

Submission No 013

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05 OCT 2009

BY: LACA

“How Do I Say Yes or No? Let Me Count the Ways” *

**A Submission by Sir David Smith **
to the House of Representatives Standing Committee
on Legal and Constitutional Affairs
October 2009**

The Attorney-General, on behalf of the Special Minister of State and Cabinet Secretary, has asked the House of Representatives Standing Committee on Legal and Constitutional Affairs to inquire into the effectiveness of the *Referendum (Machinery Provisions) Act 1984* in providing an appropriate framework for the conduct of referendums.

This submission deals with the way in which the Australian Electoral Commission carries out its statutory obligations in relation to the scrutiny and counting of referendum ballot papers, and raises the question whether the Commission, in its instructions to its officials on the handling and counting of referendum ballot papers, is ignoring or subverting the provisions of the Act and the expressed will of the Parliament.

It is the practice of the Commission to issue scrutineers' handbooks prior to the holding of elections and referendums. These handbooks provide advice to candidates, polling officials and scrutineers as to the manner in which elections and referendums are to be conducted, and on the way in which ballot papers are to be handled and counted. These handbooks purport to explain the laws that are applicable to these matters, and set out the manner in which these laws will be applied by the Commission and its scrutineers. Thus, the Commission's practice of issuing such handbooks, and the content of such handbooks, can have a profound effect on the way in which an election or referendum is conducted, and on the final outcome as a result of the handling and counting of ballot papers.

I invite the Committee to examine the handbook, *Guidelines to Scrutineers*, that was issued by the Commission prior to the holding of the 1999 constitutional referendum on the republic. The evidence tends to suggest that some of the guidelines set out in that handbook may not have been in accordance with the provisions of the *Referendum (Machinery Provisions) Act 1984*, and may even have been contrary to those statutory provisions.

If that should indeed be the case, and if the Commission believes that it is open to it to give such wide interpretations that may be contrary to the wishes of the Parliament, as

* With apologies to Elizabeth Barrett Browning 1806-1861.

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expressed in the Act, then I believe that this is a matter deserving of the Committee's scrutiny. In short, does the Commission observe the laws which it administers, or was its 1999 referendum handbook an example of the Commission's ability to misrepresent and/or ignore the intentions of Parliament?

Section 24 of the *Referendum (Machinery Provisions) Act 1984* reads:

“24. Manner of voting The voting at a referendum shall be by ballot and each elector shall indicate his or her vote:

- (a) if the elector approves the proposed law – by writing the word “Yes” in the space provided on the ballot paper; or
- (b) if the elector does not approve the proposed law – by writing the word “No” in the space so provided.”

Schedule 1 to the *Referendum (Machinery Provisions) Act 1984* contains the forms to be used. Form B, the ballot paper to be used in a referendum on proposed Constitution alteration, contains the following:

“DIRECTIONS TO VOTER

WRITE “YES” or “NO” in the space provided opposite the question set out below.”

The Commission's web site, in a document entitled “Electoral Backgrounder 10”, included the following items of information about referendums:

“3. Voting in referendums is compulsory for all eligible electors, and voters are required to write either "Yes" or "No" in the box opposite the question on the ballot paper.”

...

“20. At national referendums to amend the Constitution, voters generally rely on official AEC referendum advertising for guidance on how to fill out their ballot papers correctly. Official AEC advertising is directed to ensuring that voters know when and where to go to cast a vote, and that voters understand that they are required to write "Yes" or "No" in the boxes printed on the ballot paper next to the questions asked of the voter.”

...

“29. Informal voting is not an offence under the Referendum Act, and it is not illegal to advocate an informal vote. Any referendum ballot paper that does not show either a "Yes" or a "No" vote against the question(s) provided is categorised as informal (under section 93 of the Referendum Act, read with section 24). That is, such ballot papers are put aside and do not count towards the final referendum result.”

“30. Any referendum ballot paper that contains slogans or symbols, but does not show either a "Yes" or a "No" vote against the question(s) provided, is also categorised as informal, and does not count towards the final referendum result. On

the other hand, any referendum ballot paper that contains slogans and symbols, but also clearly and separately shows either a "Yes" or a "No" vote against the question(s) provided, is categorised as a formal vote."

Subsection (1) of section 41 of the *Referendum (Machinery Provisions) Act 1984* reads:

"41 Spoilt ballot-papers

(1) If a person voting at a referendum, before depositing a ballot-paper in a ballot-box, satisfies the presiding officer at a polling booth at which the person is voting that the person has spoilt the ballot-paper by mistake or accident, the presiding officer shall provide the person with a new ballot-paper and shall cancel the spoilt ballot-paper."

