage obtain an automatic release from his Swiss citizenship and that he knew that to be the case, it does not seem to me to be reasonable to expect him to seek release when it necessarily involves acknowledgment of citizenship that has already been formally renounced. That being so, Mr Delacretaz, by formally renouncing all other allegiance as a preliminary to naturalization and as part of the naturalization ceremony, must be held to have taken reasonable steps to renounce his Swiss citizenship.

There is nothing to suggest that Mr Delacretaz has done anything to reassert Swiss citizenship. That being so and having regard to what was said in relation to Mr Kardamatsis with respect to the onus of proof, Mr Delacretaz is neither a Swiss citizen nor entitled to the rights and privileges of a Swiss citizen for the purposes of s.44(i) of the Constitution.

APPENDIX 6

NOMINATION CHECKLISTS

NOMINATION OF SENATORS

(Group nomination endorsed by more than one party)

NOTE: 1 Information on this form is collected under provisions of the *Commonwealth Electoral Act 1918.*

This form will be publicly produced on nomination day and may be inspected by any member of the public, in accordance with the *Commonwealth Electoral Act 1918.*

NOTE: 2 A person must not make a false or misleading statement or leave out details which would make a statement misleading on a nomination form.

PENALTY: Imprisonment for 6 months.

Nomination Checklist

Have you included the following information on this form?

- ☐ name of State/Territory for which you are nominating

Part A (for candidates nominated/endorsed by registered parties)

- ☐ names of registered officers/deputy registered officers
- ☐ indicated registered officer or deputy registered officer
- ☐ names of registered parties
- ☐ party names or party abbreviations request
- ☐ signatures of registered officers/deputy registered officers

Part B (for candidates nominated by 6 electors)

- ☐ signatures and full details of at least 6 electors

Part C (order of candidates)

- ☐ list of candidates in order

***Part D** (composite name)*

- ☐ composite name for ballot paper

Part E (contact details)

- ☐ contact name and numbers for the group

Part F (candidate's particulars)

- ☐ full name
- ☐ form of name to appear on ballot paper
- ☐ residential address, occupation and sex
- ☐ contact details
- ☐ candidate's declaration - citizenship details
  - other questions answere
  - signature and date
- ☐ candidates' deposits enclosed ($500 in cash or bankers cheque for each candidate

Section 44 of *The Constitution* of the Commonwealth of Australia

Any person who -

(i.) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or

(ii.) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or

(iii.) Is an undischarged bankrupt or insolvent: or

(iv.) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

(v.) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

NOMINATION OF SENATORS

(Group nomination)

NOTE: 1 Information on this form is collected under provisions of the *Commonwealth Electoral Act 1918.*

This form will be publicly produced on nomination day and may be inspected by any member of the public, in accordance with the *Commonwealth Electoral Act 1918.*

NOTE: 2 A person must not make a false or misleading statement or leave out details which would make a statement misleading on a nomination form.

PENALTY: Imprisonment for 6 months.

Nomination Checklist

Have you included the following information on this form?

- ☐ name of State/Territory for which you are nominating

Part A (for candidates nominated/endorsed by a registered party)

- ☐ name of registered officer/deputy registered officer
- ☐ indicated registered officer or deputy registered officer
- ☐ name of registered party
- ☐ party name or party abbreviation request
- ☐ *signature of registered officer/deputy registered officer*

Part B (for candidates nominated by 6 electors)

- ☐ signatures and full details of at least 6 electors

Part C (order of candidates)

- ☐ list of candidates in order

Part D (contact details)

- ☐ contact name and numbers for the group

Part E (candidate's particulars)

- ☐ full name
- ☐ *form of name to appear on ballot paper*
- ☐ residential address, occupation and sex
- ☐ contact details
- ☐ party name choice for ballot paper (if applicable)
- ☐ candidate's declaration - citizenship details
  - other questions answered
  - signature and date
- ☐ candidates' deposits enclosed ($500 in cash or bankers cheque for each candidate)

Section 44 of *The Constitution* of the Commonwealth of Australia

Any person who -

(i.) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or

(ii.) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or

(iii.) Is an undischarged bankrupt or insolvent: or

(iv.) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

(v.) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

NOMINATION OF A SENATOR

(Single nomination)

NOTE: 1 Information on this form is collected under provisions of the *Commonwealth Electoral Act 1918*.

This form will be publicly produced on nomination day and may be inspected by any member of the public, in accordance with the *Commonwealth Electoral Act 1918*.

NOTE: 2 A person must not make a false or misleading statement or leave out details which would make a statement misleading on a nomination form.

PENALTY: Imprisonment for 6 months.

Nomination Checklist

Have you included the following information on this form?

- ☐ name of State/Territory for which you are nominating

Part A (for candidates nominated/endorsed by a registered party)

- ☐ name of registered officer/deputy registered officer
- ☐ indicated registered officer or deputy registered officer
- ☐ name of registered party
- ☐ name of candidate
- ☐ party name or party abbreviation request
- ☐ signature of registered officer/deputy registered officer

Part B (for candidates nominated by 6 electors)

- ☐ name of candidate
- ☐ signatures and full details of at least 6 electors

Part C (candidate's particulars)

- ☐ full name
- ☐ form of name to appear on ballot paper
- ☐ residential address, occupation and sex
- ☐ contact details
- ☐ independent/party name choice for ballot paper
- ☐ candidate's declaration - citizenship details
  - other questions answere
  - signature and date
- ☐ indicated whether or not Voting Ticket will be lodgec (incumbent Senators only)
- ☐ candidate's deposit enclosed ($500 in cash or bankers choque)

Voting Tickets

If you are an incumbent Senator you may lodge up to 3 Voting Tickets. These will be displayed on a poster, in ballot paper order, at polling places. If you lodge 2 or 3 Voting Tickets, they will be grouped together on the poster in an order specified by you.

The Voting Ticket(s) must be:

- lodged within 24 hours of the close of nominations;
- lodged with the Australian Electoral Officer for the State/Territory; and
- signed by the candidate.

Section 44 of *The Constitution* of the Commonwealth of Australia

Any person who -

(i.) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or

(ii.) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or

(iii.) Is an undischarged bankrupt or insolvent: or

(iv.) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

(v.) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

NOMINATION OF MEMBERS OF THE HOUSE OF REPRESENTATIVES

(Bulk nomination)

NOTE: 1 If a registered officer or a deputy registered officer nominates a party's endorsed candidates for the House of Representatives to the Australian Electoral Officer, no nomination of any other candidates endorsed by that party should be made to a Divisional Returning Officer within that State or Territory.

If a nomination for another candidate endorsed by the same party is lodged with a Divisional Returning Officer all the party's nominations made to the Australian Electoral Officer under section 167(3) of the *Commonwealth Electoral Act 1918* will be rejected (section 172 CEA).

NOTE: 2 Information on this form is collected under provisions of the *Commonwealth Electoral Act 1918.*

This form will be publicly produced on nomination day and may be inspected by any member of the public, in accordance with the *Commonwealth Electoral Act 1918.*

NOTE: 3 A person must not make a false or misleading statement or leave out details which would make a statement misleading on a nomination form.

PENALTY: Imprisonment for 6 months.

Have you included the following information on this form?

- ☐ nomination includes **ALL** the party's House of Representatives endorsed candidates

Part A (details of nomination by a registered party)

- ☐ name of registered officer/deputy registered officer
- ☐ indicated whether registered officer or deputy registered officer
- ☐ name of registered party
- ☐ party name or party abbreviation request
- ☐ signature of registered officer/deputy registered officer
- ☐ list of candidates

Part B (candidate's particulars)

- ☐ name of Division for which you are nominating
- ☐ full name
- ☐ form of name to appear on ballot paper
- ☐ residential address, occupation and sex
- ☐ contact details
- ☐ name of party endorsing
- ☐ candidate's declaration - citizenship details
  - other questions answered
  - signature and date
- ☐ candidates' deposits enclosed ($250 in cash or bankers cheque for each candidate)

Section 44 of *The Constitution* of the Commonwealth of Australia

Any person who -

(i.) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or

(ii.) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; or

(iii.) Is an undischarged bankrupt or insolvent: or

(iv.) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; or

(v.) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

NOMINATION OF A MEMBER OF THE HOUSE OF REPRESENTATIVES

(Single nomination)

NOTE: 1 Information on this form is collected under provisions of the *Commonwealth Electoral Act 1918.*

This form will be publicly produced on nomination day and may be inspected by any member of the public, in accordance with the *Commonwealth Electoral Act 1918.*

NOTE: 2 A person must not make a false or misleading statement or leave out details which would make a statement misleading on a nomination form.

PENALTY: Imprisonment for 6 months.

Have you included the following information on this form?

- ☐ name of Division for which you are nominating

Part A (for candidates nominated/endorsed by a registered party)

- ☐ name of registered officer/deputy registered officer
- ☐ indicated whether registered officer or deputy registered officer
- ☐ name of registered party
- ☐ name of candidate
- ☐ party name or party abbreviation request
- ☐ signature of registered officer/deputy registered officer

Part B (for candidates nominated by 6 electors)

- ☐ name of candidate
- ☐ signatures and full details of at least 6 electors

Part C (candidate's particulars)

- ☐ full name
- ☐ form of name to appear on ballot paper
- ☐ residential address, occupation and sex
- ☐ contact details
- ☐ independent/party name choice for ballot paper
- ☐ candidate's declaration
  - citizenship details
  - other questions answered
  - signature and date
- ☐ candidate's deposit enclosed ($250 in cash or bankers cheque)

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(i.) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or

(ii.) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or

(iii.) is an undischarged bankrupt or insolvent: or

(iv.) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

(v.) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

APPENDIX 7

SELECTED SUBMISSIONS

Submission 13 dated 26 June 1992 from the AEC

Submission 23 dated May 1991 from the AEC

Submission 24 dated 3 November 1992 from the AEC

Submission 26 dated 12 November 1992 from the AEC

Submission 28 dated 19 November 1992 from the Council on the Ageing

Australian Electoral Commission AEC

Submission No 13.

In reply please quote

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Ms J Middlebrook
Secretary
Joint Standing Committee
on Electoral Matters
Parliament House
CANBERRA ACT 2600

Dear Ms Middlebrook

THE CONDUCT OF THE 1990 FEDERAL ELECTION PART II AND PREPARATIONS FOR THE NEXT FEDERAL ELECTION

Thank you for your letter of 26 May 1992 inviting a submission from the Australian Electoral Commission in respect of the Committee's inquiry into the matters referred to above.

The submission has been prepared and is attached. We look forward to assisting the Committee further with its inquiry, should that be desired.

