2011 Submission to JSCEM: Re 'None of the Above' Campaign.

To: Joint Sitting Committee on Electoral Matters, (JSCEM)

From: Ian Bleys

Subject: Submission for 'None of the Above' Campaign:

Linked Index:

Introduction:

This submission to the JSCEM presents a case for recommending the Australian Electoral Laws pertaining to 'Compulsory Voting' are reviewed in the terms as presented hereto.

The submission contests that if 'Compulsory Voting' is to be retained, the AEC Act needs to be amended to comply with Australian and International 'freedom of expression and speech' rights. To that end, the AEC should provide an option on the ballot paper that allows all Australian enrolled electors to have the choice if they believe, think or want the choice that best represents their true and honest choice of vote option.

That option should be in the form of a box on the ballot paper that allows for a 'None of the Above' or 'Deliberate Informal' voting option.

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Meaning of 'None of the Above':

As per the explanation from the Wikipedia website, 'None of the Above' is known to represent a choice to ***'indicate disapproval or all of the candidates in a voting system'***. An extract to the Wikileaks presentation on the interpretation of the reasons and meaning of the 'None of the Above' choice appears below:

> Linked: http://en.wikipedia.org/wiki/None_of_the_above
>
> **None of the Above** (**NOTA**) or **against all** is a ballot choice in some jurisdictions or organizations, to allow the voter to indicate disapproval of all of the candidates in a voting system. It is based on the

principle that consent requires the ability to withhold consent in an election, just as they can by voting no on ballot questions.

Entities that include "None of the Above" on ballots as standard procedure include Greece (λευκό, white, but unrelated to a political party of the similarly-sounding name), the U.S. state of Nevada (None of These Candidates), Ukraine (Проти усіх), Spain (*voto en blanco*), France (*vote blanc*), Colombia (*voto en blanco*), the United States Libertarian Party and Green Party and the Florida affiliate of the American Patriot Party.[1] Russia had such an option on its ballots (Against all) until it was abolished in 2006.[2] … continues

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The 2010 Australian Election Result:

This impending review is necessary for many reasons.

Firstly, the summary numbers for the 2010 Federal election show 14,088,260 electors were enrolled to vote. Reports from the 'Get up Website', suggest this number of enrolled electors was short by an additional 1,000,000 or so eligible electors who were not on the roll.

Of those who were on the electoral roll, 947,504 electors did not show up to vote and another 728,505 voted informal. This combined total of enrolled electors who either did 'not show', or voted 'informal', represents 11.9% of the total enrolled electors. That is enough votes to rank third on the 1st preference count. When you add the 1,000,000 of eligible electors who were not on the electoral roll, that number climbs to almost 19%.

By any measure, this 19% number of eligible Australian electors represented people who either deliberately refused to show up and vote, or choose not to be registered at the time of the election, or decided to or made the mistake of voting informal. This startling statistic reveals some of the many things that are wrong with the current AEC rules and their electoral policing policies. It would also suggest that the Electoral Act needs a full review to understand why and what this abstention really represents.

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The AEC's Response (Defence) Documents:

The preliminary response correspondence quoted by the AEC, included a 'Information Backgrounder' pamphlet that quoted extracts from the Commonwealth Electoral Act 1918, and the 1924 amendment that made enrolment compulsory. Extracts from that correspondence are further presented hereto: (A full copy of this document is attached in PDF format.)

2. The AEC administers the conduct of federal elections under the provisions of the Commonwealth Electoral Act 1918 (the Act). In 1911, the former Act was amended to make enrolment compulsory. In 1924, to increase voter turnout and reduce party campaign expenditure, the Act was amended to make voting at federal elections compulsory. The Act is available on the Attorney-General's Commonwealth Law website at www.commlaw.com.au. Unless otherwise specified all references to sections are to sections of the Act. Also please note, the words 'voter' and 'elector' are used interchangeably throughout this publication.

Further commentary in that pamphlet indicated legal waverings:

3. This *Backgrounder* provides introductory information in relation to compulsory voting and its contents are a guide only. If you are in doubt about the interpretation of the law in particular circumstances you should seek your own independent legal advice.

The information contained in this publication is relevant, and also very apt when the 1924 amendment law was passed. When comparing 2010 electoral nuances with those of 1924, some glaring differences become apparent:

1. Australian Indigenous populace were not eligible to vote, http://en.wikipedia.org/wiki/Women%27s_suffrage
2. The voting age for all electors was 21, http://en.wikipedia.org/wiki/Voting_age
3. There were no television or other vision mediums that carried candidates or political party messages to the electorate for advertising or promotion of their electoral credentials,
4. There was no 'vote' cost reimbursement scheme that I have been able to find a record of.

All of these points have individual significance in a modern voting society. Electors are much more informed via increased levels of education, and awareness of politics. Politics and identifiable leaders are always a part of the major news stories carried by both print and vision media. This gives the electorate a summary profile of politicians and their party platforms. None of this type of interface formed the political exposures during the 1924 era when the laws that pertain today were enacted.

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In the case of Judd v McKeon 1926:

The same Backgrounder document also provides examples of decisions made under Laws contained within the Act. The first example goes back to 1926, i.e. Judd v McKeon. The extract published in the Backgrounder is very brief and does not reflect the full transcript of the High Court decision. To allow those reviewing this submission, a full transcript of the decision is reproduced hereto: (Published from the following website):

http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1926/33.html?stem=0&synonyms=0&query=title%28Judd%20and%20McKeon%20%281926%29%20%29

Judd v McKeon [1926] HCA 33; (1926) 38 CLR 380 (11 October 1926)

HIGH COURT OF AUSTRALIA

Judd Defendant, Appellant; and McKeon Informant, Respondent.

H C of A

On appeal from a Court of Quarter Sessions of New South Wales.

11 October 1926

Knox C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.

Brissenden K.C. (with him Collins), for the appellant.

Flannery K.C. (with him Nield), for the respondent.

The following written judgments were delivered:—

Oct. 11

Knox C.J.,

Gavan Duffy and Starke JJ.