The legislation, the direction on the ballot paper, and the information on the Commission's web site are clear enough, and require the voter to make one of two very simple alternative responses to a referendum question by writing either the word "Yes" or the word "No" on the ballot paper. As the web site's explanatory paragraphs quoted above make clear, a voter may place slogans and symbols on the ballot paper as well as, but not instead of, writing the words "Yes" or "No", which must be shown "clearly and separately" against the question(s) provided.

In short, in order to cast a valid vote, the voter is required to use one of two quite specific words, and the legislation has put them in quotation marks – there can be no mistake as to what the voter is required to do. To emphasise how a voter is required to mark a ballot paper, the "Directions to Voter" on the ballot paper itself puts the words "YES" and "NO" in quotation marks and in upper case!

The legislation is also quite specific about the action to be taken if the voter spoils a ballot paper. It requires the cancellation of a spoilt ballot paper and the issue of a new ballot paper.

One would think that all of the above-mentioned provisions are simple enough to follow and to apply. But that would be to underestimate the inventiveness of Australian voters, as well as that of the Commission.

Shortly before the 1999 constitutional referendum, the Commission issued a booklet called *Guidelines to Scrutineers*. Amongst other things, it contained instructions as to what would constitute a formal vote. Examples of formal "Yes" votes, apart from the word "Yes", included the letter "Y" and the words "OK", "Sure", and "Definitely". Examples of formal "No" votes, apart from the word "No", included the letter "N" and the words "Never" and "Definitely not". In addition, scrutineers were instructed that a tick *on its own* would be accepted as a valid "Yes" vote but that a cross would not be treated as a valid "No" vote and would be treated as an informal vote. (Emphasis added.) The words "on its own" in the Commission's scrutineers' handbook are contrary to the Commission's "Directions to Voter" number 30 (quoted above) which states that a symbol on its own would be categorised as informal and would not be counted.

When Parliament legislated in specific terms for the use of the words "Yes" or "No", did it contemplate that the bureaucracy would interpret this as allowing also the use of a

variety of other words or even single letters or symbols such as ticks? If that is the case, then the possibilities for linguistic adventurism are boundless. Why limit it to the few words and letters and symbols selected by the Commission?

Had the Parliament intended to leave the choice of responses wide open to the imagination of the voter, or that of an electoral official, section 24 would merely have required the voter to indicate whether or not he or she approved the proposed law. But Parliament didn't stop there – it went on to stipulate precisely how the voter should indicate his or her vote, and specified the two words that were to be used.

To compound its extraordinary ruling on the use of language, the Commission told scrutineers that the word “No” crossed out and “Yes” or a tick written above it would constitute a formal “Yes” vote, and the word “Yes” crossed out and “No” written above it would constitute a formal “No” vote. Of course, scrutineers would have no way of knowing whether the alteration had occurred while the ballot paper was still in the hands of the voter or afterwards.

To guard against the fraudulent alteration of a ballot paper by another person, Parliament specifically legislated that a spoiled ballot paper was to be cancelled and a new one issued. The Act contains no provision for a spoiled ballot paper to be re-used by allowing a mistake to be crossed out and over-written. By what authority does the Commission over-rule the clear and precise provisions which Parliament made, and invent a new procedure which Parliament clearly did not contemplate?

Having identified seven ways of saying “Yes” without using the word, and four ways of saying “No” without using the word, the Commission then gave the following instruction to scrutineers: “To be a formal vote, the answer to the question need only clearly express the voter’s support for or opposition to that question’s proposed constitutional change, *in a language or symbol the person conducting the scrutiny understands.*” (Emphasis added.)

In other words, the validity of a particular vote could be dependent upon the linguistic skills, or the imagination, of each individual electoral official who is conducting a scrutiny. Voters using exactly the same language or symbols could have their votes counted in one place because they were fortunate enough to have a scrutineer who understood that particular language or symbol, and could have an identical vote declared informal and not counted in another place because there was no scrutineer present who understood that same particular language or symbol. Furthermore, voters would have no knowledge of the language skills of the various scrutineers, and would thus have no way of knowing whether or not they had lodged a valid vote.

This instruction about the use of other languages or symbols must surely represent the most adventurous administrative interpretation one could ever hope to see of the simple legislative requirement to write “Yes” or “No” on a ballot paper. Was the Electoral Commission conducting a referendum or a lottery?

Subsection (8) of section 93 of the *Referendum (Machinery Provisions) Act 1984* reads:

“93 Informal ballot papers

...

(8) Effect shall be given to a ballot-paper of a voter according to the voter's intention, so far as that intention is clear."