Yours sincerely

B Cox
Electoral Commissioner

26 June 1992

PART 1

THE PROGRESS THE AUSTRALIAN ELECTORAL COMMISSION HAS MADE IN RECTIFYING THE DEFICIENCIES IN THE CONDUCT OF THE 1990 FEDERAL ELECTION WHICH WERE IDENTIFIED IN THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS' REPORT '1990 FEDERAL ELECTION' AND ANY LONGER TERM ISSUES RELEVANT TO THE ELECTION WHICH HAVE EMERGED SINCE THE INQUIRY

The AEC's submission on this term of reference is addressed by dealing with the recommendations of the Committee in its report on the 1990 election and outlining the AEC's response. The recommendations are numbered serially for ease of identification.

Scope and Conduct of the Inquiry

1. Recommendation (1.13): As a matter of urgency the Government respond to Report No. 3 of the Joint Standing Committee on Electoral Matters, The 1987 Federal Election: Inquiry into the Conduct of the 1987 Federal Election and the 1988 Referendums, May 1989 and priority be given to the introduction of any resultant amending legislation.

Response: *The Government has responded and amending* legislation has been enacted.

Making Voting Easier for the Public: the Queuing Problem

2. Recommendation (2.18): The Australian Electoral Commission develop a system, which should include reports from all presiding officers on queuing and any other delays, to provide it with reliable data of voter turnout patterns and any queues at each polling place at future federal elections.

Response: ***Supported.*** Appropriate systems have already been put in place, and were tested successfully at the Menzies and Wills by-elections and the ACT election. Polling Place Liaison Officers had already been required to record any voter flow delays up to the time of each visit to a polling place, after consulting with the OIC, and OICs were required to report on issues of concern *including queuing problems arising at their* polling places. OICs now also have the flexibility to open additional ballot paper issuing points should voter delays occur.

3. Recommendation (2.18): The Australian Electoral Commission set a formal performance standard for the length of time that it is reasonable for a voter to wait to cast a vote, and use that standard as the criterion against which the Australian Electoral Commission's level of service can be measured at the next election.

Response: ***Supported.*** The Australian Electoral Commission has thoroughly researched the queuing problem which was evident in some polling places at the last election and has revised its National Polling Place Resources Policy accordingly. Details of this revised policy are given in paragraph 4 below. In reviewing this policy, the Commission was very conscious that:

- it needs give a high level of service by, inter alia, minimising voter waiting time;
- no level of delay is desirable, and the public are likely to be sensitive to delays exceeding 10 minutes;
- polling staff are costly and should not be unavoidably idle;
- voter arrival times can not be reliably forecast and can be influenced by a range of unpredictable events

Clearly, waiting times should be as short as possible - but the optimum number of polling staff involves a trade off between their cost and the risk that their capacity will be exceeded. Past experience indicates it should be possible to keep most peak delays below 10 minutes without excessive expenditure. Overall, the Commission believes that maximum waiting times of up to ten minutes from arrival to issue of ballot papers would not be unreasonable, and it will strive to achieve this performance standard.

Whilst the Commission is confident that its revised policy (para 4 below) will achieve the desired performance in the majority of polling places, unpredictable local circumstances may lead to queues exceeding ten minutes during peak times.

The risk of this will be reduced not only through the new staffing policy set out below, but also by the provision of an additional certified list to each polling place for use if queues become excessive. Further, the emphasis placed on voter service and throughput in the polling staff training package should ensure that polling staff process voters courteously and efficiently.

Trialling of the revised policy at the Menzies and Wills by-elections and the Australian Capital Territory Legislative Assembly election has been positive and encouraging.

4. Recommendation (2.52): To alleviate queuing problems at future elections the Australian Electoral Commission:

- **employ additional staff where necessary to ensure that the ratio of ordinary vote issuing staff to potential voters is at a realistic level**

Response: ***Supported.*** *See response below.*

- **revise its National Polling Place Resources Policy to provide flexibility in the staffing and resourcing of polling places**

Response: ***Supported.*** The Commission was well aware of the queuing problems that had arisen and had already taken steps to analyse the problems and deal with them before the Committee began its hearings. Moreover, after an extensive

process of consultation and review involving staff from Divisional, State and Central Offices, the Commission's Management Board made a range of decisions in late 1990 aimed at alleviating voter delays in the future without calling unduly on additional resources.

The Commission's new National Polling Place Resources Policy contains a number of provisions designed to reduce maximum table loadings in polling booths, to permit flexibility in the deployment of polling staff, to train staff in more effective polling place and voter flow management, and to allow State managers the flexibility to approve increased resourcing arrangements where justified.

These revised procedures were applied at the Menzies and Wills by-elections in May 1991 and April 1992 respectively, and the ACT Legislative Assembly election and referendum in February 1992. Whilst voter turnout tends to be slightly lower in by-elections than in general elections, the ACT election was more akin to a general election, especially as there were two ballot papers, one being similar to a Senate ballot paper. The experience of these elections indicates that the new procedures were effective. Where queues that may inconvenience voters do occur (and it is likely they will at certain unpredictable times) the procedures are such that polling place OICs now have the flexibility to be able to service substantially more voters where peaks occur. Exit polls conducted by an independent agency in both the by-elections and the ACT election indicated a high level of voter satisfaction at the service provided by the Commission.

The salient points of the new policy are as follows:

1. Reduction of maximum table loadings from 700 to 600 for ordinary votes and from 150 to 120 for declaration votes.

2. More flexibility is to be introduced in the deployment of staff to polling place duties - staff must be able to perform different functions to meet the demands of the day.

3. Recognition of the importance of the position of queue controller in successful polling place management and the corresponding need for these staff to be trained accordingly.

4. To further speed up the ballot paper issuing process, the current bank-style queue should feed mini-queues (of say 4-5 electors) at each issuing point.

5. The position of exit director to be combined with that of ballot box guard (except possibly in very large polling places).

6. OIC/2IC training to focus on polling place management and effective voter flow.

7. State managers to be given the flexibility to approve variations to the resourcing schedules to cater for special circumstances such as high concentrations of non-literate or non-English speaking voters by approving additional staff, certified lists, screens etc where the DRO can justify the need for such variations. These variations to the resourcing schedules will include the use of part-time morning staff to help overcome the expected morning peaks in polling places where this is deemed desirable.

8. Priority to be given to the continued refinement of the procedures adopted to estimate accurately voter turnout at polling places.

It should be noted that there can be no iron-clad guarantee that undue queuing will never occur. Circumstances beyond our control may cause some delay on occasions. Further, it is clear that these new measures have important cost implications.

5. - **print the certified lists in a larger type size to facilitate the process of striking the voter's name from the list**

Response: ***Not supported.*** Certified lists are printed in "Bell Gothic" typefaces designed especially for the Bell Telephone Company to retain the legibility of highly condensed information at small point sizes. It has been used successfully in telephone books throughout the world, including Australia, for many years. The form in which it is used in the certified lists has been designed to the best typographic and legibility standards. The print is larger than a telephone book, is carefully emboldened and uses proportional white space between lines to enhance legibility. The amount of white space between lines is highly important for legibility. Larger type without white line space is less legible.

The average size of the certified list is 350 pages, each containing 200 names in two columns of 100. A larger type face will mean that fewer names will appear on each page and may well mean that two columns could not be used. Decreasing the number of names per page by 10 increases the number of pages of the average list by 19. A decrease of 20 per page increases the list by about 39 pages, and so on. Apart from the additional time, cost and paper for producing the lists with a larger type size, there could be a counter-productive increase in the search time for names at the polling place. Other factors which would make the proposed change undesirable include the need to rewrite computer programs for production and reformatting of lists, and the scanning programs which currently cater for the 200 names. These program changes may be extensive.

6. - **ensure Divisional Returning Officers review polling premises and their equipment on a regular basis**

Response: ***Supported.*** The Commission has always required its Divisional Returning Officers to review polling places and their equipment on a regular basis, and at least once between elections. A full review has been completed, or is near completion, in each of the States. Gazettal action is being undertaken. Notwithstanding this, the availability and suitability of individual polling places is monitored by Divisional Returning Offices up to the election.

Polling place equipment supplied by the Commission is continually reviewed and upgraded.

7. - **improve training for Divisional Office and polling place staff to ensure that they have all the knowledge and skills necessary to perform more effectively their tasks on polling day.**

Response: ***Supported.*** This has been already identified as a priority in respect of training and development of Divisional staff. However the training programs in place for polling staff, updated for each election to meet known and changing needs, have been generally accepted as very good. The limiting factors for training of polling staff are that they are employed once every two or three years, training time is limited and staff recruited are often the "best available" rather than the best. Another factor is the retention of experienced staff from one election to the next. Election timing has a bearing on this particularly if held during school holidays. The current situation on training is as follows:

Training of Polling Staff (TOPS)

Production of the training video for senior polling staff, declaration issuing officers, queue controllers and inquiry officers is complete. Dubbing will commence in July.

Manuals and workbooks for polling staff are at the final draft stage and will be printed in the near future. Suggested changes resulting from the Wills by-election have been incorporated into the manuals and workbooks.

Training of Divisional Office Staff (TODS)

The revised training package for divisional staff has been piloted in all states and feedback from divisional staff will be incorporated into the package. Formal training will commence shortly.

The TODS program emphasises the importance of all operational staff as trainers and managers of polling officials and election casuals. The modules focus on improving staff knowledge and looking at strategies to pass that knowledge on to others.

8. Recommendation (2.53): Prior to polling day the Australian Electoral Commission advise polling place staff that disciplinary action will be taken if staff engage in unacceptable political activity in polling places.

Response: ***Supported.*** Applicants for polling place casual positions are advised that they must undertake to refrain from any political activity during their employment by the Commission and those employed are required to sign an undertaking not to engage in political activity.

Making Voting Easier for the Public: Other Issues

9. Recommendation (3.7): As part of the Australian Electoral Commission's consideration of the redesign of the Senate ballot paper the typeface used to designate Senate groupings be reviewed to ensure that there is no potential confusion of the alphabetical "I" with the numeral "1".

Response: ***Supported.*** A range of design options for the Senate ballot paper are currently being tested through research with users. Choice of a final design, resulting from this field testing, will be made by mid-August 1992.

10 Recommendation (3.23): The Australian Electoral Commission:

- **improve its newspaper and other advertisements to inform the public on polling place, pre-poll and mobile poll locations and consider advertising general polling places in newspapers on the day before polling day**

Response: ***Supported.*** Increasingly for recent elections locations of polling places have been advertised on the day before polling day, or, if two insertions have been arranged, the first advertisements have appeared midweek and the second on polling day itself. Arrangements have been made for polling place locations in all States to be advertised before polling day for the next election.

