

The Southern Cross Group

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Supplementary Submission to the Australian Parliament's
Joint Standing Committee on Electoral Matters

Inquiry into the Conduct of the 2001 Election and Matters Related Thereto

Voting Rights and Representation in France of French Citizens Abroad: Comparisons with Australia

Brussels and Canberra
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The Southern Cross Group is an international non-profit advocacy and support organisation seeking to speak for and work with the million-odd members of the Australian Diaspora worldwide.

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This supplementary submission follows the Southern Cross Group's primary submission of 12 July 2002 and its supplementary submission of 9 December 2002 to the Joint Standing Committee on Electoral Matters (JSCEM) as part of the JSCEM's Inquiry into the Conduct of the 2001 Election and Matters Related Thereto.

It is the SCG's understanding that the JSCEM would be assisted at this stage by further information on the ways in which other countries deal with their expatriate populations on electoral matters. This submission, prepared primarily by the Southern Cross Group's Coordinator for France, Janet Magnin,¹ sets out the voting rights of French citizens abroad and details the way in which they are represented in the French parliament.

1. A Constitutional Right to Vote for All Citizens

The right to vote in France for all citizens is enshrined in the French Constitution. Voters are defined as "all French citizens of both sexes who have reached the age of 18 years, and having the benefit of their civil and political rights".² The constitutional right to vote in France attaches merely by virtue of a person's legal citizenship status and is not in any way dependent on whether a citizen resides in France or not.

By contrast, the right to vote is not a constitutional right in Australia in the sense that there is no express statement of the right to vote in the Australian Constitution except for the reference in Section 41.³ Unfortunately, Section 41 has been interpreted by the High Court to apply only to those who had the right to vote at the time the Commonwealth franchise was enacted in 1902.⁴

In the absence of an explicit constitutional right to vote in Australia, it might be argued that there is an implied constitutional right to vote by virtue of the requirement in Sections 7 and 24 that members of Parliament be "directly chosen by the people".⁵ However, the existence of such an implied right has not been articulated by the High Court to date. Even if there is an implied right to vote in the Constitution by virtue of Sections 7 and 24, the question of whether an Australian citizen living abroad would be included in the term "people" in those Sections is untested.

The Southern Cross Group takes the view that to deny Australian citizens abroad the right to vote - by restrictive legislative provisions on enrolment or any other means - should be unconstitutional in a democracy such as Australia. If a disenfranchised Australian citizen overseas were to take this matter before the High Court, it is to be

¹ Translator, dual French/Australian nationality.

² French Constitution of 1958, as updated in 1992, Article 3, Section 4. Translation into English by Janet Magnin.

³ Section 41 reads: "No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth." See Anne Twomey, "The Federal Constitutional Right to Vote in Australia", *Federal Law Review*, Volume 28 No 1, 2000, page 125.

⁴ *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254. See also Kim Rubenstein, *Australian Citizenship Law in Context*, 2002, page 269.

⁵ Section 7 of the Australian Constitution reads: "The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate." Section 24 reads: "The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of senators."

hoped that the Court would use the opportunity to define an implied right to vote into our Constitution, which is in many respects outdated. If such a right were found on the basis of Sections 7 and 24, then parts of Section 94 and 94A of the *Commonwealth Electoral Act 1918* may well be found to be unconstitutional as a result.⁶

Quite apart from the questions surrounding the constitutionality purely within the Australian context of the offending provisions of the *Commonwealth Electoral Act 1918*, the Southern Cross Group repeats its position that in any event the legislation amounts to a breach of Australia's international obligations as a party to the International Covenant on Civil and Political Rights (ICCPR). Article 25 of the ICCPR states that "Every citizen shall have the right to vote ...without unreasonable restrictions".⁷ In the view of the SCG, an individual who believed that the *Commonwealth Electoral Act 1918* infringed their right to vote would have a case before the UN Human Rights Committee.

2. Special Constitutional Rights of Representation

Article 24 of the French Constitution specifically mentions French citizens living abroad. It states: "French nationals settled outside France shall be represented in the Senate". This aspect will be discussed further below. Australia's Constitution makes no explicit reference to the representation of Australian citizens settled outside Australia in either House of Parliament.

3. Enrolment for Overseas Citizens

In France, enrolment and voting procedures are regulated by the Electoral Code. Article 9 stipulates that it is compulsory to be registered on an electoral roll in order to be able to exercise the right to vote.⁸

Article L11 of the French Electoral Code⁹ establishes a residency requirement according to which a voter can be enrolled in a municipality if they have resided in that municipality for at least six months. This would presumably cover most French citizens who move abroad after having lived at least six months somewhere in France.

