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Submission No 024

## AUSTRALIAN ELECTORAL COMMISSION

### SUBMISSION TO THE INQUIRY BY THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INTO THE MACHINERY OF REFERENDUMS

9 OCTOBER 2009

## PART 1 – INTRODUCTION AND LEGAL BACKGROUND

### 1.1 Introduction

1.1.1 On 10 September 2009 the Attorney-General, The Hon. Robert McClelland MP, on behalf of the Special Minister and Cabinet Secretary, Senator the Hon. Joe Ludwig, asked the Committee to inquire into and report on the machinery of referendums. Specifically, the Committee is required by its Terms of Reference to consider and report on:

- “1. The effectiveness of the *Referendum (Machinery Provisions) Act 1984* in providing an appropriate framework for the conduct of referendums, with specific reference to:
  - a) Processes for preparing the Yes and No cases for referendum questions;
  - b) Provisions providing the public dissemination of the Yes and No cases; and
  - c) Limitations on the purposes for which money can be spent in relation to referendum questions;
2. Any amendments to the *Referendum (Machinery Provisions) Act 1984* the Committee believes are required to provide an appropriate framework for the conduct of referendums;
3. Any other federal provisions relevant to terms 1 and 2 above, as the Committee considers appropriate.”.

1.1.2 In a letter dated 11 September 2009, the Inquiry Secretary invited the Australian Electoral Commission (AEC) to make a Submission to the inquiry. This Submission is provided in response to that letter, and is structured to mirror substantially the Inquiry’s Terms of Reference, as follows.

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| Part 1 | Introduction and legal background.  |
| Part 2 | Processes for preparing the Yes and No cases for referendum questions.                        |
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| Part 6 | Summary of issues.  |

1.1.3 It should be emphasised at the outset that the referendum process in Australia has been the subject of much analysis by, and debate amongst, political

scientists, lawyers and other commentators, including in relation to issues which fall within the Inquiry's Terms of Reference. While this Submission alludes to that analysis at a number of points, it does not seek or purport to summarise or encapsulate it.

1.1.4 In relation to the Inquiry's Terms of Reference, a number of preliminary points need to be made. First, the AEC notes that the preparation, dissemination and funding of information relating to the Yes/No case<sup>1</sup> is framed by the institutional context in which referendums take place. A referendum is mandatory under the Constitution in order for the Constitution to be altered. Any Government wishing to alter the Constitution must put a proposal to Australian electors, and have a majority of electors in a majority of States approve the proposed change.<sup>2</sup>

1.1.5 Secondly, the *Commonwealth Electoral Act 1918* (the Electoral Act) provides that enrolment is compulsory for eligible Australians, and the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act) provides that voting for electors is compulsory at referendums.<sup>3</sup> Compulsory enrolment was introduced at the federal level in 1911, and compulsory voting was introduced at the federal level in 1924. The universality of the franchise and the obligation to vote has long been seen to bring with it an obligation on the Commonwealth to ensure that electors are made aware of the changes being proposed to the Constitution, and are provided with information relevant to the Yes/No case in an equitable and accessible manner.

1.1.6 Thirdly, as constitutional reforms may involve significant questions of public policy, the resolution of which may have profound and long-term implications, it is important to ensure, as far as practicable, that information provided by the Commonwealth regarding the proposed change is prepared, presented and distributed in a way which is universally accessible to eligible Australian electors. More controversially, some have also asserted in the past the need for there to be a "level playing field" for the contest between those in favour of a proposal to change the Constitution and those against it.

## **1.2 Legal background**

### Constitutional provisions

1.2.1 The process for amending the text of the Constitution is set out in section 128 thereof, as follows.

"This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months

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<sup>1</sup> The terms "Yes and No case" and "Yes/No case" are used interchangeably throughout this Submission.

<sup>2</sup> Following an amendment in 1977, the Constitution allows for electors in the Territories to vote in constitutional referendums. Votes from the Territories are included in the national total only.

<sup>3</sup> See Electoral Act, subsection 101(4) and Referendum Act, section 45.

after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

In this section, "Territory" means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives."

1.2.2 The Parliament first prescribed the manner in which the vote of the electors should be taken at a referendum for the alteration of the Constitution in the *Referendum (Constitution Alteration) Act 1906* (the "1906 Act"). That Act was repealed by section 145 of the Referendum Act, which replaced the 1906 Act, and remains in force today. The Referendum Act includes provisions which specify:

- electors entitled to vote;
- the form of, and issuing of, the writ;
- the close of rolls period;
- the conduct of polling (including mobile, postal and pre-poll voting);

- the scrutiny (counting of votes) process;
- the return of the writ;
- the process by which results may be disputed; and
- offences under the Act.

1.2.3 For the purposes of this Submission, the AEC has primarily focussed on section 11 of the Referendum Act, which provides for the “Distribution to electors of arguments for and against proposed law”. Section 11 as it currently stands is reproduced in full at **Annex 1**.

## **PART 2 - PROCESSES FOR PREPARING THE YES AND NO CASES FOR REFERENDUM QUESTIONS**

### **2.1 Outline of existing arrangements**

2.1.1 Of particular relevance to this Part of the Submission are the following processes prescribed by subsections 11(1), 11(2) and 11(3) of the Referendum Act.

- Where the requirements have been met for passage of a proposed law for the alteration of the Constitution through Parliament, a formal argument in favour of the proposed law and a formal argument against the proposed law may be contained in a pamphlet that is printed and posted to each elector, subject to certain conditions being met.
- The conditions are that formal arguments are required to be:
  - forwarded to the Electoral Commissioner within four weeks of the passage of the proposed law
  - no more than 2,000 words for changes made by one proposed law, or averaging 2,000 words if there is more than one proposed law; and
  - authorised by a majority of those members of Parliament who voted for or against the proposed law.
- Then, unless the Electoral Commissioner is advised by the relevant Minister that the referendum is not to be held, he or she must then produce a pamphlet that contains:
  - the above-noted arguments; and
  - a statement showing the textual alterations and additions proposed to be made to the Constitution.
- The pamphlet must be posted to each elector not later than 14 days before the voting day for the referendum.

It is the AEC's understanding that if neither an argument in favour of nor an argument against the proposed law is received by the Electoral Commissioner, he or she is not legally obliged to distribute a pamphlet showing only the proposed changes to the Constitution. Such a scenario would, however, seem most unlikely.

2.1.2 For the purposes of this Part of the Submission, a clear distinction has been drawn between the preparation of the "Yes/No cases" and the preparation of the "pamphlet" referred to in the third and fourth bullet points above. In this Part of the Submission, the expression "Yes and No cases" refers to the formal arguments in favour of, and the arguments against, the proposed laws to change the Constitution. The "pamphlet", is prepared by the AEC and contains a variety of other content

(including the textual alterations and additions proposed to be made to the Constitution) in addition to the Yes/No cases.<sup>4</sup>

2.1.3 Yes and No cases for referendum questions were first introduced and provided in pamphlet form in 1912. Printed pamphlets containing Yes and No cases have been produced for most subsequent referendums to inform electors about proposals being submitted to them. An example of the pamphlet that was distributed to electors for the 1999 referendums is at **Annex 2**.

2.1.4 It should be noted that there is no requirement to produce formal arguments for or against a referendum proposal. For example, in the 1967 referendum pamphlet, a proposed law “to alter the Constitution so as to omit certain words relating to the people of the Aboriginal race in any State and so that Aboriginals are to be counted in reckoning the population” only contained a Yes case, whereas the proposed law “to alter the Constitution so that the number of members of the House of Representatives may be increased without necessarily increasing the number of Senators” contained both a Yes and a No case.

## **2.2 Issues for consideration**

2.2.1 In considering the existing arrangements, consideration needs to be given to the extent to which the process for preparing the Yes/No cases has regard to the (not universally accepted) principle of a “level playing field” for the contest between those supporting and opposing referendum proposals, and the extent to which the process of preparing the Yes/No cases or the referendum pamphlet ensures that electors are provided with sufficient information on which to base their decision.

### Format/style

2.2.2 There have been concerns raised relating to the form in which Yes/No cases have been presented within the referendum pamphlets. The AEC Submission to the JSCEM inquiry into the conduct of the 2001 federal election noted:

“10.3.10 [...] At the 1988 Referendums there was considerable public controversy about the different formats that were chosen by the presenters of the Yes/No cases for the pamphlet. For the 1988 Referendums, the then Electoral Commissioner, Dr Colin Hughes, decided, with the agreement of both the Yes and No cases, to allow the different sides to have control of the presentation for their cases, which were submitted as camera ready copy. (Refer to the AEC’s submission No 32(d) of 23 September 1988 to the JSCEM.) However, there was strong criticism that the different presentations could have favoured one case.

10.3.11 With the experience of the 1988 Referendums in mind, in 1999 the Electoral Commissioner prepared ‘*Guidelines for Members of Parliament preparing the Arguments to be sent to electors*’. The Guidelines contained definitive rules on font and point size for text, and advised that body copy text would be ‘justified’ (ie presented in the ‘justified’ text alignment), that each argument must contain only

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<sup>4</sup> The inclusion of the textual alterations and additions proposed to be made to the Constitution is not discussed further in this Submission.

words, how words would be counted, and so forth. The format of the Yes/No Case Pamphlet was designed to ensure that no argument was seen to gain an advantage by virtue of different typeface or typestyle.

10.3.12 The only variation in format was colour coding of the pages on which the different cases appeared: green for the 'Yes' pages, red for the 'No' pages. However, the AEC does not believe that this variation, which enhanced the readability of the document by making it easy to differentiate the cases, led to either of the arguments being seen to gain an advantage.

10.3.13 The AEC believes that the Guidelines for the 1999 Referendums worked as an administrative solution to the question of the format of the Yes/No Case Pamphlet. However, if (as had been the case in 1988) the Yes and No cases had wanted the opportunity to present arguments with different formats, then the situation might have been quite different. Given the potential for controversy about the format of Yes/No cases, the AEC believes that the issue of the format of the Yes/No cases should be dealt with by the Referendum Act itself.<sup>5</sup>

## Content

2.2.3 The information contained in the Yes/No cases and more broadly, the referendum pamphlet, has been observed by some to account for the failure of referendums:

"[Professor J E] Richardson has suggested that the printing of the two cases, of equal length, in the same pamphlet, gives the NO case a status that it might not have if the votes in Parliament are taken as a guide. He noted that an amendment proposal passed by the Parliament is the legal expression of the will of the people, yet this provision does not recognise that legal fact.

Professors Colin Howard and Cheryl Saunders have asked whether the totals of the votes in the two houses of Parliament ought to be included in the information sent to voters, to make clear the strength of parliamentary support for any measure. Many politicians have complained about this, yet have been prepared to take advantage of the wording of the legislation."<sup>6</sup>

## Process

2.2.4 The above-noted criticisms regarding content have led some to suggest a role for:

- independent or third party involvement in the formulation of the Yes/No cases;
- provision of independent or third party analysis of information relating to the Yes/No cases;

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<sup>5</sup> Australian Electoral Commission, Submission No 142 to JSCEM, *Inquiry into the 2001 Federal Election*.

<sup>6</sup> S Bennett, 'The Politics of Constitutional Amendment', *Research Paper No. 11 2002-03*, Parliament of Australia Parliamentary Library, available at <http://www.aph.gov.au/library/pubs/rp/2002-03/03RP11.htm#voters>.

- removal of the role of members of Parliament in authorising Yes/No cases; or
- some combination of the above.