11. - develop an information and education program to assist electors who are blind, visually impaired, and/or print handicapped

Response: ***Supported.*** Electors with these disabilities are eligible for assistance under section 234 of the Commonwealth Electoral Act. This section provides for a person appointed by the voter to accompany the voter to the voting compartment and fill out the ballot paper in accordance with the wishes of the elector. Such electors may also be eligible to register as general postal voters, or may apply at each election for a postal vote.

In order to promote information about these facilities more widely amongst the target audience the Commission plans to extend the use of radio advertisements on print-handicapped radio stations during the election period and to work more closely with organisations providing assistance to the visually impaired. The Commission worked effectively with such organisations during the February 1992 ACT election and referendum, and the arguments booklet for the referendum was made available to print handicapped electors on audio cassette.

12. - develop an information and education program to assist electors with lower literacy skills

Response: ***Supported.*** The Commission's current programs already recognize these electors. The high cost of the Commission's election advertising is largely due to the substantial use made of radio and television because of the greater effectiveness of the non-print media in reaching those segments of the community less likely to be well informed on electoral matters and also those with lower literacy skills. The high turnout and significantly lower informality rates at the 1990 election are indications of the success of these programs and of the newly designed plain-English and large print House of Representatives ballot paper.

Components of the Commission's education programs are also specifically aimed at young people with low literacy skills (eg information on enrolling and voting in comic book form and in other specialist publications) while the Aboriginal and Islander Electoral Information Service, the primary audience of which has been voters in remote, traditional communities, focuses in its delivery on electors with lower than average literacy skills. Included in the increasing number of school groups visiting the Commission's Electoral Education Centres are classes with special learning needs, including those with literacy problems.

At the recent by-election in the division of Wills, a division with a substantial lower socioeconomic population and a high percentage of voters of non-English speaking background, special information/education programs were put in place to meet the needs of voters. Media commentators noted in complimentary terms the Commission's work in this area and ascribed to it the fact that the informal vote was kept at the same level as at the 1990 General election for this division, inspite of the very large number of names on the ballot paper.

13. - improve its information and education program on declaration voting issues and procedures

Response: ***Supported.*** The Commission's advertising and information programs are reviewed after each election. In this review polling place and divisional office staff have the opportunity of raising concerns about these programs. Account is also taken of comments made by members of the public in correspondence with the Commission. Suggestions for improvements to these programs have been noted as part of the review process and will be put into effect where appropriate in the lead up to the next general election.

It is worth noting that there is no indication that the rejection of declaration votes results from a failure on the part of the voter to understand declaration voting *procedures* or of their lack of knowledge about the *availability* of the service. Rather it is a reflection of the failure by a small number of electors to properly maintain their enrolment, resulting in their providing inaccurate information when claiming their vote.

Improved training procedures will address the question of polling official error in the small number of cases where this occurs.

14. - **give a higher priority to reaching young adults approaching voting age through school visits and distribution of enrolment cards relative to other components of the youth enrolment campaign**

Response: ***Supported.*** Action in this area is already underway with a pilot scheme using enrolment promotion inserts in two publications aimed at young people ("Smash Hits" and "Graduate Outlook"). Also Commission staff regularly mount displays at venues such as youth Expos, Careers Markets and Shows at which enrolment cards and how to vote information is distributed. Visits to schools, TAFE colleges etc. by Divisional Returning Officers has been given increased emphasis since the 1990 election.

15. - **conduct an information campaign to remind aged electors of their right to vote**

Response: This issue is being addressed within the general context of the Commission's information programs. Aged persons are exposed to the Commission's general and specifically targeted advertising as are other members of the community. The Commission has no evidence that the aged are a group less likely to exercise their obligations to enrol and vote. On the contrary, the experience of our field staff is that older members of the community are particularly zealous in fulfilling their duties and make good use of special voting facilities. Given the limited resources available to it the Commission believes that priority should be given to other groups of voters with special needs before funding a special campaign aimed at aged electors. Nonetheless, the Commission will ensure that aged electors are addressed in its general advertising for the next election.

16. - **review its voter information and education program giving close attention to:**

the balance of use between print media and radio and television advertising in the information and education program

the value of continuing with the elector pamphlet distribution to all Australian households prior to the election.

Response: ***Supported.*** As a matter of course the Commission reviews all aspects of its operations following an election. The balance in the advertising campaign between print and electronic media is part of that review. To the extent that the nature of the message and budgetary considerations allow, maximum use is made of radio and television. Clearly some major components of the advertising campaign, eg the addresses of polling places and pre-poll voting centres, can only be advertised in the print media.

Following amendments to the Commonwealth Electoral Act through the Political Broadcasts and Political Disclosures Act, the Commission will prior to the next election be delivering to each household a *Candidates Information Booklet*. This much larger document will contain voter information covered in the past by the householder pamphlet.

It should be noted that in post-election research after the 1990 election 69% of respondents reported receiving the householder pamphlet and 72% of these indicated that they had read the pamphlet. 77% of readers classified it as 'useful' or 'very useful'. In the assessment of the office of Government Information and Advertising, this is considered a very satisfactory result when compared with the results of similar nationwide distributions.

Exit polls conducted at the Menzies and Wills by-elections and at the ACT election and referendum point to a high level of satisfaction with the service provided by the Commission (between 89% and 96% rated the service as either "excellent" or "good") and to good awareness of and appreciation of our information and advertising programs. Copies of these reports have been provided to the Committee.

17. Recommendation (3.26): The Australian Electoral Commission co-operate with the trade union movement and employer groups to ensure that both employers and employees are fully aware of their obligations and entitlements under sections 183 and 345 of the Commonwealth Electoral Act 1918.

Response: ***Supported.*** The Commission will shortly write to the relevant peak councils seeking their co-operation in a programme to advise employers and employees of their rights and obligations under sections 183 and 345 of the Act.

18. Recommendation (3.31): The Australian Electoral Commission investigate the performance of overseas posts in *undertaking electoral responsibilities* and *implement* procedures to ensure that overseas declaration votes are returned prior to the election date, and that all relevant Australian Electoral Commission and candidates' how-to-vote material is prominently displayed and freely available at overseas posts.

Response. ***Not supported.*** Prior to the 1990 election the procedures for persons assisting with the issue of overseas votes were extensively revised. Further, a Commission officer presents a briefing session on the election process at all Consular Training Courses held for Department of Foreign Affairs and Trade staff prior to their departure overseas. These briefings are conducted approximately every six weeks. The procedures for overseas posts explain fully the process of voting, but the Commission is limited in further action it can take.

The recommendation that overseas declaration votes be returned prior to polling day is impractical as voting overseas can take place up to and including polling day, depending on the

post's location. The changes to procedures for the 1990 election included revised despatch arrangements for ballot material back to Australia which involved the use of international couriers instead of diplomatic bags, and as a consequence there were delays only in a few locations where a courier did not operate. As a consequence no final counting was delayed, unlike at previous elections.

All official material necessary for voting is made available to overseas posts and instructions are given for its display as appropriate. The despatch of how-to-vote material is a matter for the parties and candidates. As to its display, the Commission's instructions state that all material received should be displayed but in an area separate from the area where voting is taking place. The Commission does not have any legal basis for insisting that how-to-vote material be displayed. This is a matter for the candidates and the parties to negotiate with the Department of Foreign Affairs and Trade. It should be noted that the collation and dissemination of how-to-vote material for all candidates (House and Senate) in all electorates and every State would be a massive task, verging on the impracticable, especially as much how-to-vote material is not produced until well into the election period.

19. Recommendation (3.37): Section 226 of the Commonwealth Electoral Act 1918 be amended so that the presiding officer or electoral visitor who visits a patient for the purposes of a mobile poll should display the how-to-vote cards made available for the purpose by candidates in the election.

Response: ***Not Supported.*** It is noted that under existing s.226(2A) the presiding officer or electoral visitor may, at the request of the patient, give the patient how-to-vote cards made available for the purpose by candidates. The Commission believes that the proposal would further slow an already slow process, but more particularly would create practical problems. The visiting officers are already required to display all the registered Senate group voting tickets (this is commonly a very large poster). To display how-to-vote material which might in some cases come from anywhere within a State (or from across State borders in some cases), as hospitals serve a wider catchment than the electoral division in which they are located could be impracticable. Inclusion of how-to-vote material produced very late in the process would be an added complication. The Commission therefore considers that s.226(2A) is adequate as it stands.

The Commission suggests, however, that if the JSC's recommendation is to be adopted it should also apply in the case of polling in prisons.

20. Recommendation (3.42): Section 329(3) of the Commonwealth Electoral Act 1918 be amended to include a general prohibition on the distribution of any material which discourages electors from numbering the ballot paper consecutively and fully.

Response: ***Supported.***

21. Recommendation (3.43): The Committee recommends that the Australian Electoral Commission report to the Joint Standing Committee on Electoral Matters on possible changes to the *Commonwealth Electoral Act 1918* that would have the effect of minimising the incidence of optional preferential voting.

Response:

The Commission has not been able to find a way to continue with the present situation whereby a vote marked "1, 2, 2, 2, etc" is a formal vote, and at the same time prevent voters being induced to use this provision to deliberately cast optional preferential votes.

Any attempt to tighten the prohibition on distribution of material "likely to induce an elector to mark his or her vote otherwise than in accordance with the directions on the ballot paper" (subsection 329(3) of the Act) to prohibit persons in any way inducing voters to mark their ballots "1, 2, 2, 2, etc" is likely to lead to a situation where, on the face of it, it could be an offence to explain a provision of the Commonwealth Electoral Act.

For example, if the text of s. 270 of the Act were read on radio, and the interviewer were to ask "does this mean that I can vote 1, 2, 2, 2 and my vote will be counted as a formal vote for the candidate of my choice?" the answer has to be "yes". It is difficult to see where the law could draw the line between simply explaining section 270 and inducing voters to cast an optional preferential vote. If such a distinction were to be drawn, its enforcement would seem problematical, particularly in the heat of an election campaign.

The Commission is therefore unable to see how the legislation can be changed to achieve the Committee's objective while the section 270 saving provision (which was introduced following a recommendation in 1983 of the Joint Select Committee on Electoral Reform) and the full preferential system of voting both remain. The views of the Office of Parliamentary Counsel on the likelihood or otherwise of a legislative solution to this difficulty are being sought and will be provided to the Committee when received.

