Australian Electoral Commission

SUPPLEMENTARY SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

ADVOCACY OF OPTIONAL PREFERENTIAL VOTING

Canberra

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1. PREAMBLE

1.1 This supplementary submission by the Australian Electoral Commission (AEC) is presented to the Joint Standing Committee on Electoral Matters (JSCEM) in response to its "Inquiry into the 1996 Federal Election", as advertised on Saturday 22 June 1996 in all major national newspapers. The submission is supplementary to the major AEC submission, "The Conduct of the 1996 Federal Election", presented to the JSCEM on 30 July 1996.

1.2 On 14 February 1996, two weeks after the issue of the writs for the 2 March 1996 federal election, Mr Albert Langer was sentenced to jail by the Victorian Supreme Court until 30 April 1996, for deliberately defying an injunction restraining him, until the end of polling day, from publicly advocating a form of optional preferential voting for the House of Representatives. Following his appeal against the terms of the contempt order, Mr Langer was given early release from jail on 7 March 1996.

1.3 These events resulted in widespread public criticism of the AEC, and calls for the repeal of section 329A of the Commonwealth Electoral Act 1918 (CEA), which prohibits, during the election period only, the public advocacy of any voting method other than full preferential voting for the House of Representatives.

1.4 The conduct engaged in by Mr Langer at the 1996 federal election was precisely that which the Parliament sought to prohibit by enacting section 329A. Contrary to the opinion of many commentators, the AEC was not able to exercise a discretion in invoking section 329A, because it might be viewed by some as a "bad" law, or because there was the prospect of making a martyr out of Mr Langer. There are no "bad" laws or "good" laws which can be selectively applied by responsible agencies. The AEC has a duty to uphold the laws of the Commonwealth as enacted by Parliament, and did so impartially and appropriately in Mr Langer's case.

1.5 The issues that lie behind the operation of section 329A are complex and the historical developments which led to its enactment are not widely understood. **It is the considered view of the AEC that the simple repeal of section 329A will not resolve the problems inherent in the CEA in relation to the requirement for full preferential voting.** This submission analyses those problems in detail and discusses a set of possible solutions for the consideration of the JSCEM.

1.6 It is important that the JSCEM fully examine the underlying policy conflicts that have emerged over the past decade, and make appropriate recommendations to Parliament, in order to put the problems raised by Mr Langer and his colleagues to rest. In the absence of a practical and democratic solution to these problems, it is expected that costly litigation will continue, and citizens will continue to be misled and confused about their rights and obligations at the polling booth.

1.7 **Essentially, the only practical options available are to either reinforce the CEA to support full preferential voting, or to amend the CEA to provide for optional preferential voting**. What must be weighed in the balance are the arguments for and against full preferential voting and optional preferential voting. It is said, for example, that full preferential voting confers a democratic benefit in providing for the election of candidates who are the least disliked by the majority of voters. On the other hand, optional preferential voting is said to confer a democratic benefit in allowing voters a genuine choice and preserving the franchise for as many voters as possible.

1.8 The AEC understands that if the JSCEM were to give full consideration to these options it would be obliged to consider not only the electoral consequences, but also the wider political impacts of any change to the voting system at federal elections. **For this reason, the AEC has recommended that the JSCEM seek a reference from the Government to inquire into and report on whether full preferential voting should be retained for federal elections or whether optional preferential voting should be introduced.**

1.9 This recommendation should not be taken to indicate that the AEC itself has taken any position either way on the question. However, the AEC does believe that the time has now arrived for citizens to be given the opportunity to properly debate the issues and for the Parliament to come to an informed conclusion on the best way forward.

2. BACKGROUND

2.1 Structure of the AEC Submission

2.1.1 The appendices to this AEC submission provide a detailed history of the legislative framework that supports section 329A (Appendix A); the campaign history of Mr Langer and his colleagues since the 1987 federal election, which led to the enactment of section 329A (Appendix B); and the circumstances surrounding the jailing of Mr Langer at the 1996 federal election (Appendix C).

2.1.2 Also attached are extracts of the AEC submission, separately filed with the JSCEM, providing a statistical survey of the informal and exhausted votes cast at the 1996 federal election (Appendices D and E), an extract of the AEC submission, separately filed with the JSCEM, providing the results of a survey of attitudes to full preferential and optional preferential voting (Appendix F), and copy of an article in the Federal Law Review by Anne Twomey commenting on the High Court case involving Mr Langer (Appendix G).

2.1.3 The material presented in the appendices has been put at the end of this submission because of the lengthy detail involved. It is recommended that the appendices be closely examined, as they provide the background necessary for an informed understanding of the policy options that are discussed in Chapter 3 of this submission.

2.1.4 A companion supplementary submission entitled “Advocacy of Optional Preferential Voting - Court Decisions” has also been provided to the JSCEM. This submission contains copies of the court decisions involving the AEC and Mr Hartley, Mr van Moorst and Mr Langer from 1987 to 1996.

2.1.5 The following is a preliminary overview of the court proceedings of the last decade, drawn from the material presented in the appendices.

2.2 Summary of Court Proceedings 1987-1996

2.2.1 In 1983, Parliament decided that full preferential voting should continue to apply at federal elections, but in recognition of the high informal voting levels at previous Senate elections, it was also decided to introduce ticket voting for Senate elections, and a “saving” provision to render formal those Senate votes below the line that are accidentally misnumbered. Section 270, known as the “saving” provision, was also made to apply to the House of Representatives.

2.2.2 The Parliament recognised the possibility that section 270 might open the gate to optional preferential voting for the House of Representatives in contradiction to the requirement for full preferential voting in section 240, and accordingly enacted section 329(3) to make it an offence to distribute how-to-vote cards that might induce electors to vote otherwise than in accordance with the instructions on the ballot paper.

2.2.3 At the 1987 federal election, Harry van Moorst, Mr Albert Langer, and an organisation known as the Coalition Against Poverty and Unemployment, ran a campaign advising voters not to vote at all, or to cast an optional preferential vote under section 270, or to vote informal. The AEC sought injunctions against Mr van Moorst and Mr Langer on the basis of these three campaign objectives. The Court awarded injunctions to prevent Mr van Moorst and Mr Langer from advocating not voting at all, and to prevent them from inducing electors to vote otherwise than in accordance with the instructions on the ballot paper (section 329(3)). However, the Court decided that as it was not illegal to vote informal, it could not be illegal to advocate informal voting.

2.2.4 At the 1990 federal election, Mr van Moorst indicated that he was intending to run a similar campaign, but after receiving warnings from the AEC he eventually desisted without the need for court proceedings. As a consequence of this indication that such campaigns might continue, the 1990 JSCEM recommended to Parliament a further tightening of the penalties to protect the full preferential voting system. Section 329A was enacted in 1992.

2.2.5 At the 1993 federal election, Mr Langer indicated that he was intending to run a campaign advocating informal voting and optional preferential voting. After receiving warnings from the AEC, on 5 March 1993 he applied to the High Court for an injunction to prevent the AEC from intimidating him, and a declaration that section 329A was unconstitutional. The High Court dismissed his injunction application, but referred the constitutionality of section 329A to the Full Bench. On 7 February 1996 the High Court decided that section 329A is a valid enactment of Parliament.

2.2.6 At the 1996 federal election, Mr Langer again indicated that he was intending to run a campaign advocating informal voting and optional preferential voting, and after he published an advertisement which was clearly in breach of section 329A, the AEC obtained an injunction against him from the Victorian Supreme Court. Mr Langer immediately defied that injunction, and was sent to jail for contempt of court. Mr Langer then appealed the injunction to the Federal Court and lost. He then appealed the contempt order and was given early release from jail.

2.2.7 To the extent that the AEC understands Mr Langer's position (as put by him to the courts in numerous verbal and written submissions), he maintains that full preferential voting, as it has existed for the House of Representatives since 1918, is a political strategy, maintained through electoral legislation by the major political parties in the Parliament, to reduce the chances of minor parties and independent candidates being elected to Parliament.

2.2.8 Mr Langer's frequently stated view is that the Australian Labor Party (ALP) and the AEC are somehow in league to prevent the formation of a democratically elected Australian Parliament - an allegation that the AEC categorically denies. Mr Langer alleges that the AEC has colluded with the ALP to keep the rate of informal voting as low as possible, apparently in order to favour the ALP. Mr Langer further alleges, that as optional preferential voting is more likely to deliver minor parties and independent candidates to the House of Representatives, the AEC has colluded with the ALP to resist its introduction.

2.2.9 Contrary to the impression created by the media during the 1996 election period, Mr Langer has not argued before the courts that section 329A is unconstitutional because it limits freedom of speech. Nor, at least in recent years, has he advocated optional preferential voting under section 270 of the CEA, although he appears to have no objection to its use for this purpose.

2.2.10 Instead, Mr Langer argues that a proper construction of section 240 of the CEA would allow optional preferential voting. This apparently follows from the requirement in the Constitution for Parliament to be chosen "directly by the people". However, according to Mr Langer, if section 240 is to be construed as only allowing full preferential voting, then it is unconstitutional and, by implication, so is section 329A of the CEA. The Victorian Supreme Court, the Federal Court, and the High Court have not agreed with Mr Langer's interpretations of the CEA or of the Constitution.

2.2.11 Costs were awarded by the Victorian Supreme Court against Mr van Moorst and Mr Langer in 1987 and were eventually recovered. Costs were awarded by the High Court against Mr Langer in 1996, but the AEC will not be pursuing recovery of these costs, as an important area of electoral law, namely the constitutional validity of section 329A, has been clarified and the public interest served. Costs were also awarded by the Victorian Supreme Court against Mr Langer in 1996 in respect of the injunction order and the contempt of court order. The AEC is considering enforcing recovery of these costs as Mr Langer was fully aware of the potential consequences of his actions in breaking the law and holding the court in contempt.

3. DISCUSSION OF POLICY OPTIONS

3.1 Introduction

3.1.1 In the light of the public campaigns and court proceedings over the past decade, as described in the appendices to this submission, it should be apparent that there is a basic policy conflict in the CEA in relation to preferential voting. The problem can be paraphrased simply as follows:

> A. The CEA requires full preferential voting (s. 240);
> B. The CEA prohibits inducing optional preferential voting (s. 329(3));
> C. The CEA prohibits the advocacy of optional preferential voting (s. 329A);
> but
> D. The CEA allows certain optional preferential votes as formal (s. 270).

3.1.2 While various courts have consistently upheld the Parliament's intentions in enacting the above provisions of the CEA, nevertheless there is a growing public perception that there is a "loophole" in the CEA to be exploited so as to avoid the requirement for full preferential voting.

3.1.3 The consequences of not attending to this problem are likely to be further expensive court proceedings, and continuing confusion and discontent among voters about the required method of voting in federal elections. The AEC therefore welcomes this opportunity for a major review of this aspect of the conduct of federal elections.

3.2 Position of the political parties

3.2.1 In Submission No 65 to this JSCEM the Liberal Party of Australia says the following:

> The effect of section 329A is to inhibit the ability of electors to fully express their political opinion at election time. The advocacy of informal voting should be recognised as a valid expression of political sentiment and should not be curtailed. Consistent with the warning of the AEC in a previous submission, the Party believes that section 329A is difficult to enforce. The Party recommends that section 329A of the Electoral Act be repealed.

3.2.2 That is, the Liberal Party believes that section 329A should be repealed because it restricts the advocacy of informal voting and because it is difficult to enforce. To be precise, section 329A prohibits the advocacy of any other method of voting than full preferential voting under section 240, and the provision is directed to prohibiting the advocacy of optional preferential voting under section 270. The provision was not specifically directed to prohibiting the advocacy of informal voting, although the AEC has been advised by the Director of Public Prosecutions that in some circumstances it may cover such advocacy.

3.2.3 Note that it was decided in 1987 by Justice Vincent of the Victorian Supreme Court, before the enactment of section 329A, that as informal voting is not illegal, neither can the advocacy of informal voting be illegal. The

enactment of section 329A in 1992 changed the legislative framework, but since that time Mr Langer has continued to maintain that the advocacy of informal voting cannot be illegal. This has not yet been properly tested before the courts.

3.2.4 As discussed below, the Liberal Party recommendation to repeal section 329A will not resolve the inherent policy contradictions in the CEA that have been highlighted by the campaigns and legal proceedings over the past decade.

3.2.5 In Submission No 62 to this JSCEM the Australian Labor Party says the following:

> The ALP remains committed...to the need for the Electoral Act to be underpinned by a philosophy and policy that ensures that the integrity of the preferential voting system is maintained while maximising the number of formal votes. It may be that this may as well be achieved by a continuing vigorous public education program as to how preferential voting works as by the maintenance of a statutory prohibition such as section 329A. The ALP is concerned that the campaign by advocates of optional preferential voting to deliberately undermine preferential voting not lead to proposals to simply declare informal votes which section 270 deems formal.
>
> It will be vital in considering whether section 329A has achieved the purpose for which it was designed to have access to any information about voter trends in recent elections to vote informally or in an apparently deliberate optional preferential way.

3.2.6 That is, the ALP implies that there might be problems with section 329A, and does not appear to object to the possibility of its repeal. The ALP recommends a public education campaign to reinforce the requirement for full preferential voting in the CEA, but is not in favour of strengthening the CEA to support full preferential voting, by removing the provision that renders optional preferential votes formal.

3.2.7 As discussed below, the ALP recommendation, with or without the repeal of section 329A, will not resolve the inherent policy contradictions in the CEA that have been highlighted by the campaigns and legal proceedings over the past decade.

3.2.8 The position of the National Party and the Australian Democrats is not known at this stage, but Senator Bob Brown of the Greens has foreshadowed the introduction of a Private Members Bill entitled the Commonwealth Electoral Amendment (Political Freedom) Bill 1996 to repeal section 329A.

3.3 Option 1 - repeal section 329A

3.3.1 The previous JSCEM Report on the 1993 federal election discussed the problems raised by section 329A, but decided to await the decision by the High Court on the constitutionality of the provision before coming to any conclusions. (The High Court subsequently decided that section 329A is a valid enactment of the Parliament). The Coalition/Green dissenters to the 1993 JSCEM Report, on the other hand, made an unequivocal recommendation that section 329A be repealed. Because of the jailing of Mr Langer at the 1996 federal election, many others have also recommended its repeal.

3.3.2 There is no doubt that the continued existence of section 329A is likely to cause major problems at future federal elections, as an increasing number of citizens wilfully defy the law and the AEC is obliged to launch injunctions and/or prosecutions across the country during the heat of the election campaign period. The potential for bringing the federal electoral system and the AEC into public disrepute is significant, and must be seriously considered by this JSCEM. It is not enough to contend that a law should sit idle as a deterrent factor only. If an offence exists in law, and it is being publicly and wilfully breached, the AEC is not in a position to fall back on some imaginary discretion not to uphold that law.

3.3.3 However, if section 329A alone were to be repealed, the effect would be to remove the major obstacle to advocating optional preferential voting at federal elections. This would send a clear signal that Parliament now accepted in principle that optional preferential voting should exist as an alternative to full preferential voting for federal elections, although the CEA does not clearly state as much. The question must then arise as to why Parliament does not expressly provide for optional preferential voting in the CEA, rather than allowing it to exist only as a “loophole” under section 270.

3.3.4 If Parliament were to repeal section 329A without also expressly providing for optional preferential voting, public confusion about the real intentions of the legislators on the method of voting required under the CEA can be expected to increase under the pressure of well-organised public campaigns in support of optional preferential voting. The AEC does not believe that this potential confusion can be properly and appropriately addressed by AEC education campaigns alone.

3.3.5 If section 329A were to be repealed, this might suggest that section 329(3) should also be repealed, as its legislative intention is identical to that of section 329A, that is, to prevent the undermining of full preferential voting. The only effective differences between the two provisions are that section 329A applies to “any matter or thing” and makes direct reference to section 240, whereas section 329(3) applies to “purported representations of ballot papers” (e.g. how-to-vote cards) and makes direct reference to the instructions on the ballot paper.

3.3.6 If section 329(3) were not to be repealed then Mr Langer and his colleagues will presumably continue to agitate their cause through disobedience of this provision (as they did in 1987, prior to the enactment of section 329A). It is also possible that Mr Langer and his colleagues might decide to attack the AEC in court proceedings under the provisions of section 329(1), on the grounds that the normal AEC election advertising, which does not include proactive information on optional preferential voting under section 270, is misleading and deceptive.

3.4 Option 2 - reinforce full preferential voting

3.4.1 There are two possible means, which could be used separately or together, to reinforce the requirement for full preferential voting under section 240 of the CEA. The first is to repeal subsection 270(2) of the CEA to remove the saving provision for the House of Representatives and thereby close the loophole which allows deliberate optional preferential voting. The second is to redraft section 240 to insert a requirement that a full preferential vote must be made by the use of consecutive numbers, none of which is repeated.

Repeal subsection 270(2)

3.4.2 The origins of section 270 in 1983 indicate that it was developed primarily in order to save Senate votes from informality, thus preserving the franchise for as many Senate voters as possible. Its application to the House of Representatives, although not strictly necessary in the context of the primary intention, also had the effect of saving House of Representatives votes from informality, and thus preserving the franchise for as many House of Representatives voters as possible. However, it is clear that considerable reservations were held about the possibilities for its misuse for the House of Representatives. Hence the enactment of section 329(3) in 1983, and subsequently in 1992, the enactment of section 329A.

3.4.3 It is worth considering whether subsection 270(2), which applies the "saving" provision to the House of Representatives, should be repealed. This was the position taken by the first Electoral Commissioner, Emeritus Professor Colin A Hughes, in 1990:

> Either optional preferential voting will have to be introduced, which is unlikely because of the uncertainty of its effect on party fortunes, or the saving clause ought to be deleted, which on the evidence of 1984 and 1987 would add only a couple of thousand more to the informal vote total (see his JSCEM Submission No 26, 24 July 1996).

3.4.4 The history of informal voting has been described in Appendix A, and it shows that before the 1984 federal election, informal voting for the House of Representatives was relatively low, at roughly 2.5%. At the 1984 federal election, group ticket voting was introduced for the Senate, and the informal voting rate for the House of Representatives shot up to 6.3%, possibly because some voters confused the different voting systems and assumed they could mark a House of Representatives ballot paper the same as for the

Senate ballot paper, that is, with a single mark. However, since 1984, and with a concentrated public education program, the informal voting rate for the House of Representatives has dropped back to 3.2% in 1996 (see also Appendix D).

3.4.5 It might be postulated that a similar effect would occur if the safety net for the House of Representatives were to be removed by the repeal of section 270(2). That is, while a number of voters may now be casting deliberate optional preferential votes under section 270(2), in response to the campaigns of Mr Langer and others over the past decade, the removal of the provision could then result in an immediate upsurge in the informal voting rate at the next federal election, as these "Langer" voters continue with a now ineffective voting strategy. However, over time, and with further public education, the informal voting rate could be expected to stabilise at a lower level, as it did in the years after the problems encountered at the 1984 federal election.

3.4.6 On the other hand, it might be postulated that "Langer" voters who deliberately cast optional preferential votes are well informed enough not to continue with a voting strategy that is no longer effective. If this were the case, then the potential for increasing the informal voting rate and disenfranchising informal voters by the repeal of section 270(2) might be regarded as relatively low for this category of voters.

3.4.7 There remains, of course, the possibility that "Langer" voters might revert to deliberate informal voting as a protest, if the opportunity for optional preferential voting were to be removed. For this reason, consideration should be given to whether it is necessary that the law be made explicit in relation to the advocacy of informal voting, on the understanding that informal voting cannot be made illegal, because of the secret ballot.

3.4.8 Of perhaps greater concern are those voters who accidentally misnumber their ballot papers for the House of Representatives, for whatever reason, and whose votes are currently saved from informality by section 270(2). These voters will always be with us, and their possible disenfranchisement should be seriously considered. However, it is impossible to say how many of these voters there were at this or previous federal elections back to 1984.

3.4.9 It has been possible, however, to determine the number of voters who apparently attempted to cast a Langer-style vote at the 1996 federal election, but failed to do so properly, by not completing the ballot paper, thus rendering their vote informal. There can be no firm conclusions on this, but it appears that the campaign slogans of Mr Langer and his colleagues: "1, 2, 3, 3" and "1, 2, 3, 3, 3", may have convinced some voters that they only had to put four or five numbers on any House of Representatives ballot paper in order to cast a formal vote. As Appendix D shows, a total of 313 informal voters cast a vote with the exact numbers 1, 2, 3, 3. or 1, 2, 3, 3, 3.

Redraft section 240

3.4.10 The second way that full preferential voting could be reinforced is by making an amendment to section 240 of the CEA, which is the provision that prescribes full preferential voting for the House of Representatives. In the 1993-1996 High Court proceedings Mr Langer argued that a proper construction of section 240 would allow optional preferential voting. This is because the section does not use the words “consecutive numbers, without the repetition of any number”. Although the High Court did not agree with his view, and neither did the Victorian Supreme Court or the Federal Court, nevertheless it might afford some further clarification of the intention of the provision if this alleged ambiguity were to be removed by adding in the extra phrasing.

3.4.11 For further discussion of this option, see pages 204-205 of the article by Anne Twomey, published in the Federal Law Review on the Langer High Court case, at Appendix G.

3.5 Option 3 - introduce optional preferential voting

3.5.1 Full preferential voting, which has been in force for federal elections since 1918, requires voters to express a complete range of preferences among all candidates on the ballot paper. Its purported advantages are that it obliges voters to think more deeply than they might otherwise do about the full implications of their vote, and that it provides a representative outcome in electing candidates who are the least disliked by most voters.

3.5.2 However, some voters resent being required to express preferences they may not genuinely hold, and go to considerable lengths to protest against this form of compulsion. Others actively seek out ways of avoiding the requirement while still casting a formal vote. It is also said that full preferential voting provides an unfair electoral advantage to the major political parties and works against the electoral prospects of minor parties and independents.

3.5.3 Optional preferential voting has been recognised by ALP Governments in two States of Australia as being the easiest method of preferential voting, and therefore less prone to informality errors, as well as allowing voters a sense of real choice. In 1979 the ALP Government in New South Wales introduced optional preferential voting for NSW State elections, and in 1992 the ALP Government in Queensland did the same.

3.5.4 The ALP included optional preferential voting in its national party platform until recently, and would have been aware that the enactment of section 270 in 1983 might lead to a de facto form of optional preferential voting. In 1983 the Coalition was against the introduction of optional preferential voting, because it might allow the development of first-past-the-post voting, and this was regarded as a retrograde move.

3.5.5 Perhaps the time has come for the JSCEM to revisit the possibility of introducing optional preferential voting for federal elections, rather than

allowing a de facto form of optional preferential voting to continue to exist, with all its attendant confusions.

3.5.6 A statistical analysis of formal exhausted votes at the 1996 federal election voting is presented at Appendix E. The survey did not include the Divisions of Lindsay, Moore and the Northern Territory, as the elections for these Divisions are currently the subject of Court of Disputed Returns challenges. Exhausted votes are those which are saved from informality by section 270. Where a vote has one or more clear preferences stated, then moves on into numbering errors, such as duplication of numbers, then the vote is counted until the preferences are exhausted. For example, a vote marked “1, 2, 3, 3, 3 etc”, will be counted up to the second preference, but at the point at which numbers are repeated, and the voter’s intentions are no longer clear, counting ceases as the preferences are “exhausted”.

3.5.7 It should be noted that the survey of exhausted votes examined only those ballot papers of the candidates excluded from the count during the distribution of preferences. That is, the survey does not include any ballot papers which gave a first preference to either of the last two remaining candidates in the count, and which were saved from informality by virtue of section 270. These ballot papers, in fact, did not “exhaust”.

3.5.8 It is not known precisely how many voters at the 1996 federal election cast a formal Langer-style vote: that is, a “1, 2, 3, 3, etc” vote or a “1, 2, 3, 3, 3, etc” vote. This is because, even if the resources were available for the AEC to examine the nearly 11 million formal votes cast nationwide, it would still not be possible to determine whether votes that passed into the count as formal but exhausted under section 270 were cast deliberately, as Langer-style votes, or accidentally.

3.5.9 What is apparent is that significant numbers of ballot papers at the 1996 federal election were exhausted because of duplications of numbers on the ballot papers, and these may have been influenced by Mr Langer’s campaign. It is notable that the statistics for exhausted formal votes for the House of Representatives at the past five federal elections, show a rise at the 1990 federal election (when the JSCEM first turned its attention to the public campaigns conducted by Mr Langer and his colleagues) and a rise at the 1996 federal election, when Mr Langer’s campaign appeared to impact on voting patterns.

Table 1: House of Representatives Exhausted Votes 1984-1996

Election	Exhausted Votes
1984	1 848
1987	2 082
1990	18 771
1993	7 325
1996	48 979

3.5.10 The statistical analysis at Appendix E shows that of the total 46,792 formal exhausted votes surveyed at the 1996 federal election, 41,526 were exhausted because of the repetition of numbers. Of these, where the voter gave ALP and Coalition candidates the same number, 12,514 votes were exhausted because a number was duplicated, and 25,098 votes were exhausted because the same number was used three or more times. This total 37,612 formal exhausted votes is the pool that is likely to contain Langer-style votes. Of these, there were 3,256 voters who cast a formal exhausted vote containing exactly the numbers “1, 2, 3, 3”.

3.5.11 It is important to note that there were two separate but interlinked aspects to Mr Langer’s campaign. Mr Langer was asking people to put the two major political parties last, and this might be described as a political strategy. Mr Langer was also asking people to vote optional preferential, and this might be described as a voting strategy. It cannot be assumed that all people who responded to Mr Langer’s campaign agreed with both strategies.

3.5.12 That is, some people may have voted for one of the major political parties as a first preference, and then gone on to cast an optional preferential vote by replicating numbers. It is not possible to determine how many of these optional preferential voters there were, because their votes would have gone into the much larger pool of formal votes for which preferences were not distributed.

3.5.13 The AEC notes that the two previous Electoral Commissioners, Brian Cox OBE MVO, and Emeritus Professor Colin A Hughes, have both, in their private capacities, recommended to the 1996 JSCEM that optional preferential voting be introduced for federal elections (submissions No 10 and 26 respectively).

3.6 Attitude survey

3.6.1 Immediately after the 2 March 1996 federal election, Newspoll Market Research conducted, on behalf of the AEC, a survey of voter attitudes to polling day and voting methods. The Newspoll "Post Election Survey - March 1996" has already been provided as a separate submission to the JSCEM. The extracted findings relevant to this submission are at Appendix F.

3.6.2 On 3 and 4 March 1996 Newspoll conducted a telephone survey of 1,200 randomly selected respondents aged 18 years and over who were eligible to vote. Question 15 of the survey was as follows:

> Australia currently has a full preferential system of voting where voters have to express a preference for all candidates in order of their choice. Do you personally agree or disagree that the full preferential voting system is a good one?
>
> (Respondents were required to answer on a scale of 1 to 4, from strongly agree to strongly disagree, with a fifth option for no opinion/don't know.)

3.6.3 The results show that 59% agreed that the full preferential voting system is a good one, with around half of these, 33% in strong agreement. Around I in 3, or 35%, disagreed that the full preferential voting system is a good one. The highest levels of agreement for the full preferential voting system were among those aged 18 to 24 years (71%), those who live in Victoria or Tasmania (65%), and those that believed that voting should be compulsory (65%).