2.2.5 Relevant provisions of the Referendum Act only require Yes/No cases to be authorised by a majority of those members of the Parliament who voted for or against the proposed laws. Therefore, while parliamentarians may ultimately control the final form of the Yes/No cases (and therefore potentially exert substantial influence on them), they are not required by law to draft or prepare them. There have been referendums in Australia that do not rely on parliamentarians to formulate the Yes/No cases. For example, at the State level, the Yes and No cases for the 1967 NSW State referendum regarding the establishment of a “new state” in northeast NSW were produced by an independent panel.<sup>7</sup> Similarly, the Yes/No cases for the 1999 federal referendum question relating to Australia becoming a republic were not drafted exclusively by parliamentarians.

2.2.6 The final day of proceedings of the Australian Constitutional Convention held in Brisbane from 29 July to 1 August 1985 also debated issues surrounding the conduct of referendums generally,<sup>8</sup> and specifically the following proposal to involve third parties in the preparation of the Yes / No cases:

“D. That whenever a referendum is held –

- (a) Commonwealth funded informational material be circulated to all electors, that the issues be presented by an independent person or persons nominated through the Commonwealth Parliamentary process and that the material be prepared in consultation with, and subject to the approval of, those Parliamentarians who voted for or against the proposal as the case may be... .”<sup>9</sup>

...

2.2.7 Speaking in support of the proposal, Senator Michael Tate, a delegate of the Commonwealth Parliament, described the proposal as beneficial in providing information to electors:

“Item D (a) is designed to help voters be well informed in relation to proposals for changing the Constitution and tries to bring an element of objectivity into the presentation of the arguments for and against instead of the confrontationist and propagandist “Yes/No” pamphleteering to which every letter-box in Australia is subjected. Although the independent person envisaged in the item would remain under the scrutiny of, and would be acting at the behest of, those parliamentarians who voted for or against the proposal, it introduces an element of objectivity that perhaps may lead to the presentation in a less strident way of the arguments for and against.”<sup>10</sup>

<sup>7</sup> AEC, submission to JSCEM, *Subject: Referendum 1988 – Yes/No Pamphlet – Content and Format*, Attachment 2.

<sup>8</sup> For example, see *Proceedings of the Australian Constitutional Convention*, New Parliamentary Annexe, Parliament House, Brisbane, 29 July – 1 August 1985, pp. 286-366.

<sup>9</sup> *ibid.*, p. 286.

<sup>10</sup> *ibid.*, p. 288.

2.2.8 Item D (a) received little comment in the subsequent debate. The question regarding support for Item D was ultimately resolved in the affirmative by the majority of Convention delegates.<sup>11</sup>

2.2.9 It is worth noting however, that the lack of specificity regarding the proposal for issues to be presented by “an independent person”, or “persons nominated through the Commonwealth Parliamentary process” suggests its ability to achieve the objectives outlined above by Senator Tate would be problematical. Exactly what is meant by independence is not clear, likewise what is involved in a “Commonwealth Parliamentary process” is similarly vague and unclear. A broad reading of this proposal could suggest that is compatible with existing provisions, and could be seen as similar to the process through which the Yes/No cases were produced for the 1999 referendum. Therefore, while such a proposal would provide explicitly for the involvement of third parties in the development of Yes/No cases, whether the “independence” or “objectivity” of the process or presented arguments would thereby be enhanced would be problematical.

2.2.10 Examples of arrangements which do not involve authorisation of Yes/No cases by the members of Parliament who supported or opposed the proposed law, and which involve greater use of third parties are also found overseas; selected cases are outlined at paragraphs 2.2.15 to 2.2.22 below.

#### *A role for the AEC?*

2.2.11 It might be argued that paragraph 11(4)(b) of the Referendum Act, provides the AEC with sufficient authority to assume a role in the provision of ‘independent’ information related to the Yes/No cases:

“(4) The Commonwealth shall not expend money in respect of the presentation of the argument in favour of, or the argument against, a proposed law except in relation to:

...

(b) the provision by the Electoral Commission of other information relating to, or relating to the effect of, the proposed law...”

2.2.12 Indeed, such a possible role for the AEC was explicitly spelt out by Senator Michael Macklin, who, when moving the amendment which inserted the paragraph into the Referendum Act, made the following observations.

“The second is a new item; namely, the provision by the Commonwealth Electoral Commission of other information relating to, or relating to the effect of, the proposed law. On the last occasion on which we were looking at this matter we had only just passed the Commonwealth Electoral Legislation Amendment Act and established the Electoral Commission. I think that those of us who dealt with this matter at that time were unaware of the nature of the Commission. The functions of the Commission are set out in section 7A (1) (c) of the Commonwealth Electoral Legislation Amendment Act, which we passed last year, in the following terms:

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<sup>11</sup> *ibid*, p. 363.

To promote public awareness of electoral and Parliamentary matters by means of the conduct of education and information programs and by other means;

The Act defines 'electoral matters' as follows:

matters relating to Parliamentary elections, elections and ballots under the Conciliation and Arbitration Act 1904 and referendums;

... So the Commonwealth Electoral Commission already has as part of its statutory function the conduct of education and information programs. It, therefore, seems to us appropriate that the Commission ought not be excluded from undertaking that statutory role already given to it by the Parliament and hence I made provision in paragraph (b) of the amendment circulated on behalf of the Australian Democrats for it to be able to continue that education and information function in relation to referendums.

I believe if one reads in as unbiased a way as one can the previous Yes and No case pamphlets one can see that the actual amount of material provided to the electors by them was almost zilch. Indeed, I think that any reasonable elector who did not have any great connection with a political party would have found it very difficult to understand what the argument was all about. Indeed, the Yes case more or less suggested that if the electors passed a particular referendum proposal the following morning would be much brighter than ever before and the No case suggested that if the referendum proposal were agreed to the end of the Western world was in sight. Of course, most referenda proposals mean nothing of the kind. I think that now we have an independent Electoral Commission to which we have entrusted a statutory requirement to engage in the conduct of education or information programs, perhaps provision of some information in relation to referendums, other than propaganda provided by political parties, would be for the benefit of the electoral process.

... by definition the Electoral Commission is an independent body and, hence, would not be able to promote either the Yes case or the No case. However, it would be able to provide information, hopefully of an intelligent and educational kind, to enable electors when voting either yes or no to understand the effect of the proposed change to the Constitution and how that would affect the Parliament or whatever else the referendum proposal involved.”.

2.2.13 The AEC has previously noted its reluctance to be involved in directly preparing “independent” views on referendum proposals or the Yes/No cases. The AEC’s views on the power for which provision is made in paragraph 11(4)(b) of the Referendum Act were set out in its September 1988 Submission to the Joint Standing Committee on Electoral Matters entitled *Subject: Referendum 1988 – Yes/No Case Pamphlet – Content and Format*, in the following terms:

“In both 1984 and 1988 the Commission did not exercise its right to pursue this option because it believes that it would inevitably lead to accusations of bias against the Commission. This view was justified by the way in which its attempts to allow each case to be responsible for the presentation of its arguments were misrepresented in 1988.

However, in other countries mechanisms do exist for the “third case” (see for example the Californian Legislative Analyst example in Attachment 1) to be provided and Australia has its own experiences of a similar nature (see the NSW example in

Attachment 2 whereby an independent panel wrote the case for and against the “new state” referendum in 1967).”.

2.2.14 The AEC is not aware of any developments since 1988 which have decreased the risk that provision of information under paragraph 11(4)(b) of the Referendum Act could make the Commission susceptible to accusations of bias.

### Other jurisdictions

2.2.15 Some jurisdictions employ alternative models for the preparation and production of Yes and No cases and the pamphlets in which they are distributed, which may be worthy of further consideration.

2.2.16 In the Republic of Ireland, an independent commission (the Referendum Commission) has been used since 1998 to explain the subject matter of referendum proposals, to encourage voter turnout and to promote public awareness of the referendum.<sup>12</sup> The Referendum Commission was also initially responsible for outlining the arguments for and against referendum proposals, and for fostering and promoting debate on referendum proposals. This responsibility ceased with the passage of the Referendum Act, 2001.<sup>13</sup>

2.2.17 In the United States, Oregon’s Secretary of State has produced a *Voters’ Pamphlet* since 1903. The pamphlet is produced for a number of electoral events, including referendums. At the 2008 state-wide ballot one copy of the pamphlet was provided to each household.<sup>14</sup>

2.2.18 Twelve measures were put to state-wide ballot in conjunction with the 2008 General Election, and the voters’ pamphlet contained the following information regarding the measures:

- the ballot title;
- the estimate of financial impact (prepared by a committee of state officials, including the Secretary of State and State Treasurer);
- an explanation of the estimate of financial impact, if determined to be necessary by the above-noted committee;
- the complete text of the proposed measure;

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<sup>12</sup> Further information on the Referendum Commission is available at: <http://www.refcom.ie/en/AboutUs/BackgroundandRole/>.

<sup>13</sup> <http://www.irishstatutebook.ie/2001/en/act/pub/0053/index.html>.

<sup>14</sup> Provisions regarding the *Voters’ Pamphlet* are outlined in Oregon Statute 251, available at <http://www.leg.state.or.us/ors/251.html>. General information regarding the voters’ pamphlet produced for the 2008 general election and accompanying measures can be found at <http://oregonvotes.org/nov42008/guide/geninfo.html>.

- an impartial statement explaining the measure (the explanatory statement);
- for a legislative referral, a legislative argument in support of the measure; and
- any arguments filed by proponents and opponents of the measure.<sup>15</sup>

2.2.19 A committee of five citizens is appointed to draft the impartial explanatory statement concerning a proposal. Four committee members are appointed from amongst the chief proponents and opponents of the proposal (two from each side), and one additional member as selected by the four appointed committee members.<sup>16</sup> The Committee's draft explanatory statement is limited to 500 words and must be "an impartial, simple and understandable statement explaining the measure".<sup>17</sup>

2.2.20 The statement is then subject to a public hearing no later than 95 days prior to the election at which suggestions to amend the statement or other suggestions may be received. Suggestions and comment must be considered by the committee and an amended statement may be issued no later than 90 days prior to the election. Both the original statement and any amendment can only be released following agreement of at least three members of the committee. Explanatory statements can be appealed to the Oregon Supreme Court, which may subsequently alter the explanatory statement.

2.2.21 Any citizen or group may also file arguments for inclusion in the voters' pamphlet in support of, or in opposition to, proposed measures. This can be done by either paying \$US500, or filing a petition signed by 1,000 voters. Arguments in favour of a measure appear first, followed by arguments in opposition to the measure; and the arguments are printed in the order in which they are filed with the Secretary of State's office.

2.2.22 Similarly, California's Secretary of State is required by law to produce a *Voter Information Guide*.<sup>18</sup> The *Voter Information Guide* includes a summary of the proposal and an analysis of the proposal including legislative and fiscal issues prepared by the State's legislative analyst.<sup>19</sup> Following this are unedited statements for and against each proposal as put forward by its proponents/opponents, along with a short rebuttal statement by each group.<sup>20</sup> An example of the Californian *Voter Information Guide* is provided at **Annex 3**.

<sup>15</sup> The 151-page *Voters' Pamphlet* regarding these measures is available at <http://oregonvotes.org/nov42008/guide/pdf/vol1.pdf>. A summary of the information provided regarding each measure is also available at <http://oregonvotes.org/nov42008/guide/geninfo.html>.

<sup>16</sup> Appointment of the Committee is described in detail in Oregon Statute 251, at 251.205. Where the appointed committee members fail to select a fifth committee member, the Secretary of State is obliged to do so.