Knowing the election result on election night

22. Recommendation (4.21): The *Commonwealth Electoral Act 1918* be amended to add a new step to the House of Representatives scrutiny process to guarantee that scrutineers would have the opportunity to readily observe a 'two-candidate preferred vote' in each polling place on election night

Response: ***Supported, with variation.*** In endeavouring to improve the service provided at the National Tally Room (NTR) on election night, the AEC has developed a system that departs in method but not in spirit from the recommendations made by the JSC in its report on the 1990 election.

The JSC's recommendation that scrutineers should have the opportunity to readily observe a two-candidate preferred (TCP) vote in each polling place on election night was made in the context of the 1990 election result, when a significant number of seats could not be determined until after preferences had been distributed. Therefore the fate of the Government could not officially be determined for a number of days until preference distributions were carried out.

In considering the issue the AEC Management Board believed that a more reliable indication of the outcome in each Division, and hence overall, could be ascertained if polling place staff were to actually distribute the preferences of the minor candidates in each polling place on election night. The JSC had preferred the option of scrutineers having longer opportunity to observe later preferences during the first preference count. However, on the basis of experience gained at the Menzies by-election, and in the light of similar exercises conducted by State electoral bodies in Western Australia and South Australia, the AEC concluded that a distribution by polling staff could be carried out quickly and would give a much more reliable result.

By doing an actual count of two-candidate preferred votes using polling staff, figures obtained can be entered into the AEC Election Night Information System (TENIS) and will be available for the use of all observers in the NTR. The scrutineer-observation option would not allow "official" verification of preference figures and their transmission would rely on less organised methods than the AEC's, in that they would then be passed on to party and media individuals through informal networks.

Under the planned method, two candidates will be nominated in each Division to whom preferences will be distributed. Counting staff will begin to distribute preferences as soon as the first preference count is completed. Based on the 1990 election result, an average of around 20% of first preference votes will need to be distributed. In an average polling place taking around 1200 votes, only 240 preferences would need to be distributed. The scrutineers will, of course, be able to observe this process. Other polling place staff will during this time be preparing for the Senate count.

When each polling place has completed its counting of preferences, its first preference and TCP result will be phoned to the relevant Divisional Office, where the results would be entered direct into TENIS, in the one transaction.

Past experience of trialling distribution of preferences on polling night indicates that it will take on average 15-30 minutes to complete the distribution. Smaller polling places (those that report earlier on polling night) will take less time; larger polling places will take longer.

There has been some criticism of the linking of the transmission of first preference votes to the NTR with the transmission of the preference figures on the ground that it

will delay the arrival of figures in the NTR until the preference count is completed.

The AEC has decided to link the transmission of the first preferences and the two-candidate preferred votes (the nexus) for a number of reasons;

- In close seats in most cases, the outcome of the two-candidate preferred throw will be the most reliable indicator of the outcome - the first preference count by itself will not be sufficient. Therefore it is important that preference information be transmitted as quickly as possible.

- In the polling place, the Officer in Charge (OIC) will be able to reconcile any significant imbalances between the first preference count and the TCP count before causing any figures to be entered into the computer. (Minor imbalances will be ignored in the polling places and reconciled by the Divisional Returning Officer to ensure that the count is not held up.)

- Keeping the nexus should also encourage OICs to complete the TCP count as soon as possible, as OICs are generally keen to report their figures as early as possible. Breaking the nexus may well lead to a delay in reporting the TCP figures as the pressure for a quick result would then be reduced.

- For the next election, each polling place's figures will be entered separately into TENIS. The system has been designed to cater for two data entries for each polling place, one for the House of Representatives and one for the Senate. With roughly 8500 polling places, this process will entail 17000 computer transactions from 147 locations over a five hour period. Breaking the nexus and having a separate transaction for each polling place for preference figures would require an additional 8500 phone calls from OICs and 8500 computer transactions, which would involve the need for the AEC to purchase additional computer capacity.

- Breaking the nexus would have the potential to cause confusion in the NTR. It would mean that first preference data and TCP data would not correlate for any particular Division until all data for that Division had been entered. It would therefore be possible for first preference data to indicate a Government candidate winning a seat while the TCP data indicated an Opposition candidate winning the same seat - a highly undesirable possibility.

- It is usually the case that the bulk of results comes into the NTR in a rush. The number of votes counted can rise from 10-20% to 50-70% counted in a comparatively short space of time. If the nexus were broken, the TCP result would be showing 10-20% counted while the first preference result showed 50-70% counted. Therefore,

during the most crucial phase of election night, when a sufficient amount of votes are available on which to make reliable forecasts, the TCP figures would not be available to assist this process.

- It is essential that the information arriving and being analysed in the NTR is simple and unambiguous. Breaking the nexus would turn a relatively simple system into a complex one which would frustrate expert users and confuse others.

The AEC believes there will not be a significant or unacceptable increase in the time taken for the transmission of results to the NTR. This belief is based on two changes in election night procedures.

The first is the changed counting method itself. In the past, first preference counts have been slowed by scrutineers attempting to count later preferences - in most cases OICs have been prepared to slow the count somewhat for this purpose. As there will be no need to slow the first preference count, that count should proceed faster than it has in the past. Therefore the **net** amount of time taken to complete the two counts may not be an average of 15-30 minutes longer than at previous elections, when the first count would have taken longer.

The second change will occur in the method of input. For this election, each polling place will phone the relevant Divisional Office, where data for each polling place will be entered direct into TENIS. In the past each Divisional Returning Officer kept a running total of the results for his or her Division, and would periodically phone the total to Head Office, where the data would be transcribed and entered into TENIS. The new method of input should significantly reduce the time taken for results phoned in from polling places to reach the NTR.

Taken together, these changes are expected to mean that the increase will be around 15 to 20 minutes in the time taken to transmit results to the NTR. The time taken will of course vary from polling place to polling place, depending on the numbers of votes taken at each, the numbers of candidates standing, the numbers of votes gained by "minor" candidates, polling staff ability, and the level of scrutineer activity.

The Commission considers that the benefits of transmitting two-candidate preferred data to the NTR outweigh the disadvantage of this minor delay.

Once figures arrive in the NTR, another factor to bear in mind is that the matched polling place swing analysis method (introduced by the AEC for the first time in 1990) should enable more reliable forecasting of results on early figures than has been possible in the past.

23. **Recommendation (4.24): The Australian Electoral Commission ensure that it has in place frontline and backup**

systems to record, process, transmit and publicly display House of Representatives results as soon as they are available on election night; and

24. Recommendation (4.30): The Australian Electoral Commission review its overall procedures for conducting and reporting the Senate count, particularly its data input procedures, to ensure an improved performance in the percentage of the Senate vote counted and publicly announced for every State on election night at future elections.

Response: *Supported.* Frontline and backup systems are already put in place for each election. Results are displayed on computer screens as soon as received in the national tally room and as soon as possible thereafter they are manually displayed on the national tally board. Backup systems (telephone and facsimile transmission of results) necessarily transmit data more slowly than the computerised election night results package but these systems are called into play only if a problem should occur with the computer system. The Commission's computerisation of divisional offices will increase the speed of data input.

Since 1990 election, these pre-existing backups will be supplemented by the inclusion of emergency generators in the AEC Central Office and the National Tally Room. In addition, the capacity of the computer system will be increased to better cater for the election night load and relevant techniques will, as in the past, be on stand-by for the night.

A review of tally room procedures at the 1990 election has resulted in changes to arrangements for monitoring the input of both House of Representatives and Senate results from individual States at the next election to ensure that any problems with the input and transmission rates are detected quickly.

Notwithstanding the above, it should be noted that all ordinary Senate votes were counted on election night 1990.

25. Recommendation (4.32): The Australian Electoral Commission review the layout of the National Tally Room for future elections and provide suitable office accommodation for political parties as was provided during the 1987 election and previous elections.

Response: *Supported.* The plans for the layout of the Tally Room have been altered for the next election to allow again for the building of offices for the parliamentary parties. Discussions have taken place with Australian Construction Services on this matter.

Campaign Material

26. Recommendation (5.13): The Australian Electoral Commission ensure that cardboard litter bins are provided at all polling places for the disposal of waste paper generated from elections, including how-to-vote cards, and that all bins

are subsequently collected by recycling firms for the recycling of that paper.

Response: ***Supported.*** However, cardboard litter bins were used in most polling places at the 1990 election. The Commission allows schools to keep material that they might find useful for educational purposes. Material not required is collected and recycled where it is possible to do so (the collection for recycling in some remote areas is cost prohibitive and the relevant material is therefore disposed of locally). As of the next election the Commission will be requiring that cardboard litter bins be provided at all polling places.

As well as cardboard material, the Commission endeavours to recycle as much other material as possible but some practical difficulties include the demand by recycling companies that the paper be free of rubber bands, plastic and other alien material used in packaging, and the cost of transportation from far flung divisions if the material is to be recycled at a central location.

27. Recommendation (5.16): The Australian Electoral Commission use recycled paper for the production of all its election material wherever practicable.

Supported. The Commission is already makes use of recycled paper where practicable and is keeping under notice developments in the quality and price of recycled paper with a view to its further use.

Nomination and Enrolment

28. Recommendation (6.8): The Commonwealth Electoral Act 1918 be amended so that proceedings for the deregistration of a political party that is a parliamentary party be not undertaken until after the next election for the relevant House subsequent to the political party becoming liable to deregistration.

Response: ***Supported in part.*** So far as a Senate casual vacancy is concerned, the problem perceived by the Committee will only exist until such time as the casual vacancy is filled. The problem is therefore sufficiently dealt with by providing that where the creation of the casual vacancy has caused the party in question to cease to be a parliamentary party, the party shall not be deregistered before the filling of the casual vacancy or the expiration of the former Senator's term, whichever is earlier.

So far as a House of Representatives vacancy is concerned, it would seem that all that is needed is to provide that the party remains a Parliamentary party until the by-election (or general election if there is no by-election). If at the by-election the party's candidate is returned, it would retain its Parliamentary party status. If its candidate is not returned, there may not be a case for Parliamentary party status to be carried to the next general election.

29. Recommendation (6.18): The Minister for Administrative Services seek a ruling from the High Court on what constitutes an office of profit under the Crown and when a candidate has to resign from such an office.

Response: This is a matter for the Minister. However, the AEC notes that the High Court does not give advisory opinions. On 12 May 1983 the then Attorney-General introduced in the Senate a proposed law for an alteration of the Constitution, entitled *Constitution Alteration (Advisory Jurisdiction of* High Court) 1983, which inter alia would have inserted in the Constitution specific provision for the High Court to give an advisory opinion on the interpretation of section 44 of the Constitution. The proposed law was never put to a referendum.