The appellant was convicted on a charge of failing to vote at an election of Senators for New South Wales without a valid and sufficient reason for such failure, contrary to the provisions of sec. 128A of the *Commonwealth Electoral Act 1918-1925*. That section provides, by sub-sec. 1, that it shall be the duty of every elector to record his vote at each election, and, by sub-sec. 12, that every elector who fails to vote at an election without a valid and sufficient reason for such failure shall be guilty of an offence. On appeal to Quarter Sessions the conviction was affirmed; and this appeal is brought by special leave from that decision.

The appellant contends (1) that the provisions of sec. 128A above quoted are beyond the powers of the Commonwealth Parliament, and (2) that the reason he gave for his failure to vote was a valid and sufficient reason.

In our opinion the first contention cannot be supported. By sec. 9 of the *Constitution* Parliament is empowered to make laws prescribing the method of choosing Senators, subject to one condition or qualification only, namely, that the method shall be uniform for all the States. This power, subject only to the condition mentioned, is plenary and unrestricted; and the only reason advanced for denying to Parliament the right to prescribe that every qualified elector shall record his vote was founded on the use of the word "choosing." It was said that the choosing of a candidate implied a desire on the part of the elector that that candidate should be elected, and that consequently the power of Parliament was limited to prescribing the method by which electors desiring that a candidate should be elected should signify that desire. We do not think the meaning of the expression "choosing Senators" in sec. 9 of the *Constitution* can be so restricted. In common parlance ***"to choose" means no more than to make a selection between different things or alternatives submitted,*** to take by preference out of all that are available. As an illustration of the meaning of the corresponding noun "choice" the *Oxford Dictionary* quotes the phrase "I have given thee thy choice of the manner in which thou wilt die," ***and this use of the word seems to exclude the idea that a right of choice can only be said to be given when one or other of the alternatives submitted is desired by the person who is to exercise the right, or, in other words, to choose between them*** …

The 2010 Oxford On-line dictionary definition of 'choice' as compared with the 1926 version states and Linked hereto:

(http://oxforddictionaries.com/view/entry/m_en_gb0145980#m_en_gb0145980)

'a range of possibilities from which one or more ***may*** be chosen'

The operative word in this definition is 'may', this does not imply 'must', or any other compulsory choice. So in reference to the Oxford dictionary version used by the Court in 1926, some variance has emerged in determining the conditions from the decision made in 1926, and how 'choice' is viewed by modern day opinions.

To continue the High Courts decision on Judd v McKeon:

Continues …

… It remains to consider whether any of the reasons given by the appellant was a valid and sufficient reason. The reasons given were as follows:—[The reasons as above stated were here set out.] These reasons do not purport to express the views of the appellant but those of the party to which he belongs; and in that view his only excuse, which is clearly insufficient, is that his party prohibits him from voting. But

if the reasons be taken as representing the individual views of the appellant they amount to no more than the expression of an objection to the social order of the community in which he lives.

In our opinion such an objection is not a valid and sufficient reason for refusing to exercise his franchise.

For these reasons we are of opinion that the appeal should be dismissed.

Isaacs J.

The appellant, Ernest Edward Judd, was prosecuted by Bernard George McKeon, the Commonwealth divisional returning officer for West Sydney, for failing to vote at the last Senate election for New South Wales, without a valid and sufficient reason for such failure. The offence charged was alleged to be in contravention of sec. 128A of the *Commonwealth Electoral Act 1918-1925*. That section declares, by sub-sec. 1, that "it shall be the duty of every elector to record his vote at each election." By sub-sec. 12 it is enacted that "every elector who (a) fails to vote at an election without a valid and sufficient reason for such failure ... shall be guilty of an offence." The penalty, that is, the maximum penalty, is £2. The appellant was fined by the Stipendiary Magistrate 10s. and was ordered to pay £1 5s. costs. He appealed to Quarter Sessions, and his appeal was dismissed with £3 3s. costs. An appeal was, by leave, brought to this Court and supported in argument on two grounds: (1) that a statute enacting compulsory voting at parliamentary elections is *ultra vires* of the Commonwealth Parliament, and (2) that a valid and sufficient reason was given for not voting, namely, that the only candidates were opponents of the appellant's political views.

(1) *Ultra Vires*.—The foundation of the first ground was sec. 9 of the *Constitution*. The words are: "The Parliament of the Commonwealth may make laws prescribing the method of choosing Senators," &c. The argument was that the word "choosing" imported voluntary action, and excluded all notion of compulsion upon any elector. That the franchise may be properly regarded as a right, I do not for a moment question. It is a political right of the highest nature. The *Constitution* in sec. 41 speaks of the "right to vote."

But I am equally free from doubt that Parliament, in prescribing a "method of choosing" representatives, may prescribe a compulsory method. It may demand of a citizen his services as soldier or juror or voter. The community organized, being seized of the subject matter of parliamentary elections and finding no express restrictions in the Constitution, may properly do all it thinks necessary to make elections as expressive of the will of the community as they possibly can be. The word "choose" in this connection is the time-honoured expression for the election of a parliamentary representative. Mr. Burke, in his famous speech, said to his constituents: "You choose a member indeed, but when you have chosen him he is not a member of Bristol, but he is a member of Parliament." A method of choosing which involves compulsory voting, so long as it preserves freedom of choice of possible candidates, does not offend against the freedom of elections, as established and recognized by the *Statute of Westminster I*. (3 Edw. I. c. 5).

The compulsory performance of a public duty is entirely consistent with freedom of action in the course of performing it. A tribunal may, for instance, be required, by mandamus, to determine a controversy, but its determination is to be freely arrived at. It is the failure to observe this distinction that lies at the root of the first objection, which must fail.

(2) *Valid and Sufficient Reason*.—The reason advanced has only a faint colour of even plausibility. It was urged that, assuming compulsion *intra vires*, still the duty to vote had not been made absolute, but subject to abstention for a "valid and sufficient reason." It is a reason, so the argument ran, both valid and sufficient that a man should abstain from voting if the only selection possible was one between what he considered political evils—all candidates being avowed advocates of doctrines to which the voter was opposed. But when the matter is examined the argument is at once seen to be unreal. It omits to observe the fact that every phase of opinion has an opportunity of candidature. True, there is a pecuniary consequence if the candidature proves to be an unnecessary waste of public and private time and money. But the opportunity exists. And when all opportunities are reduced to the actual candidatures and the time comes for each constituency to return its quota to the national Parliament, there is no force whatever in

the contention that a valid and sufficient reason exists for non-compliance with the primary duty of voting, merely because no one of the ultimate candidates meets with the approval of the given elector. If that were admitted as a valid and sufficient reason, compulsory voting would be practically impossible. Each elector may—if that be the will of the community expressed by its Parliament—be placed under a public duty to record his opinion as to which of the available candidates shall in relative preference become the representative or representatives of the constituency in Parliament.