3.6.4 Question 16 of the survey was as follows:

> There is an alternative system where voters would not have to express a preference for all candidates but only put numbers next to as many candidates as they wish. Would you prefer the current system or the alternative system?
>
> (Respondents were required to answer by nominating 1 for the first option, or 2 for the second option, or 3 for neither/don't know.)

3.6.5 The results show that 60% preferred optional preferential voting, and 34% preferred full preferential voting. Support for full preferential voting was higher among those aged 18 to 24 years (41%), and those who lived in Victoria and Tasmania (42%). Support for optional preferential voting was higher among Western Australians (68%).

3.6.6 In summary, while most people surveyed believed that full preferential voting is a good system, most people surveyed also preferred optional preferential voting over full preferential voting.

4. CONCLUSION AND RECOMMENDATION

4.1 The AEC has not made a specific recommendation supporting any one of the three options presented in this submission. However, the AEC is clearly of the view that the repeal of section 329A alone will not solve the underlying policy conflicts in the CEA, and the only real options are to either strengthen full preferential voting, by the repeal of subsection 270(2) and a rewording of section 240; or to move to optional preferential voting.

4.2 In weighing up these opposing two options the following possible advantages and disadvantages are identified: full preferential voting is said to allow the election of candidates that are disliked by the least number of voters, but is said to favour the major political parties; is said to encourage voters to think about their choices, but also requires some voters to express preferences they may not genuinely hold; while optional preferential voting allows the expression of a genuine choice by voters, may contribute to the maintenance of a low informal voting rate, and is said to increase the chances of election of minor parties and independent candidates.

4.3 In the light of these issues, the introduction of optional preferential voting would involve major political considerations which the JSCEM would probably want to canvass before endorsing such a fundamental change to the federal electoral system. It may be that the best approach is for the Government to provide the JSCEM with a specific reference to examine the possibility of introducing optional preferential voting at the federal level. Such a course would allow maximum public participation through the submissions and hearings process, and would allow the JSCEM to provide the Government with fully informed recommendations for change.

4.4 The JSCEM might decide as an interim measure to recommend the immediate repeal of section 329A. The AEC would support this action on the understanding that further consideration will be given to the underlying policy conflicts in the CEA before the next federal election.

Recommendation:

> **That the Joint Standing Committee on Electoral Matters seek a special reference from the Government to inquire into the possible introduction of optional preferential voting at federal elections.**

APPENDIX A - LEGISLATIVE FRAMEWORK

1 Introduction

1.1 In order to appreciate the background to the enactment by Parliament of section 329A of the CEA, it is necessary also to consider the legislative history of sections 240, 270 and 329(3) of the CEA. Section 240, which prescribes the full preferential voting method for the House of Representatives, was enacted in 1918. Section 270, the provision which saves certain votes from informality, was enacted in 1983; as was section 329(3), which makes it an offence during the election period to induce people to vote otherwise than according to the instructions on the ballot paper. Section 329A, which makes it an offence during the election period to advocate voting otherwise than full preferential, was enacted in 1992.

1.2 The following history of these provisions does not make light reading. However, the AEC believes that it is essential that this background be placed on the record in order to both inform the public debate at large about the complexity of the issues behind Parliament's enactment of section 329A, and to properly assist the JSCEM in its deliberations.

2 History of Informal Voting

2.1 The following history of informal voting is extracted from the AEC Research Report 1/85 "Informal Voting 1984 - House of Representatives". The report is now out of print, but library copy should be available from the JSCEM Secretariat.

2.2 As enacted in 1918 the CEA provided for full preferential voting at House of Representatives elections, and a form of first-past-the-post voting for Senate elections. An elector was required to vote at a Senate election by placing a number of crosses equal to the number of vacancies to be filled against the names of his or her chosen candidates, and to record a House of Representatives vote by placing a figure 1 against his or her most preferred candidate, a figure 2 against the second most preferred candidate, and so on until all candidates had been numbered. While the prescribed manner of marking a Senate vote was subsequently amended on two occasions, that prescribed for the marking of a House of Representative vote has remained unchanged up to the present day.

2.3 The CEA as at 1918 provided that a ballot paper would broadly speaking be informal if:

> (a) it was not authenticated by the initials of the presiding officer at a polling booth, or by an official mark; or
>
> (b) it had on it any unauthorised mark or writing by which, in the opinion of the Returning Officer, the voter could be identified; or

(c) in the case of a Senate vote, it had on it either no vote, or votes for a greater or lesser number of candidates than the number of vacancies to be filled; or

(d) in the case of a House of Representatives vote, it did not indicate a first preference for one candidate and subsequent preferences for all remaining candidates (with the provisos that in a two-candidate election, it would be sufficient if a first preference were shown for one candidate, and that a cross against that candidate's name would be taken to indicate such a preference in such a case.)

2.4 Criteria (a) and (b) have remained substantially unaltered to this day, though in 1983 a proviso was added to (a) whereby the responsible Divisional Returning Officer, if satisfied that an uninitialled and unwatermarked ballot paper was authentic, could treat it as formal (section 268(2)). The number of ballot papers held to be informal because of their operation has consistently been minuscule. For example, at the 1984 election, for which such an analysis was conducted, they numbered respectively 1,624 and 142.

2.5 It can be seen that even in 1918 it was recognised that a failure by an elector to mark his or her ballot paper precisely as prescribed should not automatically lead to the exclusion of that ballot paper from the count. This legislative intention has been reflected to varying extents ever since.

2.6 In 1919 the CEA was amended to introduce a form of optional preferential voting for the Senate, with electors being required to show preferences equal in number to twice the number of vacancies to be filled, plus one; and having the option of showing further preferences. Electors had to number all candidates only when there were fewer than twice the number of vacancies, plus one. An amendment to the formality criterion for Senate ballot papers provided that a Senate ballot paper would only be formal if marked exactly in accordance with the new requirements.

2.7 In 1922, the provision deeming a ballot paper marked with a single cross against one candidate in a two-candidate House of Representatives election to be indicating a first preference for that candidate was deleted. This amendment represented a more significant narrowing of the formality criteria for House of Representatives ballot papers than might be thought, since at the two elections preceding the amendments two-candidate contests were the rule rather than the exception.

2.8 In 1934, the prescribed manner of marking a Senate vote was altered to require complete preferential numbering of all candidates, and the formality criterion for Senate ballot papers was amended to require strict compliance with this in order to achieve formality. Two reasons were advanced by the Government for these changes: uniformity in the prescribed manner of voting for the Senate and the House of Representatives would be achieved, and a vague "principle of preferential voting" would be better served by the provisions of the CEA as amended.

2.9 With the introduction of these amendments, the most rigorous extent of strict numbering procedures was reached. Between 1934 and 1940, the only ballot papers without completely correct numbering which could nevertheless be included in the scrutiny as formal were those for a two-candidate House of Representatives election where a figure 1 had been placed in the square opposite one candidate.

2.10 By 1940, it was recognised that the formality tests which had applied since 1934 were too strict, and were operating to disenfranchise electors whose voting intentions were, from their ballot papers, perfectly clear. Amendments were introduced to allow a ballot paper to be formal where the elector had correctly numbered all but one of the candidates, and had left the square opposite the last candidate blank. The provisions as so amended operated at all subsequent elections up to and including the double dissolution of 1983.

2.11 Prior to the 1984 federal election, the extent of informal voting in House of Representative elections had not been a matter of widespread concern. But in Senate elections, the informal vote had risen in the 50 years following Federation from an average of 4.5% of ballot papers under the first-past-the-post system as it applied at the elections from 1901 to 1917, to an average of 8.9% (1919-31) under the system of preferential voting which required voters to record their preferences for twice the number of Senators to be elected plus one, and an average of 10.0% (1934-49) once the expression of preferences for all candidates had been made obligatory.

2.12 The tables below show the pattern of informal voting in the six States of the Commonwealth for the period 1950 to 1983:

Table 2: Senate informal votes (%) 1950-1983

State	**1950-59** (n elections)	**1960-69** (n elections)	**1970-79** (n elections)	**1980-83** (n elections)
NSW	8.3 (4)	7.5 (4)	10.4 (4)	10.2 (2)
VIC	9.0 (4)	7.6 (5)	9.9 (4)	10.9 (2)
QLD	4.6 (4)	5.4 (5)	6.6 (5)	8.9 (2)
WA	8.9 (4)	8.3 (4)	9.2 (4)	8.9 (2)
SA	6.8 (4)	6.1 (4)	9.7 (4)	8.7 (2)
TAS	10.1 (4)	6.2 (3)	8.6 (4)	7.4 (2)

Table 3: House of Representatives informal votes (%) 1950-1983

	1950-59 (n elections)	**1960-69** (n elections)	**1970-79** (n elections)	**1980-83** (n elections)
NSW	2.2 (4)	2.4 (4)	1.9 (4)	2.3 (2)
VIC	2.0 (4)	2.7 (4)	2.4 (4)	2.4 (2)
QLD	2.1 (4)	2.0 (4)	1.5 (4)	1.5 (2)
WA	2.8 (4)	3.1 (4)	2.7 (4)	2.3 (2)
SA	3.0 (4)	3.0 (4)	2.8 (4)	2.7 (2)
TAS	3.1 (4)	1.9 (4)	2.0 (4)	2.5 (2)

2.13 Public concern concentrated on the high Senate informal voting rate, but some studies of informal voting at House of Representatives elections were conducted in the period from 1918 to 1983. At least one early examination of informal voting for the House of Representatives took place in 1935 when a sample of seven Divisions was studied. In 1949 and again in 1977 informal ballot papers from all Divisions were examined to determine the way in which each ballot paper was defective. The resulting statistics, with the 1949 categories of defects rearranged to correspond as far as possible to those employed in the 1977 survey, are provided in the table below:

Table 4: House of Representatives informal votes (%) 1949 and 1977

Year of election	**1949**	**1977**
Blank ballot papers	32.3	32.4
Ballot papers with writing or scribbles only	11.1	15.0
Ballot papers with symbols (eg ticks and crosses)	27.5	21.2
Ballot papers with defective numbering	19.1	22.0
Others	12.4	9.3
n	88 275	204 912

2.14 The proportion of ballot papers ruled informal had risen from 2.0% to 2.5% between the two surveys, but the relative significance of particular categories of informality remained much the same.

2.15 On 4 May 1983 the Government of the day appointed a bipartisan parliamentary committee, the Joint Select Committee on Electoral Reform (JSCER), to enquire into and report on the conduct of federal elections, including such issues as the franchise and registration of voters, voting systems, redistributions, public funding and disclosure of funds, polling procedures and ballot papers, and the operation of the Australian Electoral Office.

2.16 The 1983 JSCER stated that one of its aims was “to ensure that electors who wished to cast a valid vote were assisted in having that vote

considered valid". In pursuit of this goal, the JSCER focussed predominantly on the problem of Senate informality. Surveys of Senate informality in 1977 and 1983 which were considered by the JSCER had indicated that 75% of informal votes were invalidated due to unintentional errors. Accordingly, the JSCER recommended that a form of ticket voting should be introduced for the Senate to simplify the system for "those electors who are content to record on their ballot papers the preference ordering recommended by a particular party or candidate":

> Voters would have the option of recording preferences for all candidates in the normal way, or of placing a tick or cross in a special square on the ballot paper to indicate adoption of a particular registered party or group list. In the latter case, the vote would be treated as if the elector had numbered every square in accordance with that list (JSCER First Report, para 3.29)

2.17 The Commonwealth Electoral Legislation Amendment Act 1983 gave effect to these recommendations by inserting in the CEA provisions that:

> (a) where a group of Senate candidates had registered a group voting ticket for an election, a square should be printed on the ballot paper above the names of those candidates (s. 211(5)).
>
> (b) a voter might vote by placing the figure 1 in such a square (s. 239(2)). A new formality criterion allowed that a tick or a cross be deemed to be a I for this purpose (s. 239(3)).
>
> (c) a voter might still vote by numbering, starting with a figure 1, all candidates in the order of his or her preference.

2.18 Under the scheme proposed by the 1983 JSCER, the formality criteria to be applied to a Senate ballot paper on which normal preferential numbering had been attempted were also to be modified. Such a ballot paper would be formal, other things being equal, if it showed a first preference by the presence of a figure 1 in the box opposite the name of one, and only one, candidate, and had numbers (any numbers) in at least 90% of the squares on that part of the ballot paper to be used for the normal preferential vote.

2.19 The Commonwealth Electoral Legislation Amendment Bill 1983, as passed by the House of Representatives, reflected this recommendation. When the Bill reached the Senate however, amendments were moved and passed, to impose on attempted Senate preferential votes a stricter numbering requirement. Ballot papers with a unique first preference would only be formal if they had:

> (a) in a case where there were 10 or more candidates, in not less than 90% of the squares opposite the names of candidates on the ballot papers, numbers which formed a sequence of consecutive numbers beginning with 1 without repetitions, or numbers which would have been such a sequence with changes to not more than three of them; or
>
> (b) in a case where there were nine or fewer candidates, in all squares opposite the name of candidates on the ballot papers, or in all but one of

> those squares (with the last left blank), numbers which formed a sequence of consecutive numbers beginning with 1 without repetitions, or numbers which would have been such a sequence with changes to not more than two of them.

2.20 The JSCER had also recommended that the House of Representatives formality criterion be amended, though no changes were recommended to alter the duty of the voter to indicate preferences for all candidates. Its proposal was that "the existing system be retained with the modification that a vote be considered formal as far as its intention is ascertainable provided that all except one of the squares are numbered."

2.21 The provisions of the Commonwealth Electoral Legislation Amendment Bill 1983 which were to give effect to this recommendation were not, in contrast to those relating to Senate voting, amended by the Senate. Consequently, the CEA provided that a House of Representatives ballot paper with a unique first preference would, other things being equal, be formal if it had numbers (any numbers) in all squares on the ballot paper, or in all but one with the last square left blank.

2.22 At the 1984 federal election the number of informal votes for the House of Representatives was several times larger than at any previous election. Party scrutineers at counting centres reported that many electors had recorded a single preference and then stopped, instead of going on to record consecutive preferences for every candidate on the ballot paper. Such a mistake, many assumed, arose from a misunderstanding of a television advertisement which the AEC had shown during the final weeks of the campaign. The advertisement explained the new ballot paper for the Senate which allowed electors to mark a single group ticket voting box with the figure 1 and stop at that point. Some viewers, so the theory ran, had believed this change applied to the marking of House of Representatives ballot papers as well.

2.23 It was also observed that the proportion of ballot papers ruled informal was higher in the Divisions which were safe for the ALP. This tendency was taken by some commentators to imply that ALP voters were more at risk in making errors, and turn that the decline in the ALP's share of the total valid vote was attributable to the higher proportion of voters who got their ballot papers wrong. Against this explanation, other commentators argued that there had been an increase in the number of ballot papers deliberately spoiled by electors, and that this was a consequence of attitudes to various policy issues.

2.24 In its 1985 Report on informal voting for the House of Representatives at the 1984 federal election, the AEC concluded the following:

> (a) While the size of, and increase in, the informal vote varied from State to State, the proportion of informal ballot papers in each Division which fell into each of the major categories of informality was more uniform than the extent of socio-economic and political variation among Divisions.

(b) Ballot papers marked with a single figure 1 and no other numbers accounted for only 42.6% of the informal vote, so that even without them the informal vote would have increased markedly over that recorded in 1983.

(c) Although ballot papers marked with a tick, cross or single figure 1 overall indicated more first preferences for the ALP than for other parties, their inclusion in the count would not have changed the result in any Division, and such inclusion would only have reduced the swing against the Government (on the primary vote) from 1.9% to 1.5%.

(d) It is not possible to identify ballot papers which were deliberately "spoiled" in contrast to those where the error was inadvertent. Consequently it is not possible to estimate what proportion of the increase was a protest vote.

(e) The proportion of people in any particular group of electors who will render their ballot papers informal appears to be associated with an inter-related set of socio-economic and demographic factors.

(f) On the basis of historical evidence, it appears likely that the level of informal voting will be higher when two different methods of voting are used simultaneously for two ballots.

2.25 Since the 1985 AEC Report on informal voting at the 1984 federal election, resources have not been available to undertake any major statistical analyses on informal voting at subsequent elections. The 1996 informal vote survey has been limited in scope but sufficient for these reporting purposes. The AEC has provided the JSCEM with a separate submission on the informal and exhausted vote survey conducted on the 1996 ballot papers. Extracts of that submission are at Appendices D and E.

2.26 The tables below show the pattern of informal voting in all States and Territories from 1984 to 1996.

Table 5: Senate informal votes (%) 1984-1996

	1984	1987	1990	1993	1996
NSW	5.2	4.9	4.2	2.65	**3.75**
VIC	3.7	4.0	3.6	3.06	**3.55**
QLD	2.7	3.1	2.5	2.04	**3.27**
WA	4.2	3.3	2.9	2.11	**3.50**
SA	5.0	3.8	2.5	2.31	**3.27**
TAS	5.7	3.8	3.1	2.56	**3.16**
ACT	3.1	2.4	2.4	1.60	**2.47**
NT	2.8	3.7	2.8	2.84	**2.75**
AUSTRALIA	4.3	4.1	3.4	2.55	**3.50**

Table 6: House of Representatives informal votes (%) 1984-1996

	1984	1987	1990	1993	1996
NSW	5.7	4.6	3.1	3.1	**3.62**
VIC	7.5	5.3	3.5	2.8	**2.93**
QLD	4.5	3.4	2.2	2.6	**2.56**
WA	7.1	6.6	3.7	2.5	**3.16**
SA	8.2	6.8	3.7	4.1	**4.08**
TAS	5.9	5.0	3.3	2.7	**2.35**
ACT	4.7	3.5	3.0	3.4	**2.82**
NT	4.6	5.8	3.4	3.1	**3.39**
AUSTRALIA	6.3	4.9	3.2	3.0	**3.20**

3 Section 240 - full preferential voting

3.1 From 1918 to 1990 the relevant part of section 240 read as follows:

> In a House of Representatives election a voter shall mark his vote on his ballot paper as follows:
>
> (a) where his ballot paper is a ballot paper in accordance with Form F in the Schedule - he shall place the number 1 in the square opposite the name of the candidate for whom he votes as his first preference, and shall give contingent votes for all the remaining candidates by placing the numbers 2,3,4 (and so on, as the case requires) in the squares opposite their names so as to indicate the order of his preference for them.

3.2 The Electoral and Referendum Amendment Act 1990 repealed section 240 and substituted:

> In a House of Representatives election a person shall mark his or her vote on the ballot paper by:
>
> (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference; and
>
> (b) writing the numbers 2,3,4 (and so on as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them.

3.3 These changes removed gender-biased language and made some very minor adjustments to the format of the provision to make it easier to read. In its operational application, section 240 has remained unchanged since 1918.

3.4 In chapter 1 and pages 62 to 65 of the 1983 First Report of the Joint Select Committee on Electoral Reform (JSCER) the various possible voting methods for both Houses of Parliament were examined, and it was concluded that full preferential voting should remain in force for both the Senate and the House of Representatives.

3.5 A discussion of the wording of section 240 and the implications of the Langer High Court case for its interpretation is provided by Anne Twomey in her Federal Law Review article at Appendix G.

4 Section 270 - the saving provision

4.1 In concluding that full preferential voting should remain in force for both the Senate and the House of Representatives, the 1983 JSCER was nevertheless clearly concerned by the high informality rate in Senate voting, noting that surveys of the 1977 and 1983 elections showed that over 75% of informal votes for the Senate were the result of unintentional numbering errors, even though the overall intention of the voter was clear.

4.2 The 1983 JSCER noted that the Australian Labor Party (ALP) had recommended the introduction of optional preferential voting for both Houses in order to reduce the informality rate. The Liberal and National Parties were opposed to optional preferential voting, which they described as being tantamount to first-past-the-post voting. The Australian Electoral Office, as it was known then, had suggested the introduction of a "list" system of voting for the Senate, which would make marking the ballot paper easier for the voter. (For example, at the 1974 federal election, there were 73 candidates on the NSW Senate ballot paper, which measured 60x15 cms.)

4.3 The 1983 JSCER recommended that the "list" system (now known as ticket voting) be introduced for the Senate, but a "below-the-line" option should be made available for those voters who wanted to express their full preferences without using a ticket vote. In order to further address the informality problem in the Senate, it was recommended that a Senate vote should be allowed as formal if consecutive numbers were placed in a least

90% of the boxes below-the-line (for 10 or more candidates) or in all boxes but one (for 9 or fewer candidates).

4.4 The 1983 JSCER recommendations indicate that the problems in the Senate voting system, where full preferential voting for an increasingly large number of candidates had led to a rise in the informality rate apparently due to errors in numbering the boxes on the ballot paper, provided the original impetus for the introduction of ticket voting and section 270 of the CEA. The JSCER did not express any concerns about the rate of informal voting for the House of Representatives, where the relatively small number of candidates does not generally give rise to problems in correctly numbering all boxes on the ballot paper. Nevertheless, in the outcome, section 270 of the CEA was made to apply to both the Senate and the House.

4.5 On 10 November 1983 during consideration of the Commonwealth Electoral Legislation Amendment Bill 1983 by the committee of the House of Representatives, Mr Hall (Liberal Party, and former Deputy Chairman of the 1983 JSCER) proposed certain amendments to clause 103, which was to become section 270. In remarking on the undesirability of "nonsense" voting, he said the following:

> The aim of these amendments is to ensure that the voter is not playing with the system but is making full use of the preferential system. To allow the Bill to go through as it is strikes a significant blow, I believe, at the preferential system because as I have said, one only has to mark the ballot paper with the number "1" and the others can be a nonsense vote. I cannot see the logic of that**.** Again, I think we downgrade the intelligence of electors if we think it is necessary to allow what amounts to a wholesale number of errors.....I put it to the Government that the attempt to vote should be genuine and it cannot be genuine unless it attempts to make the votes consecutively meaningful. I have moved the amendments in that spirit. (Hansard, House of Representatives, 10 November 1983, pages 2625 - 2626).

4.6 In reply, and in defeating Mr Hall's proposed amendments, Dr Klugman (ALP, and former Chairman of the 1983 JSCER) said the following:

> ....obviously people should use consecutive numbers and they are asked to use consecutive numbers on the ballot paper. If they make a mistake and, let us say, write down "1", "2", "3" and "3" then the votes "1" and "2" are formal. The vote is formal as long as the intention is clearly understood....I accept that this is not terribly important in House of Representatives elections. People do not make many mistakes... (Hansard, House of Representatives, 10 November 1983, page 2626).

4.7 When the Bill reached the committee stage in the Senate on 2 December 1992, the Opposition again attempted to move amendments to clause 103, in order to ensure that "nonsense" votes would not be allowed, at the same time as supporting the Government's intention to save votes from informality where the voter's intention was clear. Senator Ray (ALP, and former member of the 1983 JSCER) gave the following background to the Government's position at that time:

> It is well known that the Australian Labor Party has in its national platform a policy of optional preferential voting. We put it to the people at the last election. We do not hide from it even at this stage. We did not go ahead with that proposal, even though we had a majority on the Joint Select Committee on Electoral Reform and even though by far the vast majority of evidence given to the Committee was in favour of optional preferential voting, because it was indicated that three major parties, the Australian Democrats, the National Party and the Liberal Party, were afraid that we may get a system of first past the post voting through the back door. Therefore we thrashed around for an alternative. That alternative, which was brought up by Senator Macklin, was that it will not matter so long as people make some attempt to put a number in every square. It will not matter whether they put 5,000 in three or four of the squares - at least that was our previous understanding of this proposal - but they have to be forced to make the effort so that we do not get first past the post voting through the back door....
>
> ...The Government intended in its proposal to introduce a vague form of optional preferential voting which would not lead to first past the post voting. We have tried to accommodate the groups on the other side, in spite of the fact that optional preferential voting is written in our platform and is in our policy and that we had a majority on the Committee. (Hansard, Senate, 2 December 1983, pages 3212 to 3213)

4.8 Senator Macklin (Australian Democrats and former member of the 1983 JSCER) then put the view that the draft legislation was not yet satisfactory:

> The Government's legislation, as it stands, conforms in some way with State Acts, particularly South Australian and New South Wales Acts**.** It seems to me that the legislation goes too far for the very reasons that Senator Missen raised. If a person placed a figure 1 and then put a whole series of 2s he could, in fact, subvert the legislation in that way. I have a later amendment which, if we leave that clause as it is, might still overcome the problem. The intent of the later amendment is not to allow a person to advertise in any way or for any person to do that type of thing....
>
> ...I was trying to go some way towards what the Government was attempting. I was trying to find a middle path between shoals in this case. My hope is that this amendment, coupled with a later amendment which I intend to move, will mean that there will not be any advertising, no promotions and nobody will be able to go around canvassing the proposition that this is what people ought to do. The only thing that people will be able to canvass will be the instructions on the ballot paper....(emphasis added) (Hansard, Senate, 2 December 1983, pages 3213 to 3214)

4.9 It is clear from this passage that the potential for deliberately misusing section 270 to undermine the full preferential voting system was already becoming apparent. Senator Macklin was foreshadowing the introduction of the offence provision, section 329(3) (see below).

4.10 Senator Sibraa (ALP) then added the following:

> Unfortunately, I think the Joint Select Committee on Electoral Reform has come down with a recommendation that I consider to be still too complicated. I would have liked to see a system such as the system for the New South Wales Legislative Council. Very briefly, if a person marks on a ballot paper 1,2,3, and 4,4,4 or whatever, the vote is counted up to the point where the mistake is made... (Hansard, Senate, 2 December 1983, page 3214)

4.11 Senator Baume (Liberal Party) then led a compromise by withdrawing the Liberal Party amendment, and allowing the Australian Democrat's amendment to proceed. The Democrat's amendment retained the 90% rule for the Senate and the all-but-one-box rule for the House, and allowed a vote for either House to be exhausted but formal when duplication of numbers occurred. The Democrat amendments were agreed to by the Senate and section 270, as it is known now, was eventually enacted.

4.12 In summary, it would appear from the legislative history of section 270,

6 Section 329A - advocacy of optional preferential voting

6.1 Public campaigns against the full preferential voting system began at the 1987 federal election, and following the 1990 federal election, the JSCEM decided to examine the problems raised.

6.2 In the December 1990 Report on the 1990 federal election, the JSCEM noted on page 30, that electors had been urged not to express their preferences fully - for example by voting "1, 2, 2, 2, etc" - which effectively resulted in optional preferential voting. The AEC had advised the JSCEM that this was contrary to the underlying intention of section 270 of the CEA, which is designed to save votes which, through unintended error by the voter in numbering the boxes, would otherwise be informal. Section 270 is intended only to provide a safety net for people who make a genuine mistake in filling out their ballot papers.

6.3 The JSCEM went on to observe that:

> This practice is of considerable concern because of the significant increase in the number of House of Representatives exhausted votes between the 1987 and 1990 elections - that is, an increase from 2082 exhausted votes at the 1987 election to 18,765 in 1990. Given the small margins separating winning candidates at the 1990 election this figure is disturbing. The AEC suggested that the increase in exhausted votes would appear to indicate that the public attention given to the matter may have had an undesirable effect.
>
> The AEC commented that it is very difficult to see how section 270 of the Electoral Act could be amended to retain the safety net yet avoid de facto optional preferential voting....