However, following the Wills by-election in Victoria an unsuccessful candidate, Mr Ian Sykes has petitioned the Court of Disputed Returns, claiming that the elected member, Mr Philip Cleary, is ineligible under s.44 of the Constitution. The Court has sat once and a directions hearing will be held on 30 June 1992.

30. Recommendation (6.21): The Australian Electoral Commission produce a nominations 'checklist' to be given to each candidate, and a copy to be held at each Divisional Returning Office, to assist both candidates and District Returning Office staff in ensuring that all relevant nomination procedures are complete.

Response: Supported. The process to be followed and relevant documents will be made available with the nomination form. The requirements for nomination are already included in the Candidates Handbook which is being revised. See also item 31 below.

31. Recommendation (6.24): The Australian Electoral Commission improve the level of service and advice provided to all candidates and political parties in the lead-up to federal elections.

Response: ***Supported.*** The Commission is constantly seeking to improve the level of service it provides to candidates and political parties in the run-up to federal elections. Wide-ranging briefing sessions are planned prior to the election with representatives of registered parties. A comprehensive information pack will be handed to each candidate and, in multiples, to each party at the time of the next election. This pack will include copies of publications such as the *Candidate's Handbook,* the *Scrutineer's Handbook* and the *Electoral Pocketbook* as well as information about polling arrangements in the relevant division and copies of postal vote application forms etc. In addition each candidate will, of course, be provided with material which spells out in detail the requirements on candidates in relation to the electoral funding and financial disclosure provisions of the *Commonwealth Electoral Act.*

32. Recommendation (6.27): The Australian Electoral Commission extend its online Roll Management System to all Divisional Offices in the eastern States as an immediate priority.

Response: ***Supported.***

The upgrading of the communication system to accommodate all Divisions in the Eastern States was completed in 1991 and the database was updated through batch processing. In 1992 a major enhancement was made to the system with the introduction of on-line processing. This enables instantaneous updating of elector's details on the data base and enables interactive error correction at the time of input.

Benefits include:

- The AEC anticipates a reduced time to close the roll. It will enable the extraction of certified lists within 4-5 days of the Close of Roll. This compares with 8 days to complete close of roll processing at the 1990 election.
- Data security has been maintained through the use of our own communications network.
- Earlier availability of enrolment statistics, including close of roll figures,
- Preliminary scrutinies of declaration votes can be undertaken directly on the live database, without the need to search microfiche.
- Increased efficiency in processing objection notices through RMANS and costs savings through centralised postage procedures.

33. Recommendation (6.38): The Australian Electoral Commission report to the Joint Standing Committee on Electoral Matters on the current round of habitation reviews when those reviews are complete and that the report include an evaluation of the adequacy of procedures used for dealing with eligible non-English speaking, aged, infirm and Aboriginal voters.

Response: ***Supported.*** All States are conducting habitation reviews this calendar year. In Western Australia, Queensland and Victoria reviews began earlier this calendar year in order that they would be completed before the anticipated State elections. Although some States have completed their field work, follow-up action is continuing and the whole process is not completed until objection action takes place. Later this year a report, as requested by the Committee, will be submitted. (See further discussion in Part 2.)

34. Recommendation (6.47): The Commonwealth Electoral Act 1918 be amended to include a provision that House of Representative and Senate candidates are entitled to purchase one copy of the latest print of the Divisional or State roll (respectively) for the electorate for which they have been

nominated in accordance with the rolls that are being made available to Members of the House of Representatives and the Senate under section 91 of the Commonwealth Electoral Act 1918 and, if requested the copy of the roll should be available in tape or disk form; and

35. Recommendation (6.49): The Commonwealth Electoral Act 1918 be amended to provide for the distribution to each candidate, as soon as practicable after the close of rolls, and at least one week prior to polling day, one copy of the certified list of voters for the Division in which the candidate seeks election.

Response: ***Supported in part.*** Candidates (or anyone else) are already entitled under section 90(1) of the Commonwealth Electoral Act 1918 to purchase copies of the latest print of the roll for any Division. It should be noted, that as the roll is usually only printed two years after the previous election, the roll information contained in the latest print may well be up to twelve months out of date at the time the next election is announced. From this month, Members of the House of Representatives and Senators have been provided with Divisional roll information on floppy disks which will be updated on a monthly basis. At election time this service could be extended to all candidates. However, this would raise problems of costs and availability within the pre-election timeframe as details of candidates would not be known until after the close of nominations.

With regard to the distribution of certified lists to candidates (Recommendation 6.49), this is a similar recommendation to one made in the Committee's Report on the 1987 election, but would supplement it with a requirement that certified lists must be made available to candidates at least a week prior to polling day. This should now generally be achievable. However, the certified lists have to be produced (each copy of each list is, for technical reasons, individually laser printed) after roll close and distributed to meet the Commission's polling place needs. A general election requires the production by these means of well over 25,000 lists. As it is possible that the lists may not reach some candidates in the time frame recommended by the Committee, it is proposed that if the Act is amended, the amendment should include a provision to the effect that a failure to provide a certified list at least a week before polling day shall not be a ground for setting aside the result of an election.

Management and Operation of the Australian Electoral Commission

36. Recommendation (7.7): The Australian Electoral Commission investigate the extent to which it can devolve financial and management responsibility to Divisional Returning Officers and, where this is appropriate, does so with concomitant reporting and accounting practices.

Response: ***Not supported.*** The current arrangements for estimating Divisional election financial requirements and control of Divisional election expenditure have been the result of studies of Commission performance at the 1984 and 1987 elections which showed that:

- there was no standard recording of election expenditures, making any comparison of the efficiency of election operations in Divisions and the assessment of future election funding requirements basically flawed; and

- there were significant differences in the parameters used for estimating election resource requirements amongst the various States, leading to perceived inequities (by both Divisional and Central Office management) in allocation of resources in terms of the comparative volume and difficulty of election workloads undertaken in individual Divisions.

Current election financial management systems were set up, following recommendations from a project team of Divisional, State Head Office and Central Office representatives, in response to these deficiencies, and in an effort to provide an equitable distribution of election funds throughout the Commission. Election financial allocations are now made on the basis of the tangible factor of estimated workloads that can be supported by past experience and/or current conditions, with additional funds being granted where there are nonstandard circumstances. Financial requirements are subject to review by supervisory management and additionally in the light of the election funding ceiling imposed by the Department of Finance.

The thrust of the system is the equitable distribution of available funding, between a large number of offices discharging the same functions. While information from the system is collated centrally, and supervisory management does examine and may query the estimates, the estimation of resource requirements is undertaken by the Divisional or project manager responsible for the expenditure.

The 1990 election was the first where financial information could be collated and compared on a national basis. In the light of the 1990 experience, the procedures have been further developed and streamlined.

37. Recommendation (7.14): The Australian Electoral Commission extend its online information network to all Divisional Offices as an immediate priority.

Response: Supported. This has already been substantially achieved, although it must be noted that the South Australian Divisional Offices are not yet linked to the Commission's on-line system.

38. Recommendation (7.18): The Australian Electoral Commission take urgent steps to guarantee a more service oriented approach to its task of conducting federal elections.

Response: ***Supported.*** *However, the Commission strongly questions the implication that it has not in the past been service oriented. The fact that some important aspects of its work in connection with the 1990 election resulted in a level of service (e.g. voter delays) less than the Commission itself would want to provide, does not justify a general inference about its service orientation.*

The Commission is constantly seeking ways of improving its performance, including service provision, and testing it. For example, it has conducted a number of surveys over the years (including polling place exit polls) of client satisfaction, it obtains and uses feedback data from divisional and polling place staff, it has worked closely with the Joint Standing Committees on Electoral Matters and on Electoral Reform on the development of new procedures and amending legislation regarding ways to extend or improve client services. The concept of service is written in the Corporate Plan. As can be seen elsewhere in this submission, we have taken steps to deal with the identified 1990 problems and taken other initiatives of our own to improve services - e.g. to treat as ordinary voters in certain polling places persons who would otherwise be absent voters.

The Commission will continue to seek ways and means of improving service delivery and of ensuring that the corporate culture throughout is service oriented. That said, we would also mention that constraints, practical or legal, can apply. We need to be cost conscious, and we operate in a legislative context. The Committee observed in its report that "On many occasions the AEC dealt with the public's and candidates' concerns by pedantic recourse to the Act or precedent without always assessing individual circumstances". Such an allegation is difficult to respond to in the absence of specifics, but in any event it is worth remembering that many things the Commission does at election time are potentially subject to review by the Court of Disputed Returns. We would be doing no service to candidates by, for example, providing them with advice as to the requirements of the "office of profit under the Crown" disqualification in section 44 of the Constitution, if the adoption of that advice subsequently caused the candidate's election to be overturned.

PART 2

THE PREPAREDNESS OF THE AUSTRALIAN ELECTORAL COMMISSION TO CONDUCT THE NEXT FEDERAL ELECTION

The Australian Electoral Commission stands prepared to conduct the next election whenever it may be called. The Commission and its antecedents have been conducting elections for the Commonwealth since 1901. Since that time 36 elections, 125 by-elections and 20 separate referendums have been successfully conducted.

Following the establishment of the Joint Select Committee on Electoral Reform in 1983, subsequently becoming the Joint Standing Committee on Electoral Matters in 1987, and the AEC in 1984 there has been an intensive period of electoral reform, on the one hand, and rapid developments in electoral administration on the other. The next election will see further changes although these will be confined largely to modifications to procedures established over the last 8 years or to any adaptations required by the recent computerisation of divisional offices in Queensland, New South Wales and Victoria.

Apart from changes reviewed in the first part of this submission, the most significant changes or proposals for change to the management of the next election are outlined briefly below. They arise from changes in legislation or from a desire to further improve performance.

In addition, where legislation mandates specific action before an election the status of this activity is reviewed. *Recommendations for legislative amendments considered* necessary for the effective conduct of an election are also made.

Legislative Changes Since the 1990 Election

Compulsory Voting

Section 245 has been rewritten to provide an infringement notice system for enforcement of compulsory voting, under which apparent non-voters will be given the option of:

(i) paying a penalty
(ii) showing cause why they should not be prosecuted, or
(iii) having the matter dealt with by a court.

Recipients of notices will not be obliged to respond to them. Furthermore, the offence of 'Failure to Reply' has been done away with.

A working party has redrafted the procedural manual to take account of the new provisions. It is expected that penalties may be paid by using credit cards as well as cash or cheques.