<sup>17</sup> Oregon Statute 251, at 251.215.

<sup>18</sup> <http://voterguide.sos.ca.gov/>.

<sup>19</sup> For example see the *Official Voter Information Guide: California Statewide Special Election, Tuesday, May 19, 2009*, available at <http://voterguide.sos.ca.gov/pdf-guide/complete-vig-may192009.pdf>. Also provided at **Annex 3**.

<sup>20</sup> For more about how arguments for and against ballot proposals are selected see *ibid.*, p. 4.

## 2.3 Options for change

2.3.1 The AEC's first submission to the JSCEM *Inquiry into the 2001 federal election*, included a recommendation involving several changes to the Referendum Act that may be considered as options in the context of resolving issues related to the formatting of Yes/No cases:

"Recommendation 26: That the *Referendum (Machinery Provisions) Act 1984* be amended so as to include provisions that:

- the Electoral Commissioner be given the power to adjudicate disputes relating to the format of the Yes/No case statements;
- if a dispute arises about the counting of numbers of words for the purposes of this section, the number is to be worked out by a method determined by the Electoral Commissioner;
- if a statement exceeds the word limit, that so much of the statement may be printed as does not exceed the limit;
- statements must be in English;
- statements must not contain anything other than punctuation marks, words and numbers;
- statements must be printed in type that is uniform (as between statements) in size and style; and
- if there is not an accepted statement, that at the point where the statement would otherwise have appeared, that there must be a statement that there is no statement."

2.3.2 Content of the Yes/No cases could be changed by amending the Referendum Act so as to include provisions that:

- allocate word limits to arguments for or against a proposal in accordance with a formula that uses parliamentary support as its basis;
- reduce the current word limit of Yes/No cases;
- require a section of the Yes/No pamphlet to contain the number of votes received in each House of Parliament for or against each proposed amendment;
- require a section of the Yes/No pamphlet to contain a statement prepared by officers from an independent statutory body relating to the legislative and or fiscal impact of proposed amendments
- specify criteria for the formulation of Yes/No cases that may, or may not be subject to judicial review; and/or

- provide for a rebuttal statement by proponents and opponents of each amendment.

2.3.4 A number of options may be considered appropriate to enable participation of third parties or independent parties in the preparation of the Yes/No cases. The AEC's September 1988 Submission to the Joint Standing Committee on Electoral Matters entitled *Subject: Referendum 1988 – Yes/No Case Pamphlet – Content and Format*, noted that:

“The options available with this approach are:

- (a) Create a statutory office of Legislative Analyst to prepare independent arguments for and against proposed Constitutional changes. Such arguments could be included in the Yes/No Cases pamphlet or, indeed, replace those prepared by the proponents. In either case, production and distribution of the pamphlet would remain with the Commission because of its statutory inclusions.
- (b) Legislate to require an ad hoc independent panel, perhaps selected by the proponents and opponents and the Commission, to prepare the “third case” analysis.”

2.3.5 An additional option may be to legislate to enable public input to the Yes/No cases along the lines of the provision made in Oregon's electoral legislation (which enables public hearings), or similar hearing and submissions processes currently used for electoral redistributions under Part IV of the Electoral Act.

## **PART 3 - PROVISIONS RELATING TO THE PUBLIC DISSEMINATION OF YES AND NO CASES**

### **3.1 Outline of existing arrangements**

3.1.1 Of particular relevance to this Part of the Submission is the following requirement regarding public dissemination of the Yes and No cases, which appears in subsections 11(1), 11(2) and 11(3) of the Referendum Act:

“...the Electoral Commissioner shall, unless the Minister informs the Electoral Commissioner that the referendum is not to be held, not later than 14 days before the voting day for the referendum, cause to be printed and to be posted to each elector, as nearly as practicable, a pamphlet containing the arguments together with a statement showing the textual alterations and additions proposed to be made to the Constitution.”.

3.1.2 Related to the distribution of the referendum pamphlet (and discussed in further detail in Part 4 of this Submission) are the prescriptions set out in subsection 11(4) of the Referendum Act which limit Commonwealth expenditure to the publication and distribution of information in the referendum pamphlet (which contains the Yes/No case).

3.1.3 Although the Act includes provisions for providing the material in the referendum pamphlet in various formats (e.g. on the AEC's website, in languages other than English, Braille, cassette, ASCII disk and large print), currently the printed pamphlet posted to each elector is the main method for disseminating the Yes and No cases.

#### Public information campaign for the 1999 referendum

3.1.4 Referendums have been held, with very few exceptions, as standalone events, not concurrent with a federal election. Since such standalone events run the risk of lacking the salience of an election at which a choice of government is made, it has been the recent practice of the AEC to conduct a vigorous public information campaign in association with referendums. The distribution of the referendum pamphlet is but one element of such a campaign.

3.1.5 The public information campaign for the 1999 referendum consisted of national and state and territory-based advertising, a public relations campaign and a number of publications, as well as the mailout of the referendum pamphlet to every elector (i.e., to over 12 million persons).

3.1.6 The AEC ran the public information campaign in three phases.

- The enrolment phase encouraged timely and correct enrolment through to the close of rolls.

- The voter services phase sought to make electors aware of sources of help and assistance, and the option of casting an early referendum vote. During this period, the referendum pamphlet containing the Yes case and the No case was distributed by the AEC to all enrolled electors.
- The formality phase was dedicated to ensuring that electors understood how to mark their referendum ballot papers correctly (with messaging that voting was compulsory).

3.1.7 The scale of, and expense involved in preparing and implementing, this campaign were comparable to the sorts of campaigns implemented for federal elections.

3.1.8 The national advertising campaign consisted of six television commercials, eight radio commercials and seven press commercials. National advertising was translated into 17 languages in the ethnic press, 25 languages on ethnic radio, and 11 languages for ethnic television. Radio advertisements were translated into 20 Indigenous languages, and advertisements were broadcast on the Radio for the Print Handicapped network. State and territory-based advertising supported the national advertising by providing key local information.

3.1.9 The AEC also ran a public relations campaign, including media releases, media interviews, media briefings and photo opportunities to promote key referendum messages. Publications supporting the campaign included the referendum pamphlet, the Scrutineers' Handbook, an Electoral Newsfile, and an Electoral Backgrounder. Key information in the referendum pamphlet was also available on audio cassette, on ASCII computer disc, in Braille and in large print, to assist electors with a print disability. The pamphlet was also available on the AEC's dedicated referendum web site in English and an additional 14 languages. The AEC also provided a national telephone enquiry service and telephone interpreting service to assist electors.<sup>21</sup>

## 3.2 Issues for consideration

3.2.1 A key issue is whether the dissemination of the Yes/No pamphlet in its current form is best suited to meeting electors' information requirements.

### Logistics

3.2.2 Production and delivery of personally addressed, multi-page referendum pamphlets to every Australian elector is a major logistical exercise and an expensive one. For the 1999 referendum, 12.9 million 72-page pamphlets were produced.<sup>22</sup>

<sup>21</sup> Australian Electoral Commission (AEC), *Referendum 1999 Report and Statistics*, AEC, Canberra, 2000, pp. 40-46.

<sup>22</sup> This was the largest single print job and largest single mail out ever undertaken in Australia at that time. The printing required nine high speed web presses in three different locations for up to ten days of round the clock production. Australian Electoral Commission (AEC), *Referendum 1999 Report and Statistics*, AEC, Canberra, 2000, p. 41.

Moreover, because of the logistics involved in production, the dissemination was unable to be implemented with maximum efficiency. In 1999, some people received more than one copy of the pamphlet, as the pamphlet printing had to start before the rolls closed for the Referendum in order to meet the requirements under the Act that the AEC send the referendum pamphlet to electors at least 14 days prior to the Referendum date.<sup>23</sup>

3.2.3 The total cost for production of the referendum pamphlets for the 1999 referendum was \$16.858 million, or around \$1.30 per enrolled elector,<sup>24</sup> with printing comprising almost 45 per cent of this total, and delivery costs comprising just over 54 per cent.<sup>25</sup> A preliminary estimate by the AEC on production and delivery cost of a referendum pamphlet to every enrolled elector today based on a single-question proposal and a standalone event, places the approximate cost at around \$25 million, or around \$1.80 per elector.<sup>26</sup>

#### Need for timely, modernised, elector-centric communication

3.2.4 The timing of dissemination of the referendum pamphlet (that is, so that it is received by electors around two weeks before the date of the referendum) may also be problematic for some electors in that it may limit the time available for electors to seek additional independent information, build their knowledge of the referendum cases and actively engage in the debate early. Parties campaigning for and against proposed amendments generally commence their campaigns much sooner. The timing of delivery of the referendum pamphlet, and its role as the main source of independent elector information is at odds with community expectations to have access to this information as early as possible.

3.2.5 The possibility of more modern, elector-centric communication methods has been under consideration for over 20 years. The AEC submission to the inquiry by the JSCEM into the 1987 Federal Election and the 1988 Referendum noted:

“in [an] age of rapid communication and recognition of the educational power of television/video material, the distribution of arguments via a Yes/No Cases pamphlet may be regarded as antiquated”.<sup>27</sup>

3.2.6 The JSCEM report on the conduct of the 2007 federal election noted a “...growing reluctance on the part of electors to interact with the AEC using the paper-based and physical mail systems mandated by the Commonwealth Electoral

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<sup>23</sup> AEC, *Distribution of Referendum Pamphlet*, media release 1 October 1999.

<sup>24</sup> Based on 12.154 million enrolled electors.

<sup>25</sup> Australian Electoral Commission (AEC), *Referendum 1999 Report and Statistics*, AEC, Canberra, 2000, pp. 41,96.

<sup>26</sup> Based on 13.858 million enrolled electors, as at 30 September 2009.

<sup>27</sup> AEC, *Referendum 1988 Yes/No Case Pamphlet – Content and format*, Submission to the Joint Standing Committee on Electoral Matters Inquiry into the Conduct of the 1987 Federal Election and 1988 referendums, Submission 32(d), September 1988.

Act...”, and methods aimed at modernising the means of communication between electors and the AEC featured prominently in the final report.<sup>28</sup>

3.2.7 In keeping with the government’s e-agenda, and the AEC’s modernisation agenda, a stronger focus on the internet as a source of information and an advertising medium is appropriate for future campaigns. Moreover, greater use of on-line alternatives to paper-based pamphlets would help reduce costs, both financial and environmental, in keeping with the Government and AEC’s commitment to “green” priorities.

#### How electors obtain information about referendums

3.2.8 Today less reliance is placed on hard copy materials as the benchmark for communication in the government communication arena. The format and size of the Yes/No case pamphlet is intimidating (being wordy, dense and printed on low quality paper) and unlikely to engage Australian electors with low literacy, electors who speak English as a second language, and youth. The issue of engagement cannot be addressed necessarily through an AEC advertising campaign, or the distribution of a pamphlet – but the medium and language of any communiqué can contribute. Some interactivity within the communication channels might increase the level of engagement (e.g. use of social media) with youth.

3.2.9 The infrequent timing of referendums (the two most recent being conducted in 1999 and 1988) means that there could be significant changes in electors’ communication preferences between one referendum and the next. This can be illustrated by changes in the extent and way in which electors have followed elections in the mass media. Australian Electoral Study (AES) surveys have found that:

- in the 1969 election, 63 per cent of respondents followed the election by television, while 55 per cent used newspapers and 18 per cent used radio;
- in the 1998 election, 32 per cent of respondents followed the election by television, while 21 per cent used newspapers, 18 per cent used radio and 1 per cent used the internet; and
- in the 2007 election, 37 per cent of respondents followed the election by television, while 21 per cent used newspapers, 19 per cent used radio and 5 per cent used the internet.<sup>29</sup>

3.2.10 This is not to suggest that the referendum pamphlet has not been a useful tool in providing universal access to information regarding the Yes/No cases. The efficacy of the 1999 referendum pamphlet containing the Yes/No cases was

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<sup>28</sup> Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2007 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 2009, pp. iii-iv.