6.4 The JSCEM then made the following recommendations:

> The Committee recommends that section 329(3) of the Commonwealth Electoral Act 1918 be amended to include a general prohibition on the distribution of any material which discourages electors from numbering their ballot papers consecutively and fully.
>
> The Committee recommends that the Australian Electoral Commission report to the Joint Standing Committee on Electoral Matters on possible changes to the Commonwealth Electoral Act 1918 that would have the effect of minimising the incidence of optional preferential voting.

6.5 In its December 1992 Report, entitled "Ready or Not: Refining the Process for Election '93", at pages 17 to 19, the JSCEM examined progress in the implementation of its 1990 recommendations. The JSCEM noted that its recommendations had concerned some writers of submissions. One writer considered that if the loophole existed it should not be an offence to take advantage of it. Another thought the penalty suggestion was an infringement of civil liberties. One submission put a series of questions to the JSCEM regarding optional preferential voting. In response the 1992 JSCEM said:

> The Committee's response to these people is that the system of voting used for House of Representatives elections is fully preferential. If another system is favoured, it is for the Parliament to legislate to change the Commonwealth Electoral Act. The Committee makes no recommendation regarding such a change.

6.6 The 1992 JSCEM then noted that the Electoral and Referendum Amendment Bill was at that time before Parliament, and contained the proposed section 329A. The JSCEM said:

> The supplementary explanatory memorandum to the Bill notes that the new clause will create an offence during an election period of intentionally encouraging electors to mark their ballot papers...other than consecutively and fully. The Bill does not impose a penalty for actions outside the election period. The Committee's amendment will assist in solving the problem identified in the 1990 Report.

6.7 Clause 22A of the Electoral and Referendum Bill 1992, which proposed the new section 329A, was described in the Explanatory Memorandum as follows:

> ...to create an offence during the election period of intentionally encouraging electors to mark their ballot papers in any way other than consecutively and fully. This amendment was recommended by the Joint Standing Committee on Electoral Matters at paragraph 3.42 of its report on the 1990 Federal Election.
>
> This new section will make it an offence to advocate an "optional preferential vote" by making use of the formality criteria, which do not require fully consecutive numbering for a vote to be formal. For example, it will be an offence to encourage electors to mark their ballot papers "1, 2, 2, 2, ...".

6.8 During the Second Reading of the Bill, Senator Parer (Liberal Party) expressed the following concerns about the new provision:

> The Government has added a further amendment which entails a penalty on anyone who advertises a voting form which is not in keeping with the requirements of the Electoral Act. For example, I understand that in some past elections - maybe it was in Victoria where this occurred - an advertisement was made which tried to convince people not to vote in the normal preferential fashion. The Government has introduced a penalty for anyone who does that by way of advertisement.
>
> The only concern I have is that if a person does vote, for example, where there are four or five candidates, in the form of 1, 2, 2, 2 as an example, it is a formal vote, yet it is not in accordance with the Electoral Act as a method of voting. It is formal because the intent of the voter is recognised for what it is. So it is there to cover people who do not intentionally do that. The only concern I have is that by placing a penalty on those who would try to persuade others to vote that way is a penalty on something that is in fact, a formal vote. (Hansard, Senate, 1 December 1992, pages 3910 to 3911).

6.9 In reply Senator Bolkus (ALP) said:

> Senator Parer raised a question in which I am sure he delighted in raising: the question in respect to the provision that we are proposing which will make it illegal for people to persuade electors to use an optional preferential vote. The question is: are we not penalising people for advocating that people vote formally? I suppose this is what Senator Parer is asking. The response to that is that under the Act as it now stands we have in place which can best be described as a savings clause, which will ensure that those who have made a mistake on their ballot paper do not have their votes discarded because of an unintentional mistake. In those circumstances, we are talking about people who vote 1, 2, and then may vote for three candidates with a number 3 or for two candidates with a number 3 and next one with a number 5. That provision is basically there to ensure that people do not unintentionally vote informally in this circumstance. The legislation also ensures that we do not have an optional preferential system. Unlike some State legislatures, Federal Parliament has decided not to adopt that system....
>
> ...section 270 of the Act...says that we do not have an optional preferential voting system. What we are doing by our amendment is ensuring that people do not go out and intentionally frustrate the will of this Parliament by advocating an optional preferential system. So, to an extent, what Senator Parer is saying may have some validity; but in the context of the legislation and the theory behind it - legislation which does not accept optional preferential voting - what we are saying by our amendment is that those who were out there campaigning in the 1987 and the 1990 elections to frustrate the will of the Parliament by advocating what is in essence an optional preferential vote, should not be allowed to do that. (Hansard, Senate, 1 December 1992, pages 3915 to 3916).

6.10 During the committee stage in the Senate, Senator Kernot (Australian Democrats) asked whether a loophole existed in proposed section 329A because it only operates during the election period. Senator Bolkus replied that the time period was consistent with other offences in the CEA. (Hansard, Senate, 1 December 1992, page 3925)

6.11 The proposed new section 329A received little attention in the House of Representatives except for the following observation by Mr Bevis (ALP):

> ...the Bill makes it an offence to encourage persons to mark their ballot papers otherwise than consecutively and fully if that advice is given during the election period. I think that is an important inclusion in the Act. There are provisions in the Act to ensure that people who cast a vote have every opportunity to have their intention recorded. Those provisions should not be used as loopholes for some sections of the community to seek to undermine the basic compulsory nature of voting or the preferential nature of the voting system. This clause seeks to address that problem. (Hansard, Representatives, 16 December 1993, page 3878)

6.12 The Electoral and Referendum Amendment Act 1992, which enacted section 329A, received Royal Assent on 24 December 1992 and came into force for the first time at the issue of the writs for the 1993 federal election.

6.13 In its Report on the 1993 federal election, the JSCEM examined the operation of section 329A, on pages 103 to 106. The JSCEM noted that section 329A had given rise to two petitions to the Court of Disputed Returns by Mr Patrick Muldowney, which were dismissed on the basis that Mr Muldowney was not enrolled to vote at the 1993 federal election and therefore had no standing to petition against the election.

6.14 The JSCEM also noted that Mr Langer had sought a declaration from the High Court that section 329A was unconstitutional and that the matter had been referred to the Full Bench. As the hearing was still pending at the time of the Report the 1993 JSCEM decided to withhold further comment until the High Court handed down its decision on the constitutionality of section 329A.

6.15 In a dissent to this conclusion of the majority of the JSCEM, the Coalition members, Mr David Connolly MP, Senator Nick Minchin, Senator John Tierney, and Mr Michael Cobb MP, and Senator Charmarette of the Greens, said the following at page 162 of the Report:

> We believe that section 329A is a heavy-handed response to a highly marginal phenomenon and should be repealed, notwithstanding the fact that the Langer case has yet to be heard. Our main objection is on the ground of civil liberties: to vote informally is not an unlawful act, nor is it unlawful to use section 270 of the Act to effectively cast a first preference only. It is therefore highly objectionable that someone advocating such a vote runs the risk of spending six months in prison. We stress that these problems would be unnecessary if Australia's system of compulsory voting was to be repealed as we recommend.
>
> The preferential voting system was hardly in jeopardy before the implementation of section 329A. As the report concedes, the actual incidence of deliberate optional preferential voting at the 1990 election was very low. Similarly, the AEC warned the committee in the previous Parliament that such a provision as section 329A would be very difficult to enforce....We note that the AEC chose not to, or was unable, to have anyone prosecuted for breaching section 329A at the 1993 election. We recommend that section 329A of the Electoral Act be repealed.

6.16 In the event, section 329A remained in force for the 1996 federal election, and during the election period the High Court handed down its decision that section 329A is a valid enactment of Parliament, and does not breach the implied constitutional right to freedom of political communication.

APPENDIX B - CAMPAIGN HISTORY

1 Introduction

1.1 The following description of the public campaigns over the past decade against full preferential voting, and the consequent court proceedings involving Mr Langer and his colleagues, is provided so that the circumstances involving the jailing of Mr Langer by the Victorian Supreme Court at the 1996 federal election can be viewed in their appropriate historical context.

2 The 1987 Federal Election

Proceedings involving Mr Bill Hartley: AEC v Hartley, No 2279 of 1987, Victorian Supreme Court, Murphy J, 25 June 1987, unreported.

2.1 On 9 July 1986 The Australian newspaper reported the following:

> The expelled ALP hardliner, Mr Bill Hartley, plans to form a new ultra-left political party that will stand candidates against the Federal Government at the next Senate election. Mr Hartley's decision, announced one day after the appeal against his expulsion was overwhelmingly rejected by the ALP national conference, will further isolate him from the mainstream Labor movement.
>
> Mr Hartley said yesterday he would head the Victorian Senate ticket for the new party, to be called the Industrial Labor Party, or the Industrial Labor Coalition. The move has the potential to reduce the Victorian Senate representation of the ALP and the Australian Democrats, and could further strain relations in the strife-torn ALP Socialist Left.
>
> Six Victorian Senate seats will be contested at the next election and the ALP would need to attract 42.9 percent of the vote to win three seats. If the Hartley group attracted a significant number of disillusioned Labor supporters the third ALP seat could be jeopardy. The Democrats would need 14.3 percent to win a seat.
>
> Mr Hartley said last night that the new party was likely to damage the ALP more than either the Liberal or National parties. It also complicates the position of the Socialist Left, which is suffering an internal rift between the militant old guard and the more progressive new guard. Leaders of the factions are trying to ensure it unites behind a Left Senate candidate to join Senator John Button of the independent's faction and Senator Gareth Evans of the right-wing Labor Unity faction on the Victorian Senate ticket. Before his expulsion, Mr Hartley was the unofficial leader of the old guard Left, which also includes the federal secretary of the Food Preservers Union, Mr Tom Ryan. Mr Hartley will hope to draw most of his support from the militant Left unions.
>
> His campaign will be based on attacking the Prime Minister, Mr Hawke, over his allegedly anti-Labor policies, such as the deregistration of the ALP-affiliated Builders Labourers Federation, and support for wage discounting. Mr Hartley plans a tour of Australia next month in the hope of making the new party national. He said he expected to get considerable support from both the ALP and the wider Labor movement. He was confident Senate teams could be established in all States, and that in the longer term the party would contest Lower House seats in the federal and State Parliaments.

Mr Hartley already appears to have the support of the leadership of the BLF. The union's general secretary, Norm Gallagher, said last night: "I've had great admiration for Bill Hartley and there's no doubt that a lot of our members will give him a vote."

2.2 On 31 March 1987 the Hobart Mercury newspaper reported the following:

Former ALP Left winger and now the convenor of the new socialist Industrial Labor Party (ILP), Mr Bill Hartley, believes traditional support for the Labor Party is waning, and that his new party can step in and fill that breach. Mr Hartley, who was in Hobart yesterday to make the first steps toward recruiting Tasmanian members, said right-wing domination of the Labor movement had left a void in Australian politics. That void, "a socialist and democratic" one, would be filled by ILP Senate candidates. The ILP has recruited Senate candidates in most States and Mr Hartley hopes to find similar support in Tasmania.

Yesterday, Mr Hartley spoke to the media in Hobart and met Independent MHA Dr Bob Brown...Mr Hartley, who was expelled from the ALP last year because of policy differences, hopes to get political support from Dr Brown, but stressed that the ILP was not seeking to recruit independents. The ILP would be sympathetic to conservation ideals, but its economic policies would centre on providing a better deal for low and middle income earners.

He said the party would contest between 15 and 20 House of Representatives seats, with Mr Hartley leading the Victorian Senate team campaign. If the Federal Government called an early election, the ALP would still contest the election, although only in New South Wales and Victoria.

But, if the election was held later this year, or early next, candidates from each State would run and Mr Hartley expects to poll 10 percent of the votes - winning a seat in Victorian and one in NSW. "A lot of potential Labor voters have been abandoned by the ALP and forces are crowded into the Right of the political spectrum - new forces are emerging," he said.

2.3 On 9 June 1987 Mr Hartley distributed a media release as follows:

ILP to recommend optional preference in 11 House of Representative seats.

The option of voting only for candidates electors believe worthy of support should end the call of some organisations for an informal vote.

Mr Bill Hartley said today that the facility of optional preferential voting now available in House of Representatives elections should significantly affect the outcome of the July 11 election. He was speaking on a panel with Democrat Victorian Senate team leader, Ms Janet Powell, at the Ballarat Mt Helen CEA campus.

Mr Hartley said that following amendments to the Commonwealth Electoral Act proclaimed in 1984, it was now possible for votes to become exhausted in the course of distribution of preferences. A House of Representatives vote was now formal so long as it showed a clear first preference for a candidate. The

rest of the card could be formally marked by showing numbers, any numbers, against all other candidates, or against all other candidates but one. It was now no longer necessary to indicate a preference between major parties, and the ALP, especially, would be unable to rely on the support of its alienated followers on a "lesser of evils" basis.

In his Ballarat speech, Mr Hartley gave the following example of a formal vote where an elector could exercise an optional preference:

BALLARAT

O'Grady (ILP)	1
Coate (NDP)	2
Johnson (AD)	3
Stewart (NP)	3
Williams (LIB)	3
Milder (ALP)	3

This means that in this example Industrial Labor Party contingent votes would transfer to the Nuclear Disarmament Party, then go no further.

In summary, the vote is effective as far as it goes. If there is then no discernible difference for a continuing candidate, the vote is set aside as exhausted, Mr Hartley said.

Mr Hartley said that he had checked this example with the Australian Electoral Commission and electoral expert Mr Malcolm Mackerras. They indicated that this provision, although designed to minimise informality, did effectively introduce an option. However, they believed that the issue of how-to-vote cards indicating such an option was in a grey legal area.

We believe that electors are entitled to this option, in fact voting should not be compulsory at all.

The ILP will issue House of Representatives how-to-vote cards in eleven Divisions which will not indicate a preference between the Liberal Party, ALP, Democrats or National Party. In the Senate, to use the box voting option, we shall be obliged to register a full preference. This will be advised at the time we formally register the preference with the Electoral Commission.

Mr Hartley said that after the Nunawading scandal, the ILP wanted to make its intentions crystal clear. The last minute State Labor Government move on the 3CR licence had indicated that "dirty tricks" were on again this time. He believed the electorate did not want a bar of them.

He said that the national mood included much scepticism of politicians and alienation from a Government which had failed to fulfil its promises and deeply hurt the people who had elected it.

A "Don't Vote" or "Vote Informal" campaign had been widespread in many student and community situations. This approach would not now be necessary given the proportional representation system in the Senate and an effective optional preferential system in the House of Representatives.

It also is an excellent facility for Labor voters who wish to turn the election into a referendum on the Australia Card but who did not wish to vote for the Liberal Party on this single issue basis.

He said that it was difficult to predict the full effect of optional preferential voting in this poll. The target audience for this sort of advice is a very conscious one and could number up to ten percent of the electorate. That could then introduce a variable of between two and three percent in the outcome...

2.4 On 10 June 1987 Mr Hartley was interviewed by Kay Nankervis of radio station 2CY and the following exchange took place:

Intro: Former ALP member, Bill Hartley, is facing action by the Australian Electoral Office over a voting method he's advocating which bypasses the preferential voting system. Mr Hartley, now pushing his newly formed Industrial Labor Party, says a loophole created in the 1984 Electoral Act means voters can exercise optional preferences if they use his method. But the Electoral Office says Bill Hartley is contravening the Act by distributing how-to-vote cards, which explain how to take advantage of the loophole. They're waiting for advice from the Australian Government Solicitor's office on whether they can get an injunction against him. When Kay Nankervis rang Mr Hartley about the Electoral Office's planned action against him, he was quick to accuse the ALP of being tainted with illegality and to express surprise that he was being investigated.

Hartley: I had already discussed the issue with the Electoral Office. It was drawn to my attention by Malcolm Mackerras, who's something of not only a predictor but an expert in electoral affairs. There is a clear option in the 1984 changes to the Electoral Act, so that you can indicate a valid vote for someone who you may believe worth voting for, and then not distribute preferences by putting the same number alongside all the other candidates. Its a very clear procedure. The Australian Electoral Commission can see its a valid voting procedure, so I must say I am a little surprised. I would have to say though, that they did indicate that there could be a grey area about the issue of how-to-vote cards. So yesterday, at Ballarat, I conceded that. I reported that they had said that there might be a problem with how-to-vote cards, but indicated that if the ALP - and that's the only party likely to move, that's the Party that's alienated people who feel that they want to vote informal now - if they moved against these cards and had them knocked out, well we would then place the ALP last on cards, which we'd have to substitute. But it does surprise me that the Electoral Commission is talking about making a move themselves.

Nankervis: Why does it surprise you? They, themselves, actually cite section 329(3) of the Electoral Act, saying that its an offence to induce an elector to mark his or her vote, other than in accordance with the directions on the ballot paper. Doesn't that mean, then, that the option you're presenting to voters is illegal?

Hartley: Well, of course, its an option that voters would very much welcome and I think that one now has to put up a fight to try and establish its illegality. A vote which is conceded as valid, which gives an optional preference, and, on the other hand, a section of the Act, which the Commission points to, indicating that its wrong to influence voters in that way, maybe the matter has to be

resolved at law and maybe its a welcome move, because it could clear the way to the whole nation knowing that there's an optional preference available. In any event, the Electoral Commission and the Government, anything that they do can't change the fact that that option exists and now a lot of people, well, some people know about it already, and because of this move, a lot of people are going to know about it. And, in fact, we wanted to signal the position in case there were any problems, so that we wouldn't be seen to be acting like the Labor Party in the same way that they acted in Nunawading, where in fact, clandestinely, they published how-to-vote cards for another party, altering the preferences of that party. We made it absolutely clear what our position is. And our faith in the certainty, the validity, the legality of that vote, there's no question about that. But also our faith in the legality of recommending it.

Nankervis: Mr Hartley, I don't want to argue the point about what did or did not happen in Nunawading, but aren't you acting against the spirit of the Act?

Hartley: I doubt that very much. And I think that what happened in Nunawading is valid is an indication that its a good idea for people to be open about these things and to state them in advance. Its not an irrelevant consideration. If, in fact, the Electoral Commission, no doubt with the Special Minister of State having something to do with the directions to the Commission to move on the matter, if the Electoral Commission wants to move along these lines and to have the matter tested in court well, so be it. We don't want to act illegally in any way. We certainly don't believe that a recommendation for a valid legal vote can be per se illegal itself. There's a clear optional preference now in the Act and in the administrative instructions to Returning Officers as to how to count ballots. This wasn't widely known in 1984, that ballots that were marked in 1984 were counted as valid votes. So I think that there's quite a reasonable argument and its an interesting argument. Because it is bringing to those people on the left, who are alienated, a clear option of voting formally without making the invidious choice between the Labor Party or the Opposition.

2.5 On 11 June 1987, with the 11 July 1987 federal election pending, the AEC resolved to apply for an injunction against Bill Hartley and the Industrial Labor Party for an anticipated breach of section 329(3) of the Commonwealth Electoral Act 1918.

2.6 On 12 June 1987 the following letter to the editor from Bill Hartley was published in the Sydney Morning Herald:

Sir: Milton Cockburn's article "Hartley vote plan faces legal action" (Herald, June 10) can only lead electors to the conclusion that in House of Representatives ballots they have an optional preference, as in NSW Legislative Assembly elections, yet the Federal Government does not want them to know about it.

The development reported by the Herald, far from being dampened by the reported snide remarks of Victorian ALP officials, must come as a welcome relief to thousands of electors who previously felt they would have to suffer a fine for non-appearance, or to vote informally.

It will also direct the media to the discipline of evaluating, assessing and quantifying the extent of alienation of Labor's traditional base and Australians

concerned with values issues. They, the alienated and silenced, have a voice in determining the result.

It is significant that the Industrial Labor Party's recommendation of using the optional preference introduced by amendments to the Commonwealth Electoral Act in 1984 has so far not been challenged on the grounds of accuracy. The reported reference of my statements to the Government solicitor can only have one intention - to prevent voters knowing about the option.

It does not question the validity and legality of optionally cast votes. If an injunction is issued, maybe this will extend even to preventing the media from discussing the voting system. In an election where we see the ALP advocating identity cards, maybe we should not be surprised at this further intrusion on a fundamental freedom.

To estimate a softness on the Left edge of the Labor vote at 10 percent is probably understating the position. If a significant percentage of the silent alienated were to use the option, it would be one of the most significant factors in determining the election. Now those voters have, in many electorates, somewhere to go.

To settle the crucial issue, then, I suggest that the minister responsible for the Australian Electoral Commission, Senator Michael Tate, should respond to the following questions:

Will House of Representatives ballot papers marked in the manner recommended by the ILP be admitted to the scrutiny; do the amendments to the Commonwealth Electoral Act provide the voters with a unique first preference for a candidate and numbers, any numbers, against all other candidates (or all other candidates but one, with the final square left blank) shall be admitted to the scrutiny and counted until exhausted? If the answers to the above questions are "yes", why should the Government attempt to stop electors from knowing about it?

Is it then a fact that an optional preferential voting system is now available in House of Representatives divisions; is it contrary to section 329(3) of the Electoral Act to acknowledge and/or discuss the existence of such an option; or to advocate its exercise? In view of the reported reference to the Government solicitor, why has there been no previous move against the widely-used party practice of issuing how-to-vote cards recommending only primary votes and leaving other boxes blank?

2.7 On 12 June 1987, Mr Trefor Owen and Ms Dianne Saunders of the Victorian Head Office of the AEC contacted Mr Hartley by phone and asked him a series of questions. Mr Hartley said that he had got the idea for his proposed how-to-vote card from Malcolm Mackerras' Duntroon Monograph No 12. Since then he understood there might be some doubt - Milton Coburn of the Sydney Morning Herald had told him that an AEC officer said the proposal might be against section 329(3) of the Electoral Act.

2.8 Mr Hartley was asked: "Do you intend to issue how-to-vote cards in the manner indicated in your media release, a copy of which was telexed to the AEC on 9 June 1987?" Mr Hartley replied: "We would like to issue how-to-

vote cards but can I qualify that by saying I would like to settle any issues of legality before the election, in full consultation with the AEC. We don't want to have to print two how-to-vote cards."

2.9 Mr Hartley was then asked: "Do you undertake not to issue how-to-vote cards in the manner indicated in the aforementioned telex?" Mr Hartley replied: "Not unless it is illegal to do so and I am notified in advance. We don't want to undertake anything tricky or illegal, especially after Nunawading."

2.10 On 15 June 1987 the AEC obtained formal legal advice from Mr Charles QC of Owen Dixon Chambers West to the effect that Mr Hartley's proposal was clearly in breach of section 329(3) and therefore constituted an offence under section 329(4). Mr Charles expressed the view that an injunction application would be appropriate given the evidence so far available, but that it might also be prudent to try to obtain an undertaking from Mr Hartley before proceeding.

2.11 On 12 June 1987 the following letter from the Australian Government Solicitor on behalf of the AEC was sent to Mr Hartley:

> I have been advised that Mr T Owen and Ms D Saunders, both from the Commission, spoke to you by telephone on Friday, 9 June 1987. I attach copy of that conversation prepared by Mr Owen.
>
> Further to the abovementioned conversation I wish to inform you that I have obtained an opinion from Counsel to the effect that the publication of the how-to-vote card by yourself or the Industrial Labor Party, as proposed in your telex media release dated 9 June 1987, would amount to a breach of sub-section 329(3) of the Commonwealth Electoral Act 1918 ("the Act") and thus constitute an offence under sub-section 329(4) of the Act. This advice adds that for you or any other person to encourage voters, by press releases, letters or statements to the media or the like, to mark their ballot papers in a manner which would have been informal but for sub-section 270(3) of the Act is also an offence under section 329 of the Act.
>
> Accordingly, unless I receive a written undertaking from you that you will refrain from making any further statements encouraging voters to mark their ballot papers in a manner which would, but for section 270(3) of the Act, be informal and also refrain from issuing how-to-vote cards in a form as outlined in your abovementioned media release, I am instructed to commence proceedings for an injunction directed against you and the Industrial Labor Party.
>
> I would appreciate your response by return mail.

2.12 On 16 June 1987 the following reply from Mr Hartley was received by the Australian Government Solicitor:

> Receipt is acknowledged of your letter of 12 June 1987 canvassing the intentions of the Industrial Labor Party in the issue of how-to-vote cards for various House of Representatives divisions. The answers to your questions are:

1. Yes.
2. No.

We have made it consistently clear to the media and all concerned that we wish to be open about our intentions and to give adequate notice that, consequent on the 1984 amendments to the Act, we shall recommend optional preferences. Our advice is that there is no question that such votes would be valid, admitted to the scrutiny, and hence legal.

Our advice is that section 329(3), which is in inferential conflict with the 1984 amendments, would not override the clear intent of the 1984 amendments.

As indicated by phone, I would be happy to receive from your office any material supplementary to the provisions of the Act, such as working instructions to local returning officers dealing with this particular procedure for the exhausting of valid votes prior to the conclusion of the contingent count.

We have followed the practice of advising other parties and the media of our intentions and will similarly advise this exchange of correspondence.

2.13 On 16 June 1987 the following article written by Hugo Kelly appeared in the Age newspaper:

The Australian Electoral Commission has warned of possible legal action against a left-wing group which plans to hand out cards at the federal election advising voters not to cast a vote, according to a spokesman for the group.

Mr Harry van Moorst, a spokesman for the Campaign Against Poverty and Unemployment, a coalition of welfare, student and unemployment bodies, says the Federal Government wants to sabotage its "Don't Vote" campaign. He said the Commission had warned that legal action might be taken if the organisers went ahead with their plan to distribute "how not to vote" cards on 11 July.

According to copies of documents given to "The Age" the Commission has also sought information from the convenor of the Industrial Labor Party, Mr Bill Hartley, about a plan to advise voters that it is not necessary to direct preferences at the election. According to the documents, the Commission has written to Mr Hartley asking whether he intended to advise voters not to direct preferences on 11 July.

Section 329 of the Commonwealth Electoral Act prohibits the publication or distribution of information during an election that misleads voters.

According to the documents, Mr Hartley told the Commission in a telex message on 9 June that his party intended to hand out how-to-vote cards informing voters that it was not necessary to direct preferences. The Commission wrote to Mr Hartley asking: "Do you intend to issue how-to-vote cards in the manner indicated in your media release?" and "Do you undertake not to issue how-to-vote cards in the manner indicated?" Mr Hartley confirmed to the Commission that the Industrial Labor Party intended to hand out the cards. A member of the campaign group, Mr David Buckly, said marginal Labor seats had been selected.

> The federal electoral officer for Victoria, Mr Denis Reynolds, said last night: "As a matter of public importance, the Electoral Commission would have to look at any reported intentions which are likely to mislead or deceive electors because it is concerned with the administration of a system, which is tried and proved, to show there is a high ethos among the Australian electorate to exercise their democratic rights by voting formally.
>
> "Indeed the high turnout, 95 percent, at the 1984 federal election in a system of compulsory voting compared with a relatively small informal vote is also evidence of the high regard and ethos of the Australian voter."