It is strictly not necessary to offer any opinion as to what is imported by the words "valid and sufficient reason," because the only reason here advanced is so directly opposed to all compulsion that it is in open contradiction to sec. 128A, whatever limitation be given to the words referred to. At the same time, it would be very unsatisfactory to leave so important a matter untouched, more particularly as the learned Chairman has essayed a limitation which I cannot agree to. In my opinion, a "valid and sufficient reason" means some reason which is not excluded by law and is, in the circumstances, a reasonable excuse for not voting. If it be, as in this case, an open challenge to the very essence of the enactment, it is, of course, excluded by law and not valid. So also, if there be any express provision of any law with which the alleged reason is in conflict. Again, if a mandatory or prohibitive regulation be contravened the same result follows. But the reason may be compulsive obedience to law which makes voting practically impossible. Physical obstruction, whether of sickness or outside prevention, or of natural events, or accident of any kind, would certainly be recognized by law in such a case. One might also imagine cases where an intending voter on his way to the poll was diverted to save life, or to prevent crime, or to assist at some great disaster, as a fire: in all of which cases, in my opinion, the law would recognize the competitive claims of public duty. These observations are not, of course, suggested as exhaustive, but as illustrative, in order to dispel the idea that personal physical inability to record a vote is the only class of reasons to be regarded as "valid." The sufficiency of the reason in any given instance, is a pure question of fact dependent on the circumstances of the occasion.

The appeal should, therefore, be dismissed.

Higgins J.

I concur in the view that on this appeal no reason of any substance has been suggested for the contention that the section in question—sec. 128A of the *Commonwealth Electoral Act 1918-1925*—exceeds the powers conferred on the Federal Parliament by the Constitution; and until such a reason has been presented it is our duty to assume that the section is valid.

But, in my opinion, the form as filled up by the elector states a valid and sufficient reason for his failure to vote.

I cannot at all concur in the view taken by the learned Chairman of Quarter Sessions, that the only "valid and sufficient reason" contemplated by Parliament for failure to vote is inability to do the physical act of recording a vote—e.g., through being prevented by flood, ill-health, lack of means of conveyance or some such like reason. There is not in the Act anything that I can find to justify such a limitation of the words "valid and sufficient reason"; and further, in the same sec. 128A itself, sub-sec. 7, when Parliament wants to limit a failure of the elector to some physical reason it says so expressly: "If any elector is unable, by reason of absence from his place of living or physical incapacity, to fill up, sign, and post the form," &c.

I might add that, in my opinion, if abstention from voting were part of the elector's religious duty, as it appeared to the mind of the elector, this would be a valid and sufficient reason for his failure to vote (sec. 116 of the *Constitution*). But no ground based on religious duty has been taken by this elector.

The words of the reason for not voting—as stated by the elector in this form—have been set out; and it is not an unfair paraphrase of the words to say that this is the meaning:—"The only candidates between whom I am asked to elect are candidates who, with their parties, work for capitalism, whereas my party and myself work for socialism and the ending of capitalism. I am prohibited by my party and its principles from voting for such candidates. If you ask me why, then, we don't put forward candidates of our own, my answer is, it is too expensive—we should lose the £25 deposit in each case." This objection to vote is obviously misrepresented when it is said to be mere non-agreement with the views of any of the

candidates for election. Mere non-agreement does not exclude differences of degree of dislike of views or of persons; whereas the elector, being evidently concerned only with the struggle between capitalism and socialism, says that he cannot, as a fighter against capitalism, consistently vote in aid of any faction or person who fights for capitalism. No one, so far as I have heard, contends that the command of his party would be a valid reason justifying an elector in disobeying the command of the law.

Now, it must be remembered that voting is preferential (Act 1918-1922, sec. 123); and if the elector has in truth no preference, that fact would, in my opinion, constitute a valid and sufficient reason. It is to be presumed in favour of Parliament, unless it clearly say the contrary, that the Act of Parliament does not compel a man to say that he has a preference when he has none—does not compel him to tell a lie. If in what is obviously a labour constituency there were two labour candidates and an anti-labour elector regarded one labour candidate as being as bad as the other, this would, in my opinion, be a valid reason for declining to vote. If Colonel Newcome, after the well-known visit to the club with Clive, were asked to say which of two equally foul-mouthed members he preferred to have on the committee, would he not be justified, in the eyes of reasonable men, in saying "I prefer neither"? What if John the Baptist were asked which he preferred—Herod or Herodias? In the position which I suggest, he could not say that one was blacker than the other, for to him they appear to be both as black as pitch.

It is true that this elector has not expressly said that he had no preference, has not even used the word "preference." Yet obviously Parliament cannot have meant that these forms should be filled in with the nicety of pleadings, so long as the substance of the objection satisfactorily appears.

Parliament has given no guidance as to what it means by "valid and sufficient reason"; as often happens of late years, it has left it to the Courts to decide such things as what reason is valid and sufficient, or what remuneration is "fair and reasonable." I suppose we must try to find a separate force for each word used. "Valid" does not mean truthful; for a separate penalty is provided when the elector states a false reason (sec. 128A (12) (c)). Probably "valid" may fairly be taken as referring to the *character* of the reason, and "sufficient" as referring to the *strength* of the reason under all the circumstances. If an elector say that he did not go to vote because his wife was ill, the character of the reason would commend itself to most people; but, if the illness is merely an ordinary catarrh, the reason would hardly be called sufficient. The Courts, in the successive steps of their hierarchy, are given a very wide area of discretion; and if the elector give a reason which would commend itself to the "man in the street" as valid and sufficient, however stupidly expressed, and however stupid the underlying principles of action may appear to us, I do not think that Parliament intends that such an elector should be treated as a criminal, and punished by a fine, and possibly by imprisonment with hard labour. The object of elections being to ascertain the predominance of opinion in some given area, it must be presumed (in the absence of clear words to the contrary) that Parliament did not want to compel men to vote whose votes do not reflect any real opinion as between platforms or candidates, votes which would tend rather to defeat than to aid that object.