<sup>29</sup> I McAllister & J Clark, *Trends in Australian Political Opinion: Results from the Australian Election Study, 1987-2007*, Australian Social Science Data Archive, Canberra, 2007, p. 3.

analysed by Eureka Strategic Research using survey data from approximately 1200 people in the period immediately leading up to the referendum on 6 November 1999. The relevant extract from Eureka's report can be found at **Annex 4**. Eureka's research found that by the day before the referendum, over 80 per cent of respondents reported receiving the pamphlet and 51 per cent of respondents reported that they had also read some or all of it. The report commented as follows:

"These results are very high by commercial standards and give the lie to the claim that this is a low interest campaign.

These results are markedly better than in 1998 when only one third of respondents recalled receiving the AEC booklet. This improvement was probably due to the fact that the AEC was required to send *individually addressed* pamphlets to every elector in the lead up to the Referendum. At Federal Elections this requirement is not in effect, and information pamphlets are distributed by the AEC to households, rather than sent by AEC to individuals."

3.2.11 It is unclear that these findings would be similar should such research be conducted following a referendum today. The context of each electoral event is different and as noted above, the preferred methods of receiving political information are changing over time. Indeed, survey research conducted by Eureka Strategic Research following the 2007 federal election found that 58 per cent of respondents recalled receiving the householder booklet, with 32 per cent having read it.

#### An ageing, mobile and increasingly diverse population

3.2.12 As noted in the Government's *Electoral Reform Green Paper - Strengthening Australia's Democracy*, there are a range of environmental factors that particularly affect the context in which electoral events take place, and therefore how electoral services are delivered.<sup>30</sup>

3.2.13 A key development is that the character and composition of Australia's population is changing over time. At 30 June 2008, more than a quarter of all Australian residents were born overseas,<sup>31</sup> with migrants being drawn from an increasingly diverse range of places, and increasing numbers of Australians speaking a language other than English at home. Given these changes, it would make sense for the AEC to tailor its choice of communication media to meet the information needs of a diverse range of electors.

3.2.14 Recent decades have seen the ageing of Australia's population as a result of sustained low levels of fertility and increasing life expectancy at birth.<sup>32</sup> The ageing population has implications in terms of electors' access to information provided for referendums and voting procedures. For example, there may be more electors who

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<sup>30</sup> Australian Government, *Electoral Reform Green Paper - Strengthening Australia's Democracy*, Commonwealth of Australia, September 2009, pp. 15-16.

<sup>31</sup> Australian Bureau of Statistics (ABS), *Migration, Australia, 2007-08*, Cat. no. 3412.0, ABS, Canberra, 2009, p. 26.

<sup>32</sup> This trend is expected to continue, with the proportion of the population aged 65 years and over projected to increase from 13 per cent in 2007 to between 23 per cent and 25 per cent by 2056. ABS, *Population Projections, Australia, 2006 to 2010*, Cat no. 3222.0, ABS, Canberra, 2008.

are visually impaired or have other disabilities that may affect their ability to exercise their franchise.

3.2.15 Australia's population is also highly mobile, with many people travelling, working and living in different areas of Australia and internationally. Having a highly mobile population provides the AEC with challenges in reminding people of their obligation to enrol and vote, and, particularly in the case of Australians temporarily residing overseas, providing information regarding electoral events in an effective and efficient manner.

### Australia's digital economy and e-government

3.2.16 The Australian Government has made a number of substantial commitments towards the ongoing development of Australia's digital economy. While this will be a market-led phenomenon, advancing the digital economy will require action by government, industry and the community. Key areas for government focus are to lay the foundations for Australia's digital infrastructure, facilitate innovation and set conducive regulatory frameworks.<sup>33</sup>

3.2.17 The Government's *Electoral Reform Green Paper - Strengthening Australia's Democracy* noted the increasing importance of the internet for interacting with Government:

"1.29 The role of technology in Australians' lives is also changing over time. In recent years there has been an increasing trend towards electronic transactions and interactions, including with governments. The internet is now Australians' most preferred method of contacting government, and in 2008, 31% of Australians used the internet for the majority of their contact with government, which is more than double the rate reported in 2004-05 (14%). The Australian Government Information Management Office has noted that:

'Adoption of newer technologies means that changes in use and take-up of e-government services are occurring quickly and are likely to continue to expand in the future. These changes, and the increasing blurring of boundaries between technologies, will present challenges for government service delivery.'"<sup>34</sup>

3.2.18 Since its launch prior to the 1996 federal election, the AEC web site ([www.aec.gov.au](http://www.aec.gov.au)) has played an increasingly important and comprehensive role in disseminating electoral information. A separate web site ([referendum.aec.gov.au](http://referendum.aec.gov.au)) was established for the 1999 referendum to house the virtual tally room and other referendum-specific information. This proved very popular, with more than 166,200 users accessing the referendum site or the main AEC web site.

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<sup>33</sup> *Australia's Digital Economy: Future Directions* © Commonwealth of Australia, 2009. ([www.dbcde.gov.au/digital\\_economy/final\\_report](http://www.dbcde.gov.au/digital_economy/final_report)).

<sup>34</sup> Australian Government, *Electoral Reform Green Paper - Strengthening Australia's Democracy*, Commonwealth of Australia, September 2009, p. 16.

3.2.19 Given the use of technology in the lives of Australians and its preferred form as a tool of communication with governments, there appears to be a case to reform the Referendum Act to enable more effective communication with electors.

### **3.3 Options for change**

3.3.1 The AEC seeks to maximise the franchise for election and referendums, which in a communications context means having an informed and correctly enrolled public. As provisional enrolment for Australian citizens is available at 17 years of age and enrolment and voting is compulsory for 18 years and over, the AEC has as one of its imperatives to ensure easy access and equity to the necessary information for eligible electors to participate actively and knowledgeably in the process.

3.3.2 This is an immense responsibility and a unique challenge among Government agencies, made even more challenging by the limited resources available to the AEC. In order to best meet this challenge the AEC requires a range of communication options at its disposal which it can tailor to meet the changing information needs and expectations of electors and address any “environmental” hurdles at that time.

3.3.3 Accordingly, an AEC communications campaign for a referendum should be broadly as comprehensive and adaptable as that conducted by the AEC at federal elections<sup>35</sup>. The campaign must be comprehensive and of equivalent coverage and penetration in all States and Territories, to ensure that access and equity objectives (an informed public) are met. It is also critical and indeed an obligation of the AEC to deliver a targeted campaign that allows electors to self determine and self select access to their preferred communication media for independent information about the Referendum cases.

3.3.4 It is an obligation for the AEC to deliver this service in the most cost effective and efficient way. Prescribing the requirement to deliver a personalised pamphlet to every elector works against this – the majority of the information campaign budget comprises the printing and postage of the pamphlet leaving fewer resources for providing information by other media (which may be in more demand from electors or the lack of which may limit options for electors with special needs). Moreover, it does not give the AEC adequate flexibility to adapt its communication approach to reflect possible future challenges, the like of which are yet to be experienced or even anticipated. The infrequency of referendums makes this “flexibility” an essential part of the communications tool kit to help address whatever challenges lie ahead.

3.3.5 Accordingly, for future federal referendums the Committee may wish to consider whether the requirement to deliver the Yes/No case pamphlets as mail items addressed to all electors should continue to be prescribed in the Referendum Act. An alternative model for consideration could be the conduct of a public information campaign along the following lines.

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<sup>35</sup> For Federal Election public information campaign details refer to: 2007-2008 AEC Annual Report pp97-109; 2006 – 2007 Annual Report pp 70-75, 51-54; AEC’s submission to the JSCEM enquiry (2007) pp 21-28

- (i) A household drop of one pamphlet per address (as is currently undertaken for federal election campaigns) could replace the current requirement to deliver an information pamphlet to every elector. This would avoid the waste and expense of delivering multiple copies of the Yes/No pamphlet to all electors in one dwelling. (At the 2007 federal election just over 8 million householder booklets were provided; there were 13.645 million people enrolled at the close of rolls for the same election).
- (ii) A "fulfilment service" could operate in conjunction with the AEC call centre (similar to that run at the 2004 and 2007 federal elections) to send out Yes/No pamphlets to those electors who request a copy (and who may not have access or skills to use the internet and other media).
- (iii) There could be a greater emphasis on providing information via the internet (particularly through a dedicated referendum web site operated by the AEC). The take-up of the internet at home and in the workplace has risen exponentially since 1999, and that in turn has increased the likely effectiveness of a range of online promotional strategies and internet advertising linking to an online pamphlet.
- (iv) Public awareness of the availability of the Yes/No pamphlet could be raised through the AEC's advertising and media campaigns. (Some advertising was conducted at the 1999 referendum to raise public awareness of the pamphlet.)
- (v) In-language versions of the Yes/No pamphlet could be made available online and similarly printed and despatched on demand through the call centre as needed.
- (vi) The AEC could continue to provide the Yes and No cases in various formats for electors with a print disability (e.g. on the AEC's website, Braille, cassette, ASCII disk and large print).

3.3.6 This mix of communication media would help the AEC to best engage and inform electors in a timely manner, adapt the language and medium to best suit the audience, and provide the opportunity for interactivity and cross promotion within communication channels. It would also best allow the AEC to keep pace with developments in technology and community expectations of immediate access to reliable, independent information on demand.

## PART 4 – LIMITATIONS ON THE PURPOSES FOR WHICH MONEY CAN BE SPENT IN RELATION TO REFERENDUM QUESTIONS

### 4.1 Outline of existing arrangements

4.1.1 Subsection 11(4) of the Referendum Act imposes strict limitations on spending by the Commonwealth in support of either the Yes or No case, as follows:

“(4) The Commonwealth shall not expend money in respect of the presentation of the argument in favour of, or the argument against, a proposed law except in relation to:

- (a) the preparation, printing and posting, in accordance with this section, of the pamphlets referred to in this section;
- (aa) the preparation, by or on behalf of the Electoral Commission, of translations into other languages of material contained in those pamphlets;
- (ab) the preparation, by or on behalf of the Electoral Commission, of presentations of material contained in those pamphlets in forms suitable for the visually impaired;
- (ac) the distribution or publication, by or on behalf of the Electoral Commission, of those pamphlets, translations or presentations (including publication on the Internet);
- (b) the provision by the Electoral Commission of other information relating to, or relating to the effect of, the proposed law; or
- (c) the salaries and allowances of members of the Parliament, of members of the staff of members of the Parliament or of persons who are appointed or engaged under the *Public Service Act 1999*.”.

4.1.2 This provision was not included in the Referendum (Machinery Provisions) Bill as originally drafted by the Government in 1984. Subsection (4) was inserted by the Senate, with the then Opposition and the Australian Democrats voting together to approve an amendment moved by Senator Michael Macklin on behalf of the Australian Democrats. A similar amendment, which did not however include what is now paragraph 11(4)(b), had earlier been proposed unsuccessfully in the House of Representatives by Mr Steele Hall MP on behalf of the Opposition. A provision akin to the present paragraph (ab) was inserted by the *Referendum (Machinery Provisions) Amendment Act 1988*. This, along with the original paragraph (a), was repealed by the *Referendum Legislation Amendment Act 1999*, and the current paragraphs (a), (aa), (ab) and (ac) were inserted.