2.14 On 18 June 1987 a Writ and General Indorsement applying for an injunction against William Hartley, and a Summons, was filed and issued by the AEC in the Victorian Supreme Court. The AEC claimed the following:

> A. Injunctions restraining the Defendant by himself or agents or otherwise howsoever from printing publishing or distributing or permitting or authorising to be printed published or distributed -
>
> (a) any "Industrial Labour Party" or other how-to-vote card advocating in relation to the election of Members of the House of Representatives and Senators, polling for which is fixed for 11 July 1987 ("the election") that voters should vote otherwise than in accordance with the ballot paper directions prescribed by the Commonwealth Electoral Act 1918;
>
> (b) any other advertisement and bill pamphlet or notice containing a representation of a ballot paper for use in the election that is likely to induce an elector to mark his vote otherwise than in accordance with the said directions;
>
> (c) any other press release advertisement notice or statement calculated to encourage voters to vote at the election otherwise than in accordance with the said directions.
>
> B. Such further or other order or orders (including an order providing for the cost of this application) as to this Honourable Court seem appropriate.

2.15 On 19 June 1987 the matter was heard before Justice Murphy of the Victorian Supreme Court. Mr Hartley appeared in person and sought an adjournment, having been served with the papers only the night before. An adjournment was granted.

2.16 The AEC proceeded with an application ex parte for an interim injunction pursuant to section 383(3) of the CEA. The material supported the conclusion that Mr Hartley intended to distribute material which, if the AEC was correct, would constitute an offence against the CEA. Prima facie, this appeared to His Honour at the time, and he granted an interim interlocutory injunction until the adjourned hearing.

2.17 On 25 June 1987, the parties again appeared before Justice Murphy, the AEC seeking a permanent injunction. The AEC was represented by Mr Stephen Charles QC, with Mr Macaw assisting, instructed by the Australian Government Solicitor.

2.18 Justice Murphy delivered his reasons for decision and his orders on the same day as follows:

> What the defendant has done, and intends to continue to do, is, broadly speaking, to exhort electors, either by media publicity or by distributing "how to vote" cards, to vote for candidates in the election for the House of Representatives by voting 1 for the candidate for the Industrial Labor Party (where applicable) and possibly 2 for, say, the Australian Democrats or the Nuclear Disarmament Party, and then by placing the same or any other number in all of the other squares applicable to the candidates for what has been called by Mr Hartley the major political parties, namely the Australian Labor Party, the Liberal Party and the National Party.
>
> This, Mr Hartley has asserted before me, and intends to assert elsewhere, "is a valid, legal and formal vote".
>
> His proved desire is to register a protest against the major parties, including the Australian Labor Party for the effect of such a vote as he proposes would be (pursuant to section 270(2) of the said Act) to register a vote in favour of the Industrial Labor Party with a preference for a minor party, as he puts it, such as the Australian Democrats or the Nuclear Disarmament Party, as the case may be, but not constituting a preference for any other candidate. See section 270(2)(d)(e)(f) and (g).
>
> Section 270(3) makes it clear that any number repeated after a sequence of numbers "shall be disregarded".
>
> Before section 270(2) became law as part of amending legislation coming into effect in January 1984 such a vote would, it seems, have been adjudged informal, and a vote in a House of Representatives election is still in my view prima facie informal in this form if "it does not indicate the voter's first preference of one candidate and his contingent votes for all the remaining candidates". See section 268(1)(c) of the said Act.
>
> Mr Hartley's submission is that as his intended action would not lead voters to vote informally but on the contrary would encourage them to vote, and to vote formally, it does not offend against section 329 of the said Act.
>
> Section 329 is, in his submission, purposed to prohibit people from encouraging voters to vote informally.
>
> In my opinion, this is but a half truth. Section 329(1) (insofar as is here relevant) is designed to prohibit persons from misleading an elector in relation to the casting of his vote.
>
> Section 329(3) is designed to prohibit a person from printing, publishing (including by radio or television) or distributing material containing a how to vote card "that is likely to induce an elector to mark his vote otherwise than in accordance with the directions on the ballot paper". See section 329(3).
>
> Section 240 of the said Act relates to the marking of votes in a House of Representatives election. It follows that advising an elector that it is legal

intentionally to vote in a manner not in conformity with section 240 would be to mislead the elector in regard to the casting of his vote....

It follows in my view that a person printing, publishing (including by radio or television) or distributing how to vote cards or authorising such printing, publishing or distribution as proposed by Mr Hartley is engaging in an activity that is likely to induce an elector to mark his vote otherwise than in accordance with the directions on the ballot paper - contrary to section 329(3).

Mr Hartley has submitted that section 270 creates a positive entitlement in voters (referred to as electors in the Commonwealth Electoral Act) to exercise choice in nominating the number of preferences which they desire to express.

On the other hand, Mr Charles QC, who with Mr Macaw appeared for the Australian Electoral Commission, has submitted on behalf of the plaintiff that section 270 is designed to avoid informality due to "mistake, inadvertence or sheer incompetence."

He has referred me to the discussion by the Senate in Committee when considering the 1984 amendments, and on a perusal of the Hansard report it appears plain that section 270, as we now know it, and section 329(3), as we now know it, were designed to work in conjunction. Their overall intention was expressed by Senator Macklin (Hansard 2 December 1983, p.3223) as follows:

> "The intent of amendment No 32 is in fact to prevent advertisements or the canvassing of anything in relation to proposed sub-s.161(2). The amendment seeks to prevent the printing of how to vote cards which display such things as ticks or blanks or anything of that kind. In other words, all that one would be allowed to canvass and promote would be those instructions contained on the ballot paper which explain to a voter how to indicate his preference for candidates at an election. The amendment seeks to prevent people canvassing a variety of provisions which have been included in the legislation to help decrease the number of informal votes but which should not be used around the traps for party political purposes during an election campaign."

Senator Gareth Evans, who was at that time the Attorney-General, then stated: "I indicate that these amendments are acceptable to the Government". and amendments were thereupon agreed to.

Accordingly, I do not accept Mr Hartley's submission. In my opinion, the provisions of the Act relating to the casting of votes and prohibiting the publication of material which might mislead or induce an elector to vote otherwise than in accordance with the directions on the ballot paper are to be considered independently from issues of formality or informality once a vote is cast.

The elector has duties cast upon him as part and parcel of the compulsory voting system laid down by section 245(1) of the Act. Ballot papers used in an election shall be in accordance with section 209 and the Schedule to the Act. Form F in the Schedule relates to House of Representatives elections and contains directions to the elector. Anyone misleading an elector in relation to the casting of his vote or inducing an elector, as outlined in section 329(3), to vote otherwise than in accordance with the directions on the ballot paper, commits an offence. See section 329(4) of the said Act.

However, should a ballot paper, when the vote is cast, be prima facie informal because it is not marked in accordance with the requirements of the Act (section 268(1)(c)), it may be saved if it falls within the saving provisions of section 270(2)(a)(b)(d)(e)(f) and (g).

I am satisfied that, unless enjoined, Mr Hartley intends to cause or authorise to be printed, published or distributed material containing a representation or purported representation of a ballot paper, or ballot papers, for use in the current election for the House of Representatives in the Commonwealth Parliament that is likely to induce electors to mark their vote otherwise than in accordance with the directions on the ballot paper contrary to section 329(3).

I am also satisfied that unless enjoined, Mr Hartley intends to print, publish, including by radio or television, or distribute or cause to authorise to be printed published, including by radio or television, material that is likely to mislead electors in relation to the casting of their votes contrary to section 329(1).

In my view section 383 is designed specifically to deal with such a situation as this. Accordingly, I am prepared to order:

1. That William Hartley be restrained until 8.00 pm Australian Eastern Standard time on Saturday 11th day of July 1987 or further order, personally or by his servants or agents from:

(a) printing, or causing, permitting or authorising to be printed, any material relating to the casting of votes in the current House of Representatives election for the Commonwealth Parliament -

(i) which advises or suggests to electors that they are entitled to vote or that it is legal to vote, or that a formal vote may be cast by voting;
(ii) which exhorts electors to vote;
(iii) which asks electors to vote;
(iv) which encourages electors to register their protest by voting -

in any way other than in accordance with the directions on the ballot paper.

(b) from publishing any material or authorising the publication of any material, whether in writing or by radio announcement or statement or interview, or by television advertisement, statement or interview, including in the above any statement to a member of the press or freelance journalist or radio announcer or television personality, or any person employed by the press, radio or television, relating to the casting of votes in the current election for the House of Representatives in the Commonwealth Parliament -

(i) which advises or suggests that they are entitled to vote or that it is legal to vote, or that a formal vote may be cast by voting;
(ii) which exhorts electors to vote;
(iii) which asks electors to vote;
(iv) which encourages electors to register their protest by voting -

in any other way than in accordance with the directions on the ballot paper.

(c) from distributing or causing or permitting or authorising the distribution of any material relating to the casting of votes in the current election for the House of Representatives in the Commonwealth Parliament -

(i) which advises or suggests to electors that they are entitled to vote or that it is legal to vote, or that a formal vote may be cast by voting;
(ii) which exhorts electors to vote;
(iii) which asks electors to vote;
(iv) which encourages electors to register their protest by voting -

in any other way than in accordance with the directions on the ballot paper.

(d) from printing or publishing (including by radio or television) or distributing any advertisement, handbill, pamphlet or notice including any how-to-vote card -

(i) which advises or suggests to electors that they are entitled to vote or that it is legal to vote, or that a formal vote may be cast by voting;
(ii) which exhorts electors to vote;
(iii) which asks electors to vote;
(iv) which encourages electors to register their protest by voting -

in any other way than in accordance with the directions on the ballot paper.

2. That the Defendant pay the Plaintiff's costs of this application including the costs of the application for the interim injunction granted on the 19th day of June 1987.

2.19 On 8 July 1987, just prior to polling day, the Melbourne Head Office of the AEC was occupied by a group of protesters including members of the Industrial Labor Party. ILR Senate candidate David Kerin was arrested by the Australian Federal Police, after the police had been called in by Mr Denis Reynolds, the Australian Electoral Officer for Victoria, to remove the protesters. The protesters claimed that the AEC had failed to inform voters about optional preferential voting and misinformed voters by saying informal votes are illegal.

2.20 On 14 June 1989, pursuant to a Summons for Taxation filed on 15 March 1989, the Supreme Court ordered that the costs of the AEC were taxed and allowed at $8,369 including $474 taxing fee.

2.21 On 24 May 1990 Mr Hartley wrote to Senator Barney Cooney seeking his assistance in waiving the costs incurred in the legal proceedings. Senator Cooney referred Mr Hartley's request to the Attorney-General.

2.22 By 31 July 1990, with the costs of the court proceedings still not discharged by Mr Hartley, interest had accrued on his outstanding debt, increasing the original $8,369 owed to $10,044 owed.

2.23 On 11 March 1992 the Minister for Finance approved, pursuant to subsection 70C(2) of the Audit Act 1901, and on the application of the AEC, waiver of recovery of the interest accrued on the court-ordered costs of $8,369.

2.24 On 13 May 1991 Senator Nick Bolkus, the then Minister for Administrative Services, wrote to Mr Hartley, in response to various representations on his behalf in relation to waiver of the costs. Senator Bolkus advised Mr Hartley that all interest accrued on the debt was to be waived, and that the Australian Government Solicitor had been asked to negotiate with him a reasonable time to pay the original costs by regular instalment, if preferred over a lump sum payment.

2.25 On 28 August 1991 a cost payment scheme was eventually agreed upon by Mr Hartley and the Australian Government Solicitor, as follows: Repayments of $75 per month commencing 20 September 1991; to be increased to $150 per month after March 1992; the balance of the costs to be paid in full within 60 days of reaching age 65 on 26 October 1995.

2.26 Mr Hartley discharged his debt of $8,369 to the Commonwealth in October 1995.

Proceedings involving Mr Harry van Moorst and Mr Albert Langer: AEC v van Moorst and Langer, No 2335 of 1987, Victorian Supreme Court, Murphy J, 26 June 1987; Vincent J, 2 July 1987; Murray J, 6 July 1987, unreported.

2.27 In June 1987, a spokesman for the Coalition Against Poverty and Unemployment (CAPU), Mr Harry van Moorst, publicly stated that he had been warned by the AEC of possible legal action under section 329 of the CEA, in relation to a proposed "Don't Vote" campaign by CAPU, urging people not to vote at all, or to vote informal, or to vote optional preferential under section 270, at the 11 July 1987 federal election.

2.28 Mr van Moorst is reported to have said: "Its a recognition of the conservative right-wing policies both parties are promoting", and he called for: "an effective political alternative...so the most effective way of protesting against all parties is by just not voting." Mr van Moorst remarked: "The problem we have at the moment is that people are finding themselves disenfranchised because what they are being offered by the two major parties is a Tweedledum and Tweedledee situation." Mr van Moorst also said in a television interview:

> "Australia's one of the few countries in which voting is compulsory and in which giving preferences is compulsory. Now we've found a way, firstly, that giving preferences will no longer be compulsory under the new Electoral Act, and we're encouraging people to do that. So we're suggesting you can vote for independents. There are a number of independents standing, but don't give your preferences to either of the major parties**.** And if you don't wish to vote, then that too is legal. You can vote informal, its a legal thing you can do."

("The Australian", 16 June 1987; "The Age", 16 June 1987; "Capital 7 Television", 16 June 1987; the "Sydney Morning Herald", 17 June 1987; and "RVN2 Television", 17 June 1987)

2.29 On 18 June 1987 the AEC was advised by Mr van Moorst by phone that he intended to encourage people not to vote at all, or to vote informal, or to vote optional preferential under section 270, and that he would be producing posters, stickers, and how-to-vote cards in support of the campaign. On 22 June 1987 the Australian Government Solicitor on behalf of the AEC wrote to Mr van Moorst advising him that his proposed actions would be in breach of sections 245 and 329 of the CEA and section 7A of the Crimes Act. The AEC sought a written undertaking from Mr van Moorst that he and CAPU would desist from his campaign, and warned him that if such an undertaking was not provided then the AEC intended to initiate proceedings for an injunction.

2.30 Later on that day Mr van Moorst handed an AEC officer a letter accusing the AEC of legal intimidation and harassment, and of not accurately or completely informing the public of its rights in an election, especially with regard to the "new preferential possibilities**"** enabled by the amendments to the Act in 1984. Mr van Moorst said that he and CAPU believed that they had little choice but to maintain their right to engage in political debate of this kind

and to fill in the information gap created by the AEC's denial of important information to the electorate. The letter from Mr van Moorst then asked the AEC the following four questions:

> 1. To what extent have members of the ALP, especially the Government, brought pressure to bear or made any suggestions to the Commission to undertake such legal action? Is this yet another aspect of the ALP's "Dirty Tricks" department, like the legal intimidation used to try to prevent Bill Hartley and the ILP expressing their democratic rights concerning optional preferences, or the attempt to use the law to prevent John Stone standing for the Senate, or the use of the Electoral Office to distinguish Paul James Keating from Paul John Keating by putting "unemployed" after the former's name (in the first instance in our history) to try to discredit him?
>
> 2. Will the Electoral Commission undertake to correctly and fully inform the public of its rights and obligations under the Act, including the right to refuse to give a vote to unworthy candidates (to the extent of voting informal if all candidates are so deemed) and the right to give preferences only to a worthwhile candidate(s) and to place any unsupported candidates on an equally unacceptable footing by giving them the same preference number on the ballot paper (as per sections 268 and 270 of the Electoral Act)?
>
> 3. Will the Commission agree to stop wasting taxpayer's money on legal harassment of people exercising their democratic rights of freedom of speech and political debate and freedom of choice on elections (including the freedom to choose those whom one does not support)?
>
> 4. Will the Commission, instead of devoting time to legal harassment, now agree to pressure its Victorian counterpart to enforce the law and take seriously the fraud perpetrated by certain ALP members in the case of Nunawading? We look forward to an early reply. Until we receive an appropriate undertaking from the Commission we have little choice but to inform the public of its rights under the Electoral Act and its general rights under a democratic system.

2.31 Mr van Moorst also supplied the AEC with copy of the CAPU campaign literature (see insert over).

2.33 As a consequence of Mr van Moorst's refusal to heed the warnings given by the AEC, and his stated intention to breach the provisions of the CEA, proceedings were instituted by the AEC in the Victorian Supreme Court for injunctions against Mr van Moorst in the following terms:

> The plaintiff claims:
>
> A. Injunctions restraining the Defendant by himself his servants or agents or otherwise howsoever from printing publishing or distributing or permitting or authorising to be printed published or distributed -
>
> > (a) any "Coalition Against Poverty and Unemployment" or other how-to-vote card advocating in relation to the election of Members of the House of Representatives and Senators, polling for which is fixed for 11 July 1987 ("the election"), that voters should vote otherwise than in accordance with the ballot paper directions prescribed by the Act;
> >
> > (b) any other advertisement handbill pamphlet or notice containing a representation or purported representation of a ballot paper for use in the election that is likely to induce an elector to mark his vote otherwise than in accordance with the said directions;
> >
> > (c) any other press release advertisement notice in writing or by radio or television calculated to encourage voters to vote at the election otherwise than in accordance with the said directions.
>
> B. Injunctions restraining the defendant by himself his servants or agents or otherwise howsoever from inciting, urging, aiding or encouraging any person (whether by printing or publishing in writing otherwise howsoever) not to record that person's vote as an elector at the election in accordance with section 245 of the Act.
>
> C. Such further or other orders (including an order providing for the cost of this application) as to this Honourable Court seem appropriate.

2.34 On 24 June 1987 Mr Albert Langer distributed the CAPU "Don't Vote" campaign literature outside the Victorian Supreme Court, and on 25 June he asked Justice Murphy, who was hearing the van Moorst matter, whether any order made against Mr van Moorst would have the same effect against him. Mr Langer stated that he was not an agent of Mr van Moorst, but he was a member of CAPU, and that he intended to continue to wage a similar campaign. Mr Langer was therefore joined in the court proceedings.

2.35 On 26 June 1987 the AEC application for an interim injunction was heard before Justice Murphy of the Victorian Supreme Court, with Mr Charles QC, assisted by Mr Macaw, and instructed by the Australian Government Solicitor, appearing for the AEC. Justice Murphy made the following orders:

> 1. That an injunction be granted until 4.30 pm on Wednesday 1st July 1987, restraining each defendant until that time, personally or by his agents:

(a) from distributing material which encourages or advises those reading the said material not to vote at the federal election on 11th July 1987;

(b) from speaking publicly or disseminating to the public in such a way as to encourage or advise those listening or reading to what has been said, not to vote at the federal election on 11th July 1987.

2. That the summons dated 23rd June 1987 be adjourned to 10.30 am Wednesday 1 st July 1987.

3. That the defendants file and serve upon the plaintiff by noon on Tuesday 30th June 1987 any affidavit material upon which they, or either of them, intend to rely on Wednesday 1st July 1987.

4. Reserve costs.

2.36 On 30 June 1987 Mr van Moorst filed an affidavit detailing the history of CAPU and the “Don’t Vote” campaign, explaining that the lack of time prevented him from providing further affidavits from witnesses, and asking the court to grant relief from the actions of the AEC interfering with their democratic rights and liberties. Mr van Moorst said that he and others were seeking a court order instructing the AEC to refrain from taking a partisan political stand and instead to discharge its duty under the CEA and to inform the public of the full implications, responsibilities and rights of electors under the CEA.

2.37 On 1 July 1987 the AEC made an application to the Victorian Supreme Court for an interlocutory injunction against Mr van Moorst and Mr Langer. Mr Macaw of counsel appeared for the AEC.

2.38 On 2 July 1987 Justice Vincent of the Victorian Supreme Court handed down his reasons for decision and orders as follows:

The first-named defendant is the co-ordinator, and according to the application, the sole employee of a body known as "The Coalition Against Poverty and Unemployment". That organisation has been described in the affidavit as "a coalition of unemployment groups, self-help groups, low income groups and other community groups aimed at achieving substantial economic and political changes to Australia’s socio-economic system with a view to permanently abolishing poverty and unemployment".

Mr van Moorst further stated that during 1985 a public meeting was convened at which the suggestion was raised by a number of persons, including the second-named defendant and himself, that what was described as a "Don’t Vote campaign" should be conducted in opposition to the Australian Labor Party at the next elections. A motion to that effect was apparently put to the meeting by Mr Langer and Mr van Moorst and was carried. Following a further meeting in May 1986, such a campaign was commenced, in which each of the defendants has accepted he was actively engaged.

Mr van Moorst has indicated his participation in a number of different ways, which I do not think it is necessary to set out in detail. Mr Langer described

his connection with the matter in the affidavit which he filed in opposition to the application as follows:

Both the defendants are engaged in a "Don't Vote Campaign" aimed at encouraging electors who might otherwise vote for the Australian Labor Party to instead deliberately cast informal votes with a view to bringing down the present ALP Government.

The defendants are actively encouraging electors to record their votes because they wish to see as many deliberately informal votes as possible counted rather than the voters protest against the policies of the ALP Government being seen as mere apathy and staying at home.

It would also appear that when the present matter first arose before Murphy J, on the return of the proceedings for an interlocutory injunction, Mr Langer stated that he was part of the coalition and that he had been engaged in and intended to continue to be so engaged in these activities with Mr van Moorst.

On behalf of the plaintiff it has been contended that the defendants have each been engaged in an attempt to induce electors not to vote at all in the forthcoming elections for the House of Representatives and the Senate of the Federal Parliament; alternatively, to record an informal vote, or to vote otherwise than in accordance with the directions on the appropriate ballot paper.

The defendants deny that their activities have been directed to inducing electors not to record a vote at all, and claim that they have been endeavouring instead to persuade as many people as possible to indicate dissatisfaction with the major political parties by marking their ballot papers in a way which would render their votes informal. They also state that they desire to inform electors of the provisions of section 270 of the Electoral Act, which has the effect of preserving certain votes which otherwise would have been regarded as informal by virtue of section 268 and which they submit would enable an elector to vote for a particular candidate of choice without expressing any preferences between other candidates on the ballot paper, who may be considered unacceptable by the elector.

Turning to the issues raised in the present matter, I propose to deal first with an argument which was presented by Mr Macaw on behalf of the plaintiff to the effect that the system of compulsory voting established by the Electoral Act requires not only that an elector record his vote, but that he should mark the ballot paper in accordance with section 329 or 240 as appropriate. This would involve a requirement that the elector complete the paper and indicate choices among the candidates presenting themselves for election in order of preference.

Failure to do so, Mr Macaw submitted, would constitute an offence under section 245(12). He relied for support for this argument upon the provisions of the Act, considered in the light of what he suggested were the essential characteristics of the compulsory voting system, and upon an opinion expressed by Blackburn CJ of the Australian Capital Territory Supreme Court in O'Brien v Warden (1981) 37 ACTR 13, at p 16:

> I need say no more than that it seems to me arguable that under the Act the elector's obligation to vote is satisfied not only by his attendance at a polling booth but also by going through the whole of the procedure laid down, including the marking of a ballot paper in a manner which is not informal - ie in a manner which appears to

> express a preference. His Honour himself described this as the "heretical view".

It is not necessary for present purposes to embark on an elaborate analysis of the legislative structure created by the Electoral Act. It is sufficient, I think, to indicate that with great respect to that learned judge, I consider that the views expressed by Sir Garfield Barwick CJ in Fadderson v Bridger (1971) 126 CLR 271, and Crockett J, this court, in Ludke v Little (1970) VR 807, are to be preferred. In the first case Barwick CJ said at p 272:

> 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.

echoing Crockett, J in the earlier decision at p 811:

> To record an informal vote is not an offence. To fail to mark a ballot paper so as to show preferences as directed...is not an offence.

I do not consider that an elector is required to do more than record his vote. What mark he places on the ballot paper is a matter for his judgement and his conscience. The possibility that he may face prosecution if, after having cast a secret ballot, he discloses that he did not mark his ballot paper in accordance with section 268 would, in my opinion, be something of an absurdity.

The system of compulsory voting requires that electors record votes at each election. It is, of course, integral to the operation of that system that they must choose between the candidates or that, contrary to the dictates of their consciences, they must vote for persons who they may regard as being totally unacceptable to fill the offices for which they present themselves.

A further refinement of the argument later advanced by Mr Macaw to the effect that, whilst it may not be an offence to cast an informal vote, it is not lawful to do so, involves in my opinion, a distinction without a difference.

Nor do I consider that there is any offence committed by conducting a campaign directed to persuading electors to record an informal vote at an election, provided that the means chosen to not in some fashion contravene the Act or some other law of the Commonwealth.

The particular complaints which may provide bases for the grant of interlocutory relief against the defendants here are three in number.

One, it is contended that they have been engaged or propose to be engaged in conduct designed to induce persons not to vote at all in the election. The campaign has been designated the "Don't Vote campaign". It has been argued by counsel appearing on behalf of the plaintiff that, although in this court the defendants have resiled from any suggestion that the option of not voting at all was an integral part of their presentation, in the material which has been produced it is clear that there is, to say the least, ambiguity about their position.

In my view, although assurances to the contrary have been given by each of the defendants, it is obvious upon consideration of the material that electors are being urged to refrain from voting altogether. In a handbill headed "How Not to Vote" the statement appears "You should either not vote at all or to avoid the problems of possible fines you should vote informally".

Although the second-named defendant denied any responsibility for that particular document, each of the defendants attempted in the course of argument to justify it in one fashion or another. In this context mention should

also be made of the statement of Mr Owen that the particular handbill was given to him by the first-named defendant on 23 June 1987.

As I have indicated during the course of argument, it is in my view clear that the handbill contains a primary invitation to voters not to vote at all or to record an informal vote if they are concerned about the possibility of prosecution for so doing.

Section 245(1) imposes an obligation on each elector to record his vote at each election. To fail to do so constitutes an offence under sub-section (12). To incite a person to commit an offence against the law of the Commonwealth is itself an offence under section 7A of the Crimes Act 1914. Accordingly, it is clear that where one of the two courses urged in the handbill would involve the commission of an offence, the use of the handbill as a means of incitement or encouragement to adopt an unlawful course would itself be an offence.

A further argument to which I should refer in this context was advanced on behalf of the plaintiff, and was to the effect that even without reference to the operation of the Crimes Act, the urging or encouragement of electors to act contrary to their statutory obligations under the Electoral Act would justify a grant of interlocutory relief.

I consider that there is also much to be said for this proposition. I am satisfied that unless the defendants were enjoined from so doing they would continue to issue advice and distribute material which does advise electors not to vote at all. In the circumstances I consider that it is appropriate to grant injunctive relief on this basis.

Two, the plaintiff claims that the defendants have in their material urged electors to vote otherwise than in accordance with the directions contained in the ballot paper. This contention relates to section 329 of the Electoral Act, which reads...

Contravention of either of those sub-sections constitutes an offence under the Act. The "relevant period" as defined in section 322, refers to the interval between the issue of the writ for the holding of an election and the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting his vote in the election.

In the handbill to which I have earlier referred, under the heading "How Not to Give Preferences" a method of voting has been indicated which relies upon the operation of section 270 of the Electoral Act, which provides....

That provision, which was only relatively recently enacted, was clearly intended to preserve what would otherwise be informal votes. It is apparent from perusal of the Hansard record of the parliamentary debate which occurred at the time that the provision was introduced into the legislature, that section 329 was enacted to prevent precisely the type of activity in which the defendants propose to engage. The question has been considered recently by Murphy J in the matter of Australian Electoral Commission v Hartley (delivered 25 June 1987) who I understand to have adopted a similar view.