However, for other cases, Article L12 of the French Electoral Code states that French citizens settled outside France and registered at their nearest French consulate can, on request, be enrolled in any one of the following municipalities: the municipality of their birth; the municipality of their last official domicile; the municipality of their last place of residence, on condition that this residence was for six months at least; the municipality

⁶ See the Southern Cross Group's Primary Submission to the JSCEM of 12 July 2002 for a full discussion of how various provisions of the *Commonwealth Electoral Act 1918* negatively impact on Australians overseas so that they cannot vote.

⁷ See the Southern Cross Group's Primary Submission to the JSCEM of 12 July 2002 in this Inquiry, page 8.

⁸ Note however that while enrolment on an electoral roll is a compulsory prerequisite to exercising the right to vote (as in Australia), in France voting is not compulsory, even for French citizens residing in France.

⁹ The entire French Electoral Code can be found at <http://www.legifrance.gouv.fr/WAspad/RechercheSimpleCode?commun=CELECT&code> but is in French, and no official translation into English is available. Further detailed information may possibly be obtained through the French Consulate-General in Sydney <http://www.consulfrance-sydney.org/leconsulat/index.en.htm> or the French Embassy in Canberra <http://www.ambafrance-au.org/index.en.htm> who usually have bilingual legal advisers on their staff. Note that the OSCE/Office for Democratic Institutions and Human Rights has published the following report on the 2002 French Presidential Elections and describes in English various articles of the French Electoral Code that govern the operation of elections in France: http://www.osce.org/odihr/documents/reports/election_reports/fr/fr_prel_april2002_asm.php3#4

where one of their ascendants was born, or is or was registered on the electoral roll; or the municipality where one of their first degree descendants is registered. Wives and husbands can be enrolled in the municipality of their spouse, by virtue of their marriage.

When applying to be enrolled for a new address, the French citizen's application must be accompanied by a request to be removed from the former roll if necessary. (Provision is also made in the electoral code for persons who cannot fulfil even these requirements, such as nomads, merchant seamen etc.)

These options as to the municipality which may be used to identify the place of enrolment of a French overseas citizen, may in part bear on the concerns raised by some members of the JSCEM as to the place of enrolment that would apply for expatriate Australians applying to be re-enrolled in the event that the Australian legislation is amended to remove the current restrictions on overseas voting.¹⁰

3.1 Failing to Vote Does Not Lead to Removal from the Roll

French electoral rolls are permanent, but are revised at regular intervals, according to information supplied from the compulsory part of the Social Security Scheme (name, nationality, date and place of birth, address). The only reasons for which a person can be removed from the electoral roll are death, irregular enrolment (eg, enrolled in two places) or having been deprived of one's right to vote (for example by a legal judgment or due to being of unsound mind). Since it is not compulsory to vote in France, a person cannot be removed from the electoral roll simply for not having voted.

In Australia, by contrast, an Eligible Overseas Elector (or any other overseas Australian citizen who is still on the electoral roll) who misses voting in one Federal Election may well find themselves removed from the electoral roll as a consequence, resulting in their permanent disenfranchisement while they remain overseas, even despite the fact that voting is currently not compulsory for Australians overseas.¹¹

3.2 Enrolment from Overseas Possible any Number of Years after Leaving France

Furthermore, a French citizen living abroad can be enrolled according to the same rules that govern citizens living in France. Generally, French citizens are automatically enrolled on their 18th birthday, but provision also exists for enrolment during certain periods, and for certain categories of citizen (newly naturalized, for example) at any time. Application for enrolment can be made between 1 September and 31 December of any year, and enrolment comes into effect on 15 April the following year. Although these dates may appear to be rigid, they are well known in advance, and, in France, elections are programmed years in advance, as Parliaments are for fixed terms under the Constitution.

By contrast, an Australian overseas loses their right to enrol from overseas within two years of leaving Australia.

¹⁰ Proof Committee Hansard for the Joint Standing Committee on Electoral Matters, 20 September 2003, page EM 109 and following.

¹¹ See the Southern Cross Group's Primary Submission to the JSCEM of 12 July 2002 in this Inquiry, page 24 and following.

3.3 Refusal to Enrol and Removal from the Electoral Roll are Notified in Writing

In France, any refusal to enrol a person or removal from the roll is notified in writing to the elector's home address, with full reasons given, and the decision may be contested before a magistrates' court. The decision of the magistrates' court is forwarded by registered post. In Australia, communications from the Australian Electoral Commission (AEC) regarding a person's enrolment are sent by ordinary mail, whether to an address in Australia or overseas. There is no guarantee that the recipient will actually receive the letter, and as reported by the Southern Cross Group in July 2002, there have been cases where people have been removed from the electoral roll simply because they never received correspondence from the AEC.