The question that needs to be answered is whether this particular sub-section relates back to the earlier sections of the Act that require the words "Yes" or "No", and where a determination might need to be made by an official in certain cases as to which of these two words the voter intended to write; or whether section 24 of the Act can be given whatever interpretation the Electoral Commission chooses to give it, and used to ignore and over-ride the Act's quite specific instructions as to the precise words to be used.

Indeed, paragraph 29 (quoted above) from the information on the Electoral Commission's web site suggests that the first of these two propositions is the correct one, that is, did the voter write, or intend to write, either the word "Yes" or the word "No"? It seems most unlikely that Parliament intended to give officials *carte blanche* to invent their own weird and wonderful ways for voters to indicate their vote; and even less likely that Parliament intended that the validity of a vote marked in a foreign language or symbol would depend upon the linguistic skills or the imagination of an individual scrutineer.

As there was no organisation with legal standing that would have enabled it to challenge the rulings by the Electoral Commission, as contained in the *Guidelines to Scrutineers*, an individual did so in his own name. The application was filed in the Federal Court only four days before the referendum was to be held, and had no prospect of success – in giving his decision on the day before the referendum was to be held, the Judge ruled against the application "on the balance of convenience", and awarded costs to the Electoral Commission.

In dismissing the application for an interlocutory injunction, the Judge decided that the relief sought by the applicant was not justified on the grounds of, inter alia, the considerable, if not insuperable, difficulties in changing instructions to all polling staff at such a late stage; and the lengthy unexplained delays on the part of the applicant in instituting proceedings. The lawfulness of the Electoral Commission's interpretation of the legislation and of its instructions to scrutineers was simply not tested by the Court because, in the circumstances, it was not feasible for the Court to do so.

I submit that it would be appropriate for the Committee to examine the extent to which the provisions of the *Referendum (Machinery Provisions) Act 1984* were complied with during the 1999 constitutional referendum, and, more particularly, the extent, if any, to which the Electoral Commission ignored the quite specific provisions of the legislation through the instructions which it included in its *Guidelines to Scrutineers*. The Instructions allowed answers that differed from those specifically and explicitly called for in the legislation; the Instructions wrongly allowed a symbol on its own (a tick) to be counted as a valid vote, contrary to the Electoral Commission's own published information about the use of symbols on their own in referendums; the Instructions allowed a spoilt ballot paper to be overwritten, contrary to a quite specific provision in the Act, thus allowing the possibility of fraudulent alteration of the voter's intention; and the Instructions allowed foreign languages or symbols to be used, but only at polling places where there was an electoral official who understood the particular foreign language or symbol – in the absence of such an official, ballot papers marked with the same foreign language or symbol at another polling place would be treated as informal and not counted.

I further submit that it would be appropriate for the Committee to examine the relationship between sections 24 and 93(8) of the Act. On its face, the relationship is not clear, and I understand that the information provided by the Electoral Commission in its *Guidelines to Scrutineers* was based on legal advice from the Attorney-General's Department. In view of the bizarre (and possibly unlawful) effect of that advice, as evidenced by some of the instructions in the Scrutineers' handbook, it would seem that the matter should receive the attention of the Committee, and possibly the Parliament.

Section 24 specifies two specific words that are to be used in answering the question on the ballot paper; while section 93(8) requires that effect be given to the voter's intention, so far as that intention is clear. Was section 93(8) intended to cover the voter who has difficulty in forming the letters of the words "Yes" or "No", or was it intended to cover the use of any other word or symbol that a voter might choose to use. More to the point, was it intended to include the use of foreign languages or symbols, where the voter's intention might be clear to one electoral official at one polling place, where the vote would be treated as formal and counted, but not clear to another electoral official at a different polling place, where an identical vote would be treated as informal and not counted. This random and haphazard acceptance or rejection of ballot papers marked with foreign languages or symbols strikes at the democratic principle of treating all voters and their votes equally, and turns a referendum into a lottery, so far as some voters are concerned.

If the Electoral Commission does not have open slather to, in effect, rewrite its legislation in relation to the casting and the counting of referendum ballots, it should be so instructed, and it should be required to observe the existing legislative provisions.

Should the Committee find that the legislation is unclear and that scope exists for the Electoral Commission to interpret imaginatively the legislation under which it operates in the conduct of elections and referendums, the Committee may wish to consider recommending that all relevant legislation be amended to ensure that, in relation to future elections and referendums, it will be the Parliament that decides just what does constitute a formal vote, and that determines the procedure to be followed with spoilt ballot papers, and not electoral officials.