It has been argued on behalf of the defendants before me that it is not unlawful, and indeed could hardly ever be concerned to be unlawful, to inform electors of the rights which they possess under the Electoral Act. That is certainly not a proposition with which I would consider it is possible to have

any dispute. There is no prohibition against the communication of rights under the legislation.

It would also seem to follow as a matter of ordinary common sense interpretation of section 270, that if a valid vote may be cast in accordance with that provision, an elector may choose to case such a vote. What is prohibited under section 329 is firstly the production of material that is likely to mislead or deceive an elector in relation to the casting of his vote and, secondly, what might be generally described as the use of advertisements, handbills, or pamphlets, which contain a representation or purported representation of a ballot paper that is likely to induce an elector to mark his vote otherwise than in accordance with the directions on the ballot paper.

Parliamentary debate, from which the purpose of the enactment can be seen, was directed to the possibility that what was essentially a saving provision designed to formalise votes which may have been inadvertently cast informally, could not be employed as a political tactic by the distribution of representations of ballot papers, whether contained in handbills or pamphlets or indeed in how-to-vote cards.

It is clear that a number of differences may be detected between the layout and the contents of the handbill produced in evidence, and that of a ballot paper. But it is also clear that the language chosen by the legislature under section 329(3) is of sufficient breadth to encompass a wide range of representations of a ballot paper. There is no question that it is confined to facsimiles of ballot papers or indeed, to the familiar how-to-vote card.

I consider that the representation contained in the handbill to which I have referred, does satisfy the requirements of the section. It is clearly intended to induce electors to mark ballot papers otherwise than in accordance with the directions on the ballot paper, and again, I consider that if the defendants were not restrained from so doing, that it is likely that in one form or another similar representations would be distributed. In this context it is significant to note that the defendants have expressed an intention, if possible, to distribute how-to-vote cards.

Three, it has been argued on behalf of the plaintiff that the defendants have contravened and are likely to contravene section 329(1) by the distribution of material indicating that electors have a right to cast an informal vote. I have already dealt with this argument and do not consider that it requires any further attention at this stage, except to say that I consider that it is incorrect. It does not appear that there is any restriction created by the legislation upon a campaign urging persons to cast a vote which is informal.

It is not permissible in the course of so doing, either to mislead electors in any way as to precisely what is being said, nor is it permissible to use as a part of that campaign a representation of, or purported representation of, a ballot paper, because to do so would involve an invitation to voters to mark a vote otherwise than in accordance with the directions on the ballot paper. That distinction arises by reason of the effect of section 329(3). It is not, as I have indicated, prohibited of course, to convey information as to the rights of electors under section 270 or as to the effect of 270.

But again that cannot be done if the material is likely to mislead or deceive voters and the manner in which that information may be communicated is restricted by the operation of section 329(3). It is a contravention of the legislation to urge voters not to record a vote at all. The system of compulsory voting does require that electors attend for the most part at a

polling place and make a choice. That choice in my view does permit them to say in effect "a plague on both their houses".

The court orders and directs:

1. That the defendants be restrained until 8 pm Australian Eastern Standard Time on Saturday 11 July 1987 personally or by their servants or agents or otherwise howsoever from printing, publishing or distributing or permitting or authorising to be printed, published or distributed -

> (a) any advertisement, handbill, pamphlet, notice or how-to-vote card containing a representation or purported representation of a ballot paper for use in the election that is likely to induce an elector to mark his vote otherwise than in accordance with the ballot paper directions prescribed by the Commonwealth Electoral Act 1918.

2. That the defendants be restrained until 8 pm Australian Eastern Standard Time on Saturday 11 July 1987 personally or by their servants or agents or otherwise howsoever from inciting, urging, aiding or encouraging any person (whether by printing, or publishing, in writing or otherwise howsoever) not to record that person's vote as an elector in the election in accordance with section 245 of the Act.

3. That the defendant's pay the plaintiff's costs of this application including the costs of the application for the interim injunction granted on the 26th day June 1987, but not including the costs in relation to senior counsel.

2.39 On 2 July 1987, the same day as the hearing before Justice Vincent, the defendants issued a summons seeking orders against the AEC. On 6 July 1987 this matter was heard before Justice Murray of the Victorian Supreme Court. Mr Charles QC, assisted by Mr Macaw, and instructed by the Australian Government Solicitor, appeared for the AEC. Justice Murray delivered his reasons for decision and orders on the same day as follows:

> On 23 June 1987 the Australian Electoral Commission issued a writ against the defendant van Moorst seeking certain injunctive orders in relation to a campaign being conducted or about to be conducted by the defendant as the co-ordinator of a group known as the Coalition Against Poverty and Unemployment.
>
> On the same day, the plaintiff Commission issued a summons seeking interlocutory relief in accordance with the terms of the writ.
>
> The defendant Langer was added as an additional defendant, certainly with his consent, and I might say, almost by his own motion, by the order of Murphy J on 24 June.
>
> The summons was heard by Vincent J on 2 July and His Honour made certain orders, but His Honour refused to restrain the defendants from encouraging electors to vote informally. His Honour took the view that whereas it was an offence to encourage people not to vote, because under the Electoral Act all eligible persons are required to vote, and it was an offence to publish documents which might be facsimiles or representations of ballot papers, it was not an offence to vote informally and, similarly, it was not an offence to encourage voters to vote informally. On page 15 of Vincent J's judgement, His Honour said:

> The system of compulsory voting does require that electors attend for the most part at a polling place and make a choice. That choice, in my view, does permit them to say, in effect "a plague on both their houses".

On the same day as the hearing the defendants issued a summons by which they claimed four orders:

1. that a declaration be made that any elector who does not wish to vote for any of the candidates at any election is entitled deliberately to vote informally and to encourage others to do so;

2. that any elector who do not wish to give preferences to any candidate at any election is entitled to mark their ballot paper otherwise than in accordance with the directions on the ballot paper, but so as to cast a formal vote for those persons for whom they do have a preference - and certain sections of the Electoral Act are set out - and to encourage others to do so;

3. an order requiring the AEC prominently to display these declarations in all polling places and in all electoral matter published; and

4. an injunctions restraining the Commission, by its servants, etc, by speech, telephone call, letter, printed publication, radio or television broadcast from intimidating or misleading any persons as to their right to mark their vote otherwise than in accordance with the ballot paper directions and their right to encourage others to do so.

The summons was argued before me on 3 July. Mr Macaw of counsel, who appeared for the plaintiff, submitted that I had no jurisdiction to entertain the summons by virtue of the provisions of s.383(1) of the Commonwealth Electoral Act...

Mr Macaw submitted that as neither of the defendants were candidates in the forthcoming election, and neither of them holds the office of the Electoral Commissioner, I have no jurisdiction to make the orders sought.

In my opinion, this objection is ill-founded. It does not appear to me that s.383 is designed to limit or restrict the jurisdiction of the court. On the contrary, it is designed, in my opinion, to extend the jurisdiction of the court. This is demonstrated by sub-section (10).....

In its normal function, this court, by virtue of the provisions of the Judiciary Act, exercises federal jurisdiction and has power, in the absence of any restriction, to make orders which it would be entitled to otherwise make.

The point, in my opinion, is that by virtue of the provisions of sub-sections (5) and (6), where a candidate for election or the Electoral Commission is the plaintiff, the court is not required to be satisfied that the defendant is likely and intends to engage in the conduct complained of, and by sub-section (b) the court does not have to be satisfied that the person will engage in conduct of that kind, even though he has not engaged in it before. Sub-section (6) is in much the same vein.

Consequently, by reason of the fact that neither of the defendants, who are applicants in this summons, are candidates, the ordinary principles of granting injunctive relief apply.

During the course of discussion before me, Mr Macaw made it abundantly clear that the plaintiff intended to abide by the order of Vincent J and did not propose to make any statement to the effect that it is unlawful to cast an informal vote or that it is unlawful for persons to encourage others to vote

informally, and the Commission does not intend to take any action to that end.

Having regard to the ordinary requirements that before the court will, in the exercise of discretion, grant an injunctive relief, it needs to be satisfied that the defendant threatens or the defendants intent to repeat the conduct complained of, the application does not get to first base on any view, but there are other serious difficulties facing the defendants in this application, and there is no need for me to go into them at any length.

In my opinion, neither of the defendants has any standing or any justiciable interest to apply for any of the orders sought. The whole proceeding puts me strongly in mind of an action brought by that legendary litigant, Mr Albert Haddock, who sued a firm of solicitors for attempting to obtain money by menaces, when the firm wrote to Mr Haddock requiring payment of a debt and threatening to sue if he did not pay.

The defendants in this case have no standing in which to seek to get declarations against public officials which, in effect, amount to declarations of a wide and general nature which are merely declaration seeking to repeat the effect of an order of the Court which has been made after argument heard and to require those officials to publish them. The defendants have no special interest which is not enjoyed by every member of the public.

The summons is, in my opinion, entirely misconceived and I order, therefore that it be dismissed. I will order the defendants to pay the costs of the plaintiff, not including any costs for senior counsel.

The court ordered:

1. That the summons filed by the defendants on 2 July 1987 be dismissed.

2. That the defendants pay the plaintiff's costs of this application, not including the costs of senior counsel.

2.40 On 7 July 1987 the Age newspaper reported the following:

A political pressure group yesterday failed to get injunctions against the Australian Electoral Commission for allegedly misleading voters. In the Supreme Court Mr Justice Murray dismissed a summons by the Coalition Against Poverty and Unemployment, saying it was misconceived.

A coalition member, Mr Albert Langer, had sought a declaration by the court after a decision last week by Mr Justice Vincent in which informal voting was ruled legal. The coalition had planned a campaign urging voters to record informal votes at Saturday's election.

Mr Langer had told the court that the Commission should be stopped from misleading electors about their voting rights and that various voting options under the law should be publicised. He claimed that the Commission was advocating that voting informal was illegal.

Mr Justice Murray said yesterday that the Commission had told the court it intended to abide by last weeks decision and would not make statements that it was illegal to vote informally.

2.41 At 10.40 am on 8 July about 10 persons, led by Mr Harry van Moorst, walked uninvited into the office of the Australian Electoral Officer for Victoria, Mr Denis Reynolds, and demanded certain undertakings. When Mr Reynolds finally asked a staff member to ring the police they left the office shouting slogans.

2.42 Six months later, on 5 February 1988, the Australian Government Solicitor on behalf of the AEC, wrote to Mr van Moorst and Mr Langer, demanding payment by 4 March 1988 of court costs awarded by Justice Vincent on 2 July 1987 and Justice Murray on 6 July 1988. Costs, excluding costs of senior counsel, were assessed at $6,000. As no response was received to this letter in over a year, on 15 March 1989 a summons for taxation of costs was filed. On 14 April 1989 the court ordered that the costs of the plaintiff be taxed and allowed at $8,873.50, including $502.80 taxing fee.

2.43 As no payment of the taxed costs had been made by the defendants, on 22 November 1989 the Australian Government Solicitor resolved to issue a Warrant of Seizure and Sale. On 17 January 1990 the Warrant was forwarded to the Sheriff for execution.

2.44 Mr van Moorst then wrote to the Prime Minister seeking a waiver of costs. The correspondence between Mr van Moorst and the then Prime Minister, and the responding AEC Brief to the then Minister for Administrative Services, are reproduced here in full because they bring into sharp relief the misconceived views of Mr van Moorst and others about the decisions of the Victorian Supreme Court, and the operation of the AEC as an independent statutory authority with full responsibility for the administration of the CEA, that have been part of the public debate since the events of 1987.

2.45 On 16 January 1990 Mr van Moorst wrote to the Prime Minister as follows:

> I want to bring to your attention an important issue of freedom of speech and democratic rights which affects your government.
>
> The issue results from a Supreme Court action taken by the Electoral office in conjunction with the Government Solicitor during the 1987 election campaign.
>
> Briefly the Coalition Against Poverty and Unemployment, in association with various other groups and individuals, ran a “Don’t Vote” campaign. The campaign aimed to encourage people to refuse to give a formal vote and to write slogans on their ballot paper instead. Alternatively, the campaign suggested voters could vote in such a manner as to avoid giving their preferences to those they did not support by utilising the preferential alternatives enabled by the 1983 amendments to the Electoral Act.
>
> The Australian Electoral Commission, with the advice of the Government Solicitor (and after consultation with at least one member of Cabinet) tried to obtain 4 Victorian Supreme Court injunctions to halt the campaign. Because we believed the campaign to be legal (as was subsequently supported by the Supreme Court ruling) and because of the important principles involved, we

had no choice but to oppose the injunctions. We did so by defending ourselves because there was no way we could afford the cost of legal representation before the Supreme Court.

The four injunctions sought by the Electoral Commission were:

> 1. That it is illegal to vote informal and hence it is illegal to encourage others to so vote;
>
> 2. That it is illegal to publicise the alternative preferential voting system enabled under the 1983 amendments to the Electoral Act;
>
> 3. That it is illegal to encourage people not to turn up to vote at all (which was never the intention of the campaign);
>
> 4. That it is illegal to publish election material that contains a facsimile of a ballot paper.

The Supreme Court judged that it was legal to vote informal and therefore that it was equally legal to encourage people to do so (so long as there was nothing misleading about such encouragement, something which was not alleged in the campaign anyway.) The Court also judged that it was legal to publicise the alternative preferential voting system. As these were the two major components of the campaign the Supreme Court's decision was a denial of the Electoral Commission's claim that the campaign was illegal.

However, the Supreme Court decided that, because the "Don't Vote" slogan was ambiguous it would grant an injunction preventing the campaign from presenting itself in such a manner that might actually encourage people to refrain from attending the polling booths and having their names crossed off the roll. The campaign was quite willing to accept this and would have readily agreed to such a suggestion from the Electoral Commission had it been made, without the need to go to court.

The Court also decided that one of the leaflets published by the campaign may be construed to be a facsimile of a ballot paper and therefore issued an injunction to prevent that particular leaflet (or leaflets with a similar layout) from being published. Once again, this was a very minor point, as shown by the fact that the same leaflet, with minor changes in layout an presentation, was able to be published the same day as the Supreme Court's decision was handed down. Again, had the Electoral Commission asked for such a minor alteration, instead of insisting that the whole campaign be abandoned and that people's rights to vote informal or to speak freely to encourage others to do so be abrogated, we would have been most amenable and court proceedings would have been avoided.

We were content with the matter until the Electoral Commission proceeded to demand costs, something which the Court could not totally refuse in the light of the injunctions, albeit minor injunctions, granted. We asked the Commission to refrain from collecting costs on the grounds that the whole issue had been settled in the public interest. This attitude was reflected in the Victorian Commissioner's statement on television that he was pleased that the matter had now been clarified for the Commission and for the public.

Nevertheless the Commission (or the Government Solicitor) proceeded with costs and we are now faced with a demand for $11,000. Because the Coalition Against Poverty and Unemployment is an unincorporated, voluntary organisation, the debt falls on myself as the defendant on behalf of CAPU. As you will appreciate, I can neither afford to pay, nor am I willing to pay such an impost. However, today I received a notice that my property will seized unless I pay immediately. I will go to prison before allowing the only property I have (the home of our family!) to be seized.

The importance of this issue should not be underestimated. The Supreme Court of Victoria upheld the right of Australians to vote informally or to refuse to cast a preference for parties or candidates for whom they had no preference. It upheld these important democratic rights against attempts by a government-sponsored agency, the Electoral Commission, and the Government Solicitor, to deny such rights. In addition, it upheld the equally important right of people to freely express their opinions about how electors should consider voting and how they can avoid giving preferences to those to whom they do not wish to give a preference. The Court upheld an important aspect of freedom of speech against those who sought to deny it.

Surely, if anyone should be penalised for this whole affair it should be those who sought to deny the democratic rights of Australian voters and the freedom of speech of those who did not agree with either the government of the day or its major opposition. We did not initiate the expensive court proceedings: we went to protect our rights and hence the rights of all Australians.

But there is a further point to be stressed: even had we lost the Supreme Court case, it would still have been in the public interest to have the matter clarified for once and for all (as was rightly pointed out by the Victorian Commissioner in his TV interview after the case concluded.)

In view of the above comments we ask you to refrain from collecting the costs incurred through the Supreme Court action. Your stand against the collection of costs by the airlines against the Pilots Federation was fully justified and we support that stand. Surely our case is at least as commendable as that of the Pilots Federation.

We therefore ask you to waive the costs incurred (as was done by the Liberal Party some years ago by the Liberal Government in an action involving costs against the D.O.G.S. - hence you are not setting precedent).

Looking forward to an early reply.

2.46 As at 2 February 1990 Mr van Moorst and Mr Langer jointly owed $10.391.68, with interest of $5.71 accruing for each day unpaid.

2.47 On 20 April 1990 the then Deputy Electoral Commissioner wrote to the Minister for Administrative Services in response to a request from the Minister for a Brief on the issues raised in Mr van Moorst's letter to the Prime Minister. The Brief read as follows:

It goes without saying that the facts are not as set out by Mr van Moorst. In the run up to the 1987 election it came to our attention that certain groups

were engaging in how to vote campaigns in contravention of the Commonwealth Electoral Act. One of these groups was the Coalition Against Poverty and Unemployment.

The Coalition's campaign was in three parts: (one) incited electors not to vote; (two) incited electors to vote informally; and (three) incited electors to vote otherwise than in accordance with the instructions on the ballot paper in contravention of section 329(3) of the Commonwealth Electoral Act.

Acting with the advice of Senior Counsel and the Australian Government Solicitor, the Commission instituted proceedings in the Supreme Court of Victoria with a view to putting a stop to this campaign. The Commission was successful in respect of the first and third parts of the campaign - the court ruling in respect of the second was that it was not a contravention of the Act to vote informally and that accordingly it was not an offence to incite people to vote informally.

In respect of the not to vote campaign Mr van Moorst appeared to advise the Supreme Court (as he does in the letter to the Prime Minister) that he resiled from any suggestion that not voting was an integral part of the campaign. This is not a view shared by the trial judge who said:

> In my view, although assurances to the contrary have been given by each of the defendants, it is obvious upon consideration of the material that electors are being urged to refrain from voting altogether. In a handbill headed "how not to vote" the statement appears "You should either not vote at all or to avoid the problems of possible fines you should vote informally."

Further, far from being convinced that Mr van Moorst would abandon this part of the campaign once the error of his ways had been pointed out to him, the trial judge ruled:

> I am satisfied that unless the defendants were enjoined from so doing they would continue to issue advice and distribute material which does advise electors not to vote at all. In the circumstances I consider that it is appropriate to grant injunctive relief on this basis.

In his letter to the Prime Minister, Mr van Moorst misrepresents the Commission's attitude to the third part of the campaign in much the same way he did before the Supreme Court. Mr van Moorst asserts that the Commission was seeking to prevent him from informing electors of the rights they possessed under the Commonwealth Electoral Act and that the Commission was seeking to deny him the right to inform electors that they could vote, for example 1, 2, 2, 2, in the House of Representatives. You may recall a similar campaign at the recent election.

This of course was never the Commission's position and had it been it would have been rejected by the trial judge who in this respect said:

> It has been argued on behalf of the defendants before me that it is not unlawful, and indeed could hardly every be concerned to be unlawful, to inform electors of the rights which they possess under the Electoral Act. That is certainly not a proposition with which I would consider it is

> possible to have any dispute. There is no prohibition against the communication of rights under the legislation.

What the Commission did argue was that Mr van Moorst was publishing material containing a representation of a ballot paper that was likely to induce electors to mark their ballot papers other than in accordance with the instructions on the ballot paper. In respect of this line of argument his Honour said:

> Parliamentary debate, from which the purpose of the enactment can be seen, was directed to the possibility that what was essentially a saving provision, designed to formalise votes which may have been inadvertently cast informally, could not be employed as a political tactic by the distribution of representations of ballot papers, whether contained in handbills or pamphlets or indeed in how-to-vote cards.

Being satisfied that the matter published by Mr van Moorst offended in the manner complained of, the trial Judge said:

> If the defendants were not restrained from so doing, it is likely that in one form or another similar representations would be distributed.

It is also clear from the above extract and the judgement as a whole that Mr van Moorst's assertions to the Prime Minister that he was prepared to discuss and amend his material lacked substance at trial.

Mr van Moorst had ample opportunity to discuss and amend his materials. He was first contacted by an officer of the Commission in relation to the material on 18 June 1987. That same officer delivered to Mr van Moorst on 23 June 1987 a letter from the Australian Government Solicitor. On 23 June Mr van Moorst was present when Mr Justice Murphy of the Supreme Court of Victoria granted an interlocutory injunction to prevent further dissemination of the material complained of until the matter came on for a full hearing on 1 July (which lasted a full day).

On 23 June 1987 Mr van Moorst indicated he did not wish to discuss the offending material and handed to the officer a letter which clearly indicated that he was in no such mood. I draw your attention to that part of the letter which suggests that the proceedings against him were "yet another aspect of the ALP's "dirty tricks" department" and that the Commission was acting at the suggestion of or under pressure from the Government - a line he continues to pursue with the Prime Minister when he asserts that the Commission consulted at least one member of Cabinet before instituting proceedings. If the Minister's office was informed, and my recollection is that it was, it was to be informally advised that proceedings were being instituted.

So far as we are concerned there is no basis on which the order for costs should be waived. Mr van Moorst is no different from any other person who persists in illegal conduct, is taken to court, is unsuccessful in his attempt to justify his illegal conduct, and is ordered to pay the costs of the enforcer of the law.

2.48 Mr van Moorst and his supporters continued to write to the then Minister for Administrative Services seeking a waiver of costs. By 21 January

1991 the amount owed by Mr van Moorst and Mr Langer had increased to $12,021.14.

2.49 On 11 March 1991 the Minister for Finance approved, pursuant to subsection 70C(2) of the Audit Act 1901, waiver of recovery of the interest which had accrued on the court costs and Mr van Moorst was advised of this on 13 May 1991. Further representations to the Minister by Mr van Moorst and his supporters on payment of the remaining costs continued through 1991, until on 11 November of that year, Mr van Moorst agreed to a time-repayment schedule that would discharge his debt by 1996.

3. The 1990 Federal Election

3.1 In the lead up to polling day on 24 March for the 1990 federal election, the Greens (WA) were reportedly distributing campaign material produced by Mr van Moorst and CAPU, which promoted optional preferential or informal voting. Mr Bowman, of the Greens (WA) was warned by the Australian Electoral Officer for Western Australia that the campaign material breached the CEA and that the AEC would seek an injunction to stop its distribution. Mr Bowman of the Greens (WA) accordingly agreed to cease distribution of the CAPU campaign material in that form.

3.2 On 14 March 1990, Mr van Moorst wrote to the Australian Electoral Officer for Western Australia the following letter:

> This letter is written to bring to your attention several points regarding your actions concerning the "alternative preferential system" being promoted by ourselves and many others around Australia. I am aware that you have available the judgement of Hon Mr J Vincent of the Victorian Supreme Court and that should clarify many matters. There are also some questions to which I would like answers from you.
>
> I would stress that the leaflet which Justice Vincent judged to have been a "representation of a ballot paper" (p 15 of his judgement) was:
>
> (a) substantially more like a ballot paper than the present document to which you have objected. It was consciously designed to have an appearance vaguely like a ballot paper whereas the present document purposely avoids such an appearance. The only similarity may be that both documents, and ballot papers, contain boxes into which numbers are placed opposite the names of candidates or parties. This would not (in our view), of itself, constitute sufficient grounds for declaring a document to be a representation of a ballot paper. While the Judgement says nothing about this aspect it would hardly be in the Electoral Office's interest, nor that of the Australian electorate, to have people prevented from informing the public about the way the system works. Indeed, any attempt to inform the public which inadvertently misleads would constitute an offence under the Act (Sec. 390(1)). It would seem quite reasonable to argue that in order to avoid breaching the Act it is important to be able to graphically display the way preferences might be distributed in a formal vote. As many teachers would argue: "a picture is worth a thousand words". Such a picture of voting preferences in no way constitutes a "representation of a ballot paper" as described under the Act. If the Act were to be interpreted in such a manner as to make such a picture illegal (and Justice Vincent is not explicit about this matter) then it would create a significant legal anomaly whereby something that is legal to do, and legal to explain to people, cannot be explained in the most efficient and effective way possible, thereby making the person doing the explaining run the risk of inadvertently misleading the public and falling foul of other sections of the Act. This could not have been the intention of the legislators;
>
> (b) very little alteration to the document judged to be a representation of a ballot paper by Justice Vincent was required to make it immune from further prosecution. Justice Vincent indicated that if there were no boxes or numbers

opposite the names of candidates on the leaflet then it would probably not constitute a representation of a ballot paper. We made some minor alterations to the leaflet, omitting the boxes opposite names, and distributed the new leaflet the very same day. It is my understanding that the Electoral Commission sought legal advice and found there were no grounds for legal action. No further prosecution occurred and we were legally able to distribute the leaflet, and similar leaflets, throughout the election period.

2. If you are not prepared to accept the above considerations could you please advise me at what point the leaflet in question would cease to be a "representation of a ballot paper" in your view. I would stress that this is clearly the only part of the Act under which you can object to the said leaflet.

3. In view of your apparent intention to prosecute and/or take out injunctions against some of the Greens in WA for distributing a leaflet which I have authorised, do you or the Australian Electoral Commission intend to take the same action against me?

4. Has the Australian Electoral Commission any intention to explain to the Australian voters how the preferential system works in light of the amendments of 1983/4? This would seem a particularly important course of action in view of the rather distorted version of the preferential options contained on the front page of the Australian (10/3/90). Under the Electoral Act it is the Commission's obligation to inform the public about its voting rights and responsibilities. The problem of the alternative preferential possibilities under the Act will not disappear: a full and accurate explanation would surely be the only justifiable course of action.

3.3 On 20 March 1990, the Australian Electoral Officer for Western Australia replied to Mr van Moorst as follows:

I acknowledge receipt of your letter dated 14 March 1990. In that letter you make comments in relation to a document entitled "Democratic Rights and Options in This Election" which is authorised by you for the Coalition Against Poverty and Unemployment. You also request that I provide answers to certain questions which you have asked in your letter.

2. I assume you have written to me because of advice I have given to the Western Australian Green Party that the document contravenes s.329(3) of the Commonwealth Electoral Act 1981 ("the Act") and that anyone who falls within the terms of s.329(3) is guilty of an offence, and that I shall take action if necessary to prevent the printing, publishing or distribution of the document.

3. You state in paragraph 1(a) of your letter that the leaflet which Justice Vincent judged to have been a representation of a ballot paper was substantially more like a ballot paper than the present document. You further state:

> The only similarity may be that both documents, and ballot papers, contain boxes into which numbers are placed opposite the names of candidates or parties. This would not (in our view), of itself, constitute sufficient grounds for declaring a document to be a representation of a ballot paper.

4. I am unable to agree with your statements. With respect, you appear to have misunderstood s.329(3). The section does not refer to documents that are a representation of a ballot paper, but instead refers to documents which contain such a representation. A document may contain a large amount of material that does not offend against s.329(3), but if within that document there is contained a representation of a ballot paper then the whole document is in contravention of the section.

5. This distinction was drawn by Mr Justice Vincent in his judgement in AEC v van Moorst and Langer (1987), Vic Sup Ct No 2335, when at page 15 he stated that:

> I consider that the representation contained in the handbill to which I have referred, does satisfy the requirements of the section.