4.1.3 The scope of the prohibition in subsection 11(4) was elaborated by the High Court in the 1988 case of *Reith v. Morling and Others* (1988) 83 ALR 667, the judgement in which is set out at **Annex 5**. The case was treated as an application for an interlocutory injunction to restrain the Commonwealth and the Attorney-General from expending moneys or causing moneys to be expended upon an advertising campaign in connection with the referendum upon four proposed laws for

the alteration of the Constitution which was to be held on 3 September 1988. In his judgement, Dawson J made the following observations:

“The submissions on both sides accepted that it is proper to construe the words “in respect of the presentation of the argument in favour of, or the argument against, a proposed law” appearing in s 11(4) of the Act as being a reference to the arguments which were authorised by those who voted for and against the proposed law, forwarded to the Electoral Commission in accordance with s 11(1) and included in the pamphlet. I should have thought that there was something to be said for a broader construction of the phrase “the argument” in sub-s (4), whereby it is taken as a reference to the argument for or the argument against in general and not as a reference to the particular arguments included in the pamphlet. Such a construction would, I think, give effect to an intention that Commonwealth Government expenditure in relation to the presentation of the cases for and against a proposed law should, subject to the exceptions contained in paras (b) and (c), be restricted to the preparation, printing and distribution of the pamphlets referred to or the preparation and distribution of translations of them.

However, I am content to proceed upon the narrower basis for which the parties contend.”

Having so addressed the scope of the provision, His Honour concluded that even adopting the narrower construction on which the parties were in agreement, the requested injunction should be granted.

4.1.4 The High Court’s judgement determined the application of subsection 11(4) so far as the 1988 referendums were concerned. In relation to the 1999 referendums, the operation of subsection 11(4) was specifically excluded by section 4 of the Referendum Legislation Amendment Act 1999, which provided that:

“Subsection 11(4) of the Referendum (Machinery Provisions) Act 1984 does not prevent expenditure by the Commonwealth in respect of things done during 1999 (whether or not by the Commonwealth) in connection with either of the following proposed laws (including expenditure before the relevant Bills are introduced into the Parliament):

- (a) a proposed law to alter the Constitution to establish the Commonwealth of Australia as a republic;
- (b) a proposed law to insert a preamble in the Constitution.”.

4.1.5 In the absence of further judicial analysis of the meaning of subsection 11(4), it is unclear whether the Court in future would adopt the narrower construction upon which the parties were prepared to agree in *Reith v Morling*, or the broader construction flagged by Dawson J in the passage quoted at paragraph 4.1.3 above.

4.1.6 Another aspect of subsection 11(4) is worthy of note: the prohibition it imposes only applies to the Commonwealth; there are no limitations on expenditure by the States or Territories, or by political parties, interest groups or “third parties”.

4.1.7 This issue was discussed at the Australian Constitutional Convention in Brisbane on 1 August 1985, as part of the proposal mentioned at paragraphs 2.2.6 to 2.2.8 above. The proposal put to the Convention was in the following form:

“D. That whenever a referendum is held -

- ...  
(b) outside the expenditure on the formal Yes/No cases, no expenditure should be incurred by the Commonwealth on the promotion of either side of a proposal for constitutional change and it be a practice understood by all parties to the federal compact that States and Territories should not incur expenditure of public funds on the promotion of either case.”.

4.1.8 In explaining the proposal, Senator Michael Tate, described the proposal as follows.

“As to item D (b) – the subcommittee puts to the plenary session that it should vote on the question of the expenditure on the formal ‘Yes/No’ cases. Certainly the Commonwealth Government cannot accept that expenditure should be limited in the way that it is indicated. It is blind to the reality that there may be very powerful, vested interests mounting a campaign and incurring the expenditure of vast amounts of money in a very sophisticated media assault on a proposal which perhaps commands bipartisan support within the Parliament.

In any case, I do not see why it should be the case that the Parliament or the Commonwealth Government cannot devote moneys to promoting a particular proposal for constitutional change, particularly when it might be the case that State Governments or Parliaments themselves devote sums of money to sabotaging the particular proposal. While there is some indication in the latter part of item D (b) that States and Territories should not incur expenditure of public funds on the promotion of either case, we know that conventions of the Constitution have very little actual bite and significance when political opportunism beckons in the other direction. I see no reason why the Commonwealth Government should not itself promote the “Yes” case by way of expenditure over and above the presentation of the “Yes/No” pamphleteering.”<sup>36</sup>

4.1.9 The argument against limiting State and Territory expenditure was put to the Convention by Mr N J Harper, a delegate of the Queensland Parliament:

“...I move the following amendment:

“That all the words after ‘change’ in proposal D (b) be omitted.”

The purpose of this amendment is clear on its face and raises a number of fundamental propositions concerning amendments to the Constitution.

At present, constitutional amendment may be achieved only by the passage of the proposed law through both Houses of Commonwealth Parliament or passage through one House of Parliament on two occasions in the same session. Accordingly, there is some measure of protection built into the Constitution whereby the interests of States, through the role of the Senate, may be protected.

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<sup>36</sup> *Proceedings of the Australian Constitutional Convention*, op. cit., p. 286.

Additionally, any proposal for amendment must be adopted by a majority of the States and a majority of electors in the Commonwealth.

Inherent in section 128, then, is the fundamental acknowledgement that constitutional amendment has the capacity to directly impact on the future and powers of State Government and the States of Australia have a unique and independent role in approving any constitutional amendment. I do not believe that the mechanism dealing with funding of referendums which has been developed by the Constitutional Amendment Subcommittee would necessarily ensure the full ramifications of proposals on States are adequately placed before the electorate. Indeed, I have grave reservations that it would not do so, and I have, consequently, moved this amendment to the motion to remove any constraints on state Government from placing valid arguments before electors in their State.

For 84 years the people of Australia have consistently rejected proposals for constitutional amendment which have had the effect of interfering with the rights of the States as essential and vital elements of our federation. They have therefore accepted the proposition that State Governments are the cornerstone on which our federation has been established and built.

It must be acknowledged that the people of Australia have given a mandate to their elected representatives in State Government to do all within their power to maintain the basis upon which the Commonwealth was founded. Let us again recall that it was founded on the principle of two levels of independent and responsible government being essential to the strength and future of this great nation. State Governments must be free and unfettered in determining whether funds will be spent on a campaign either for or against a referendum proposal. We are in a totally different position from the Commonwealth Government on the matter.”<sup>37</sup>

4.1.10 The amendment put by Mr Harper was ultimately agreed to by Convention delegates.<sup>38</sup>

## **4.2 Issues for consideration**

4.2.1 A key question for consideration is whether the prohibition in subsection 11(4) on Commonwealth expenditure should be retained. The argument put in its favour in the parliamentary consideration preceding its enactment was essentially that it would prevent partisan use of public funds. This view was clearly stated by Mr Steele Hall MP in the House of Representatives Second Reading debate on 29 May 1984:

“I foreshadow that in the passage of this Bill I will seek to insert at the relevant place an amendment which I have had drafted to ensure that no future government of any colour can take public money to support its own view at a referendum, that an even-handed case must be put to the Australian people. The morality of the situation is quite clear: A government going to the public in a referendum must be even-handed. If it wants to put a case it should go to its party, fund that case through its party and do so as vehemently as the resources it can get for that campaign allow. That is fair. But it is not fair to use the numbers on an individual issue of a referendum which may not have intervened in the election campaign in the slightest. It may not have

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<sup>37</sup> *ibid.*, p. 295.

<sup>38</sup> *ibid.*, p363.

intervened; it may not have been part of it. There is no sanction and no mandate for a government to be involved in such a way.”.

4.2.2 The Government's contrary arguments were summarised by Senator Gareth Evans when he unsuccessfully moved, on 7 June 1984, an amendment the aim of which was to have no general prohibition on spending of Commonwealth funds, but require the Government to make funds available to opponents of a referendum proposal where the Government intended to spend money in support of the proposal:

“This amendment, which has been circulated, deals with the question of funding for promotional expenditure in relation to referendums. The Government's preferred position is that there be no statutory limit placed on promotional expenditure for referendum campaigns. By promotional expenditure, I mean expenditure over and above that which is required in the presentation of the official Yes and No cases, and which is required by statute to be even-handed, and has traditionally been so, in the way in which public moneys have been allocated. The reasons for the Government's preferred position were fully explained by me in this place in December last year when this matter was debated in the context of the then proposed five referendum items.

There are three points that are relevant and bear quick repetition. The first is that the No case tends traditionally to be predominant in media reporting of referendum campaigns, simply by virtue of the stridency with which it is usually advanced and the ease with which opposition to proposals, as distinct from reasoned support, can capture the airwaves. The Yes case traditionally starts with a disadvantage, as has been acknowledged by most commentators over the years. Promotional expenditure on the Yes case to that extent is justified to redress the inherent imbalance that tends traditionally to be associated with the conduct of referendum campaigns. The second reason that has been advanced by the Commonwealth in support of promotional expenditure is that it enables proposals which are the product of genuine cross-party consensus or intergovernmental consensus-in particular those worked out in the context of the Constitutional Convention-to be properly and effectively communicated to the Australian people and assists the cause of consensual constitutional reform thus being advanced.

The third reason advanced for allowing the Commonwealth in appropriate circumstances to spend promotional moneys is that by that means one overcomes the effect of expenditure from public money by the States-all too often a situation that has existed in the context of referendum campaigns. It is a matter not of creating an imbalance, but of redressing an imbalance in expenditure of public money which exists by virtue of the States ploughing in, as Queensland obviously was anxious to do in the last referendum campaign.”.

**Annex 6** sets out the text of the amendment moved by Senator Evans, and of an Explanatory Memorandum provided in support of it

4.2.3 In relation to this question, the arguments of principle relating to it were well canvassed in 1984 and 1988 (in the context of *Reith v Morling*), and the AEC would wish to make only a few general observations.

4.2.4 First, the issue of the use of public resources for advertising which might be seen by some to have a political purpose or intention has had some salience in

recent years. In their Joint Media Release of 2 July 2008 (No. 22/2008) entitled *New Advertising Guidelines*, Senator the Hon John Faulkner, then Cabinet Secretary and Special Minister of State, and The Hon Lindsay Tanner MP, Minister for Finance and Deregulation the following statements, among others, were made:

“Specific guidelines ensure that the Government advertising system is not abused and that all campaigns are properly authorised and funded within the boundary of legislative authority or a Cabinet decision:

*The subject matter of material to be communicated to the public should be directly related to the Government’s responsibilities. As such, only policies or programs underpinned by legislative authority, appropriation of the Parliament, or a Cabinet Decision which is intended to be implemented during the current Parliament, should be the subject of an advertising campaign.*

This guideline ensures that a Government cannot advertise, as “government policy”, a proposed election policy, as the Howard Government did in its tax advertising campaign in 1998.

The appearance and messages of campaigns are also addressed by the guidelines:

The material communicated must be presented in an explanatory, fair, objective and accessible manner. Specifically, information in campaigns should be directed at the provision of objective, factual and explanatory information and enable the recipients of the information to reasonably and easily distinguish between facts, on the one hand, and comment, opinion and analysis on the other.