Our supplementary submission of 9 December 2002 canvasses the problems that arise in relation to the AEC systems, or lack thereof, for maintaining contact addresses for overseas Australians.

3.4 Registration at Overseas Missions Encouraged

French citizens living abroad are actively encouraged to register at their nearest French embassy or consulate, although this is not compulsory. This allows them, among other things, to vote directly at the embassy or consulate in Presidential and European elections and referenda, if their embassy/consulate is established as a polling station, and to vote for the members of the High Council for French Expatriates (more about the Council below). They can (in fact, they are encouraged) to be both registered at their embassy or consulate and enrolled in a municipality in France.

While of recent times the Australian Department of Foreign Affairs and Trade (DFAT) has been actively promoting the need to register their contact details with the Department to Australians living overseas, the Committee will be aware that the registration process is in no way linked to the processes of the Australian Electoral Commission in respect of enrolment and/or the casting of votes. Significantly, in evidence given to the Committee at its hearing on 2 December 2002, the DFAT representative went to some lengths to explain that DFAT's overseas posts acted merely as arm's length agents for the AEC during the polling period and referred all persons raising enrolment issues direct to the AEC.

4. Voting

When French citizens are abroad, either short or long term, there are three possible ways of voting in French elections, but they are not all available for all elections or for all electors.

For presidential and European elections and referenda, French citizens living abroad can vote:

- in polling stations established at their nearest diplomatic or consular office if they are registered there and if a polling station has been established; or
- in person (in France) if they are registered only in their municipality of residence in France; or
- by proxy.

For parliamentary, regional, cantonal (district) and municipal elections, they should vote:

- by proxy if they are registered at the embassy or consulate;
- either in person (in France) or by proxy if they are registered only in their municipality of residence in France.

The French Ministry for Foreign Affairs recommends double registration, both in France and at the closest embassy or consulate,¹² for citizens to be able to vote in all elections. However, voting twice in the same election is not possible. Registration at an embassy or consulate prohibits personal voting in France for presidential and European elections and referenda.

4.1 Voting by Proxy

Every French elector who is outside France at the time of any election¹³ and however long they stay abroad, that is, whether they are simply travelling or are a French national living abroad, can exercise their right to vote by proxy on the condition that they are registered on an electoral roll in France. The only restriction is that the person asked to vote in their place (their proxy) must be enrolled in the same municipality.¹⁴

The proxy votes are drawn up at a consulate, and, taking into account the postal delivery delay (that is, at least two to three weeks before the election), may be arranged for one poll only, or for a year on presentation of an identification document. Proxies can be arranged for a longer period (up to three years) but these are restricted to French citizens living abroad who regularly register at the consulate.

Australia does not allow its overseas citizens to vote by proxy.

5. Representation of French Expatriates in the French Parliament

Under Article 24 of the French Constitution of 1958 (the Fifth Republic), “French nationals settled outside France shall be represented in the Senate”.¹⁵ The Senate in France, unlike in Australia, is not elected directly by French citizens but by “indirect universal suffrage”. Its members are elected by an electoral college made up essentially (95%) of municipal council delegates, the number of which depends on the number of inhabitants in each municipality. Thus, they are elected by elected representatives, according to the principle of proportional representation.¹⁶ The 12 Senators representing French citizens abroad (of a total of 321 Senators) are elected in a similar way: indirectly, according to a system of proportional representation. But instead of municipal delegates, French citizens abroad elect members to the Conseil Supérieur des Français de l'Étranger (C.S.F.E.), the “High Council for French Expatriates”, which then elects the Senators. In addition, this Council is much more than simply an electoral college, as it

¹² <http://www.diplomatie.gouv.fr/etrangers/vivre/elections/index.html#3>

¹³ A municipal, cantonal (district), regional, parliamentary, presidential or European election, or a referendum.

¹⁴ In fact, this is an extension of the general rule that applies to many categories of French citizens who cannot be in their electorate on voting day, or who cannot physically go to a polling booth (Article L71): a proxy may be appointed to vote in their place, as long as the proxy is also enrolled in the same electorate and it has been organised prior to the day.

¹⁵ <http://www.legifrance.gouv.fr/html/constitution/constitution2.htm#titre4>

¹⁶ For more detailed information in English about the French Senate and the Electoral College see: <http://www.senat.fr/english/role/colleg.html>

operates in both directions for the benefit of expatriates, by representing expatriates and their special interests in relation to the French government and also with governmental and other bodies in their host country.