Candidate Information Booklet

As a result of legislation introduced as part of the *Political Broadcasts and Political Disclosures Act 1991*, the *Commonwealth Electoral Act 1918* has been amended to include subsection 362(4) and section 386A. These amendments require the AEC to deliver to each household in Australia, at the time of the next election, a booklet containing profiles and policy statements for candidates for the House of Representatives and the Senate. General voter information and divisional maps will also be included.

The total number of booklets to be produced is approximately 6.5 million, the estimated number of households in Australia. In order to keep each publication to a manageable size, and at the same time to minimise the likelihood of the incorrect booklet being delivered to residences on divisional borders, 14 separate booklets will be produced. There will be 4 for New South Wales, 3 for Victoria, 2 for Queensland, with 1 for each of the other states and for the territories. Delivery to each household will be by contracted letter box delivery companies, except for non-metropolitan areas where delivery will be by Australia Post.

The production and distribution of these booklets is a massive task, for which planning is now well advanced. Major logistical considerations such as paper requirements and supply, deadlines, printing and distribution are being addressed. To date, discussions and meetings have been held with AGPS, printers, paper manufacturers, distribution companies, and our advertising agency in order to explore the full range of production options and to ensure that we are fully aware of the limits to the logistics of an exercise of this size and complexity.

The legislation requires that recycled paper be used as far as practicable. This will be influenced by the capacity of Australian manufacturers to produce light grammage news-print style paper. In view of the very large paper requirements of this job, we will need to have paper made in advance of the likely calling of an election, and to be prepared to carry considerable storage costs.

Given the fact that we will be working to such a tight timetable from close of nominations to polling day, usually only 22 days, careful consideration is being given to the development of procedures which will streamline the transmission of candidates' material from divisional offices to typesetters, and fully coordinate the whole typesetting, printing and distribution process.

Funding and Disclosure

Part XX of the Act has had 2 major amendments since the 1990 election; the *Political Broadcasts and Political Disclosure Act 1991* and the *Commonwealth Electoral Amendment Act 1991* which received Royal Assent on 16 June 1992. The effect of these amendments is that all election forms and handbooks have to be rewritten. In addition, the impending move to a computer based system of recording FAD data will require a complete review of all procedures, both election related and party registration. Design of the computer system is proceeding well, but is not due to be completed until end October this year. Rewriting of procedures cannot be commenced until testing and documentation of the new system has been completed. Work on new forms, handbooks and procedures is underway.

Registered political parties are no longer required to lodge returns after an election as they are now required to lodge annual returns 20 weeks after the end of each financial year. The first returns under these new provisions are due in November 1992. Work on forms and handbooks cannot be commenced until the regulations detailing the return requirements have been drawn up. This is anticipated to occur within the next few weeks.

Legislative Requirements Relating to the Election

Habitation Reviews.

S.92(5) requires a habitation review to be conducted within the period of 18 months ending on the expiry of the House of Representatives. These might normally be held later this year as the purpose of conducting habitation reviews within the period specified is to ensure that rolls are as accurate as possible for the election. However, in Western Australia, Queensland and Victoria reviews began earlier this calendar year in order that they would be completed before the anticipated State elections.

Based on the most recent review the current one should generate about three million notations to the rolls including one million additions of which 250,000 would be new (that is, not previously enrolled anywhere) enrolments.

The methodology developed in recent reviews of paying a fee to review officers for collecting enrolment cards at the door, rather than waiting for the elector to mail them, is showing a benefit. On the one hand cards are received quickly for action and, on the other, it is a cheaper means than using the Post Office and other casual labour for processing. Another efficiency introduced at this review is that of automated objection processing. This should save some $400,000 and is enabled by the computerisation of divisional offices.

Redistribution

The redistribution establishing new seats and boundaries in four States and the ACT has been gazetted. Staffing arrangements for the new seats have for the most part been completed and permanent offices established except for one in Queensland which should be ready in mid-August. Electors in all affected divisions will be able, from maps in the Information Booklet to be distributed to all households, to identify the division in which they reside.

Administrative Changes Not Already Outlined in Part 1

Absent/Ordinary Voting

The Commission intends to alter polling place arrangements so as to reduce the number of absent votes issued in some polling places. In certain polling places where a significant number of absent votes have been issued in the past, the Commission intends to arrange for the issue of ordinary votes.

An example of the changes to be made is in the Brisbane City Hall polling place where, in past elections, 4000 absent votes have been issued. Our intention is to replace the issue of absent votes with the issue of ordinary votes. Voters who attend the City Hall will spend less time at the polling place and will experience a much simpler procedure in casting their vote.

Advantages which will flow from this change in procedures are:

- Voters in polling places where ordinary voting has replaced absent voting will be dealt with much faster (an ordinary vote is five times quicker to issue than an absent vote). This will further alleviate queuing problems at polling places.
- A higher number of votes will be counted on polling night.
- Dealing with a smaller number of absent votes after polling day will speed up the completion of post polling day activities.

For the next election it is expected that this change in procedures will be introduced in a small number of polling places on a trial basis at the option of individual Divisional Returning Officers. If the change proves to be successful it will apply to more polling places in future elections to the extent that our expectation is that ultimately absent voting could be reduced by up to 20% when the procedure is fully utilised.

In reply please quote

90/1106

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SUBMISSION NO. 23

Contact Officer

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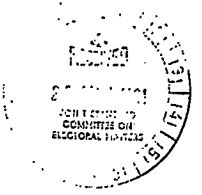

Ms B Forbes
Secretary
Joint Standing Committee
on Electoral Matters
Parliament House
CANBERRA ACT 2600

Dear Ms Forbes

Enclosed is a Submission to the Committee entitled "Evidential Effect of Authorisations borne by Electoral Material".

Yours sincerely

B Cox
Electoral Commissioner

22 May 1991

AUSTRALIAN ELECTORAL COMMISSION

SUBMISSION TO THE

JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

SUBJECT: EVIDENTIAL EFFECT OF AUTHORISATIONS BORNE BY ELECTORAL MATERIAL

MAY 1991

The purpose of this Submission is to recommend to the Committee that section 329 of the Commonwealth Electoral Act 1918 be amended to provide that the fact that a person has been named on electoral material as having authorised that material can be used as prima facie evidence in proceedings against that person for an offence against the Act.

2. Section 329(1) of the Act provides:

> 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 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.

3. After the 1990 election a number of complaints were made to the Commission concerning a particular how-to-vote card. In response to a request from the Commission the Australian Federal Police investigated inter alia whether there had been a breach of section 329(1) of the Act.

4. While the Office of the Director of Public Prosecutions was of the view that the how-to-vote card in question contravened the section, it concluded, on the basis of the Australian Federal Police investigation, that it was not possible to bring criminal proceedings against any person, because it could not be shown by admissible evidence that any particular person was responsible for publishing or distributing the card. The Office of the Director of Public Prosecutions has advised the Commission (see Attachment A) that consideration needs to be given to an amendment of the Act along the lines spelt out in paragraph 1 above.

5. The Committee has already considered the issue in relation to section 351 of the Act, at paragraphs 5.25 to 5.31 of its Report No. 3 ("Inquiry into the Conduct of the 1987 Federal Election and the 1988 Referendums"). The Committee recommended at paragraph 5.31 (recommendation 44) that:

> Section 351(3) of the Commonwealth Electoral Act 1918 be amended so as to provide that the person whose name is printed as the authoriser of a how-to-vote card is deemed to be the publisher.

The Government is still considering the Committee's recommendation.

6. The proposed amendment to section 329 would be consistent with the amendment which the Committee has recommended to section 351. In the absence of such an amendment, section 329 will to all intents and purposes be unenforceable.

Commonwealth Director of Public Prosecutions

DPP

Head Office

Your reference:

Our reference 90/71

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Telex AA61702

10 April 1991

The Chairman
Australian Electoral Commission
West Block
PARKES ACT 2600

Suggested Amendments to the Commonwealth Electoral Act

I am writing to suggest that consideration be given to amending the Commonwealth Electoral Act to provide that the fact that a person has been named on electoral material as having authorised that material can be used as prima facie evidence in proceedings against that person for an offence against the Act.

2. The need for such a provision was highlighted by a recent case concerning the alleged distribution of a misleading how to vote card.

3. The how to vote card falsely represented that the candidate had endorsements from groups which had not endorsed him. It was our view that the card contravened sections 329(1) and 351 of the Commonwealth Electoral Act but that it was not possible to bring criminal proceedings against any person. The problem was that it could not be shown by admissible evidence that any particular person was responsible for publishing or distributing the cards.

4. The cards bore the name of the printer, as required under the Act. They also bore the name of the person who had authorised them. However, the fact that the person was named on the card was not admissible as evidence against her, it being hearsay evidence.

5. Section 328 of the Commonwealth Electoral Act requires that the name of an authorising person appear on all electoral material. However, there is nothing in the Act to facilitate proof that the person so named was connected with the material.

1495T

6. The AFP made enquiries of the printer named on the card. The printer was able to identify the person who had placed the order and subsequently collected the printed cards. However, it appeared that that person was a messenger with no responsibility for drafting or distributing the cards.

7. The AFP also attempted to question the candidate, the person who was named as having authorised the card, the messenger and various other people involved in the matter. All declined to talk to them.

8. In the result there was insufficient evidence to bring charges against any person in respect of the how to vote cards. Consideration was given to the possibility of prosecuting one or more officers of the relevant party under section 351(2) but, in the circumstances of this case, that did not appear appropriate. The preparation and distribution of the relevant cards appeared to be the private initiative of the candidate and/or the person named on it as having authorised it.

9. There seems no reason in logic why the prosecution should not be able to rely on a statement appearing in electoral material as prima facie evidence in a case like the present. There is a legislative requirement that the authorising person be named in such material. I suspect that a person in that position would be somewhat surprised to find that the fact that he or she was so named has no legal consequence.

10. A provision along the lines suggested would clearly not have provided any basis for prosecuting the candidate, who may have been more responsible for the production and distribution of the cards than the person whose name appeared on the card. However, if that person had been at risk of prosecution, it is possible that the candidate and others involved in the case may have been more forthcoming when interviewed by the AFP. It may then have been possible to determine who was the main offender in this matter.

11. If the Act is amended as suggested above, consideration will also have to be given to amending the relevant substantive provisions to ensure that it is an offence against each of them to authorise the publication or distribution of offending material. At present, for example, the word "authorise" appears in the appropriate places in section 329, but does not appear in section 351.