This guideline ensures that emotive political imagery and slogans are avoided. This is also stipulated in the following guideline:

*Material should be presented in a manner free from partisan promotion of government policy and political argument, and in objective language. The dissemination of information using public funds should not be directed at fostering a positive impression of a particular political party or promoting party political interests. Dissemination of information may be perceived as being party-political because of any one of a number of factors, including:*

- a. *the content of the material - what is communicated;*
- b. *the source of the campaign - who communicates it;*
- c. *the reason for the campaign - why it is communicated;*
- d. *the purpose of the campaign - what it is meant to do;*
- e. *the choice of media - how, when and where it is communicated;*
- f. *the timing, geographic and demographic targeting of the campaign;*
- g. *the environment in which it is communicated; or*
- h. *the effect it is designed to have.*

These guidelines also observe the sensitivity of the timing of advertising campaigns which could be politically favourable to the incumbent Government.”.

4.2.5 Paragraph 2.10 of the Government's September 2009 *Electoral Reform Green Paper – Strengthening Australia's Democracy*, in a discussion of "Key Principles of an Australian Electoral System", also noted, as an element of "Neutrality", that "There should be protections against the inappropriate use of the resources of the state for political benefit."

4.2.6 Secondly, the underlying purpose of such guidelines, and of similar guidelines and standards which have been applied in many parts of the world, is to ensure that public resources cannot be improperly used to influence public opinion in support of a particular electoral outcome. If that principle is accepted, the question then arises of whether it should be seen as applicable not just to elections, but also to referendums. It is at least arguable in the Australian context that it is even more important to apply the principle to referendums than to elections, since a decision to elect a particular government can be reviewed by the people and reversed by a majority of them, three years later, whereas a decision to change the Constitution may well prove difficult for even a clear majority of voters to reverse, because of the "double majority" requirement in section 128 of the Constitution. A reading of the Yes/No Cases produced for past referendums also suggests that the disputation surrounding referendums is often couched in language reflecting partisan divisions of a comparable type to those seen at elections.

4.2.7 At the other end of the scale, it might be argued that when there is a strong national consensus in favour of a particular constitutional amendment (for example that which was endorsed at the 1967 "Aboriginals" referendum), it would be in the national interest for the strongest possible vote in favour of the change to be mobilised.

4.2.8 The points noted in paragraphs 4.2.6 and 4.2.7 should, however, be assessed in the light of the impossibility of ensuring a genuine "level playing field" in relation to the use of public resources so long as subsection 11(4) of the Act restrains only Commonwealth, but not State or Territory expenditure.

4.2.9 As noted at paragraph 4.1.4 above, the operation of section 11(4) was excluded in relation to the 1999 referendums. That opened the way for a range of activities, described as follows in the 2000 *Annual Report* of the Department of the Prime Minister and Cabinet, in the passage relating to the Department's Referendum Task Force:

"The Referendum Task Force provided support to a Ministerial Steering Group overseeing preparations for the referendum on whether Australia should become a republic and on adding a preamble to the Constitution. The task force worked closely with the Attorney-General's Department, the Australian Government Solicitor and the Australian Electoral Commission in developing the proposed Constitutional alterations and other legislation, administering public information programmes and ensuring that arrangements for the referendum, held on 6 November 1999, proceeded smoothly.

The Joint Select Committee (JSC) on the Republic Referendum, established to consider the referendum legislation, reported in August 1999. The task force prepared submissions and gave evidence to the JSC and assisted in developing the government response to the JSC's report. In broad terms, the JSC supported the

proposed legislation as an effective expression of the republic model that emerged from the 1998 Constitutional Convention and made a number of recommendations for fine tuning. Support was provided for the Prime Minister, the Attorney-General and the Special Minister of State during parliamentary debates on the referendum bills, concluding with endorsement of the *Constitution Alteration (Establishment of Republic) 1999* and the *Constitution Alteration (Preamble) 1999* by both Houses in August 1999 for submission to the referendum.

National research confirmed the need for effective public information activities. The task force supported the Steering Group and the Ministerial Committee on Government Communications in developing and implementing the neutral public education programme and the arrangements for the 'Yes' and 'No' campaign advertising which preceded the referendum.

The neutral public education programme aimed to provide balanced, factual information which would enable Australians to understand the arguments for and against change and make informed votes. An information pamphlet, developed in consultation with an Expert Panel chaired by Sir Ninian Stephen, was distributed widely and was supported by television, radio and print advertising and a website. Materials were available in 22 languages other than English and in alternative formats. Focus group testing of the advertising materials indicated that the referendum campaign was perceived to be clear, easy to understand, neutral and unbiased. Tracking research showed that, by the end of the three-week television advertising campaign, awareness of the referendum was almost universal, at 96 per cent.

Public funding was made available for the 'Yes' and 'No' advertising campaigns overseen by committees drawn from Constitutional Convention delegates. This unique approach to public information for referendums allowed robust public debate on the arguments for and against change. While the content of the advertising and campaign strategies was the responsibility of the 'Yes' and 'No' committees, task force staff worked with each committee to ensure transparency and accountability in the use of public funds. Processes were in place to check that each campaign met basic standards without compromising confidentiality.”.

### **4.3 Options for the future**

4.3.1 At least the following options for the future can be identified.

- (i) Make no change. This approach will continue to give effect to the aims of those who supported the introduction of subsection 11(4) in the first place, but will not deal with the fact that the prohibition is asymmetrical, applying to the Commonwealth but not to the States or Territories.
- (ii) Amend section 11(4) so as to make it apply to the States and Territories as well as to the Commonwealth. Such an amendment, in relation to the States, would seem likely to be challenged on constitutional grounds.
- (iii) Devise a mechanism which will draw an effective distinction between proposed laws which are the subject of strong partisan division (in relation to which the current prohibition could be retained), and those upon which there

is a broad national consensus (in relation to which the current prohibition could be excluded).

- (iv) Establish a scheme for equal public funding of the Yes and No cases, as was done in relation to the 1999 referendums.
- (v) Adopt a mechanism akin to that proposed unsuccessfully by Senator Evans on behalf of the then Government in 1984, and set out at **Annex 6**, under which there will be funding available to the Yes and No cases in proportions reflecting the division in the Parliament for or against the proposed constitutional amendment.
- (vi) Repeal subsection 11(4).

## **PART 5 – AMENDMENTS TO THE REFERENDUM (MACHINERY PROVISIONS) ACT 1984**

5.1. The 1906 Act which preceded the Referendum Act was a relatively short document, the substantial effect of which was to apply the *Commonwealth Electoral Act* to referendums, with a number of necessary changes. At the time of its repeal, the 1906 Act consisted of 55 sections, plus one Schedule; some further prescription regarding referendum processes was set out in the *Electoral and Referendum Regulations*.

5.2 The Referendum Act, by way of contrast, was designed to be a “stand-alone” document. It still refers at a number of points to the Electoral Act, but primarily to deal explicitly with situations arising when an election and referendum are held concurrently.

5.3 The 1983-84 period in which the Referendum Act was developed and enacted represented the start of an era in Australian federal electoral arrangements in which legislative amendments became much more frequent than in the previous decades, not least because of the ongoing reviews of electoral processes by parliamentary committees, most notably the Joint Standing Committee on Electoral Matters (JSCEM). This, however, has posed its own challenges. In its 12 July 2002 Submission to the JSCEM on *The Conduct of the 2001 Federal Election*, the AEC made the following points, among others.

### **“10.6 Concordance of the Referendum and Electoral Acts**

10.6.1 During the conduct of the 1999 Referendums, it became clear that the Referendum Act has suffered significant decay over the past decade (since the last referendums in 1988), as legislative amendments made to the Electoral Act over that period have not been carried over consistently into the Referendum Act. This resulted in some considerable operational problems at the 1999 Referendums that were dealt with at the time through administrative flexibility. However, legislative repair work to the Referendum Act is still necessary.

10.6.2 The AEC believes consistency between the Referendum Act and Electoral Act is desirable as a matter of principle – so as to avoid unnecessary confusion to administrators and so as to minimise the risk of unintended drafting consequences from the use of divergent language.

**Recommendation 36: That, as far as practicable, the *Referendum (Machinery Provisions) Act 1984* and the *Commonwealth Electoral Act 1918* be expressed in the same terms when describing the same processes.”.**

The 2002 Submission highlighted in an Attachment a significant number of points of divergence between the two Acts. While these have been addressed in the period since then, the very fact that they arose highlights the disadvantage of having two separate Acts making similar prescription for electoral processes.

5.4 In the light of this experience, the AEC is of the view that there would be significant advantages in consolidating the Referendum Act and the Electoral Act into a single statute. Such an arrangement would enable all who have a stake in

electoral or referendum processes to refer to a single main document, which would be particularly advantageous if referendums and elections are held concurrently, and would be an effective way of addressing the problem identified by the AEC in 2002.

## PART 6 – SUMMARY OF ISSUES

6.1 The stipulation set out in the section 128 of the Constitution that:

“if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.”

in the AEC's view gives rise to a reasonable inference that electors have a right to be sufficiently informed about any proposed law to alter the Constitution to enable them to cast meaningful votes. The context of compulsory enrolment and compulsory voting similarly requires that information provided on the proposed alterations should be disseminated in a way that is equitable and accessible to all Australian electors.

6.2 The AEC's responsibilities in this regard are set out in two separate statutes. The AEC has a statutory function under the Electoral Act to promote public awareness of electoral matters,<sup>39</sup> a concept which is defined in the Act as including matters relating to referendums. Further, the Referendum Act requires the AEC to assemble the Yes/No cases and distribute them in a pamphlet addressed to every enrolled elector.

6.3 This Submission has outlined a range of issues that impact on the process for preparing and disseminating the Yes/No cases, as well as issues related to limiting the purposes for which money can be spent in relation to referendum questions.

6.4 Should there be a desire to reform section 11 of the *Referendum (Machinery Provisions) Act 1984* the AEC has canvassed a range of options.

- In Part 2 of this Submission, recommendations previously put to the JSCEM have been restated (at paragraph 2.3.1) and a number of options relating to involvement of third parties/independent parties in the preparation of Yes/No cases and the referendum pamphlet have been outlined.
- Part 3 has examined the process for disseminating the Yes/No cases and has raised the possibility of removing the requirement under the Referendum Act for the Electoral Commission to post a referendum pamphlet to every elector.
- Part 4 has discussed the limitations on the purposes for which money can be spent in relation to referendum questions, and has identified, at paragraph 4.3.1, six options that the Committee may wish to consider.
- Finally, Part 5 has recommended consolidation of the Referendum Act and the Electoral Act into a single statute.

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<sup>39</sup> Electoral Act, paragraph 7(1)(c).

**SECTION 11 OF THE REFERENDUM (MACHINERY PROVISIONS) ACT 1984**

**11 Distribution to electors of arguments for and against proposed law**

(1) Where:

- (a) a proposed law for the alteration of the Constitution, being a proposed law passed by an absolute majority of both Houses of the Parliament, is to be submitted to the electors; and
- (b) within 4 weeks after the passage of that proposed law through both Houses of the Parliament, there is forwarded to the Electoral Commissioner:
  - (i) an argument in favour of the proposed law, consisting of not more than 2,000 words, authorized by a majority of those members of the Parliament who voted for the proposed law and desire to forward such an argument; or
  - (ii) an argument against the proposed law, consisting of not more than 2,000 words, authorized by a majority of those members of the Parliament who voted against the proposed law and desire to forward such an argument;

the Electoral Commissioner shall, unless the Minister informs the Electoral Commissioner that the referendum is not to be held, not later than 14 days before the voting day for the referendum, cause to be printed and to be posted to each elector, as nearly as practicable, a pamphlet containing the arguments together with a statement showing the textual alterations and additions proposed to be made to the Constitution.