The sentence here is 10s., with costs £1 5s., and in default three days "hard labour."

The case of [*Krygger v. Williams*] under the *Defence Act* may be accepted in its entirety without this case being affected. There a youth was charged under sec. 135 with failing to render the personal service required of him, military service as a senior cadet, "without lawful excuse." The Act did not allow conscientious objection to such military service as a "lawful excuse." Such an excuse was excluded by the law; but the law had made provision for allotment of conscientious objectors to non-combatant duties (sec. 143 (3)). This was the limit of the "lawful excuse," the only excuse allowed by law. There is no such limit here in the words "valid and sufficient reason." The distinction is obvious, whatever view one may take of the fact that the two Judges in that case treated the defendant's conscientious objection to perform military duties—to attend drill, to serve as a cadet—as if it were a mere objection to fight. A man may of course assist the operations of a combatant force as much by doing its fatigue duty as by standing in the firing line.

My view is that the words "valid and sufficient reason" are not to be construed in a niggardly spirit, but liberally, and on grounds which would commend themselves to honest men, whatever their political or social outlook, as being grounds which are reasonable. But the Courts are not given any right to say what

political or social opinions are to be treated as reasonable. I disagree absolutely with the view that the Courts are to say what political or social views are to be treated as reasonable, or in accordance with common sense. The fact that the elector entertains scruples which we do not share, or which our imagination cannot grasp, is not a ground for saying that the scruples are either invalid or insufficient from the elector's standpoint.

For these reasons I think that the appeal should be allowed.

Rich J.

In my opinion, compulsory voting is valid. The vote is not merely a right but a duty. Every elector must discharge that duty, and if he "fails to vote at an election without a valid and sufficient reason for such failure he shall be guilty of an offence" (sec. 128A (12) of the *Commonwealth Electoral Act 1918-1925*). The reason must be valid—sound in law and fact; and, if valid, must be sufficient—substantial and satisfactory in the absence of countervailing answer. The appellant's excuse does not fall within this category. In this workaday world no elector finds a candidate "in se ipso totus teres atque rotundus." The "compleat" candidate is exhibited in the form and image of the individual elector, and the mould has been broken. Human affairs, however, are not so much concerned with the ideal and unattainable as with the practical and possible, and the Federal law requires every citizen to vote unless he can furnish a valid and sufficient reason for his failure to do so.

I agree that the appeal fails.

Appeal dismissed with costs.

Solicitor for the appellant, A. C. Roberts.

Solicitor for the respondent, Gordon H. Castle, Crown Solicitor for the Commonwealth.

Justice Rich's opinion was to allow the appeal. This decision was not a unanimous decision of the High Court and as such, demonstrates contra opinions within the Court.

This 'None of the Above' submission is not advocating that compulsory voting is wrong, it is just trying to emphasise that if compulsory voting is to be retained, then the elector must be given the avenue to vote their heartfelt choice as opposed to be forced to vote 'intentional informal'. Providing a 'none of the above' ballot option, the AEC then complies with providing the elector every option to express their 'choice'.

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In the case of Lubcke v Little:

This 1970 decision as quoted in the Backgrounder states:

… In my opinion, the respondent does not, by his possession of a genuinely held inability to form a preference, … thereby gain immunity from the sanction imposed by [the Act] if he fails to vote. The voting is certainly preferential … but it does not follow that a subjective incapacity on the part of the voter to determine that he prefers one candidate in an election to another affords a valid and sufficient reason for failing to vote.

(No permanent record of this decision could be found on the Supreme Court of Victoria website, nor the Austlii website.)

However, the text presented above does give cause to reassess the comments in a modern context. How can the Court purport to make a decision on whether a person can make or not make a decision to choose between candidates they do not

know? Surely, a third choice could or might be 'none of the above', and that choice would represent the elector's true choice, and not represent a forced choice.

By way of example: an elector is faced with five unknown food dishes, (i.e. substitute for candidates), yet the elector is instructed by law that they must choose their dish preference in order of one to five. They are not allowed to taste, smell or have any knowledge of how or what ingredients were used to prepare the dishes. How is the elector to determine their preference and choice in how to place the dishes in order of preference, if not by appearance?

It is common knowledge that appearances are deceptive, it has been proven in history that people holding office and wanting to hold office, are not always what they seem to be. The elector has cause and reason to be sceptical before he makes a choice and most often, the elector is in no real position to be able to make an honest an informative decision.

In fact, if one was to carry the logic argument presented hereto to its ultimate level, none of us really know our neighbour or those closest to us. Therefore how can one possibly know a political candidate to be able to place a blind trust in them to govern us in ways that each of us individually would want us to be governed?

So it must be asked, that when forced to determine a preference for individuals whose names appear on a ballot paper, how can such a decision be made when no knowledge of the candidates is known other than they purport to either represent themselves or a particular political party?

This choice then represents nothing but a 'blind choice' for a Political party, and that then in turn diminishes the significance of the individual candidates. Yet, political elections are about electing individuals who may stand to represent them selves, or a particular party to which they have pledged allegiance. The whole process becomes a circle turning on itself as it to bemuse and confuse the elector and all they know is that they face an intimidatory retribution if they do not make a selective choice.

It becomes more and more about a 'donkey vote system' and that in no way represents the charter entrusted to the AEC in its oversight in managing the election process.

What number, or percentage of voters know the people well enough to be able to form an opinion about them to the extent of voting them in order of preference for such a position as a member of the Australian Parliament?

What is the difference in this scenario of the court imposing a decision that the voter must choose, when compared with a military rule dictatorship lining up voters 'under threat', and telling them to make a choice between two evils. In a modern society, intimidation (fine or threat jail), at the electoral ballot box cannot be used to make or force electors to chose, yet it is there in law and history shows that the law is enforceable.

The choice should be the candidate's task in making themselves presentable and as an alternative to the other candidates. For many years and as shown in past elections, the choice has become not about individuals, but about Party politics. This has facilitated the emergence of the two major parties (Labour and Liberal Coalition) to become dominate, and has directed the Australian elector to choose between either of these parties or the alternatives offered in their electorate.