6. It is my opinion, supported by independent legal advice, that the document contains representations of House of Representatives and Senate ballot papers that are in fact more like ballot papers than the representation contained in the handbill referred to by Mr Justice Vincent in his judgement, a copy of which I have seen.

7. You further state in paragraph 1(a) of your letter that:

> It would seem quite reasonable to argue that in order to avoid breaching the Act it is important to be able to graphically display the way preferences might be distributed in a formal vote.

While this may be a reasonable argument it is precisely such a graphical display which is prohibited by s. 329(3). As Mr Justice Vincent pointed out in his judgement, while the Act does not prohibit conveying information as to the effect of s. 270 or the rights of electors under s. 270, it is not permissible in the course of doing so to use as part of that campaign a representation of a ballot paper. Any attempt to try and convey the effects of s. 270 in graphic form is likely to amount to a representation of a ballot paper and thus infringe s. 329(3).

8. While, as you have suggested, the inability to demonstrate the effects of s. 270 in graphic form may be an anomaly, it is nevertheless the effect of s. 329(3). Contrary to your assertion that this could not have been the intention of the legislators, this is precisely what Parliament did intend, as Mr Justice Vincent pointed out at page 14 of his judgement.

9. With respect to the matters raised in paragraph 1(b) of your letter, I am unable to find the comments which you attribute to Mr Justice Vincent in his judgement. I agree that if there were no numbers opposite the names of candidates or parties in that leaflet or in the present document then they would probably not contain a representation of a ballot paper. But the removal of the boxes alone is in my opinion not sufficient to stop the leaflet and the present document from infringing s. 329(3). It is the use of numbers together with names of candidates or parties which constitutes the representation of a ballot paper and thus causes the infringement of s. 329(3).

10. You also state in paragraph 1(b) that after making changes to the leaflet by omitting the boxes the AEC sought legal advice and found that there were no further grounds for legal action, and that you then distributed the leaflet and similar leaflets throughout the 1987 election period. While this may be correct it does not alter my opinion that the present document, with or without boxes, infringes s. 329(3).

11. In relation to paragraph 2 of your letter, it is not my function to draft a suitable document which does not infringe s. 329(3). However, I will give consideration to any further document which you wish to submit for my consideration and will advise you whether it infringes s. 329(3). If I consider that any further document also infringes s. 329(3) it will only be on the grounds that it contains a representation of a ballot paper. I have in fact approved a version of the document submitted to me by Mr Bowman.

12. In relation to your question in paragraph 3 of your letter I will not take any action against you. However, if you intend to take further steps to print, publish or distribute, or cause, permit, of authorise to be printed, published or distributed the document, or a version of the document with only the boxes removed, the AEC Victorian Office will take such action against you and any other person engaging in such activity.

13. Finally, I refer to the matters which you have raised in paragraph 4 of your letter. It is the Commission's duty during an election period to inform electors of their responsibilities to vote in the election and how they are required by the Act to cast their vote. The provisions governing how an elector is required to mark his or her vote on a ballot paper in a Senate and House of Representatives election are contained in sections 239 and 240 of the Act. These sections state that an elector shall mark his or her ballot paper in a specific manner. Insofar as those sections were amended by legislation in 1983 and 1984 the Commission's advertising has advised electors of their present responsibilities.

14. Section 270, which was inserted into the Act in 1984, is not a provision dealing with an electors rights or responsibilities. As was pointed out by Mr Justice Vincent in his judgement, Parliamentary debate indicates that the purpose of enacting s. 270 was that it was essentially a saving provision designed to formalise votes which may have been inadvertently cast informally. Hence the enactment of s. 329(3).

15. While the practical effect of s. 270 is that the vote of an elector, which would otherwise be informal because it has marked two candidates with the same number, will now be classified as a formal vote, Parliament did not see fit to change the obligations of voters under section 239 and 240. During the critical election period the Commission sees its responsibility as informing electors of their responsibilities under the Act (i.e. to vote and cast their votes in accordance with sections 239 and 240) and not the education of voters as to the effects of a saving provision such as s. 270.

16. It is the Commission's view that to advise electors of their responsibilities under sections 239 and 240, and at the same time to try and explain to them the complicated savings provisions in s. 270 should they fail to cast their vote in accordance with sections 239 and 240, would only cause confusion among

electors and distract them from their primary responsibility to vote in accordance with ss. 239 and 240.

3.4 The AEC heard no more from Mr van Moorst for the rest of the 1990 federal election period.

4 The 1993 Federal Election

Proceedings involving Mr Albert Langer: Langer v the Commonwealth (1996) 70 ALJR 176

4.1 In December 1992 the Parliament enacted section 329A of the CEA, which makes it an offence, during the election period only, to advocate voting otherwise than in accordance with section 240 of the CEA, which requires full preferential voting.

4.2 In the lead up to the 13 March 1993 federal election, on 25 February 1993, Mr Albert Langer telephoned the AEC in Canberra to ask whether publishing material encouraging people to vote informally was illegal. It was suggested that he seek his own legal advice. Later that day Mr Langer faxed to the AEC in Canberra a copy of his proposed campaign leaflet which was headed “How to vote for the Lizards” and contained a message to vote informal (see insert over). The AEC replied to Mr Langer on the same day suggesting he seek his own legal advice, drawing his attention to sections 329A and 240 of the CEA, and indicating that his leaflet would appear to be in breach of the CEA by advising voters to “avoid any numerals and boxes”.

4.3 On 27 February 1993 Mr Langer faxed to the AEC a copy of a two-sided proposed campaign leaflet which also advocated voting informally (see insert over). The AEC again replied to Mr Langer on the same day suggesting he seek his own legal advice, noting that his leaflet still advocated voting informally, and again drawing his attention to sections 329A and 240 of the CEA.

4.4 In each of its short written replies to Mr Langer, the AEC did not offer a formal legal opinion on his proposed leaflets, or engage in any debate about possible interpretations of the legislation, or threaten to prosecute him. The AEC simply sought to ensure that Mr Langer was aware of the recent introduction of section 329A in late 1992, and noted particular aspects of his leaflets that could possibly be caught by the provision, and on which he might seek his own legal advice. Such correspondence from the AEC, advising enquirers of the relevant provisions of the CEA, but making no final judgements, is not uncommon during election periods.

4.5 Mr Langer was clearly of the view that advocating an informal vote was not in breach of the new section 329A. His conclusion would have been based on the 1987 court proceedings, in which it was decided by Justice Vincent that since an informal vote could not be illegal, neither could advocating an informal vote be illegal. However, the preliminary view of the AEC in 1993, in the absence of any judicial interpretation, was that the enactment of section 329A had changed the legislative framework from that which prevailed in 1987, and that in some very particular circumstances, advocating an informal vote could be in breach of section 329A (and see for example, DPP advice provided at the 1996 federal election, page 105).

4.6 During the following few days Mr Langer made numerous calls to various AEC officers seeking formal undertakings that the AEC would not prevent him from advocating a 1, 2, 2, 2, etc vote. It then became clear that Mr Langer's intention in advocating informal voting in his earlier faxed leaflets had now developed into an intention to advocate optional preferential voting. AEC officers declined to provide any such undertakings to Mr Langer.

4.7 On 1 March 1993 Mr Langer spoke on radio 5AN in Adelaide to Ms Julia Lester, who also interviewed Mr Ian Spencer, the then Australian Electoral Officer for South Australia. The interview ran as follows (in part):

> Julia Lester: Now you've got a bit of a warning to issue to the Electoral Commission, I gather. Is that right?
>
> Albert Langer: Yes, they've been engaging in a systematic campaign of harassment and intimidation to try and criminalise the right of people to vote informal and to encourage others to vote informal. I would just like to warn Mr Spencer that if he makes any claim that it is illegal to encourage people by printing or publishing or broadcasting electoral matter that encourages people to vote informal, I will issue criminal prosecution against him and in fact I would urge you to arrest him immediately and take him down to the nearest Magistrate.
>
> Julia Lester: A strong opening from Albert Langer. Ian Spencer. Good morning to you.
>
> Ian Spencer: Good morning.
>
> Julia Lester: And what's your response to that?
>
> Ian Spencer: I don't know if it needs a response. Mr Langer - I've never met him, I don't know why he is picking on me. The Act I've got in front of me says its an offence -
>
> Julia Lester: Its an offence to do what exactly?
>
> Ian Spencer: To encourage people to vote otherwise than in accordance with section 240 of the Act.
>
> Julia Lester: And what does that mean exactly - so its an offence to do what?
>
> Ian Spencer: 240 of the Act says in a House of Reps election a person shall mark his or her ballot paper by writing the number one in the square opposite the name of the candidate for whom the person votes as his or her first preference, and writing the numbers two three four and so on as the case requires in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them.
>
> Julia Lester: So am I right in saying Ian Spencer that its not against the law to write you know a nursery rhyme or your mum's phone number on the election paper, its an offence though to tell somebody else to vote informally. Is that right?

Ian Spencer: Ah well, that of itself doesn't make a ballot paper informal, the example you've given. But what could render the ballot paper informal would be some of that writing obliterating the way in which the vote was cast.

Julia Lester: Yes, I'd like to come back in just a moment. Sorry, I've confused the issues without realising it there. I guess what I'm saying to you, while Albert Langer is with us, is it true from what you've read, because I'm not quite understanding it, that it is against the law for someone like Albert Langer to hand out a piece of paper saying vote informal.

Ian Spencer: Certainly.

Julia Lester: It is?

Ian Spencer: Certainly.

Julia Lester: And how long has that been against the law?

Ian Spencer: Prior to Christmas just gone past.

4.8 On 5 March 1993, Mr Langer filed in the High Court a Writ of Summons and Statement of Claim, naming the Commonwealth as first respondent, the Australian Electoral Commission as second respondent, and the Electoral Commissioner as third respondent, in the following terms (in part):

7. Section 329A of the Act is invalid:

(a) as it denies the right of the Australian people to choose freely their representatives to the Commonwealth Parliament;

(b) as being beyond the legislative power of the Commonwealth Parliament; and

(c) as infringing the implied constitutional freedom of communication in relation to public affairs and political discussion between members of the society generally.

8. The plaintiff has published and intends to publish material in which voters are encouraged to vote informally by filling in a ballot paper otherwise than in accordance with section 240 of the Act. This publication the second and third defendants allege contravenes section 329A of the Act.

9. Pursuant to section 382 of the Act, proceedings against persons committing offences against the Act are to be instituted by the third defendant.

10. The second and third defendant have threatened and intend unless restrained to prosecute the plaintiff for breaches of section 329A of the Act.

11. On 8 February 1993 writs were issued for a general election ("the Election") of Members of the House of Representatives and Senators of the Commonwealth Parliament.

12. The second and third defendants have since the date of the writs published material based on section 329A of the Act which material is misleading and intimidating and has had, will have, or is likely to have an effect on the freedom of the Election such that it will no longer be free or fair.

And the plaintiff claims:

1. A declaration that section 329A of the Commonwealth Electoral Act 1918 is invalid.

2. A mandatory injunction requiring the defendants to publicise widely the orders of this Court and to rectify adequately the misleading and intimidating material already published.

3. An injunction to restrain the second and third defendants from instituting or threatening to institute proceedings against the plaintiff for breach of section 329A of the Commonwealth Electoral Act 1918.

4. Damages.

5. Interest on such damages as the Court may award.

6. Such further or other order or orders or relief as to the Court may seem meet.

4.9 On 5 March 1993 Mr Langer also filed in the High Court an Affidavit in the following terms:

[illegible]

(a) the election material distributed by the AEC, including "The Handbook for Candidates" published in January 1993, which contains on page 23 misleading and intimidatory claims that it is now a criminal offence to publish anything with the intention of encouraging persons voting at the election to fill in an informal ballot paper. A true copy of this page is annexed and marked "A".

(b) An evening news television broadcast by the Government's Special Broadcasting Service on 22 February 1993, claiming that a recent amendment to the electoral act made it illegal to publicly advocate voting informal.

(c) Conversations subsequent to 22 February 1993 with several staff of the AEC by myself and reports of similar conversations by Marilyn Hanson, and Tom Brennan, in which those staff said, "It is illegal to encourage person voting at the election to vote informal." or words to that effect. A copy of statements supplied by Marilyn Hanson and Tom Brennan are annexed hereto and marked "B" ad "C" respectively.

(d) Correspondence with the AEC. On 25 February 1993, I forwarded to the AEC a copy of a leaflet I had prepared, a copy of which is annexed and marked "D" and received a reply from the AEC the same day, a true copy of which is annexed and marked "E".

As a result I forwarded to the AEC a copy of a further leaflet, a true copy of which is annexed and marked "F" and on that same day received from the AEC a reply, a true copy of which is annexed and marked "G". In the light of these letters and the proceeding referred to hereunder, I am concerned that the defendants propose to prosecute me for distributing these leaflets.

(e) The broadcast on ABC radio 5AN at 11 am Australian Eastern Standard Time (19.30 am Adelaide time), of a debate between myself and Ian Spencer, South Australian Electoral Officer, who is not a candidate in the current general elections. A true transcript of that broadcast is annexed and marked "H".

6. My belief is further grounded on earlier dealings I have had with the AEC as set out hereunder.

7. In 1987, the AEC commenced proceedings in the Supreme Court of Victoria against a candidate in the then Federal General Elections, William Hartley. On 25 June 1987, Mr Justice Murphy made orders restraining Mr Hartley from, inter alia, printing and publishing certain material. Annexed hereto and marked "J" is a true copy of that order.

8. On 23 June 1987, the AEC also commenced proceedings in the Supreme Court of Victoria against one Harold van Moorst seeking a similar injunction. On 24 June 1987, Mr Justice Vincent made restraining orders. Now produced and shown to me and marked "AL 1" are true copies of certain of the documents filed in those proceedings.

9. Notwithstanding the differences between orders made in the two proceedings mentioned above, the AEC published a memorandum to all

Divisional Returning Officers, a true copy of which is annexed and marked "K".

10. The campaign by the AEC referred to in paragraph 4 above assists the ALP because there are many former ALP supporters likely to vote for ALP candidates if not encouraged to vote informal, and many other voters likely to vote for non-ALP candidates with preferences directed to ALP candidates. Many of these voters would not vote for, or give preferences to, Coalition candidates, but may vote informal if encouraged to do so. The number of potential votes for Coalition candidates that may be lost in this election because of disillusioned voters deciding to vote informal is much smaller because the Coalition is not in Government. The results in several marginal seats could be determined by whether or not the AEC's campaign is successful. This could in turn determine whether the present ALP Government is thrown out of office or not.

11. Now produced and shown to me and marked "AL 2" are copies of the Supplementary Explanatory Memorandum relating to the Electoral and Referendum Bill 1992 tabled in the Senate, the Explanatory Memorandum relating to that Bill tabled in the House of Representatives and the Hansard Report on the Debates on that Bill in both Houses of the Commonwealth Parliament.

4.10 On 5 March 1993, Mr Langer also filed in the High Court a Notice of Motion seeking the following orders:

1. A declaration that section 329A of the Commonwealth Electoral Act 1918 is invalid.

2. A mandatory inunction requiring the defendants to publicise widely the orders of this Court and to rectify adequately the misleading and intimidating material already published.

3. An injunction to restrain the second and third defendants from instituting or threatening to institute proceedings against the plaintiff for breach of section 329A of the Commonwealth Electoral Act 1918.

4. Such further or other orders or relief as to the Court may seem meet.

4.11 The AEC's immediate response to the material presented in paragraph 8 of Mr Langer's Statement of Claim in the High Court was to consider whether there were grounds for prosecuting him under section 329A, or for an injunction under section 383 in the relevant Supreme Court. The AEC decided that it did not have enough evidence that an offence had in fact occurred, sufficient to justify the AEC initiating any court proceedings. It was therefore concluded that the better course was to allow Mr Langer's writ to proceed unimpeded, with the Solicitor-General appearing on behalf of the Commonwealth.

4.12 On 11 March 1993, the day before polling day for the federal election, the matter was heard by Justice Deane of the High Court. Mr Langer appeared for himself, and Dr Gavan Griffith QC, the Solicitor-General,

appeared for the Commonwealth, instructed by the Australian Government Solicitor.

4.13 Dr Griffith, for the Commonwealth, advised the Court that there was no present intention by the AEC to initiate any proceedings against Mr Langer for a breach of section 329A. Dr Griffith also proposed that the constitutional issue on the validity of section 329A be referred to the Full Bench of the High Court for consideration. Justice Deane agreed with this course of action and then asked Mr Langer for his views on whether an interlocutory injunction against the AEC should proceed. Mr Langer responded as follows (in part):

> What I seek is an interim order to stop this nonsense by the simple expedient of the Court deciding that it will convene a Full Court to issue the appropriate declarations, and if your Honour cannot do that this afternoon or tomorrow, then the Court will adjourn with orders to the Electoral Commission and the State electoral offices and anyone else your Honour can think of to make sure that they do not hold that unfree election in the meantime....
>
> It seems to me that where the Commonwealth itself is engaged in the intimidation and the misleading practices, and where the Electoral Commission is engaged in those practices, the balance of convenience is very clearly on the side of stopping them at once. There basically is not any one else in Australia who could do the kind of damage to the election that the Electoral Commissioner and the Electoral Commission, of which he is the chief executive, are doing.
>
> There is not a form of intimidation that could be more severe than an Act of the Commonwealth Parliament threatening to send people to jail for six months for exercising their lawful rights to encourage other voters to vote lawfully...
>
> Basically, my concern is that anything that is done this late in the election to prevent me being criminally prosecuted does not change the reality of what the issues really before the Court are, which is whether this election is a free election or not. I mean, they could prosecute me next week, or they could, what I suspect they probably intend to do, merely make threatening and intimidating noises as they have done, in the full expectation that eventually the Full Court will declare it unconstitutional. It is not the criminal prosecution that really is the central element in why the Court should act now. The central element is that 10 million people or more are being called upon to go on Saturday to vote in an election that is not free. (*transcript, pages 4-5)*

4.14 Justice Deane asked Dr Griffith for his views on the balance of convenience in relation to the application for interlocutory orders. After providing these and the conclusion that such orders should not be made, Dr Griffith went on to suggest that the question that could be referred to the Full Bench might take the form of paragraph 1 of Mr Langer's Statement of Claim, on the basis that the Commonwealth did not admit paragraphs 10 and 12 of the Statement of Claim. That is, the Commonwealth denied that the AEC and the Electoral Commissioner had threatened to prosecute Mr Langer for breach of section 329A, and denied that the AEC and the Electoral Commissioner had published misleading and intimidating material. Mr Langer

protested this and then went on with his submissions in support of interlocutory orders.

> In regard to the interlocutory orders, I think the Court should look at the conduct of the defendant and the defendant's behaviour in this matter. That what emerges from the material in Hansard and the government's explanatory memorandum for the Act, makes it fairly clear that the Electoral Commission, which drafted the legislation, and the government that put it before the Parliament, was quite consciously trying to deceive the Parliament. They certainly told the Parliament that it does have the effect of outlawing a vote like 1, 2, 2, 2.
>
> One of the Senators in the debate said, "Does not this mean we are making it a crime to advocate a vote that is lawful?". But they quite deliberately concealed from the Parliament the fact that it had the effect of making it unlawful to vote informally and yet the other affidavits that I have submitted show that this has in fact been the long term aim of the Electoral Commission during the last three elections.
>
> That even when there was no such legislation, as the section that is in dispute now, the Electoral Commission was harassing and intimidating people in the elections by claiming that it was illegal to vote informal, then by taking out injunctions to stop them from advocating that, and when they lost those injunctions and were given orders merely on urging people not to vote at all, which was not, in fact, what people were doing, they proceeded to collect costs of about $12,000 and are in the middle of trying to sell people's homes over it at the moment. (*transcript, page 10*)

4.15 The following exchange then took place between Justice Deane and Mr Langer as follows:

> His Honour: If you get involved in allegations about trying to sell people's homes, about which there is no evidence at all before me, and which really does not seem to be relevant, you are creating a position in which people are being maligned in this Court, with no opportunity of answering the allegation against them.
>
> Mr Langer: I appreciate that. I have not got the affidavits on that, I just received a fax this morning with statements and when it does come on later I will put in the affidavit material and explain the relevance then.
>
> His Honour: I really do not think selling people's homes is going to have much to do with it.
>
> Mr Langer: When you have an Electoral Commission that in three successive general elections has tried to intimidate people against encouraging people to vote informal -
>
> His Honour: You have said that, but what we were referring to was a government authority, with a judgement, taking steps to execute on that judgement. Now, all I am saying is, when there is no evidence on the matter, it does not help me to put that in the colourful language of selling people's homes which involves an accusation against individual people. I just find it singularly unhelpful. (*transcript, pages 10-11*)

4.16 Mr Langer went on as follows:

> Well, I am afraid I have not got the evidence before you because of the time constraints, so I will have to leave it until I can bring in the affidavit material. But it is as a result of this current thing coming up so suddenly through television broadcasts on 22 February that suddenly says it is illegal to do what everyone had thought was legal. Without going into the details of it, this is not something new that suddenly occurred to the Government in December and they had this bright idea and that they misdrafted the section, or something like that, like in the Nationwide case concerning bringing an industrial court into disrepute, there was a reference by one of the judges that it would be tempting to think that this was a draftsman's error, and the material that is before you shows it is no draftsman's error.
>
> This was the result that the Electoral Commission sought; that they drafted that legislation to achieve the result of making it illegal to encourage people to vote informal. They got it put through Parliament on the basis that it was to achieve something else, which I would say is also unconstitutional, and they will succeed in carrying out an election with people intimidated in that way, unless the Court acts today or tomorrow, and that conduct by the defendants should be sufficient to sweep aside any objections they have to being dealt with quite summarily by the Court. It simply should not be allows for a government and its electoral commission to behave in that kind of way.
>
> The elections should be conducted according to the law that everyone understands about elections, not in the way that the electoral officer for South Australia announced in the radio broadcast which is in my affidavit there, where he says, "Well, it is only the High Court that can declare the law. As far as I am concerned it is a law until the High Court declares otherwise.", which is all very true in the normal circumstances, but is a very strange way to be conducting an election, that you bring in an Act immediately before the election, which you know damn well the High Court will declare unconstitutional immediately after it and in the meantime you conduct an unfree election. I say that the Court has an inherent jurisdiction to prevent that kind of abuse of the electoral system. That you are the only authority that can stop a government behaving in this way and that if you choose not to stop them you are acquiescing in it. (*transcript, pages 11-12*)

4.17 Justice Deane then asked Dr Griffith to repeat what he said at the commencement about the AEC's current intentions with regard to the initiation of proceedings against Mr Langer. Dr Griffith confirmed that the AEC had no intention to initiate proceedings.

4.18 After a short adjournment, Justice Deane delivered his decision as follows (in part):

> ...On 8 February 1993, writs were issued for a general election to elect members of the Commonwealth House of Representatives and Senate. In his statement of claim, the plaintiff alleges that, since that date, the Electoral Commission and the Electoral Commissioner have published material based on s. 329A of the Act, which material is misleading and intimidating, and has

had, will have or is likely to have an effect on the freedom of the election such that it will no longer be free or fair.

The statement of claim also alleges that the plaintiff has published and intends to continue to publish material in which voters are encouraged to vote informally by filling in a ballot paper otherwise than in accordance with s. 240 of the Act and that the Electoral Commission and the Electoral Commissioner have threatened and intend, unless restrained to prosecute the plaintiff for breaches of section 329A.

...The affidavit evidence filed in support of the notice of motion establishes that officers of the Commission have, in communications with the plaintiff and others, given advice and acted on the basis that s. 329A is a valid enactment of Parliament, which makes it a criminal offence to print, publish or distribute, or cause, permit, or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging an informal vote in an election for the House of Representatives.

I am prepared to infer from letters written to the plaintiff which are in evidence that, were it not for the present proceedings in this Court, there would be a real likelihood that the Commissioner would, pursuant to s. 383 of the Act, institute criminal proceedings against the plaintiff for an alleged breach of s. 329A if the plaintiff continues to distribute material urging or encouraging people to vote informally in the election which is to be held next Saturday. However, in the context of the present proceedings, the Solicitor-General has informed the Court that the Commission has no present intention to institute criminal proceedings or proceedings for an injunction in relation to any apprehended breach of what it sees as the valid requirements of s. 329A.

The first question to be asked in considering whether there should be a grant of interlocutory relief is whether there is a reasonable prospect that the plaintiff will eventually succeed in his attack on the validity of s. 329A. On that question, it appears to me that s. 329A should be construed in a way which would not extend to non-misleading material which encourages a person knowingly to cast an informal vote or that s. 329A is, if construed in the manner in which the Commission construes it, beyond the legislative competence of the Commonwealth Parliament and invalid. In that regard I am conscious of the fact that there is no provision of the Act which makes the casting of an informal vote a criminal offence. The basis of the argument that s. 329A is invalid lies, as I see the matter, in the constitutional principles explained in the recent cases of Australian Capital Television Pty Ltd v The Commonwealth (1992) 108 ALR 577 and Nationwide News Pty Ltd v Wills (1992) 108 ALR 681.

The question of the possible invalidity of s. 329A is plainly an important one in what is arguably a developing area of constitutional law. It is clearly a question which is appropriate to be argued before the whole Court. I indicate no view about what the ultimate answer to it will be. It is, however, necessary that I make plain that the plaintiff has not persuaded me that it is quite clear that the whole Court will eventually hold that s. 329A is invalid. Accordingly, it becomes necessary for me to consider whether I should grant interlocutory relief preventing the Commission from acting on the basis that s. 329A is a valid law of the Commonwealth or from instituting criminal proceedings for any acts done in contravention of the words of that section.

> It is well settled that, in considering whether interlocutory relief should be granted in a case such as the present, the starting point must be that the Court must, to adopt the words of Mason ACJ in Castlemaine Tooheys Ltd v South Australia (1986) 161 CLR 148, respect the enactment of the Parliament unless and until that enactment is judged ultra vires.
>
> In the present case, there is no evidence that officers of the Commission have sought physically to prevent distribution of material advocating an informed informal vote. As has been said, the Solicitor-General has stated that the Commission has no present intention to institute criminal proceedings or seek such relief, the argument that s. 329A is invalid would be available to the accused or the defendant as a defence to the proceedings. I have taken account of what has been said by the plaintiff in support of the making of interlocutory orders. I have, however, come to the firm conclusion that it would, in all the circumstances of this case, be inappropriate to make any such orders.
>
> In view of some comments which the plaintiff made, I should add that the refusal of interlocutory relief does not involve any endorsement of or acquiescence in any attempt by the Commission to enforce what it sees as the valid requirements of s. 329A. I involves no more than a conclusion that, acting on the basis of settled legal principles, the material before the Court does not justify the granting of interlocutory relief.

4.19 Justice Deane thus dismissed Mr Langer's applications for injunctions against the Commonwealth, the AEC and the Electoral Commissioner, and reserved costs. On the basis that paragraphs 10 and 12 of the statement of claim were disputed by the defendants, Justice Deane reserved for the consideration of the Full Court the following question: Is section 329A of the Commonwealth Electoral Act 1918 a valid enactment of the Parliament of the Commonwealth?