(2) Where:

- (a) a proposed law for the alteration of the Constitution, being a proposed law passed by an absolute majority of one House of the Parliament only, is to be submitted to the electors; and
- (b) within 4 weeks after the second passage of that proposed law through that House of the Parliament, there is forwarded to the Electoral Commissioner:
  - (i) an argument in favour of the proposed law, consisting of not more than 2,000 words, authorized by a majority of those members of the Parliament who voted for the proposed law and desire to forward such an argument; or
  - (ii) an argument against the proposed law, consisting of not more than 2,000 words, authorized by a majority of those members of the

Parliament who voted against the proposed law and desire to forward such an argument;

the Electoral Commissioner shall, unless the Minister informs the Electoral Commissioner that the referendum is not to be held, not later than 14 days before the voting day for the referendum, cause to be printed and to be posted to each elector, as nearly as practicable, a pamphlet containing the arguments together with a statement showing the textual alterations and additions proposed to be made to the Constitution.

(3) When there are to be referendums upon more than one proposed law on the same day:

- (a) the arguments in relation to all the proposed laws shall be printed in one pamphlet;
- (b) the argument in favour of any proposed law may exceed 2,000 words if the arguments in favour of all the proposed laws do not average more than 2,000 words each and the argument against any proposed law may exceed 2,000 words if the arguments against all the proposed laws do not average more than 2,000 words each; and
- (c) there may be one statement setting out all the alterations and additions proposed to be made to the Constitution by all the proposed laws, with marginal notes identifying the proposed law by which each alteration or addition is proposed to be made.

(4) The Commonwealth shall not expend money in respect of the presentation of the argument in favour of, or the argument against, a proposed law except in relation to:

- (a) the preparation, printing and posting, in accordance with this section, of the pamphlets referred to in this section;
- (aa) the preparation, by or on behalf of the Electoral Commission, of translations into other languages of material contained in those pamphlets;
- (ab) the preparation, by or on behalf of the Electoral Commission, of presentations of material contained in those pamphlets in forms suitable for the visually impaired;
- (ac) the distribution or publication, by or on behalf of the Electoral Commission, of those pamphlets, translations or presentations (including publication on the Internet);
- (b) the provision by the Electoral Commission of other information relating to, or relating to the effect of, the proposed law; or

- (c) the salaries and allowances of members of the Parliament, of members of the staff of members of the Parliament or of persons who are appointed or engaged under the *Public Service Act 1999*.

**1999 REFERENDUM PAMPHLET**

**CALIFORNIA VOTER INFORMATION GUIDE**

**EXTRACT FROM EUREKA STRATEGIC RESEARCH REPORTS, 1999 AND 2007**

**REITH v MORLING and OTHERS**

HIGH COURT OF AUSTRALIA

Dawson J

12 August 1988

Melbourne

Dawson J.

This matter comes before me upon a summons issued by the plaintiff seeking an interlocutory injunction against the Commonwealth and the Attorney-General for the Commonwealth restraining them from expending moneys or causing moneys to be expended upon an advertising campaign in connection with the forthcoming referendum upon four proposed laws for the alteration of the Constitution, which is to be held on 3 September 1988. In the action itself the plaintiff, in addition to a permanent injunction, seeks a declaration that the expenditure of moneys by the Commonwealth on the advertising campaign in support of the proposed laws to be submitted to the referendum is in breach of s 11(4) of the Referendum (Machinery Provisions) Act 1984 (Cth) (the Act). He also seeks against the members of the Electoral Commission, who are joined with the Commonwealth and the Attorney-General as defendants, orders which would have the effect of requiring them to apply to a court prescribed under the Act to restrain the Attorney-General or the Commonwealth from engaging in conduct which would constitute a breach of s 11(4) of the Act.

Notwithstanding the relief sought in the summons, the Solicitor-General, who appears for the Attorney-General and the Commonwealth, and Mr Goldberg who appears for the plaintiff, have requested me to treat these proceedings as the trial of an action and have indicated that they would be content with a declaration if I should see fit to make one. Accordingly, Mr Heydon who appears for the members of the Electoral Commission, has not sought to place any submissions before me, no relief being sought against his clients.

The procedure for the holding of a referendum for the alteration of the Constitution is laid down in s 128 of that document and machinery provisions are to be found in the Act. The necessary preliminary steps have been taken to pass each of the proposed laws for the alteration of the Constitution through Parliament and, in accordance with s 11(1) of the Act, "an argument in favour of the proposed law ... authorized by a majority of those members of the Parliament who voted for the proposed law and desire to forward such an argument" and "an argument against the proposed law ... authorized by a majority of those members of the Parliament who voted against the proposed law and desire to forward such an argument" were forwarded to the

Electoral Commissioner who, in accordance with s 11(3), has had printed a pamphlet containing the arguments. The pamphlet is now in the course of distribution through the post to each elector.

Section 11(4) of the Act provides:

The Commonwealth shall not expend money in respect of the presentation of the argument in favour of, or the argument against, a proposed law except in relation to--

- (a) the preparation, printing and distribution of the pamphlets referred to in this section, or the preparation and distribution of translations into other languages of material contained in those pamphlets;
- (b) the provision by the Electoral Commission of other information relating to, or relating to the effect of, the proposed law; or
- (c) the salaries and allowances of members of the Parliament, of members of the staff of members of the Parliament or of persons who are officers or employees within the meaning of the Public Service Act 1922.

The parties have agreed upon a statement of facts and, in addition to those facts which I have already recounted, the following circumstances are relevant. The plaintiff is a member of the House of Representatives and is the Shadow Attorney-General, that is, the member of the Federal Opposition generally responsible for matters pertaining to the laws of the Commonwealth which matters, in the government, are the responsibility of the Attorney-General. The plaintiff is also the chairman of the Referendum Task Force established by the Leader of the Federal Opposition to supervise its campaign in relation to the referendum. He was one of the members of Parliament who voted against the proposed laws. No objection is taken to the standing of the plaintiff to bring these proceedings.

The Attorney-General's Department has authorised the broadcasting of four television advertisements as part of the Commonwealth Government's advertising campaign concerning the proposed laws. The cost of the advertising is to be met from government revenue. The Electoral Commission sought advice from counsel with respect to the content of the four advertisements, which have not yet been broadcast, and was advised that expenditure upon them was not in breach of the Act. The plaintiff also sought advice and received a contrary opinion. Both opinions were annexed to an affidavit sworn by the plaintiff and are before me. I have seen a video tape of the final version of the four advertisements intended to be broadcast and have been provided with a transcript of three of them, although the argument has now been confined to two of them and then only to portions of those two.

The first of the advertisements in relation to which the plaintiff questions the expenditure of government money commences by showing an oil painting of Sir Henry Parkes which dissolves to a painting of the Constitutional Committee of 1891. The picture then shifts to a meeting room in which the commentator stands. Towards the end of the advertisement the commentator picks up a copy of the report of the Constitutional Commission and shows it to the camera. The commentary is as follows:

If there can be said to be a father of our Constitution, it would be Sir Henry Parkes.

But in fact the draft Constitution was the work of many men and as many points of view.

People from each of the colonies took part, each putting forward the view of the people they represented.

That same process continues today, because the original authors foresaw the possible need to make changes in the future.

*Over two years ago, the Constitutional Commission representing a cross-section of Australians began a review.*

*They held public meetings in each State and accepted over 4000 submissions. Their recommendations form the basis for three of the four proposed amendments on which you'll be asked to say yes or no in the September 3 Referendum.*

The September 3 Referendum.

The portion of the commentary which I have emphasised is the portion to which the plaintiff raises objection.

The second advertisement to which objection is raised commences with a picture of the old Parliament House which dissolves to a picture of the commentator standing in front of the new Parliament House. The commentary is as follows:

*Just as our Federal Parliament has outgrown its old home and moved to this magnificent new Parliament House, you have the opportunity on September 3 to review our Constitution*

You will be asked to say yes or no to four amendments; to provide four year maximum terms for members of both Houses of the Commonwealth Parliament.

To provide for fair and democratic parliamentary elections throughout Australia.

To recognise local government.

And to extend the right to trial by jury, to extend freedom of religion and to ensure fair terms for persons whose property is acquired by any government.

You have the opportunity to decide upon these proposals by Referendum -- the same process that saw our Constitution adopted in the first place. This ensures that the will of the majority is respected.

The September 3 Referendum.

Again, the portion of the commentary which I have emphasised is the portion to which the plaintiff raises objection.

Mr Goldberg, in presenting the plaintiff's argument, also placed reliance upon two paragraphs in the argument in favour of the proposed laws contained in the pamphlet being distributed to electors. The first paragraph is in the general portion of that argument and is as follows: "They [the proposals] are the result of an extensive process of consultation with ordinary Australians." The second paragraph, which is also in the general part of the argument in favour, is as follows: "At last there is a chance to change the Constitution for the benefit of people and not politicians."

The submissions on both sides accepted that it is proper to construe the words "in respect of the presentation of the argument in favour of, or the argument against, a proposed law" appearing in s 11(4) of the Act as being a reference to the arguments which were authorised by those who voted for and against the proposed law, forwarded to the Electoral Commission in accordance with s 11(1) and included in the pamphlet. I should have thought that there was something to be said for a broader construction of the phrase "the argument" in sub-s (4), whereby it is taken as a reference to the argument for or the argument against in general and not as a reference to the particular arguments included in the pamphlet. Such a construction would, I think, give effect to an intention that Commonwealth Government expenditure in relation to the presentation of the cases for and against a proposed law should, subject to the exceptions contained in paras (b) and (c), be restricted to the preparation, printing and distribution of the pamphlets referred to or the preparation and distribution of translations of them.

However, I am content to proceed upon the narrower basis for which the parties contend. Upon that basis the plaintiff must, in order to succeed, establish that the expenditure of which he complains, that is to say, the advertisements to which he objects, are "in respect of the presentation of" one or other of the arguments contained in the pamphlet in question. It is not submitted that they are in respect of the presentation of the argument against the proposed laws, so that the only question is whether they are in respect of the presentation of the argument in favour of the proposed laws.

Mr Goldberg on behalf of the plaintiff points to the first of the paragraphs in the case for the proposed laws in the pamphlet which I have set out. He submits, and there was no submission to the contrary, that the reference to the proposals being the result of an extensive process of consultation with ordinary Australians is a reference to the public meetings held by the Constitutional Commission and the submissions made to it. The italicised passage in the commentary of the first of the two advertisements, which I have set out above, referring to the work of the Constitutional Commission is, so Mr Goldberg submits, a reinforcement of the statement made about it in the case for the proposed laws in the pamphlet and is, therefore, in respect of the presentation of the argument contained in that case.

In relation to the second of the two advertisements, Mr Goldberg points to the paragraph from the pamphlet which I have set out and says that the reference to there being at last a chance to change the Constitution for the benefit of the people and not politicians is an argument for change at this point in time and is strengthened by both the pictures of the new and old Parliament Houses and the statement that on 3 September, the electors have the opportunity to review the Constitution "just as our Federal Parliament has outgrown its old home and moved to this magnificent new

Parliament House". The statement, Mr Goldberg submits, is an exhortation to change and thus in support of the argument in favour of the proposed laws.