Very little face to face inter-reaction happens between undecided voters and candidates. Most community rallies are staged managed by the local party

organisations and exclude those who are not registered members of the respective parties. This disenfranchises and disadvantages the voter who is not a member of the major or fringe parties, and makes them completely dependant to media advertising and letterbox marketing to gain some knowledge of the respective candidates.

As part of the High Court decision quoted in the Backgrounder information pamphlet, the following text appears:

> The High Court gave some practical examples of what would be regarded as valid and sufficient reasons for not voting: Physical obstruction, whether of sickness or outside prevention, or of natural events, or accident of any kind, would certainly be recognised by law in such a case. One might also imagine cases where an intending voter on his way to the poll was diverted to save life, or to prevent crime, or to assist at some great disaster such as a fire, in all of which cases in my opinion, the law would recognise the competitive claims of public duty. **However, the Court warned this was not the only class of reason that would be accepted, it will depend on the circumstances in each case.**

Surely, the caveat contained within this last statement should provide for the interpretation, and possibility that there are times when the candidates presented for nomination, are not of sufficient calibre or ability in the electors viewpoint.

In this Australian 'free society', where 'freedom of expression and speech' is afforded and constitutionally accepted, all electors should be afforded the choice to make their honest and truthful decision based on their want to vote for any or none of the candidates nominated. That decision 'must' be allowed to be taken with no outside influence, or threat of intimidation. Any forced vote extraction will only diminish the integrity of the vote, and prevent the AEC from forming a true assessment as to the will of the people.

This type of interface in enforcing compulsory voting, does not endear candidates to a very sceptical electorate and as such, their inclination to respond in kind is to either not vote or vote informal.

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In the case of Faderson v Bridger:

As copied from:
http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1971/46.html?stem=0&synonyms=0&query=title%28Faderson%20and%20Bridger%20%29

> Faderson v Bridger [1971] HCA 46; (1971) 126 CLR 271 (11 October 1971)
>
> HIGH COURT OF AUSTRALIA
>
> FADERSON v. BRIDGER [1971] HCA 46; (1971) 126 CLR 271
>
> Parliamentary Elections (Cth)
>
> High Court of Australia Barwick C.J.(1), McTiernan(2) and Owen(3) JJ.
>
> CATCHWORDS
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> Parliamentary Elections (Cth) - Compulsory voting - Election for Senate - Preferential voting - Failure to vote - No preference held as between candidates - Whether "a valid and sufficient reason" for failure to vote - Commonwealth Electoral Act 1918-1966, ss. 123, 128A (12)*.
>
> HEARING Melbourne, 1971, October 8, 11. 11:10:1971 APPEAL from the Magistrates' Court at Bendigo, Victoria.

DECISION

October 11.

The following judgments were delivered:-

BARWICK C.J. The appellant was convicted by a magistrate for an offence failed to vote at an election without a valid and sufficient reason for such failure. (at p272)

2. The appellant gave evidence before the magistrate to the effect that he could not do as the ballot paper would have required him to do, it being a Senate election involving the expression of preferences. He could not do this he said because he had no preference, and that if he had been forced to state his preference he would have been telling a lie. (at p272)

3. The appellant did not attend at any electoral booth and obtain a ballot paper. (at p272)

4. The magistrate found that the appellant did not vote and that his reason for not voting was that he did not have any preference amongst the candidates. (at p272)

5. Mr. Forsyth has assisted us very considerably and has put before us an argument to the effect that the inability of the voter if accepted as a fact to form any preference amongst the candidates is a valid and sufficient reason for failing to vote. Consequently the conviction ought to be set aside. (at p272)

6. We have not found it necessary to ask counsel for the respondent to assist us, as I formed the conclusion, and so I understand have my brother Justices, that there is no substance in the arguments which have been put before us, although put before us very clearly and expertly. (at p272)

7. Section 128A places a duty on every elector to record his vote. This is done by attending at a polling booth, accepting a ballot paper, and, as s. 119 provides, marking it and depositing it in the ballot box. A failure to vote therefore involves a failure to attend, accept the ballot paper and having marked it, to put it in the ballot box. Of course there is no offence committed by not marking the ballot paper in such a fashion that the elector's vote is in law a valid vote. (at p272)

8. Section 123 in relation to a Senate election requires the voter to "place the number 1 in the square opposite the name of the candidate for whom he votes as his first preference", all the remaining squares to be marked with successive numbers as the voter determines as contingent votes. (at p272)

9. The first thing I should like to say is that the finding of the magistrate that the appellant did not "have any preference amongst the candidates", in my opinion, does not carry the appellant to the point where it can be said that he could not mark the ballot paper in an order of preference. However much the elector may say he has no personal preference for any candidate, that none of them will suit him, he is not asked that question nor required to express by his vote that opinion. He is asked to express a preference amongst those who are available for election, that is, to state which of them he prefers, if he must have one or more of them as Parliamentary representatives, as he must, and to mark down his vote in an order of preference of them. In that respect I would adopt if I might a sentence from the judgment of Crockett J. in Lubcke v. Little (1970) VR 807, at p811 :

"Just as perfection is unobtainable, so too is complete imperfection. The gradation of de-merits in everyone, including prospective parliamentarians, is infinite and so no one individual will compare identically with another - even in denigration."

To face the voter with a list of names of persons, none of whom he may like or really want to represent him and ask him to indicate a preference amongst them does not present him with a task that he cannot perform. (at p273)

10. The case in my opinion is covered by what was decided in Judd v. McKeon [1926] HCA 33; (1926) 38 CLR 380 . It is quite true that in that case the elector laid some stress on the compulsive effect of his membership of a political party in relation to his ability to choose a candidate but the majority, in my opinion, indicated that the voting obligation did not involve him in choice in the sense of selection between

alternatives, one of which was suitable to him. In the judgment of Knox C.J., Gavan Duffy J. and Starke J. it is said that:

"In common parlance 'to choose' means no more than to make a selection between different things or alternatives
submitted, to take by preference out of all that are available. As an illustration of the meaning of the corresponding noun 'choice' the Oxford Dictionary quotes the phrase ***'I have given thee thy choice of the manner in which thou wilt die,'*** and this use of the word seems to exclude the idea that a right of choice can only be said to be given when one or other of the alternatives submitted is desired by the person who is to exercise the right, or, in other words, to choose between them." (1926) 38 CLR, at p 383

…

For the courts to use 'I have given thee thy choice of the manner in which thou wilt die,' as a direct quote in support of the meaning of the word 'choice', gives pause to try an understand why the court would use such an intimidatory choice, particularly when making the distinction of choosing one candidate over another.