12. If you require any further information please contact me on 270-5634.

GEOFF GRAY
Assistant Director

1495T

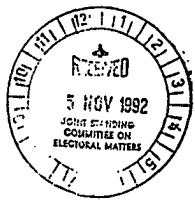
SUBMISSION NO. 24

Australian Electoral Commission AEC

In reply please quote

Contact Officer

Telephone



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Ms J Middlebrook
Secretary
Joint Standing Committee
on Electoral Matters
Parliament House
CANBERRA ACT 2600

Dear Ms Middlebrook

THE CONDUCT OF THE 1990 FEDERAL ELECTION PART II AND PREPARATIONS FOR THE NEXT FEDERAL ELECTION

At page 11 of the Australian Electoral Commission's submission in respect of the Committee's above inquiry dated 26 June 1992, we noted that legal advice was being sought on ways of implementing the Committee's Recommendation (3.43).

Copies of the advice we have received from the Attorney-General's Department and the Office of Parliamentary Counsel are attached.

The advice tends to confirm the Commission's view, as expressed at page 11 of our submission, that it is extremely difficult to find a satisfactory way to prevent persons from inducing voters to vote "1, 2, 2, 2, etc" so long as such a vote remains a formal vote.

Yours sincerely

B L Cox
Electoral Commissioner

3 November 1992

ATTORNEY-GENERAL'S DEPARTMENT

Office of General Counsel

OGC92457478

15 October 1992

Ms Peta Dawson
Acting Director
Research Section
Australian Electoral Commission
PO Box B201
QUEEN VICTORIA TERRACE ACT 2600

Dear Ms Dawson

COMMONWEALTH ELECTORAL ACT 1918 ('THE ACT') SECTION 270; OPTIONAL PREFERENTIAL VOTING

I refer to our discussions today and to your facsimile message requesting my advice on the proposal put forward by the Office of Parliamentary Counsel as a suggested solution of problems arising under section 270 of the Act.

2. The proposed solution advocated the disregard of a repeated preference and the substitution of the next preference in place of the repeated preference. (For example if a ballot paper was marked in the pattern 1, 2, 2, 3.., it would be read as 1, 3.... thus promoting the third preference to the second preference).

3. I agree with the view expressed in your earlier memorandum to us dated 19 August 1992 that a legislative provision having this effect would not ensure that the voters' intentions were given effect. In my view, it would be inappropriate to include provisions in the Act that had the effect of distorting the franchise by failing to give effect to a voters' intention.

Yours sincerely

Margaret Byrne
Acting Senior General Counsel

Telephone: (06) 250 6269
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ATTORNEY-GENERAL'S DEPARTMENT

Criminal and Security Law Division

92216559

Friday, 18 September 1992

Electoral Commissioner
Australian Electoral Commission
PO Box E201
Queen Victoria Terrace
PARKES ACT 2600

Attention: Peta Dawson

Dear Ms Dawson

COMMONWEALTH ELECTORAL ACT-SECTION 270-OPTIONAL PREFERENTIAL VOTING

I refer to your memorandum dated 19 August 1992 to Mr Frank Marris of this Department in relation to section 270 of the *Commonwealth Electoral Act 1918 ("the Electoral Act")*. You sought advice on the proposal to make it an offence to advocate optional preferential voting and the problems that may be encountered in terms of enforcement and monitoring compliance.

2. It was suggested in paragraph 4 of your letter that a possible approach to the problem may be to amend subsection 329(3) of the *Electoral Act* to omit, for example, the words "that contains a representation or purported representation of a ballot paper for use in that election". The effect of this change would be to substantially broaden the offence. It would include an offence where a person advocates optional preferential voting no matter how that is done. The removal of the words would also make it an offence where a person explains the provision in the media, but may not intend to induce an elector to exercise optional preferential voting. Broadening the offence in the way you have proposed is therefore only acceptable if the defence provided by subsection (5) is also made to apply to subsection (3).

3. I agree with the comment by the Office of Parliamentary Counsel at paragraph 6 of their letter that the ballot papers should state positively that a voter must not put the same number in more than one square. This may remove some of the possible ambiguity in voting and make it more difficult for a person to advocate that optional preferential voting in that way. It would also clearly bring that particular activity within the ambit of the offence in subsection (3). It may also be worth considering a media compaign to advocate that optional preferential voting is not acceptable.

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4. As to your comments about compliance, I have some doubt as to whether a media suggestion that voting 1, 2, 2, 2, 2 would come within "print, publish, or distribute ... an advertisement, handbill, pamphet or notice ". Comments made on talk-back radio would certainly not be caught. If you want to try to catch that sort of thing you will not achieve it with the suggested amendment. I also think you would have difficulty formulating a clear enough offence provision to capture such activity.

Yours sincerely

John Walsh

John Walsh
Senior Government Lawyer
Criminal Law Branch

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cc. Margaret Byrne, Office of General Counsel

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OFFICE OF PARLIAMENTARY COUNSEL
ROBERT GARRAN OFFICES
KINGS AVENUE
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OUR REFERENCE:

YOUR REFERENCE:

11 August 1992

Deputy Electoral Commissioner
Australian Electoral Commission
West Block
Queen Victoria Terrace
Canberra
ACT 2600.

Commonwealth Electoral Act 1918 — section 270

I refer to your letter of 2 July 1992 in which you discuss steps taken by certain voters to achieve de facto optional preferential voting. I agree that the problem is a difficult one. You wish to prevent this practice, while maintaining the safety-net provided by section 270, and at the same time not adopting such a heavy-handed approach that it could be an offence to explain a provision of the Act.

2. Although I do not think there is a complete solution, I think 2 steps could be taken to discourage the practice you refer to, namely, to mark a vote "1, 2, 2, 2 etc" and so deliberately cast an optional preferential vote. However, before suggesting these steps, I should point out that, as I see it, a deliberate optional preferential vote could also be cast by marking a vote "1, 3, 4, 5 etc".

3. The first step would be to amend section 270 to ensure that (subject to paragraph 270(1)(b)) in a case where numbers are repeated, or a number is skipped, the voter is treated as expressing preferences for the remaining candidates voted for. For example:

- if a vote is marked "1, 2, 2, 2, 3, 4, 5, 6", the voter would be treated as having expressed preferences for numbers 1, 3, 4, 5 and 6 (and the repeated numbers would be disregarded entirely);

- if a vote is marked "1, 3, 4, 5, 6, 7, 8, 9", the voter would be treated as having expressed preferences for each of the candidates voted for (and the missed number would be disregarded entirely).

4. The result would prevent the voter from achieving optional preferential voting by repeating numbers or omitting numbers. If the vote passed the other tests provided in section 270, the vote would be full preferential voting, but with only the omissions caused by the errors.

5. One difficulty with this approach is the effect on a voter who makes an inadvertent error. In the case of a skipped number, the voter's intention is clear. However, in the case of a repeated number, it is not. It would be possible to use some arbitrary test to decide the order between the candidates whose squares contain the same number.

However, it would be simpler merely to disregard the repeated numbers, and proceed to the next highest number on the vote. This would have the advantage of being the same rule as the one applying where a number is skipped.

6. The second step would be to amend sections 239 and 240, and the ballot papers, to state positively that a voter must not put the same number in more than one square. This would remove any possible ambiguity in sections 239 and 240, and make it more difficult for anyone to advise in good faith that marking a paper "1, 2, 2, 2 etc" is acceptable.

7. I shall be happy to discuss the matter further if you wish.

(I M L Turnbull)
First Parliamentary Counsel

Australian Electoral Commission AEC

In reply please quote

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Mr A Bevis, MP
Chairman
Joint Standing Committee
on Electoral Matters
Parliament House
CANBERRA ACT 2600

Dear Mr Bevis

ELECTION NIGHT COUNTING

Following this morning's informal meeting with the Committee, I would like to set out our understanding of the proposal which emerged, presented on a basis which we consider would be workable and satisfactory.

1. Before election day, the election night computer system will be set up to run as it did for the 1990 election; that is, estimated two-candidate preferred results will be calculated by the computer for each Division. The historical (1990 election) data used by the system will be supplied to the television networks, to use as they see fit. This data will show which two candidates in each Division topped the poll in 1990 (on redistributed boundaries in relevant States).

2. After nominations close, two candidates will be identified by the AEC in each Division to whom preferences will be distributed on polling night. These candidates will be identified on objective criteria, usually on the basis of the previous election result.

3. The names of the two identified candidates will not be made publicly known prior to polling day. Each DRO and OIC will be informed in confidence and on a need to know basis of the names of the two candidates. This may mean that some officers will be advised before polling day as a consequence of their receipt of polling day material. It is not envisaged that there need be a sealed envelope to be opened after the polls close. DROs and OICs will be instructed to keep the information confidential until after the polls close.

4. After the polls have closed, polling places will count first preference votes as quickly as possible. These results will be phoned to the Divisional office, where they will be entered into the computer system as soon as possible. In the Tally Room, the election night computer system will display these progressive first preference results and associated swings, together with notional two candidate preferred results calculated by applying 1990 preference trends to the first preferences. The television networks will receive the "raw" first preference results as soon as they are available in the Tally Room.

5. After the first preference result is phoned in, a number of officers in the polling place will conduct a two candidate preferred distribution to the two identified candidates. Generally, this result will be phoned to the Divisional office as soon as possible. The DRO will maintain a manual tally sheet showing the progressive two candidate preferred result for each polling place in the Division. When all polling places have reported their two candidate preferred result, the DRO will manually calculate the total two candidate preferred result for the Division and enter that total result into the computer system. As soon as that total result is processed by the computer, the display screens in the Tally Room will be amended to replace the notional two candidate result for that Division with the actual two candidate preferred result. A suitable notation will appear on screen to point out that actual data is displayed. It is recognised that this may occur comparatively late on polling night, at least in some Divisions.

6. At the same time as the two-candidate preferred count commences, the Senate count will commence in the polling places. The Senate count will be phoned through to the Divisional office as soon as possible. (If it was not practicable to separately phone through the two candidate preferred vote, that will also be phoned through at this stage.) As each polling place's results are received in the Divisional office, they will be entered into the computer system and transmitted to the Tally Room.

7. After completion of the "official" two-candidate preferred count, scrutineers will be given reasonable opportunity to examine ballot papers as they wish. That is, officers will be made available to display ballot papers in such as way as to enable scrutineers to observe preference flows on ballots counted to any or all candidates.

The Commission does not support the suggestion that DROs phone candidates to inform them of the two-candidate preferred result. In the past, DROs have never had the responsibility of contacting candidates on polling night to inform them of any results. It is the Commission's view that candidates should inform themselves of the results on election night, either through scrutineers' reports, enquiry of the DRO, or the media. It would be unreasonable to place this additional burden on the DRO at this extremely busy time, particularly as many candidates may be difficult to contact on election night.