4.20 On 1 April 1993 the Australian Government Solicitor filed in the High Court a Question Reserved Book containing the following Question Reserved:

> The plaintiff's Statement of Claim herein is annexed hereto.
>
> Save that they do not admit the allegations made in paragraphs 10 and 12 and deny that section 329A of the Commonwealth Electoral Act 1918 is invalid, the defendants admit the plaintiff's allegations.
>
> The following question is reserved for the consideration of a Full Court:
>
> > Is section 329A of the Commonwealth Electoral Act 1918 a valid enactment of the Parliament of the Commonwealth?

4.21 On 13 September 1994, about a year later, a related matter, Muldowney v South Australia, was listed before Chief Justice Mason for directions. Mr Muldowney, a colleague of Mr Langer, had challenged the constitutional validity of a provision of the South Australian Electoral Act

which was similar to, but not the same as, section 329A of the CEA. The High Court agreed to hear the Muldowney case concurrently with the Langer case.

4.22 Mr Muldowney had previously sought to overturn the 1993 federal election on the basis, inter alia, that section 329A was unconstitutional. Mr Muldowney's two petitions were dismissed by the Court of Disputed Returns because he was not enrolled to vote, and therefore had no standing to petition against the election result. Mr Muldowney then appealed this decision to the High Court. Mr Muldowney's appeal was dismissed with costs by Chief Justice Mason.

4.23 On 3 and 4 October 1995 the Full Bench of the High Court heard the Langer matter (and the Muldowney matter). Dr Gavan Griffith QC, assisted by Mr Stephen Gageler, and instructed by the Australian Government Solicitor, appeared for the Commonwealth, and Mr Stephen Gageler, instructed by the Australian Government Solicitor, appeared for the AEC and the Electoral Commissioner. Mr Langer represented himself.

4.24 The written submissions filed by the Commonwealth read (in part) as follows:

> 5. Subject only to such limitations as are implied from the system of representative government established by the Constitution, the Commonwealth Parliament has plenary power under sections 51(xxxvi) and 31 of the Constitution to make laws "relating to" elections for the House of Representatives, including laws regulating the conduct of persons in relation to such elections.
>
> 6. Leaving to one side the operation, if any, of the implied constitutional freedom of political communication, there can be no real doubt that section 329A is properly characterised as a law "relating to" elections for the House of Representatives so as to fall within the subject matter of sections 51(xxxvi) and 31 of the Constitution. The relevant character of the section is sufficiently established in that it -
>
> > regulated the conduct of persons in relation to such elections;
> > alternatively, prohibits conduct which is intended to interfere with procedures prescribed for holding such elections and which (because of its intended effect and proximity to such elections) may well objectively have that tendency.
>
> 7.1 Section 329A does not impinge upon the implied constitutional freedom of political communication in that the form of communication prohibited is not within the scope of the constitutional protection.
>
> 7.2 Freedom of political communication is an implication from the system of representative government established by the Constitution. It does not exist as an independent constitutional principle.
>
> 7.3 The freedom, although described in various terms, is directed towards protecting political communication concerning government at all levels. In

particular, in the context of elections, the freedom ensures that electors have access to information, and can discuss and debate arguments, policies and matters pertaining to the fitness of the various candidates for office in order to better equip them to make an informed electoral choice.

7.4 Section 329A does not impose a restriction upon such discussion or upon political discussion generally. Nor does it proscribe discussion about the appropriateness of the voting system or the conveying of information concerning that system.

7.5 Rather, section 329A is directed at the publication of material concerning the processes or mechanisms by which voting occurs.

7.6 As such, section 329A does not impinge upon or interfere with the implied freedom of political discussion.

7.7 Once it is accepted that, in accordance with the system of representative government established by the Constitution, it is for the Parliament both -

> to determine whether or not an elector must cast a vote;
>
> and to prescribe the electoral system in accordance with which such a vote is to be recorded and counted.

It follows that it is open to the Parliament to prohibit conduct which is intended to undermine the operation of that electoral system and which hence has the tendency to undermine the efficacy of the electoral process.

7.8 It does not matter that the prohibited conduct may in some broad sense be considered to the political communication. Political communication which is antithetical to the proper operation of the electoral process which underlies representative government stands outside the area of constitutional protection.

8.1 Alternatively, if section 329A does impinge upon the area covered by the implied constitutional freedom the section does not infringe that freedom.

8.2 Freedom of political communication is not absolute but may be restricted in the public interest.

8.3 Thus Parliament may, for example, prohibit the publication of misleading or fraudulent information in relation to elections in order to ensure that elections are free and fair although such regulation must be balanced against freedom of speech.

8.4 Such restrictions must be enacted to fulfil a legitimate purpose and be “appropriate and adapted” or proportionate to the fulfilment of that purpose, or “not go beyond what is reasonably necessary” to achieve that purpose.

8.5 Section 329A prohibits only the *intentional* encouragement of voting otherwise than in accordance with s.240. The section is limited to the election period (s.322). It was an appropriate response to a significant increase in the number of exhausted votes following the relaxation of the requirements for formal voting to “save” votes previously rendered informal by genuine error.

8.6 As such the section is a constitutionally permissible limitation on freedom of political communication in that it imposes a narrowly focussed prohibition which is appropriate and adapted to the preservation of the integrity of the system of full preferential voting established by the Act.

4.25 The written submissions filed by Mr Langer read as follows:

1. The Question Reserved now before you has annexed to it a Statement of Claim setting out the nature of the proceedings in which the question required determination. Paragraph 12 states the following allegation, which has not been admitted by the defendants:

2. "The second and third defendants have since the date of the writs published material based on section 329A and of the Act which material is misleading and intimidating and has had, will have or is likely to have an effect on the freedom of the Election such that it will no longer be free or fair."

3. Urgent relief was refused because it was considered necessary to first determine whether s.329A should be construed as the defendants claimed, and second whether it was valid.

4. If the enactment did authorise the defendants to proscribe publications encouraging electors not to vote for candidates who they do not choose as their representatives, then the conduct of the defendants may not be described as intimidating and misleading and the election may be deemed free and fair.

5. Otherwise the Court will subsequently have to decide what relief to grant. If it is futile to invoke the original jurisdiction of the High Court of Australia to restrain officers of the Commonwealth from intimidating and misleading people during an election campaign there is little point seeking declarations about the state of the law. If the High Court does have a role to play as guardian of the Constitution it may be necessary for it to decide in these proceedings whether the elections that were conducted on the basis that s.329A was a valid enactment which authorised the defendant's conduct, were in fact free elections according to law.

6. The whole point of laws relating to elections is to enable the electors to effectively choose their representatives in Parliament. Without free elections there is no Parliament. Without a Parliament there is no responsible government. The Governor-General in Council has no authority to make judicial appointments on the advice of Ministers who are not responsible to Parliament.

7. Justice Gummow is not entitled to sit in these proceedings because he does not hold a valid commission as a Justice of the High Court of Australia.

8. It may also be in appropriate for Sir Gerard Brennan to sit as that could involve him in determining matters relevant to the validity of his commission as Chief Justice. There is however some precedent for a Justice to sit in such circumstances where the invalidity of the commission would revive another commission.

> 9. That situation arose on the last occasion where it was necessary for an Australian Court to determine that a legislature was not validly constituted because its members had not been properly elected according to law.

4.26 At the opening of the Full Bench hearing on 4 October 1995 Mr Langer indicated that he was not intending to argue the invalidity of section 329A on the basis that it infringed the implied freedom of political communication (as indicated in his 1993 statement of claim - para 7(c)), but instead on the basis that it prevented free and fair elections. As the 1993 federal election was not free and fair, it was not valid, and therefore the subsequent appointment of Justice Gummow by the elected representatives was not valid:

> This is not about a fiction of implied freedom of communication in relation to political matters, it is about the reality of whether or not we have free elections in Australia....If the enactment did authorise the defendants to prescribe publications encouraging electors not to vote for candidates who they do not choose as their representatives in Parliament and if such an enactment is valid, then the conduct of the defendants may not be described as intimidating and misleading and the election may be deemed free and fair....
>
> If it is futile to invoke the original jurisdiction of the High Court of Australia to restrain officers of the Commonwealth from intimidating and misleading people during an election campaign, there is little point seeking declarations about the state of the law....
>
> The whole point of laws relating to elections is to enable the electors to effectively choose their representatives in Parliament....My view is that without free elections there is no Parliament and without a Parliament there is no responsible government. The Governor-General in Council has no authority to make judicial appointments on the advice of ministers who are not responsible to Parliament. Accordingly, Justice Gummow is not entitled to sit in these proceedings because he does not hold a valid commission as a Justice of the High Court of Australia. (*transcript, pages 3-4*)

4.27 Chief Justice Brennan then said that as it appeared the validity of Justice Gummow's appointment would be contingent on the validity of section 329A, then argument on section 329A should proceed, and the question concerning Justice Gummow could be dealt with later.

4.28 Mr Langer then proceeded to develop his argument that section 329A is invalid because it prevents the advocacy of a "direct choice" by electors under section 240 of the CEA. In the course of his argument, and under questioning from McHugh J, Mr Langer indicated his support for compulsory voting:

> To me it seems a perfectly normal and reasonable part of an electoral law to say that you are required to actually think it over rather than taking the day off at the beach I just do not see that that is an infringement on anyone's personal liberties and I think it plays several useful roles in the Commonwealth Electoral Act. One is that it completely eliminates intimidation. If, for example, you have a number of people who intend to vote for the Labor Party and their employer does not like the idea then they can be

worried about whether to take time off from work or not, but if they are able to day, “Look, its compulsory. I have to go and vote,” there really is not much the employer can do about it. (*transcript, pages 19-20*)

4.29 Members of the Bench engaged Mr Langer in lengthy questioning in order to understand his submissions. The following extract is included to demonstrate the difficulties presented by Mr Langer’s style of argument.

Mr Langer: To me, marking your vote on a ballot paper is what section 240 prescribes. It defines how one marks one’s vote. If instead of marking a vote, instead of choosing the candidates you want to represent you in Parliament, you just fill out a ballot paper, that is certainly contrary to the spirit of the Act. It is generally known as “donkey voting” and it would be at least comprehensible - whether it was in power or not - that a Parliament might wish to discourage people from encouraging that. It would certainly be very understandable if the Parliament wished to discourage the Electoral Commissioner from encouraging that, which is precisely what they have been doing.

Brennan CJ: Well, I confess that I do not understand the argument, Mr Langer.

Mr Langer: The argument that I am presenting now is that section 329 of the Act, not 329A but 329, deals with a number of matters in relation to casting a vote and marking a vote and how to vote cards that give advice on marking a vote....for example, if you were to tell electors that they can vote by striking out the names of the candidates they disapprove of, that would be misleading and deceiving because....the vote would not be effective, and Parliament has prohibited that by section 329(1), and it is an entirely reasonable prohibition.

[Section 329(3)] refers to the traditional how to vote card that shows the names of the candidates and the boxes. You may not distribute one of those that is likely to induce an elector to mark his or her vote otherwise than in accordance with the directions on the ballot paper. Now my reading of that would be that it is aimed at leaving blank squares, for example, or using ticks and crosses as you can do on Senate ballot papers....Likewise, the Act permits you, if you leave one square blank, it is deemed that you wrote that as your last preference, so it is an entirely permissible vote. But if there were how to vote cards showing one square blank, then, for example, in a two-seat election, in a division where there are only two candidates, there would be a lot of how to vote cards showing just a number 1 for the candidate, and electors could believe that you are entitled to just write the number 1, and they could vote that way in other seats.

So these to me are classic examples of reasonably proportionate infringements on freedom of communication in relation to elections; they are designed to protect the electoral process. Now if one was to try to construe section 329A as being another reasonable proportionate, in a regulation of the electoral process, the only construction I can think of that fit that way is if the words “fill in a ballot paper” are intentionally to distinguish the concept from casting a vote or marking a vote.

If that was the intention of Parliament, then it is prohibiting people from encouraging voters to just fill in a ballot paper as opposed to marking a vote,

and the question would then arise for determination as to whether or not that is a valid enactment. But I do not see how one could imagine it to be a valid enactment for people to be prohibited from encouraging voters to only vote for the candidates they support; I mean, it just is not an election if you are voting for candidates you just do not support. I am not sure whether that is the argument that you did not follow or not. That is my case. The Parliament cannot tell you that you are to vote for people you do not choose as your representative in Parliament.

Brennan CJ: The only way in which you can cast a vote for the House of Representatives is by following the procedure that the Parliament prescribes. If you do not follow that procedure, you do not effectively cast a vote and the manner prescribed by the Parliament for casting a vote is by section 240, the marking of a ballot paper or, if you wish, the filling in of a ballot paper.

Mr Langer: And implicit in 240, I would say, is that if you do not choose any of the candidates, leave it blank. Surely it could not be that you are required to pretend to vote for a candidate who you do not choose. How could that be an election? The consequence would be that you would have a Parliament elected by donkey voters. Would you construe 240 as requiring you to write the number 1 next to a candidate who you do not choose as a representative in Parliament?

Brennan CJ: You proceed with your argument Mr Langer.

Mr Langer: I would not construe it that way, but the Electoral Commissioner did or said that he did and announced publicly that that is what people are obliged to do and that we are committing a crime punishable by six months imprisonment by encouraging them not to do it. To me, if section 329A is a valid enactment, the only validity it could have would be that it would be aimed at the Electoral Commissioner, at his saying “You cannot go around telling people to fill in a ballot paper instead of actually marking a genuine vote on it.” The whole point that the Electoral Commission has been making for a number of years is that they say you are obliged to. They say you must donkey vote....

Dawson J: Mr Langer, all this is very interesting and it may or may not be that section 329A is an undesirable provision, but why is it unconstitutional?

Mr Langer: If it [s.240] was requiring electors to give consecutive unrepeated numbers on their ballot papers, whether or not they support those candidates, then it would be requiring electors to vote for candidates they do not choose.

Dawson J: Perhaps that is so. Why is that unconstitutional?

Mr Langer: Because the Constitution rests on the fact that the Parliament is chosen by the electors. If the Parliament is chosen by electors randomly numbering pieces of paper not knowing that this is choosing a member of Parliament, then it has not been chosen by the electors. If an elector supports an independent candidate, they are entitled to vote for that candidate. My reading of the Act says that they are entitled to vote for that candidate by writing 1 next to the name of that candidate and 2 next to all the other names. The Electoral Commissioner says, “No you’re not allowed to do that. The Act

says we'll count it, but you're not supposed to do that." So, you are not allowed to encourage people to do that. If that is so -

Dawson J: I understand that. So that your argument is not based upon any implied freedom of speech, but is based upon the words "directly chosen by the people"?

Mr Langer: Yes...The requirement for freedom of communication at elections arises because of the electoral process....This is not about the legal fiction that was used in the Theophanous case and other cases. There is a role for legal fictions. This is about a general election....

McHugh J: But section 329A does not prohibit you from encouraging people to vote informally, does it? It only prohibits you from encouraging people to "fill in", being the operative words, a ballot paper otherwise than in accordance with section 240. So, is there anything in 329A which would stop you from telling people not to vote for a candidate at all?

Mr Langer: Not in my view, but the Electoral Commissioner's view was that I would be up for six months jail if I did it and they wrote me a letter saying so. The Parliament's view was the 1,2,2,2, that they intended to prohibit people from advocating...There is nothing in the parliamentary debate that suggests it was aimed at informal voting

McHugh J: Is that not, on its natural reading, what it is designed to prohibit; the 1,2,2,2, vote?

Mr Langer: Again, I have difficulty even there. On the 1,2,2,2, I would say that it was not a figment of the Electoral Commissioner's imagination; that that was what was debated in Parliament, it is just that it is not in the Act. I cannot see, on its natural reading, that there is anything there that prohibits a 1,2,2,2, vote.....

Gummow J: Mr Langer, in the end we have to decide what the words that were used meant, not what they hoped they would mean but what they meant, and if Justice McHugh is right as to what 329A means in that suggestion he was putting to you, do you then say 329A would still be invalid?

Mr Langer: I do on entirely different grounds.

Gummow J: What would they be?

Mr Langer: That it refers to....that section 329A refers to and is based on section 240. Section 240 in my view is invalid for two reasons. One is....having to number all the candidates. The other is an even more harmless aspect of it which is having to number -

Dawson J: Just a second Mr Langer. You would concede, would you, that under 240 the 1,2,2,2, vote is invalid?

Mr Langer: No, I do not concede that at all.

Dawson J: I was just wondering that.....

Mr Langer: In paragraph (a) [of section 240] you have to write the number 1 against one candidate. In paragraph (b) you are writing the numbers 2,3,4 and so on as the case requires against the other candidates. They would be together if you were not trying to emphasise the fact that there is to be a number 1. There could be more than one of these numbers 2,3 and 4. It would be very, very easy to draft a provision that said "You shall write consecutive unrepeated numbers". A deliberate decision was made not to write that, and I have gone back through the legislation back to 1919. (*transcript, pages 25-31*)

And later:

Brennan CJ: Now we are talking about 329A. Would you come back to those words "to fill in".

Mr Langer: What I am saying is that on an application by the Electoral Commission it has been held by Justice Vincent of the Supreme Court of Victoria that the directions on the ballot paper are intended to encourage persons voting at the election to vote otherwise than in accordance with section 240.

Brennan CJ: Be it so, would you please give me any construction of the words in 329A "to fill in a ballot paper otherwise than in accordance with section 240" as meaning anything other than to fill in a ballot paper as a matter of the form of completion in accordance with section 240?

Mr Langer: Yes, I would say that the possible interpretation of the provision is that it is intended to prohibit the Electoral Commissioner from distributing the current ballot papers. What happened following that court case -

Brennan CJ: Please, whatever might be the intention, what meaning? We are concerned with meaning and operation or words, not intentions.

Mr Langer: That the most obvious thing to think of as regards "any matter or thing encouraging persons to fill in a ballot paper" is the directions on the ballot paper. That is what first comes to mind. The directions on the ballot paper are what encourage people to fill in ballot papers in certain ways and what I am putting to the Court is that one possible interpretation of the section is that it prohibits the distribution of ballot papers with misleading directions.....

Brennan CJ: Mr Langer, I do not want to interrupt you but I am endeavouring to discover the basis on which your argument is founded. I will ask you this question only once more and then I shall desist....

Mr Langer: And I am putting forward two alternative constructions...

Brennan CJ: Forget what the purpose might be or the history of any litigation; just give us your views of the meaning of those words. (*transcript, pages 51-52*)

4.30 After the lunch adjournment of the Court the Chief Justice ruled that Justice Gummow was competent to sit and would participate in the decision

of the matter. Dr Griffith, for the Commonwealth, delivered his oral submissions along the lines of his written submissions, arguing for the constitutional validity of section 329A.

4.31 In passing, Dr Griffith submitted that in particular circumstances section 329A would not apply to informal voting:

> Mr Griffith...section 329A is not a plenary prohibition, as it were, under the Act. It says nothing on the issue of whether a person encourages others to lodge in the ballot box a blank paper. It does not deal with that. It does not deal with whether or not a person writes in a slogan such as "no Dams", "No bridges" on a ballot paper, whether or not that person also fills the boxes as is required by section 240 or whether a person does not fill the boxes and in effect votes invalidly.
>
> Toohey J: Why would it not deal with the blank ballot paper?
>
> Mr Griffith: Your Honour, because it is dealing with the issue of filling in a ballot paper. (*transcript, page 65*)

4.32 Dr Griffith was then asked by the Court if he had any objection to Mr Langer's request to file a supplementary written submission, and he replied that there would be no problem as long as there was a page limit. The Chief Justice then granted Mr Langer permission to file a five page supplementary submission within 21 days, with a further 7 days for the Commonwealth to file a reply.

4.33 Mr Langer then made further oral submissions in reply to Dr Griffith's submissions, introducing his argument that if enough exhausted votes were cast in a division then an absolute majority could not be formed and a supplementary election would be required. He then continued to argue that section 329A is constitutionally invalid, because section 240 is constitutionally invalid, because it does not permit the election of candidates "directly chosen by the people" under section 24 of the Constitution.

4.34 On 24 October 1995 Mr Langer filed his five page supplementary submission and a further 9 pages of written submissions, both in very small type. The Commonwealth replied to his written submissions, to the extent that they were relevant, and Mr Langer then served the respondents with a 21 page affidavit with attachments.

4.35 On 7 February 1996 the High Court handed down its order in Langer v Commonwealth, and on 20 February 1996 the High Court handed down its reasons for decision. The Court ordered by a majority (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ with Dawson J dissenting), that section 329A of the CEA is valid. Costs were awarded against Mr Langer.

4.36 The High Court decision establishes that:

> (1) a compulsory system of full preferential voting is constitutionally valid;

(2) section 240 of the CEA requires that a voter mark a ballot paper by writing consecutive, unrepeated numbers commencing with the number 1 to indicate an order of preference as among all the candidates whose names appear on the ballot paper, but sections 268(1)(c) and 270(2) have the effect that certain ballot papers which do not satisfy this requirement will nevertheless be included in the scrutiny;

(3) section 329A is a law enacted pursuant to sections 31 and 51(xxxvi) of the Constitution as it:

(i) prohibits conduct which has the tendency to undermine the system of full preferential voting prescribed by section 240; and

(ii) does not infringe the implied constitutional freedom of political communication.

4.37 The High Court held that section 240 is the foundation of the full preferential voting system established by the CEA. The general rule is that under subsection 268(1)(c) a ballot paper is informal if it is not filled in accordance with section 240. However, the provisos to section 268(1)(c) and subsection 270(2) of the CEA set out limited circumstances in which a ballot paper that is not filled in accordance with section 240 will nevertheless be included in the scrutiny. In particular, the effect of section 270 is that a voter is not required to number each square so that the numbers may be read consecutively, as required by section 240, provided that the voter places the number 1 in one square and has numbers (not necessarily consecutive) in all the other squares (except that one square may be left blank). For example, under section 270, in an election in which there are five candidates, a ballot paper will not be excluded from the scrutiny if it records votes such as 1, 2, 2, 2, 2 or 1, 2, 3, 3, 3.

4.38 Section 270 was included in the CEA 'only to provide a safety net for people who make a genuine mistake in filling out their ballot papers' (JSCEM 1990 Federal Election Report, page 30). Section 329A is directed against encouraging voters to avoid the full preferential voting system prescribed in section 240 by taking advantage of the safety net provisions of subsection 270(2).

4.39 The High Court addressed two issues in deciding that section 329A of the CEA is valid. One is linked to the alleged invalidity of section 240 of the CEA and the other to the implied constitutional freedom of communication of political matters.

4.40 In relation to the alleged invalidity of section 240, section 24 of the Constitution requires that members of the House of Representatives be 'directly chosen by the people'. Mr Langer argued that, if section 240 of the CEA requires a voter to record a preference for a candidate for whom the voter does not wish to vote (in any order of preference) then section 240 is invalid as it does not allow the voter the freedom to choose that is protected by section 24 of the Constitution. He argued that, if section 240 is invalid, it

follows that section 329A (which is directed to compliance with section 240) is also invalid.

4.41 The High Court first rejected Mr Langer's argument that section 240, properly construed, does not require a voter to record a preference vote for a candidate for whom the voter does not wish to express a preference. As McHugh J concluded:

> the plain meaning of the section is that the voter must place a number in each square, commencing with the number 1 and rising consecutively, so as to indicate the voter's order of preference for each candidate. A complete expression of preferences for all candidates is required irrespective of the difficulty that a voter may have in deciding the order of preference. A ballot paper that gives the same number to more than one candidate is in breach of the directions that the section addresses to the voter, although that breach is not made punishable by fine or imprisonment.

4.42 The Court also held that section 240, so construed to require full preferential voting, is a valid exercise of the legislative power conferred on the Commonwealth Parliament by sections 31 and 51(xxxvi) of the Constitution to prescribe the method of choosing members of the House of Representatives. Section 24 of the Constitution is not infringed as a system of compulsory voting on a full preferential basis and complies with section 24 by permitting a free choice by the expression of a preference among the candidates available for election. As Brennan CJ said on page 6 of the decision:

> It is not to the point that, if a ballot paper were filled in otherwise than in accordance with section 240, the vote would better express the voter's political opinion.

4.43 As the system of full preferential voting prescribed by section 240 is valid, the majority held that section 329A is also valid as it assisted in preventing the efficacy of that system from being undermined. This conclusion is not affected by the provisions in sections 268(1) and 270, which save certain ballot papers which would otherwise be informal. According to Brennan CJ, McHugh J and Gummow J, the purpose of those saving provisions is not to make optional preferential voting available as a method of voting alternative to the primary method of full preferential voting, but is to minimise the exclusion of ballot papers from the scrutiny. Toohey and Gaudron JJ, in their joint judgement, appear to take a similar approach. Although their Honours refer to sections 240, 268 and 270 as effecting a modified preferential voting system, they held section 329A to be valid because it 'assists in the maintenance of a system of full preferential voting' (page 22; see also page 24 and cf Brennan CJ at page 6; McHugh J at page 34 footnote 59 and Gummow J at page 44).

4.44 Dawson J took a different approach to the operation of sections 240, 268 and 270 of the CEA. This formed the basis of his dissenting judgement as discussed later.

4.45 In relation to the implied constitutional freedom of communication in political matters, in a series of cases commencing in 1992, the High Court has held that an implied constitutional freedom of political communication operates as a restraint on the legislative powers of the Commonwealth Parliament. The freedom derives from the system of representative government established and maintained by the Constitution. According to the majority judges, although section 329A restricted freedom of speech it was not thereby invalid as it was directed to the legitimate purpose of protecting the method of voting prescribed by section 240 and therefore effective participation in the electoral process, rather than to repressing freedom of political discussion:

> Section 329A does not prohibit discussion about the operation or desirability of the method of voting prescribed by section 240, nor does it prohibit advocacy of its amendment or repeal....Nor does section 329A prohibit a person from informing electors of the state of the law. It simply prohibits encouragement of voters to fill in their ballot papers otherwise than in accordance with the method of voting prescribed by the Act (Brennan CJ at page 8; see also Toohey and Gaudron JJ at page 23).

4.46 In relation to the dissenting judgement of Dawson J, central to his opinion that section 329A is invalid, was his conclusion on page 12 that: 'when sections 240, 268 and 270 are read together - as they must be - it is clear that the Act allows more than one method of casting a formal vote.' Those methods are full preferential voting (section 240) and optional preferential voting (section 270).

4.47 According to Dawson J, section 329A had the intended effect of keeping from voters information about an alternative method of casting a formal vote which they were entitled to choose under the CEA. It is therefore invalid as its restriction on freedom of communication is directed to preventing voters from making the informed choice protected by section 24 of the Constitution. Dawson J saw no practical difference for this purpose between making information available and encouraging its use: 'to make available useful information is ordinarily to encourage its use' (page 17).

4.48 Dawson J also observed that section 329A would be valid if section 240 stood alone and was not qualified by sections 268 and 270 (that is, so that the CEA provided for only one system of voting). Section 329A would then have the legitimate purpose and effect of protecting the sole voting system (full preferential) established by the CEA. On the other hand, Brennan CJ observed that 'there would much to be said for the view' that section 329A is invalid if (contrary to his view but in accordance with the view of Dawson J) the CEA was to be construed as prescribing a method of voting alternative to that prescribed by section 240.