The implication of preferred method of death as the option used in understanding the word 'choice', begs to ask what the court was thinking when all the defendant was choose not to vote. Surely the Courts response in taking the voter's abstention to a level that is in the extreme sense, 'intimidatory'.

It might also be a pertinent question for the era to ask about what measure of respect politicians had in the electorate in 1924 as compared in modern times. The point being, that these same political leaders that this defendant refused to make a choice upon, were parlayed with the elected representatives who made the decisions to send Australian troops to the slaughter in WWI and fought on foreign soil.

You all remember 'Gallipoli' and 'The Somme', where 10's of thousands of Australian troops died. History shows that war was fought for a cause of such insignificance to Australia, that it would be very easy to hold the opinion that Politicians of that era, were always viewed by the electorate as less than respectable and perhaps contemptible in their respect for families and the loved ones who died in that horrible war. Given that potential thought process, it is very believable that when faced with a choice in electing public office representatives at that time, 'none of the above' would have become a natural response.

Continues ….

Although it is true that the majority of the Court did indicate that the compulsive quality of membership of the political party felt by the elector was not an adequate excuse, the reasons for judgment from which I have just quoted went on to say-

"But if the reasons be taken as representing the individual views of the appellant they amount to no more than the expression of an objection to the social order of the community in which he lives." (1926) 38 CLR, at p 384 (at p274)

11. However, Isaacs J., in his judgment, did deal with the nature of a valid and sufficient reason in passages that I think that I should quote. His Honour said this :

"But the opportunity exists." (That is the opportunity for all persons to be candidates.) "And when all opportunities are reduced to the actual candidatures and the time comes for each constituency to return its quota to the national Parliament, there is no force whatever in the contention that a valid and sufficient reason exists for non-compliance with the primary duty of voting, merely because no one of the ultimate candidates meets with the approval of the given elector. If that were admitted as a valid and sufficient reason, compulsory voting would be practically impossible." (1926) 38 CLR, at p 386

If I may here interpolate, this appellant really says that he is not required to vote because there is no one of the ultimate candidates who meets with his approval. It is that reason, he says, which disables him from expressing a preference. Later on, Isaacs J. says this:

"In my opinion, a 'valid and sufficient reason' means some reason which is not excluded by law and is, in the circumstances, a reasonable excuse for not voting. If it be, as in this case, an open challenge to the very essence of the enactment, it is, of course, excluded by law and not valid." (1926) 38 CLR, at p 386 (at p274)

12. In my opinion the argument in this case really amounts to this: that this elector says he was under no duty to vote because in fact no candidate met with his approval; all of them met equally with his disapproval. That, to my mind, is what Isaacs J. refers to as "an open challenge to the very essence of the enactment". Therefore what I have just read from his Honour's judgment in Judd's Case [1926] HCA 33; (1926) 38 CLR 380 seems to me to fit this case. (at p274)

13. Higgins J., of course, went the whole distance that the appellant would wish to go: but he was plainly in the minority. Rich J. (1926) 38 CLR, at p 390 , in referring to the "compleat" candidate, seems to me to have been referring to that appellant's reasons as expressing his individual opinion and was expressing a view which precludes the acceptance of the argument of the appellant in this case. (at p274)

14. Accordingly, in my opinion the magistrate was right and this appeal ought to be dismissed. (at p274)

McTIERNAN J. I agree with the reasons which have been given by the Chief Justice and I do not wish to add anything to what his Honour said. (at p275)

OWEN J. I agree that the appeal should be dismissed. The point raised by the appellant is, I think, concluded against him by the judgments of the majority of this Court in Judd's Case [1926] HCA 33; (1926) 38 CLR 380 and in particular by the judgment of Isaacs J. in that case. (at p275)

ORDER

Appeal dismissed with costs.

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Freedom of Expression and Speech:

The viewpoints expressed by the verdicts of the High Court Justices, Magistrates and other decision makers in the examples portrayed in the Backgrounder, does not sit well with the view that 'freedom of expression or speech' is at the heart of their decisions.

By example, if one was to frequent a MacDonalds restaurant, look at their menu board and the selection of meal choices, you can select any choice of meal. Yet, at the same time, you can walk away if you make a decision that nothing on the menu presents something appetising to the point that you want to order from the menu. Your choice would be 'none of the above' because you chose not to order anything.

Yet, in applying the Courts logic in the examples presented in the Backgrounder to the above situation, if you were not to choose from this MacDonalds menu, (i.e. list of candidates), you would risk a fine or further prosecution for not making a choice from the menu offered.) If there was another option on the menu, i.e. 'none of the above', you would at least be able to state your honest choice and not be at risk of a fine or other prosecution.

There is no implied intimidation or force decision in walking away from the MacDonalds menu by not making an unwanted choice. Yet, as the law is currently

prescribed, there is a very implied intimidatory oversight that you risk a fine or other retribution by not voting.

The Court does distinguish in that 'turning up to vote' is complying with the law. So in using base logic, casting an 'informal' vote is not against the law. However, the AEC is also charged with providing a ballot paper that gives the elector every opportunity to express their choice of candidate. Then by use of the same logic, it would suggest that 'none of the above' should be a registered choice on the ballot paper.

I contest that the Courts dissention to the defendants argument in all exampled cases in the Backgrounder, where the defendant has argued and stated that they are not able to choose between the 'worst of two or more evils', it is a very valid and 'free expression' of choice. I further contend that there might be other and more sinister reasons in wanting to make voting compulsory.

Further to this, the Courts by association believe that all Candidates seeking public office are of good heart and nature. I say, what if it is the belief of the dissenting elector, that Political candidates are not perfect persons and genuine in the reasons they chose to take public office? Surely the elector has that 'freedom of thought' process and the right to think that is the case. It is not written anywhere in Australian law that another has the right to impose their will or political beliefs on another. If one was to simply respond and say,

'I do not believe you nor care to hear your viewpoint. I just do not want to vote for you or anyone else as my elected candidate.'