The Commission considers the above scheme to be a suitable compromise which meets the concerns of the Commission and the Committee.

Yours sincerely

B Cox
Electoral Commissioner

10 November 1992

PS

Later this afternoon you mentioned to Dr Bell an interest in recommending an interim (at about the 40% mark) two candidate preferred result in each Division be compiled and entered into the computer system. This raises technical and operational concerns which we would prefer to avoid. Moreover parties and others will have the benefit of progressive information which scrutineers will have observed as a result of the preference count in each polling place. As an end of count two candidate preferred result will be entered into our system on the night, we would prefer that such a recommendation not be made.

SUBMISSION NO. 26

Australian Electoral Commission AEC

In reply please quote

Contact Officer

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Parkes ACT 2600

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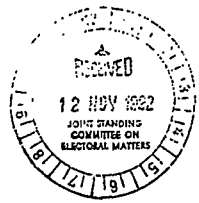

Mr A Bevis, MP
Chairman
Joint Standing Committee
on Electoral Matters
Parliament House
CANBERRA ACT 2600

Dear Mr Bevis

ELECTION NIGHT COUNTING

Following further informal discussions, set out below is our understanding of the latest proposal which has emerged, presented on a basis which we consider would be workable and satisfactory.

1. Before election day, the election night computer system will be set up to display first preference results and actual two-candidate preferred results, with the nexus between them broken. The historical (1990 election) data used by the system (on redistributed boundaries in relevant States) will be supplied to the television networks, to use as they see fit.

2. After nominations close, two candidates will be identified by the AEC in each Division to whom preferences will be distributed provisionally on polling night. These candidates will be identified on objective criteria, usually on the basis of the previous election result.

3. The names of the two identified candidates will not be made publicly known prior to polling day. Each DRO will be informed in confidence and on a need to know basis of the names of the two candidates. DROs will be instructed to keep the information confidential until after the polls close. Each polling place OIC will be given a sealed envelope to be opened after the polls close with the names of the two candidates enclosed. If they need to know, the television networks with computer analysis systems will be informed in confidence of the names of the two candidates on the morning of polling day, to give them time to program the names into their systems.

4. After the polls have closed, polling places will count first preference votes as quickly as possible. These results will be phoned to the Divisional office, where they will be entered into the computer system as soon as possible. In the Tally Room, the election night computer system will display these progressive first preference results and associated swings. The television networks will receive the first preference results and associated polling place data in regular batched updates, as they have requested.

5. After the first preference result is phoned in, a number of officers in the polling place will conduct a two candidate preferred distribution to the two identified candidates. Generally, this result will be phoned to the Divisional office as soon as possible. The DRO will maintain a manual tally sheet showing the two candidate preferred result for each polling place in the Division and the progressive total for the Division. When the progressive total reaches about 10% of the expected total for the Division, the DRO will enter the progressive total into the computer system, together with details of which polling places are included in the total. The DRO will repeat this process at around 40%, and will input the final Divisional total when all polling places have reported. Some flexibility may be required here, dependent on how quickly or slowly figures arrive - for example, if one polling place is late in reporting, the DRO could enter the total all bar that one polling place as the third transaction, and enter the final figure when the outstanding polling place reports. As soon as the two-candidate preferred result is processed by the computer, the display screens in the Tally Room will show the two candidate preferred result for the relevant Division, using matched polling place analysis.

6. At the same time as the two-candidate preferred count commences, the Senate count will commence in the polling places. The Senate count will be phoned through to the Divisional office as soon as possible. (If it was not practicable to separately phone through the two candidate preferred vote, that will also be phoned through at this stage.) As each polling place's Senate results are received in the Divisional office, they will be entered into the computer system and transmitted to the Tally Room.

7. Polling staff will be instructed that scrutineers are to be able to scrutinise preference flows as well as formality during stages 4, 5 and 6 above, although it is expected that the first preference count at stage 4 will proceed relatively quickly given that the two-candidate preferred count will commence immediately after. The speed of the count will therefore depend in part on whether scrutineers impede counting staff. After completion of the "official" two-candidate preferred count, scrutineers will be given reasonable opportunity to examine ballot papers as they wish. That is, officers will be made available to display ballot papers in such a way as to enable scrutineers to observe preference flows on ballots counted to any or all candidates.

8. Candidates wishing to ascertain election night results may do so by contacting the relevant DRO.

The Commission considers the above scheme to be a suitable compromise which meets the concerns of the Commission and the Committee.

Set out below are answers to specific questions that have not been covered by the above scheme.

The Scrutineers Handbook states, and polling place staff are instructed, that scrutineers are able to enter and leave a polling place at any time.

In comparing the AEC's original proposed scheme and the above scheme, there are some differences in timing on election night. Under the above scheme, first preference results will arrive (we estimate) on average 15 to 30 minutes earlier than under the AEC's scheme. Under the above scheme, two candidate preferred results will arrive roughly 30 minutes after they would have begun to arrive under the AEC's option (in other words there may be a 45-60 minute period in which first preferences will be available for a particular Division but no two candidate preferred figures will be available). The timing for input of Senate results should be much the same under either option.

The above scheme will involve about 2-3 weeks of programming time, followed by associated testing. In addition, it will involve some amendment of manuals. It does not, however, present any significant technical problems.

At the early stages of counting, a higher proportion of first preference votes will be displayed than of two candidate preferred votes. We will be seeking to make this arrangement well understood so as to avoid possible confusion. The delay in posting the two candidate preferred result is a trade off for somewhat earlier posting of first preferences.

To enable work to commence on reprogramming the system, we would appreciate early advice of your recommendation on this matter.

Yours sincerely

B Cox
Electoral Commissioner

12 November 1992

SUBMISSION NO. 286

COUNCIL ON THE AGEING

19 November 1992

Ms J Middlebrook
Secretary
Joint Standing Committee on Electoral Matters
Parliament House
CANBERRA ACT 2600

Dear Ms Middlebrook

RE: INQUIRY INTO THE CONDUCT OF THE 1990 FEDERAL ELECTION (PART II) & PREPARATIONS FOR THE NEXT FEDERAL ELECTION

In reply to your letter of 12 November and our phone call in October, your inquiry has been discussed at meetings of the Executive Directors from all State and Territory Councils on the Ageing.

The issues raised by the Executive Directors are:

Information:

Information about facilities available for the frail aged people and people with disabilities should be made at the earliest possible time prior to the election and between elections.

Topics which should be published include:

a) that voting is compulsory;

b) that postal voting is available;

c) that people may apply to be registered to be postal voters on a regular basis;

Frail aged people, people with limited sight, and those people with mobility problems should be targeted;

d) Older people have problems getting to polling booths. Some transport is required;

e) More publicity about which polling booths are physically accessible to people with disabilities.

../2

Council on the Ageing (Australia) A.C.N. 008 483 574
3rd Floor, VACC House, 464 St Kilda Road, Melbourne, Victoria 3004

People of Non-English Speaking Backgrounds (NESB):

It is noted that older people of NESB have the highest level of informal votes. Information as detailed above should target this group through their communities, ethnic press, ethnic radio and television - taking into account the high level of illiteracy amongst some of the aged in these communities who do not have a good understanding of Australian Electoral Laws.

The community languages need to be used. Particular emphasis needs to be placed on the declining communities such as the Polish.

Publicity:

The information, which needs to be spread to the frail aged, should be distributed through the general media, including the age-specific press and community service newsletters.

On behalf of the COTA network, I thank you for this opportunity to comment and your patience in waiting for the input.

Yours sincerely

Mrs Sue Doobov
Executive Director - COTA (ACT)

cc: COTAs

Ref: k\wp\002c\middlebr.111

APPENDIX 8

SENATE SCRUTINY TIMES

SENATE ELECTIONS 1961–1990 (cont.)

Time taken to conduct the scrutiny

POLLING DAY	STATE	WRIT RETURNED	TIME (DAYS)
13/12/75	NSW	5/2	54
	VIC	19/1	37
	QLD	19/1	37
	WA	19/1	37
	SA	19/1	37
	TAS	19/1	37
	ACT *	24/12	11
	NT *	15/1	33
18/5/74	NSW	25/6	38
	VIC	25/6	38
	QLD	18/6	31
	WA	19/6	32
	SA	18/6	31
	TAS	20/6	33
2/12/72 #	QLD	22/12	20
21/11/70	NSW	16/12	25
	VIC	17/12	26
	QLD	18/12	27
	WA	11/12	20
	SA	14/12	23
	TAS	10/12	19
25/11/67	NSW	20/12	26
	VIC	19/12	25
	QLD	18/12	24
	WA	5/1	42
	SA	20/12	26
	TAS	18/12	24
26/11/66 #	NSW	13/12	18
	VIC	15/12	20
	QLD	14/12	19
	WA	12/12	17
9/12/61	NSW	30/1	52
	VIC	11/1	33
	QLD	12/1	34
	WA	10/1	32
	SA	12/1	34
	TAS	22/12	13

* 1975 was the first Senate election in which the Territories had Senate entitlements.
# 1972 and 1966 were Senate by-elections.

Time taken to conduct the scrutiny

POLLING DAY	STATE	WRIT RETURNED	TIME (DAYS)
24/3/90	NSW	14/5	51
	VIC	27/4	34
	QLD	9/5	46
	WA	23/4	30
	SA	7/5	44
	TAS	26/4	33
	ACT	20/4	27
	NT	20/4	27
11/7/87	NSW	25/8	45
	VIC	18/8	38
	QLD	17/8	37
	WA	10/8	30
	SA	6/8	26
	TAS	7/8	27
	ACT	4/8	24
	NT	31/7	20
1/12/84	NSW	11/1	42
	VIC	7/1	38
	QLD	3/1	34
	WA	8/1	39
	SA	8/1	39
	TAS	24/12	23
	ACT	27/12	26
	NT	27/12	26
5/3/83	NSW	6/4	30
	VIC	29/3	24
	QLD	30/3	25
	WA	29/3	24
	SA	29/3	24
	TAS	21/3	16
	ACT	18/3	13
	NT	28/3	23
18/10/80	NSW	17/11	30
	VIC	13/11	26
	QLD	18/11	31
	WA	24/11	37
	SA	14/11	27
	TAS	10/11	23
	ACT	24/10	37
	NT	13/11	26
10/12/77	NSW	13/1	34
	VIC	13/1	34
	QLD	19/1	40
	WA	10/1	31
	SA	6/1	27
	TAS	20/1	41
	ACT	21/12	11
	NT	30/12	20