The C.S.F.E. in this respect could be an attractive model for Australia to consider at this stage, since France does not have an “expatriate constituency” in the sense that French abroad do not vote directly for Senators especially representing only expatriates. As well as their right to vote as a member of the electoral roll for a municipality for a member of the lower house, French overseas also have the C.S.F.E. specifically dedicated to their needs and concerns.

The setting up of a similar Australian body (called, say, the National Advisory Council for Australian Expatriates) would be a very positive step towards allaying the concerns and difficulties currently faced by Australians living overseas, and providing formal liaison with various national bodies such as the AEC, although at this stage, a French-based Australian model would stop short of the French arrangement whereby through the C.S.F.E. there are dedicated Senators in the upper house for citizens abroad. Its first task could well be to instigate research and lead the debate on finding the most suitable form for the representation of Australians resident overseas in the Australian Parliament.

5.1 The High Council for French Expatriates (C.S.F.E.) – Structure and Areas of Activity

The C.S.F.E. is a body consisting of 150 members, elected directly by registered French nationals living abroad. The Council elects 12 Senators, who thus become *ex officio* members of the Council, to represent expatriate French citizens in the Senate, where they can propose laws and amendments for the benefit of expatriates. On the Council, there are also twenty personalities appointed by the Minister of Foreign Affairs "by reason of their competence in matters concerning the general interests of France abroad". The President of the Council is the Minister for Foreign Affairs, (who can directly advise the Cabinet), and there are three vice-presidents elected by the Council.

The full Council meets once a year, but there is a permanent bureau and various committees (social affairs; economic, fiscal and customs affairs; education, culture and information; for French expatriates' representation and rights; war veterans; employment and vocational training; C.S.F.E. reform; plus various working groups established for specific needs as they arise) whose meetings and actions continue all year round. The Committees report to the full Council meeting and every Council member must be a member of a Committee but one only.

Council members can also be elected to various national boards, including the Economic and Social Council, the Social Security Fund for French Expatriates, the Agency for French Teaching Abroad, the National Study Grants Commission, the Standing Committee for Employment and Vocational Training for French Expatriates, the National Legal Aid Council, the Paris Departmental Rights Entitlement Council, the Council for the Social Protection of French Expatriates, and the National Association of French Schools Abroad.

The Council also reports to the Government on its research into the problems that affect French expatriates in the areas of education (schooling and training), law, social

security, foreign trade, taxation, and more. It also has the role of giving its opinion and expressing its wishes on the actions of the administration on behalf of French citizens living outside of France. Members of the Council also provide liaison between diplomatic personnel abroad and local French communities. Further information is available in English from <http://www.csfe.org/>.

6. Numerical Comparisons

There are approximately 1,900,000 French nationals living outside France, which represents about 3% of the total French population (including its overseas departments and territories) of approximately 60 million.¹⁷

By comparison, DFAT estimated that there were some 860,000 Australians living permanently overseas as at December 2001, equivalent to some 4.4% of Australia's resident population at the last census.

Numbers of Australian citizens living overseas have been increasing annually. The SCG notes that the Government's white paper *In the National Interest*, released on 12 February 2003, indicates "there are more than one million Australians traveling, working and living overseas at any one time."¹⁸ Thus, as a proportion of the combined total of the resident population and overseas Australian citizens, overseas Australian citizens represent 5% of a broader Australian population.¹⁹

7. Conclusion

In the French context, the value of the work and influence of French citizens abroad is recognized and supported through the structures that have been established. This "value" works in both directions, in the positive influences that French citizens can exercise abroad and in the positive benefits that "metropolitan" France gains in return.

Expatriates share with their country of adoption the benefit of their experience, their education and culture. In this way, they are a positive, living example for the country of their birth (or naturalisation). Then, in return, they are often in a position to advance the interests of their original country in the foreign setting, either directly in making business links, or indirectly through the positive example they set.

Since the influence of an expatriate affects both countries, and indeed since expatriates can be affected by the laws of both countries, we maintain that it is normal that they should be able to exercise their unfettered democratic right to vote for those who will represent them in both countries, in the same way that citizens remaining in their original country also votes in many different elections for different representatives, i.e. at local, state, or federal level.

¹⁷ Website of the Embassy of France, Canberra at <http://www.ambafrance-au.org/index.en.htm>

¹⁸ Australia's Foreign and Trade Policy White Paper "Advancing the Nation's Interest", Department of Foreign Affairs and Trade, Canberra, 12 February 2003, page 119, available at www.dfat.gov.au/ani

¹⁹ Currently the Australian Census does not seek to include Australian citizens not resident in Australia as at the census date.

The French model is but one, albeit perhaps a leading example, of the way in which other countries recognise the value of their overseas diaspora. The SCG believes it is time that Australia followed suit.