On the other hand, the Solicitor-General, as I understand him, submits that both the advertisements in their entirety amount to no more than an encouragement to the electors to be aware of the issues involved in the forthcoming referendum. He points to the fact that in each of them it is made clear that electors have the choice of voting in favour or against the proposed laws. If, contrary to his submission, any argument for or against the proposed laws is contained in the advertisements, he argued that it is of a subsidiary nature only and should not be allowed to obscure their dominant purpose which is merely to raise public awareness. He further submits that there is no link between the advertisements and what appears in the pamphlet in the argument in favour of the proposed laws. In particular, he says that the statement in the pamphlet that there is at last a chance to change the Constitution for the benefit of the people and not politicians has no particular meaning which would enable it to be considered an argument or part of the presentation of an argument. Moreover, he submits that change, or the opportunity for change, is implicit in any referendum and to refer to the fact is not to promote any particular case.

Whilst the last proposition may be true, it is the promotion of change rather than the mere reference to it which is put on behalf of the plaintiff as being objectionable and the promotion of change in the context of a referendum for the alteration of the Constitution must inevitably be in favour of the case for alteration. Nor do I think that the statement in the pamphlet concerning the chance to change the Constitution is sufficiently devoid of meaning to rob it of any argumentative value. An irrational argument or an argument lacking in cogency is none the less an argument which in some contexts may be persuasive.

I have come to the conclusion that the plaintiff has made out his case that the material to which he points in the two advertisements is in promotion of those aspects of the argument contained in the pamphlet in favour of the proposed laws to which he refers. It is, to some extent, a matter of impression, but after careful consideration I am not left in any real doubt about the conclusion which I have reached. In those limited respects to which the plaintiff makes reference, I do not think that it could be said that the advertisements are merely directed to raising public awareness of the forthcoming referendum. I do not understand the Solicitor-General to have argued that if the advertisements promote in any significant way any part of the argument in favour in the pamphlet, expenditure in relation to them is not contrary to s 11(4) of the Act. Consequently, I am prepared to make the necessary declaration.

The declaration will be that the expenditure of moneys by the Commonwealth upon the two advertisements containing the passages which I have italicised above is, or would be, to the extent of those passages, a breach of s 11(4) of the Referendum (Machinery Provisions) Act 1984 (Cth).

*A H Goldberg and J E Middleton for the plaintiff.*

*J D Heydon QC and P R Hayes for the first, second and third defendants.*

*G Griffith QC, S-G, S P Charles QC and C M Maxwell* for the fourth and fifth defendants.

Solicitors for the plaintiff: *Weigall & Crowther*.

Solicitors for the first, second and third defendants: *Freehill Hollingdale & Page*.

Solicitor for the fourth and fifth defendants: *Australian Government Solicitor*.

**AMENDMENT TO THE *REFERENDUM (MACHINERY PROVISIONS) BILL 1984*  
MOVED BY SENATOR GARETH EVANS ON BEHALF OF THE GOVERNMENT  
(SENATE HANSARD, 7 JUNE 1984, PP. 2729-30) – PROPOSED SECTION 10A**

**“Commonwealth to provide funds for arguments against proposed law in certain cases**

10A. (1) Where-

- (a) a proposed law for the alteration of the Constitution has been submitted to the electors; and
- (b) the Commonwealth has incurred expenditure in promoting the case in favour of the proposed law,

the Minister shall, as soon as practicable after the submission of the proposed law to the electors, prepare a notice in writing stating that that expenditure has been incurred by the Commonwealth and setting out the amount of that expenditure or, if more than one proposed law was submitted to the electors on the same day, setting out the total amount of the expenditure incurred by the Commonwealth in promoting the cases in favour of all the proposed laws, and shall cause a copy of the notice to be published in the Gazette.

(2) A notice under sub-section (1) is conclusive evidence for the purposes of this section of the amount of the expenditure incurred by the Commonwealth in promoting the case in favour of a proposed law, or the cases in favour of proposed laws, for the alteration of the Constitution.

(3) Where-

- (a) a proposed law for the alteration of the Constitution has been submitted to the electors;
- (b) the number of members of the Parliament who voted against the proposed law is equal to or exceeds 5 per cent of the number of members of the Parliament who voted either for or against the proposed law;
- (c) the Commonwealth has incurred expenditure in promoting the case in favour of the proposed law; and
- (d) a person who is a prescribed person in relation to the proposed law has incurred expenditure in promoting the case against the proposed law,

a person who is a prescribed person in relation to the proposed law may, by notice in writing in an approved form given to the Electoral Commission, request the Commonwealth to make a payment in accordance with this section.

- (4) Where-
- (a) a request is made to the Electoral Commission under sub-section (3) in relation to a proposed law for the alteration of the Constitution; and
  - (b) the Electoral Commission is satisfied that-
    - (i) the person who made the request is a prescribed person in relation to the proposed law; and
    - (ii) a person who is a prescribed person in relation to the proposed law has incurred expenditure (in this sub-section referred to as the 'relevant expenditure') in promoting the case against the proposed law,

The Commonwealth shall pay to the person who made the request an amount calculated in accordance with the formula

$\frac{A B}{C}$ , where-

- A is the amount of the expenditure incurred by the Commonwealth referred to in paragraph (1) (b) or, if more than one proposed law was submitted to the electors on the same day, the amount ascertained by dividing the total amount of the expenditure incurred by the Commonwealth in promoting the cases in favour of all the proposed laws by the number of proposed laws so submitted;
- B is the number of members of the Parliament who voted against the proposed law ; and
- C is the number of members of the Parliament who voted for the proposed law,

or the amount of the relevant expenditure, whichever is the lesser amount.

- (5) Where-
- (a) an amount would, but for this sub-section, be payable to a person under sub - section (4) in relation to a proposed law for the alteration of the Constitution;
  - (b) that amount is less than the amount referred to in that sub-section as the relevant expenditure; and
  - (c) the number of members of the Parliament who voted against the proposed law is less than 10 per cent of the number of members of the Parliament who voted either for or against the proposed law,

sub-section (4) does not apply in relation to the person and the Commonwealth shall pay to the person an amount equal to the sum of the amount that would, but for this sub-section, be payable to the person under sub-section (4) and the amount calculated in accordance with the formula

AB (10-D), where-  
200C

- A is the amount represented by the symbol A in the formula in sub-section (4);
- B is the number of members of the Parliament who voted either for or against the proposed law;
- C is the number of members of the Parliament who voted for the proposed law; and
- D is the number obtained by dividing 100 times the number of members of the Parliament who voted against the proposed law by the number of members of the Parliament who voted either for or against the proposed law,

or the amount of the relevant expenditure, whichever is the lesser amount.

- (6) Where the Electoral Commission is satisfied that an amount will become payable to a person under sub-section (4) or (5), the Electoral Commission may, by notice in writing given to the Attorney-General, authorize the making of advances to the person on account of the amount that is expected to become payable to the person under that sub-section and, where such an authorisation is given, advances shall be made accordingly.
- (7) Advances authorized by the Electoral Commission shall be made subject to the condition that the amounts advanced are expended in promoting the case against the relevant proposed law for the alteration of the Constitution.
- (8) Payments under this section shall be made out of moneys appropriated by the Parliament for the purposes of this section.
- (9) Where a request is made to the Electoral Commission under sub-section (3) in relation to a proposed law for the alteration of the Constitution by a person who is a prescribed person in relation to the proposed law, no subsequent request may be made under that sub-section in relation to the proposed law.
- (10) In this section-
  - (a) a reference to members of the Parliament who voted for, or voted against, a proposed law shall be read as a reference to members who voted in favour of, or in opposition to, as the case may be, a motion in the Senate or the House of Representatives that the Bill for the proposed law be read a third time;
  - (b) a reference to a prescribed person, in relation to a proposed law, shall be read as a reference to a person acting on behalf of those members of the Parliament who voted against the proposed law or on behalf of a majority of those members; and

- (c) a reference to expenditure incurred in promoting the case in favour of, or against, a proposed law shall be read as not including a reference to-
- (i) expenditure incurred in the preparation, printing and distribution of the pamphlets referred to in section 11, or in the preparation and distribution of translations into other languages of material contained in those pamphlets;
  - (ii) expenditure incurred in respect of the provision by the Electoral Commission of other information relating to, or relating to the effect of, the proposed law; or
  - (iii) expenditure incurred in respect of the salaries and allowances of members of the Parliament, of members of the staff of members of the Parliament or of persons who are officers or employees within the meaning of the Public Service Act 1922."

**EXPLANATORY MEMORANDUM RELATING TO THE AMENDMENT TO THE REFERENDUM (MACHINERY PROVISIONS) BILL 1984 MOVED BY SENATOR GARETH EVANS ON BEHALF OF THE GOVERNMENT (SENATE HANSARD, 7 JUNE 1984, pp. 2731-2)**

"The amendment would insert a new clause 10A in the Bill which would require the Government to make funds available to opponents of a referendum proposal where the Government intended to spend money in support of the proposal.

Sub-clause (1) requires the Minister to publish a notice in the Gazette setting out the amount of Commonwealth expenditure. This statement is the basis upon which the entitlement of the opponents of a proposal is to be calculated.

Sub-clause (2) provides that a notice published under sub-section (1) is conclusive evidence of the amount of expenditure incurred by the Commonwealth. A provision of this kind is necessary for the smooth administration of the scheme.

Sub-clause (3) sets out the preconditions to a grant in paragraphs (a) to (d) and the procedure to be followed by a spokesperson for the opponents of a referendum proposal in making a claim. The conditions are that:

the proposal must have been put to referendum;

the number of opponents equals or exceeds a threshold of 5% of total votes cast ;

the Government has spent money in promoting the 'Yes' case; and

members of Parliament who are opposed to the proposal have incurred expenditure in promoting the 'No' case.

Sub-clause (4) is the substantive provision for payments to be made to a spokesperson for the opponents of a referendum proposal.

Where the Electoral Commission is satisfied that the claimant is an appropriate person (i.e. one of the members of Parliament who voted 'No') and that he has incurred expenditure in promoting the case against the referendum proposal, the Commonwealth is required to pay to the person an amount proportionate to the votes against the proposal in the Parliament but if the amount spent is less than that amount the claimant only receives reimbursement of the amount spent.

The effect of the formula is that the proportion of funds for the 'No' case to total funds corresponds to the proportion of 'No' votes to total votes.

Sub-clause (5) provides that where the opposition in Parliament is between 5% and 10% of the total votes cast, the opponents are entitled to a weighted percentage of the funds. In effect, opponents would get a "bonus" of a few thousand dollars to ensure that the amount provided is commercially practicable for the purpose of mounting a 'No' case. The proportionate rule applies at 10% and above.

Sub-clause (6) allows advance payments to be made to the opponents of a referendum proposal. The mechanism adopted is that the Electoral Commission would notify the Attorney-General by letter that an amount was expected to become payable and a payment could thereupon be made out of moneys appropriated for a referendum information program. The approximate entitlement of the opponents of a referendum proposal could be calculated, once the votes had been taken in the Parliament, by reference to the amount appropriated for a referendum information program.

Sub-clause (7) imposes the condition that amounts advanced must be spent on promoting the case against the relevant referendum proposal. For example, an entitlement in respect of one proposed constitutional alteration could not be spent on promoting opposition to another proposed alteration.

Sub-clause (8) provides that payments are to be made out of moneys appropriated for the purpose.

Sub-clause (9) precludes the making of more than one claim in respect of a particular referendum proposal.

Sub-clause (10) defines:

the opponents of a referendum proposal by reference to the votes at the Third Reading stage;

who may make a claim on behalf of opponents of a referendum proposal as any member who voted against the particular proposal; and

expenditure incurred in promoting a referendum proposal as not including expenditure on the official Yes/No pamphlet or salaries and allowances of members of Parliament, ministerial staff and public servants."