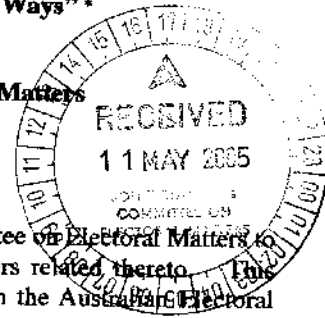


Joint Standing Committee on Electoral Matters
Submission No. 159
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SUBMISSION NO. 159

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

A Submission by Sir David Smith **
to the Joint Standing Committee on Electoral Matters
March 2005



The Special Minister of State has asked the Joint Standing Committee on Electoral Matters to inquire into the conduct of the 2004 federal elections and matters related thereto. This submission deals with a related matter, namely, the way in which the Australian Electoral Commission carries out its legal obligations in relation to ballot papers.

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

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

If that should indeed be the case, and if the Australian Electoral Commission believes that it is open to it to give such wide interpretations to the wishes of the Parliament, as expressed in the relevant legislation, then I believe that this is a related matter deserving of the Committee's scrutiny. In short, does the Australian Electoral Commission observe the laws which it administers, or was its 1999 referendum handbook an example of the Commission's ability to misrepresent and/or ignore the intentions of Parliament?

* With apologies to Robert Browning.

** Sir David Smith was Official Secretary to five Governors-General from 1973 to 1990. He was an appointed delegate to the 1998 Constitutional Convention; and a member of the No Case Committee for the 1999 Constitutional Referendum. Since his retirement he has held the following appointments at The Australian National University, Canberra: Visiting Fellow in the Political Science Programme of the Research School of Social Sciences 1991-92; Visiting Fellow in the Faculty of Law 1998-99; and Visiting Scholar in the Faculty of Law since 2000.

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

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

(a) if the elector approves the proposed law – by writing the word "Yes" in the space provided on the ballot paper; or

(b) if the elector does not approve the proposed law – by writing the word "No" in the space provided."

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

"DIRECTIONS TO VOTER

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

The Australian Electoral Commission's web site, in a document entitled "Electoral Backgrounder 10", includes the following items of information about referendums:

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

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

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

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

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

"41 Spoilt ballot-papers

(1) If a person voting at a referendum, before depositing a ballot-paper in a ballot-box, satisfies the presiding officer at a polling booth at which the person is voting that

the person has spoiled the ballot-paper by mistake or accident, the presiding officer shall provide the person with a new ballot-paper and shall cancel the spoiled ballot-paper.”

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

In short, in order to cast a valid vote, the voter is required to use one of two quite specific words, and the legislation has put them in quotation marks – there can be no mistake as to what the voter is required to do. The legislation is also quite specific about the action to be taken if the voter spoils a ballot paper. It requires the cancellation of a spoiled ballot paper and the issue of a new ballot paper.

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

Shortly before the 1999 constitutional referendum, the Electoral Commission issued a booklet called *Guidelines to Scrutineers*. Amongst other things, it contained instructions as to what would constitute a formal vote. Examples of formal “Yes” votes, apart from the word “Yes”, included the letter “Y” and the words “OK”, “Sure”, and “Definitely”. Examples of formal “No” votes, apart from the word “No”, included the letter “N” and the words “Never” and “Definitely not”. In addition, scrutineers were instructed that a tick (on its own) would be accepted as a valid “Yes” vote but that a cross would not be treated as a valid “No” vote and would be treated as an informal vote.

When Parliament legislated in specific terms for the use of the words “Yes” or “No”, did it contemplate that the bureaucracy would interpret this as allowing also the use of a variety of other words or even single letters or symbols such as ticks? If that is the case, then the possibilities for linguistic adventurism are boundless. Why limit it to the few words and letters and symbols selected by the Electoral Commission?

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

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

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

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

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

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

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

"93 Informal ballot-papers

...

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

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

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

As there was no organisation with legal standing that would have enabled it to challenge the rulings by the Electoral Commission, as contained in the *Guidelines to Scrutineers*, an individual did so in his own name. When the case came before the Federal Court, the Judge ruled against the application "on the balance of convenience", that is, the convenience of the Electoral Commission and its Divisional Returning Officers, and awarded costs to the Commission. The lawfulness of the Commission's interpretation of the legislation and of its instructions to scrutineers was simply not tested by the Court.

I submit that it would be appropriate for the Committee to examine the extent to which the provisions of the *Referendum (Machinery Provisions) Act 1984* were complied with during the 1999 constitutional referendum, and, more particularly, the extent, if any, to which the Australian Electoral Commission ignored the quite specific provisions of the legislation through the instructions which it included in its *Guidelines to Scrutineers*. If the Commission feels entitled to rewrite the rules in relation to referendums, it will surely claim the same right in relation to elections.

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

Should the Committee find that the Commission is indeed free to interpret the legislation under which it operates in the conduct of elections and referendums, the Committee may wish to consider recommending that all relevant electoral legislation be amended to ensure that, in relation to future elections and referendums, it will be the Parliament, and not officials, who decide just what does constitute a formal vote, and who determine the procedure to be followed with spoilt ballot papers.

SIR DAVID SMITH
 1/36 SHACKLETON CIRCUIT
 MAWSON, ACT 2607
 (2) 6286 5094