When they voted, if they were to make this decision, they would be wanting to vote informal. This then misleads the AEC because they cannot distinguish between the 'accidental' informal, and the 'intended' informal. By including the 'none of the above' option, the AEC has a more accurate vote assessment, and that statistic can be used to allow more informed debate on a host of other matters.

It is a fair assessment to say that past politicians and their corrupt behaviour can be blamed for the electorate's scepticism at the reasons why candidates seek public office. Corruption is at the root of all evil and in all levels of politics, that evil is everywhere to be found.

Government, at Federal, State, and Local levels are the biggest businesses in any country. As such, the oversight on any public spending should be at the highest level. Government contracts are the most lucrative business available. Wining those contracts starts at the base level, political donations, and lobbyist activity. With this scepticism in the elector's mindset, why is it so hard for the Courts to accept that it is a lie to be forced the elector to see one candidate as better than any other candidate when all they see is the corruption and broken promises that are endemic in all Political leaders?

Creditability is what our political process lacks. The way to make elected Politicians and candidates aware of the electorate's true responses, is to allow the dissenting electors a deliberate 'informal' vote in the form of 'none of the above'. This will ensure in a very public way, and specifically to the candidates and elected representatives on the ballot paper, that they be given the insight into the direct correlation between the votes that won them office, as compared with those who believe that 'none of the above' deserve to be in office.

Included in my previous messages to both the AEC and the JSCEM, I included the following paste from Wikipedia on the subject of 'Freedom of speech': (Can be viewed on line at :

http://en.wikipedia.org/wiki/Freedom_of_speech_by_country

> International law
>
> Main article: Freedom of speech (international)
>
> The United Nations Universal Declaration of Human Rights, adopted in 1948, provides, in Article 19, that:
>
> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[1]

As pertains to Australia, the same source comments as follows:

> Australia
>
> See also: Censorship in Australia
>
> Australia does not have a bill or declaration of rights; however, in 1992 the High Court of Australia judged in the case of Australian Capital Television Pty Ltd v Commonwealth that the Australian Constitution, by providing for a system of representative and responsible government, implied the protection of political communication as an essential element of that system. This freedom of political communication is not a broad freedom of speech as in other countries, but rather a freedom whose purpose is only to protect political free speech. This freedom of political free speech is a "shield" against the government - and the government only - it is not a shield against private interests. It is also less a causal mechanism in itself, rather than simply a boundary which can be adjudged to be breached. Despite the court's ruling, however, not all political speech appears to be protected in Australia and several laws criminalise forms of speech that would be protected in other democratic countries such as the United States.
>
> In 1996, Albert Langer was imprisoned for advocating that voters fill out their ballot papers in a way that was invalid.[4] Amnesty International declared Langer to be a prisoner of conscience.[5] The section which outlawed Langer from encouraging people to vote this way has since been repealed and the law now says only that it is an offence to print or publish material which may deceive or mislead a voter. At present, therefore, Langer's actions would not seem to be considered illegal.
>
> The Howard Government re-introduced sedition law, which criminalises some forms of expression. *Media Watch* ran a series on the amendments on ABC television.[6]
>
> In 2006, CSIRO senior scientist Graeme Pearman was reprimanded and encouraged to resign after he spoke out on global warming.[7] The Howard Government was accused of limiting the speech of Pearman and other scientists.

I contest the belief that 'freedom of expression or speech' is representative of having to, or being forced by law, to vote when there is no interest in making a choice between candidates or a political party.

I further contest that if any vote cast is assessed at $2+ donation back to the party or candidate who the vote was cast for, then there is vested interests in Government's and Opposition Member's to maintain a compulsory vote law.

However, to comply with 'political free speech' practices, the ballot should also include a 'none of the above' or 'informal' choice so as to allow the elector to truly express their heartfelt decision.

This outcome would also allow the AEC to correctly determine the intent of the 'non-declared' vote as either 'elected informal', or 'mistaken informal'. It would then flow that this statistic would give elected and aspiring members, a truer and fairer indication of how their constituents view their credentials and suitability for public office.

I accept that any repeal of the compulsory vote law would require an amendment act to be passed by Parliament. That in itself would require Members to vote against their own vested interests. This is a matter that should be considered as a referendum question, and the possible avenue for such a question would be the next census. For that to happen, debate on this 'none of the above' option on the ballot paper, or the abandonment of compulsory voting, needs to begin urgently.

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Reasons for compulsory voting:

I accept and agree with the reasons for compulsory voting. It gives the populace a sense of attachment to their community, and the need to be concerned with 'pubic office', and also generates an awareness of the candidates and their profiles.

Unfortunately, with the AEC providing such comprehensive data on every 'booth' and 'voting station', candidates are able to make decisions well in advance about where they will campaign during their election. As a result, marginal seats tend to be where most Party candidates spend their time electioneering.

Safe seats, or seats where a candidate and their party polled poorly in past elections, are generally targeted with 'letterbox' type campaigns. As a result, constituents never really get the chance to interface with candidates. Local political party rallies are held during campaigns, and these are generally invitee only with party members targeted.

The access to each candidate at these rallies is heavily monitored for a number of reasons. From the candidates perspective, this is mainly about not being compromised or 'caught short' on an un-solicitored question, or not having a prepared response ready, or to not be embarrassed should there be media cameras close by. Security is another concern, but that is generally used as a defence prop rather than with any real threat concerns.

With this type of candidate protectionism, candidates are rarely exposed to the undecided voter. Thus begins the mis-trust in the political system and the non acceptance of having to vote for any candidate that has made no effort to win your own vote.

The 'None of the Above' option may only have real significance at a single election before the candidates, and the political parties get the message about the need to expose themselves more to the electorate.

Political voting is about, or should be about voting for the individual. If you don't know the individual, what are your options?

For decades voters have been enticed and hoodwinked to vote for the leader of the Party - thinking that their candidate being a member of that party will be the best candidate.

This type of voting system is dangerous and breeds complacency by the party candidates as they fly on the curtails of the Party and its Leader. This can be a double

edged sword if the party Leader is waning in popularity, or the Parties policies are found wanting.

If you expect voters to live with compulsory voting, there must be a 'none of the above' option on the ballot paper to give the voter every possible choice in making their vote with an honest conscious.

This 'none of the above' option will also allow the AEC to correctly determine the voter intent, as opposed to never really knowing why the informal vote was higher, or lower as it might turn out to be.

Without compulsory voting, voters who did not have a want to vote for any candidate would not bother to vote. If they had the want to vote for a candidate or a party, they would go and vote.

The decision is simple, if voting is to remain compulsory, give the voter every choice they might want to consider when they choose to make their decision on who they want to vote for.

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Electoral Vote Reimbursements:

In the 2010 election, some $54 million of Australian taxpayer funds was reimbursed to the candidates or their Party representations. In 2007, the amount was $49 million. The refund value of each vote in 2010 was $2.31191 and $2.10027 in 2007. The 2010 figure represents more than a 10% increase per vote cast.

The two major parties shared over $80 million of the funds reimbursed or just over 80%. With that guarantee of refund, advertising and market saturation trawling for votes makes the electoral process very flawed and subject to mis-appropriation and fraud.

Add to this the taxpayer funding of all electioneering undertaken by incumbent members who travel and expend prior to the Parties election launch. In the 2010 election the Labour party did not launch their campaign until several weeks after the Labour Prime Minister called the election. This must represent an abuse of the electoral laws, and the cost of all pre launch electioneering has to be reviewed and refunds asked for.

Then there is the Ministers printing and postage allowance, all available and an edge that gives the incumbent member a financial advantage over any other candidate wanting to contest the electorate. How many members use their printing and postage allowance:

1. As a marketing tool for themselves and their party?
2. As a medium to be critical of the Government/Opposition during the election period?

Or, what portion of the candidates allowance is expended in the three months leading into an election as compared with other periods?

A table of AEC extracted data concerning the AEC reimbursements made for the 2007 and 2010 Federal elections appears below:

Parties	Election Funding Rate: **$2.31191** **Sep-10**	Election Funding Rate: **$2.10027** **Nov-07**
Australian Labor Party	20,935,323.18	$22,030,460.82
Liberal Party of Australia	20,819,820.08	$18,133,645.07
Australian Greens	7,086,053.13	$4,370,920.20
National Party of Australia	2,441,843.88	$3,239,706.37
Family First Party	403,122.45	$141,016.33
Country Liberals (Northern Territory)	177,617.04	$169,178.85
Christian Democratic Party (Fred Nile Group)	17,407.51	
Australian Sex Party	11,197.72	
Liberal Democratic Party	11,116.80	
Shooters and Fishers Party	10,527.26	
Pauline's United Australia Party		$213,095.49
Family First		$141,016.33
Independent candidates (2010)		
Tony Windsor (New England, NSW)	129,099.25	$110,755.64
Robert Oakeshott (Lyne, NSW)	91,691.26	
Bob Katter (Kennedy, Qld)	87,383.75	$68,336.48
Andrew Wilkie (Denison, Tas.)	31,557.85	
Louise Burge (Farrer, NSW)	21,400.20	
John Clements (Parkes, NSW)	20,933.28	
John Arkan (Cowper, NSW)	19,326.39	
Michael Johnson (Ryan, Qld)	17,284.98	
Matthew Hogg (Riverina, NSW)	11,710.96	
Alan Lappin (Indi, Vic.)	11,239.33	
James Purcell (Wannon, Vic.)	10,564.25	
Charles Nason (Maranoa, Qld)	10,427.85	
Paul Blanch (Calare, NSW)	9,364.37	
Katrina Rainsford (Wannon, NSW)	9,200.23	
Brad King (Blair, Qld)	7,353.01	
Deidre Finter (Lingiari, NT)	4,511.67	
Kenny Lechleitner (Lingiari, NT)	4,213.44	
(2007) Nick XENOPHON		$312,497.07
Gavin James PRIESTLEY		$39,978.64
Timothy James HORAN		$35,910.42
Caroline Marcelle HUTCHINSON		$22,254.46
Gavan Michael O'CONNOR		$22,115.84
Noel Stephen BRUNNING		$20,843.08
Aaron Anthony BUMAN		$13,322.01
Bernard James QUIN		$12,794.84
Cathryn MOLLOY		$11,711.11
Ramon MCGHEE		$9,220.19
Robert James BRYANT		$9,184.48
Timothy Eric WILLIAMS		$8,705.62
Jamie Robert HARRISON		$6,985.50
Total	**52,411,291.12**	**$49,002,638.51**

What portion of this refund distribution is based on a forced vote system?

Should candidates be awarded electoral vote refunds when the candidates did not really earn the vote as a first choice preference, but by a decision a voter was forced to make when he had no real preference for any of the candidates?

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None of the Above Party:

The AEC should be given powers to disallow registration of party names that sound similar, or look similar to the 'None of the Above' ballot choice, if the JSCEM makes recommendations for changes to include the 'None of the Above' option on the ballot.

There is one such party out there at the moment. Linked here:

http://www.noneoftheabove.com.au/

To prevent any voter confusion to any recommendations made by the JSCEM, those recommendations should also include provisioning for individuals and Political Party registrations, trying to take advantage of the proposed 'None of the Above' ballot paper option.

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Summary:

Voting in this country is still conducted under law decisions, rulings, and interpretations that were made almost 100 years ago. In the time frame since, much has changed in the way politics work, and how candidates campaign and get elected.

It is time for this review Committee to make recommendations that will allow the AEC to conduct elections that allow all voters, to vote their true choice/decision/view on the ballot paper.

Why should candidates or political parties be afraid of a 'none of the above' option on the ballot paper? It can only be a fear of rejection or that the voter will protest vote for nay number of reasons. That exposure for the candidate and political party will make them more accountable to the electorate and that can only be a good thing.

Election should not be run to allow candidates or political parties to escape scrutiny, nor to their advantage. The voters are the ones making the decisions on who they want to govern them. Unless that are completely happy with the candidates, and their choice in a singular candidate they want to represent them, they must be given the option to indicate their abstention to make a decision they do not want to make.

Voting in any other capacity is a forced vote and no better that dictators who impose their own elections and voter acceptance at the point of a gun.

Our democracy advocates accepts the freedoms afforded all citizens under the law. The AEC Laws as they currently stand, do not advocate these freedoms.

It is time to make a change and hove out leaders face the true choices of democracy and allow the 'None of the Above' vote choice onto the ballot paper.