4.49 Finally, it is worth noting the comments of Gummow J, who appeared to adopt the construction of section 329A accepted by the Solicitor-General for the Commonwealth in the course of the hearing, that section 329A is concerned with the way a ballot paper is filled in (that is, the way the ballot paper is marked to record an order of preference) and does not prohibit:

(1) encouraging persons not to vote at all by leaving their ballot papers blank;

(2) encouraging persons who do fill in a ballot paper in accordance with section 240 also to write additional words or other graphic representations on the ballot paper (pages 44-45)

4.50 However, these issues were not expressly addressed in other judgements (but compare for instance, the comments of Toohey and Gaudron JJ at page 22).

4.51 In a discussion of this High Court decision in the Federal Law Review, Anne Twomey, a Lecturer in Law at the University of Sydney, condemns the decision as largely superficial because it has left Australians none the wiser as to the fundamental principles which underlie the Constitution (Twomey A, "Free to Choose or Compelled to Lie? - The Rights of Voters after Langer v The Commonwealth", Federal Law Review, Volume 24, pages 201-220).

4.52 While the AEC does not necessarily agree with this view, Ms Twomey's critique is worth examination to the extent that it brings to light the underlying policy conflicts in the CEA in relation to full preferential voting under section 240 (see Appendix G).

APPENDIX C - THE 1996 FEDERAL ELECTION - COURT PROCEEDINGS

Proceedings involving Mr Albert Langer: AEC v Albert Langer, 1996 No 4287, Supreme Court of Victoria, Beach J, 8 February 1996, unreported; AEC v Albert Langer, 1996 No 4287, Supreme Court of Victoria, Beach J, 14 February 1996, unreported; Langer v AEC, VG No 96 of 1996, Federal Court of Australia, Black CJ, Lockhart and Beaumont JJ, 1 March 1996, unreported; Langer v AEC, VG No 96 of 1996, Federal Court of Australia, Black CJ, Lochhart and Beaumont JJ, 7 March 1996, unreported.

1 Initiation of Proceedings

1.1 On 13 January 1996, "The Weekend Australian" published a letter from Mr Albert Langer which said the following, in part: "In the next election several groups are going to publish "How to Vote" cards in marginal seats encouraging voters to put both the ALP and the Coalition last." The AEC was already familiar with public campaigns opposing the federal election system by Mr Langer and his colleagues at previous elections, and now had reason to believe that during the 1996 federal election period Mr Langer would reactivate his campaign encouraging people to vote optional preferential.

1.2 On 29 January 1996, the day after the issue of the writs for the 1996 federal election, Mr Langer contacted the AEC and requested a written undertaking that the AEC would not advise people that it is an offence to advocate informal voting. Mr Langer was advised that the AEC would do no more and no less than continue to inform the public of the legal requirements for voting under the CEA. Mr Langer then indicated that he intended to publish electoral advertising advocating informal voting and optional preferential voting, and asked if the AEC would be prepared to comment on it. The AEC indicated that, if he faxed through copy of his proposed advertisement, formal legal advice would be obtained from the Director of Public Prosecutions (DPP) before any comment was made.

1.3 Mr Langer then faxed to the AEC a copy of his proposed election advertising, entitled "How to Vote for Neither!", with the annotation "I am printing, publishing and distributing the above electoral matter now" and his signature and the date. The AEC then formally asked the DPP for legal advice on whether the proposed advertisement appeared to be in breach of section 329A, and what options were open to the AEC were it to be published.

1.4 In the meantime, on 31 January 1996 Mr Langer published his advertisement in the "The Australian" newspaper (see insert over), and later that day Mr Langer spoke on radio station 2GB advocating the method of voting set out in the advertisement. Mr Langer made the following statements in an interview with Mr Ken Richards:

Langer: Its very simple. You number the candidates you choose in the order of your choice and then you number all the remaining candidates equal last and we've put an ad in the Australian on page eight today, with at the bottom its got "Remember number every box to make your vote count." Its very simple. You simply put the candidates you reject equal last....The Constitution says that members of Parliament are directly chosen by the people, then you can't possibly be required to vote for candidates who you reject....

Richards: In a very close electorate, where its going to be decided on preferences, it then becomes impossible to distribute my vote in preferences and it may be that no candidate ends up with an absolute majority. What happens then?

Langer: According to my reading of the Electoral Act, what happens is there's a supplementary election. It used to be that they distributed preferences until one candidate had an absolute majority. Just before the 1990 election, that was changed to distributing preferences until only two candidates remain in the count. And then, if one candidate has an absolute majority its elected. So the result of that is that when its only the ALP and the Coalition candidates are left, they can't distribute the preferences from one to the other. So the result would be that most marginal electorates in Australia would have a supplementary election if, for example, the Greens put out how-to-vote cards saying put them both last....

Richards: And does an absolute majority just mean 50% plus one vote?

Langer: Yes. And what's very interesting is not my little ad but the fact that Bob Brown was in The Australian on the 6th of this month saying that the Greens are seriously considering putting both major parties last and, if they do that, I would say its going to be a very interesting election because there's a hell of a lot of voters who are sick of both the parties and if any significant force is advocating it, I'd say that we're going to have a very big change in the electoral system in Australia.

Richards: Yes, its interesting. I was talking to Dr Ross Fitzgerald, the political scientist in Queensland, early in the week and one of the comments he made is that there are now so many people who feel the political system simply does not represent them.

Langer: That's right. In New Zealand, 85% of the voters rejected the two party system there, in the single member electorates, the same system that we've got here. In the ACT there were 65% in favour of proportional representation.

Richards: Is that what you're trying to get us towards?

Langer: Yes. We're putting a direct choice petition and asking all the minor parties and independents to sign it, saying that they support proportional representation and the second part of it saying a pledge that they won't give their preferences to any candidate who opposes PR. Because the extraordinary thing is that the minor parties are all actually encouraging their supporters to vote for the parties that exclude them from representation.

1.5 The AEC immediately sent Mr Langer's published advertisement to the DPP with a further urgent request for advice on whether a breach of section 329A was now apparent, and whether an application by the AEC for an injunction under section 383 of the CEA would be appropriate in the circumstances. Late on the afternoon of 31 January 1996, formal legal advice was provided to the AEC by the DPP that (in part):

> In my view the printing or causing to print, publish etc this pamphlet/advertisement breaches section 329A. Evidence of a number of technical matters is required to establish an offence against section 329A...At this point, it would seem likely that such evidence would be available, and on the assumption that it would be, I am of the opinion that a prima facie case for an offence against section 329A by Mr Langer could be established.
>
> As observed in your request for advice, the pamphlet/advertisement appears to address only optional preferential voting and not informal voting. Encouraging the latter does not arise in the case under consideration...
>
> As a matter of statutory interpretation the words of the section must be determined by giving the words their proper operation. Section 329A addresses encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240. The evidence in each particular case would have to be considered to see if a breach of the section was disclosed. It may be that in certain cases encouraging people to vote informally would be in breach of the section.
>
> If a person encourages persons voting at the election to *fill in* a ballot paper in a way that leads to an informal vote result, in my opinion in some cases an offence may be disclosed. For example, an advertisement might urge voters to register a protest by writing r,u,b,b,i,s,h in each of the boxes. To do this in my view would fall within the section and would be an offence.
>
> Section 329A is limited to encouraging persons to fill in a ballot paper otherwise than in accordance with section 240. To encourage a person not to fill in a ballot paper would not appear to fall within the section. I doubt if merely encouraging a person to vote informally falls within the section.
>
> It seems that at least to some extent section 329A may have an operation in relation to encouraging informal voting and the particular evidence in each case would have to be considered to determine if an offence was disclosed.
>
> With respect to the advertisement stated to be authorised by Mr Langer in The Australian it is premature at this stage, and the absence of a brief of evidence, to decide if Mr Langer or any other person or company should be prosecuted. One matter that would require careful consideration would be whether such a prosecution was in the public interest.
>
> In many cases, the appropriate response, at least initially, to such a breach of the section might be a warning letter. Another response might be proceedings for an injunction to be brought by the Commissioner. This would have the effect of preventing further breaches of the legislation during the election period. I note that the issue of an injunction is being addressed between the Commissioner and the Attorney-General's Department.

1.6 In accordance with this legal advice, and further consultations with the Director of Public Prosecutions and the Attorney-General's Department, the AEC instructed the Australian Government Solicitor to commence proceedings on behalf of the AEC for an injunction against Mr Langer.

2 Injunction

2.1 On 2 February 1996 the AEC filed an Originating Motion, Summons, and an Affidavit with the Victorian Supreme Court seeking the following relief/remedy as follows:

> 1. An order, interlocutory and permanent, that until 6.00 pm on 2 March 1996 the Defendant whether by himself, his servants or agents or howsoever otherwise, be restrained from printing, publishing, or distributing, or causing to be printed, published or distributed, any matter or thing whatsoever with the intention of encouraging any person to vote at the federal election for the House of Representatives to be held on 2 March 1996 by filing in a ballot paper otherwise than by:
>
> > (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference; and
> >
> > (b) writing the numbers 2, 3, 4 (and so on as the case requires consecutively without writing any particular number more than once in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them.
>
> 2. An order that the Defendant pay the costs of this proceeding.

2.2 On 5 February 1996 Mr Langer filed with the Victorian Supreme Court an Affidavit and a Motion seeking orders against the AEC in the following terms:

> 1. An order, interlocutory and permanent, that until 6.00 pm on 2 March 1996 the Australian Electoral Commission, whether by its officers, employees, agents or otherwise, must not print, publish or distribute, or cause, permit or authorise to be printed, published and distributed, any matter or thing, with the intention of encouraging persons voting at the general election for the House of Representatives to be held on 2 March 1996 to fill in a ballot paper otherwise than in accordance with the voter's free choice of the candidates favoured or rejected by:
>
> > (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference; and
> >
> > (b) writing the numbers 2, 3, 4 (and so on as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them.
>
> 2. An order, interlocutory and permanent, that the Australian Electoral Commission, whether by its officers, employees, agents or otherwise, be

restrained from hindering or interfering with the free exercise of the political right of any person to publish electoral matter encouraging voters at any election for either House of the Parliament of the Commonwealth to mark their ballot papers so as to reject all or any number of the candidates at that election.

3. An order, interlocutory and permanent, that the Australian Electoral Commission, whether by its officers, employees, agents or otherwise, be restrained from doing any act or thing, for the purpose of influencing any person to vote at any election for either the House of the Parliament of the Commonwealth by writing in the squares on a ballot paper any number greater than 1 no more than once.

4. A declaration that ballot papers which indicate the order of preference of a voter in favour of 1 or more candidates by means of consecutive unrepeated numbers starting with the number 1 and which indicate the order of preference of a voter against all the remaining candidates by means of a consecutive equal last preference for those candidates, are formal votes pursuant to sections 239, 240 and 268 of the Commonwealth Electoral Act. Such ballot papers cannot be taken as expressing no preference with respect to the rejected candidates under section 270(1)(g) or section 270(2)(g). In a House of Representatives election such votes cannot be counted to any of the rejected candidates under section 274(7)(d) and cannot be set aside as "exhausted" under section 274(8). No candidate rejected by a majority of formal votes can be returned as elected and if no candidate is elected a supplementary election must be held as provided for by section 181(2).

5. An order requiring the Australian Electoral Commission to publish the following notice prominently in every polling booth compartment and in all electoral matter it prints, publishes, distributes or broadcasts with respect to the procedures for filling in ballot papers at the general election for the House of Representatives to be held on 2 March 1996:

"Number any candidates you choose from 1 to the number of candidates you choose, in the order of your choice. Number all the remaining candidates who you do not choose, equal last."

6. A declaration that paragraph 39A(b) of the Electoral and Referendum Regulations is inconsistent with the Commonwealth Electoral Act 1918 and the Constitution and invalid to the extent that it purports to authorise the use of directions for filling in ballot papers for the House of Representatives with the words:

> "Number the boxes from 1 to (here insert the number of candidates) in the order of your choice".

7. A declaration that if the Governor-General has not made valid regulations consistent with the Commonwealth Electoral Act and the Constitution to provide accurate directions for filling in ballot papers for the House of Representatives in time for the printing and distribution of ballot papers required for the general election for the House of Representatives to be held on 2 March 1996, it shall be lawful to use the following directions:

> "Number any candidates you choose from 1 to the number of candidates you choose, in the order of your choice. Number all the remaining candidates you do not choose, equal last."

8. An order dismissing the Originating Motion filed by the Australian Electoral Commission in these proceedings as a wilful and malicious abuse of process.

9. A permanent order to restrain the Australian Electoral Commission from instituting or threatening to institute proceedings or making any public announcement concerning its intentions with regard to proceedings against Albert Langer for breach of section 329A of the Commonwealth Electoral Act 1918 without first obtaining leave of a Justice of this Court in chambers.

10. An order requiring the Australian Electoral Commission to publicise widely and urgently the judgement of this Court in a form and to an extent approved and supervised by an officer of the Court.

11. An order restraining the Australian Electoral Commission from conducting any election for either House of the Parliament of the Commonwealth until the Court determines that its judgement has been sufficiently publicised for a free and fair election to be held.

12. Damages, including special, punitive and exemplary damages.

13. Costs.

14. Interest on costs and damages.

15. Such further or other orders as the Court thinks fit.

16. Alternatively, a permanent stay on the Originating Motion as the Australian Electoral Commission has already submitted to such an order as the High Court of Australia may make with respect to the issues it now wishes to litigate in the Supreme Court of Victoria.

2.3 On 5 and 6 February 1996 Justice Beach of the Victorian Supreme Court heard submissions from the AEC and Mr Langer on the injunction applications. The AEC was represented by Dr Chris Jessup QC, assisted by Mr Charles Gunst and instructed by the Australian Government Solicitor. Mr Langer represented himself. On the second day, Justice Beach adjourned the hearings when he was advised by the AEC that the High Court had just indicated that it was ready to hand down a decision on a related matter involving Mr Langer and the AEC, which had arisen at the 1993 federal election.

2.4 On 7 February 1996 the High Court held that section 329A of the CEA is a valid enactment of the Parliament of the Commonwealth and ordered that Mr Langer pay the costs of his action commenced at the 1993 federal election. The full reasons for the decision were not handed down until 20 February 1996 (*Langer v Commonwealth and Ors (1996) 134 ALR 400*), and have been discussed earlier in this submission.

2.5 On 8 February 1996 Justice Beach of the Victorian Supreme Court delivered his decision and orders as follows (in part):

> The case for the Commission is that, properly construed, s. 240 required the squares on the ballot paper to be consecutively numbered commencing with the number 1 and repeating no number. In the present case what the defendant is seeking is to persuade electors to do, so it is said, is to number the candidates they favour in the order of their choice and then to give the same number to each of the remaining candidates, effectively placing such candidates equal last. For example, where there are five candidates, the three favoured candidates are to be given the numbers 1, 2, and 3, while each of the remaining candidates is to be given the number 4. It is said that by encouraging electors to fill in their ballot papers in that fashion the defendant is encouraging them to fill in their ballot papers other than in accordance with s.240, hence this application to have the defendant restrained in the manner sought in the summons filed in the proceeding.
>
> The defendant, who appeared unrepresented before me, raised a number of arguments in opposition to the plaintiff's application.
>
> In the first place he contended that the provisions of s.329A are unconstitutional and thus invalid. In the second place he contended that, if the section is not invalid, it should be construed in such a way as not to extend to non-misleading material which encourages a person knowingly to cast an informal vote. In the third place he contended that s.240 of the Act should not be construed as requiring the squares on a ballot paper to be consecutively numbered: it is sufficient compliance with s.240 that a number be inserted in each square and, of an elector is so minded, the same number on two or more squares.
>
> In evaluating the arguments advanced by the defendant I have taken into account not only the lengthy oral submission he made to me on Monday and Tuesday last but also the documentary material handed up by him during the course of the hearing, including the decision of Deane J of 11 th March 1993 in High Court proceedings No C2 of 1993, in which the defendant is the plaintiff and the Commonwealth, the Commission and Brian Cox are defendants, the defendant's written submission and oral submissions to the Full Court of the High Court in that case, and the plaintiff's submissions in reply to the High Court in proceeding No C22 of 1993 in which Patrick Kevin Muldowney is plaintiff and the State of South Australia and others are defendants.
>
> In considering whether interlocutory relief should be granted in a case such as the present, the starting point is that the court must respect the enactment of the Parliament unless and until that enactment is judged ultra vires....The fact is that yesterday the High Court delivered its decision in Langer v The Commonwealth... and held that s.329A of the Commonwealth Electoral Act 1918 is a valid enactment of the Parliament of the Commonwealth. The defendant's contention in relation to the validity of the section must therefore be rejected.
>
> In support of his second contention the defendant placed great reliance upon the provisions of s.270 of the Act...The substance of his argument was that in encouraging electors to vote informally in respect of certain candidates he

was not doing anything unlawful, as the votes of electors voting in the manner he advocates would still be formal votes by virtue of the provisions of sub-ss (2) and (3) of s.270.

In my opinion the fact that the votes of electors voting in the way the defendant advocates may be saved from being totally informal by reason of the provisions of those sub-sections, is not to the point. The simple issue for the court to determine is whether the defendant is encouraging persons who will vote at the federal election on 2nd March to fill in their ballot papers otherwise than in accordance with s.240. If he is, then he is committing an offence under s.329A of the Act and the Commission is entitled to seek injunctive relief against him in accordance with the provisions of s.383 of the Act.

The third argument advanced on behalf of the defendant requires a consideration of the working of sub-s.(b) of s.270. Having written the number 1 in the square opposite the name of the candidate for whom the elector votes as his or her first preference, the sub-section then requires the elector to write the numbers 2, 3, 4 and so on as the case requires in the squares opposite the names of all remaining candidates so as to indicate so as to indicate the order of the person's preference for them.

What the defendant contends is that there is no express requirement that an elector write the numbers consecutively or that he not use the same number on more than one occasion, and that requirements to that effect cannot be implied in the section.

In my opinion it is unnecessary to imply any words into s.240(b). A reading of the section leaves me in no doubt but that the intention of the legislature was to ensure that, once an elector has placed the number 1 in the square opposite the name of the candidate for whom the elector voted as his or her first preference, the elector then write the numbers 2, 3, 4 and so on in numerical sequence in the squares opposite the names of the remaining candidates so as to indicate the order of the elector's preference for them. I consider that that is the only sensible interpretation of the words "writing the numbers 2, 3, 4 and so on". The elector is required to indicate his preference for the candidates by ranking them in the order of his choosing. He does that by numbering them in numerical order and by using each number once. If that was not the intent of the legislature at the time s.240 was introduced into the Act, it was certainly its view of the section at the time s.329A was. That much is clear from the Explanatory Memorandum to the Electoral and Referendum Amendment Bill 1992...

It was argued by the defendant that where an elector rejected more than one candidate the case required assigning a repeated number as an equal last preference with respect to all the rejected candidates; that there is simply no other way specified for an elector to indicate that choice.

In my opinion the section imposes a duty upon an elector to express a preference even though he may not have a preference for any of the candidates....It is not open under s.240 for an elector to repeat a number on the ballot paper because the elector claims not to prefer one candidate ahead of the other. Even if he does not like any of the candidates he has a duty to indicate a preference among them... that does not present him with a task he

cannot perform. The fact that an elector commits no offence by not marking the ballot paper in such a fashion is irrelevant. He or she has a duty to do so and the results of elections demonstrate that the vast majority of electors fulfil that duty.

I turn then to s.329A. It is clear from the Supplementary Explanatory Memorandum that s.329A is designed to support s.240 by establishing a full preferential system and one which is not undermined by reliance on s.270. In my opinion s.270 is intended to cover inadvertent error and is not intended to establish a system of optional preferential voting in substitution for a mandatory full preferential system...

In the present case the evidence that it is the intention of the defendant to encourage electors at the forthcoming election to fill in their ballot paper by not writing the numbers 2, 3, 4 and so on in numerical order in the squares opposite the names of the candidates remaining after they have selected the candidate of their first preference, is overwhelming. Not only is there the evidence to which I have earlier referred, evidence which has not been challenged by the defendant, there is the content of his own statement of claim in proceeding C2 of 1993, in particular para 8, which says:

> 8. The plaintiff has published and intends to continue to publish material in which voters are encouraged to vote informally by filling in a ballot paper otherwise than in accordance with s.240 of the Act. This publication the second and third defendants allege contravenes s.329A of the Act.

I find, therefore, that the defendant has published material with the intention of encouraging persons voting at the 2nd March election to fill in their ballot papers otherwise than in accordance with s.240 and that the Commission is entitled therefore to seek an injunction restraining him from engaging in that conduct pursuant to s.383 of the Act.

It is clear from the wording of s.383 that the court has a discretion as to whether it will grant injunctive relief. If the conduct engaged in by the person in question could be categorised as trivial and unlikely to be repeated a court may well decline to intervene. But that is not the situation in the present case. The defendant, who during the course of the hearing described himself as a revolutionary communist, is seeking by his actions to achieve the result that no candidate for election will be returned with an absolute majority of votes as required by the Act, and that a supplementary election will have to be held. In that situation I propose to grant to the Commission the relief it seeks. I make the following orders in the proceeding....

> 3. Until 6.00 pm on 2 March 1996 or further order the Defendant, whether by himself, his servants or agents or howsoever otherwise, be restrained from printing, publishing or distributing, or causing to be printed, published or distributed, any matter or thing whatsoever with the intention of encouraging any person to vote at the federal election for the House of Representatives to be held on 2 March 1996 by filling in a ballot paper otherwise than by:

(a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference; and

(b) writing the numbers 2,3,4 (and so on as the case requires) consecutively without writing any particular number more than once, in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them.

4. The Defendant's motion be struck out.

5. The costs of this application of this proceeding be taxed and taxed by paid by the Defendant.

2.6 When Justice Beach finished reading out his reasons for judgement and orders on the afternoon of 8 February, Mr Langer asked to clarify some matters. He said that he intended to publish the judgement and the Judge said that it was open to anybody to do so. Mr Langer then said that there are other ways in which his message could be communicated to people. The Judge said that it was not his place to advise Mr Langer, except to say that he should be careful, Pentridge is not a comfortable place. Mr Langer then asked for a stay pending an appeal, but this was refused.

2.7 Immediately Justice Beach left the Bench, Mr Langer invited Mr Stephen Lucas of the Australian Government Solicitor, representing the AEC, to accompany him outside to see what he was about to do. Mr Langer then crossed the road outside the court and distributed his pamphlet "How to Vote for Neither!" to a group of people including journalists and photographers, in wilful defiance of the injunction just ordered against him. The next day his action was widely reported in the newspapers.

3 Contempt of Court

3.1 On 12 February 1996 the AEC filed in the Victorian Supreme Court a Summons addressed to Mr Langer in the following terms:

> You are summoned to attend before the Court on the hearing of an application brought by the Plaintiff that you be dealt with for contempt of the Order of the Court made by the Honourable Mr Justice Beach on 8 February 1996, namely that:
>
> > Until 6.00 pm on 2 March or further order the Defendant whether by himself, his agents or howsoever otherwise, be restrained from printing, publishing, or distributing, or causing to be printed, published or distributed, any matter or thing whatsoever with the intention of encouraging any person to vote at the federal election for the House of Representatives to be held on 2 March 1996 by filling in a ballot paper otherwise than by:

> (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference; and
>
> (b) writing the numbers 2, 3, 4 (and so on as the case requires) consecutively without writing any particular number more than once, in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them.

It is alleged that you committed a contempt of the Court by wilfully disobeying the said Order, in that at about 3.45 pm on 8 February 1996 in Lonsdale Street outside the Supreme Court you did publish and distribute a leaflet entitled "How to Vote for Neither!", a copy of which is annexed hereto.

The Plaintiff seeks orders that:

1. The Defendant be punished for the said contempt.

2. The costs of the application be paid by the Defendant.

3.2 A supporting affidavit was filed by Mr Stephen Lucas of the Australian Government Solicitor describing the events that took place after the injunction order on 8 February, as they were reported in "The Australian" newspaper on 9 February. Two other affidavits were filed by a journalist from "The Australian" newspaper, Ms Rachel Hawes, and a photographer from the same newspaper, Mr Graham Crouch, saying that Mr Langer had faxed them on 8 February inviting them to attend the Supreme Court on that day as he would be holding a press conference after the proceedings concluded. Ms Hawes and Mr Crouch said that Mr Langer held the press conference as indicated and had handed out his pamphlet "How to Vote for Neither!" to about 10 journalists and photographers.

3.3 On 14 February 1996 Justice Beach of the Victorian Supreme Court heard submissions from the AEC, represented by Dr Peter Buchanan QC, assisted by Mr Charles Gunst and instructed by the Australian Government Solicitor, and from Mr Langer, who represented himself.

3.4 As part of his oral submissions Mr Langer admitted that he deliberately engaged in the conduct described in the AEC affidavits as contempt of court, but then argued that Justice Beach had no jurisdiction to hear the matter because his original injunction order was wrong in law:

> You have made a judgement that the law of this country imposes a duty on voters to vote for candidates who they do not support. You could not hold a bona fide belief that is the law of the country. It is not the law of the backward police state, even the most corrupt regime does not expect voters to obey an enactment that tells them that they must vote for candidates who they oppose. That sort of electoral system is maintained outside its framework of laws through thuggery and intimidation, people being beaten up in back streets for not voting for candidates the regime wants them to vote for. No

country has or could have a written electoral law that requires or imposes on people to vote for candidates they do not support.

Australian electoral law spells out compulsory preferential voting, but you have interpreted that system as requiring that voters do not use repeated numbers. I do not believe that interpretation is correct, but that is not the matter before this court at this time.

If your interpretation was correct, if it was true that one could read into the words of s.240 of the Commonwealth Electoral Act an implied prohibition on voting against the candidates you reject and a duty to vote for candidates who you oppose, then it would follow automatically that that section was constitutionally invalid because no Parliament has the power to impose such a duty on voters. It is elementary, it is understood by any school child, that elections ought to be free. That has been the law of this country and of the people that it came from for more than 700 years. You cannot have a free election if you are under a duty to vote for somebody that you oppose.

The concept is obvious, you understand the concept, the Electoral Commission understands the concept, these proceedings are criminal, not legal. (*transcript, pages 7-8*)

3.5 Mr Langer also put to the court his support for compulsory voting and his view that the AEC was in league with the ALP Government at the time, as follows:

I'm not bullshitting when I say I support compulsory voting. I get into a lot of arguments with my friends about this, and I'm not the sort of person that pretends to support some law I oppose. There is no inconsistency between requiring people to turn up and express their political stance and their constitutional right to have whatever political stance they like and to choose whatever candidates they like, and the Electoral Commission would remove a great deal of grief from itself and wouldn't be jeered at in front of school sessions and so on if they would simply explain that fact, but they have another brief.

Their brief is to drum up votes for the Australian Labor Party, the government of the day. I don't know what they will do in a few weeks, but in the last twelve years they have been assigned the task of maximising the formal vote in disillusioned Labor voters, and they've been assigned a large budget to convince those voters that it is their duty to vote for the party they prefer, which in the majority of cases of people who deliberately vote informal is people who prefer the Coalition but don't want to vote for either, and the Electoral Commission has been actively involved in the election campaign to try and convince people who vote that this is illegal under various sections of the Electoral Act. (*transcript, pages 27-28*)

3.6 Mr Langer then expressed his willingness to accept punishment for the sake of his cause:

....if you were threatening to have me shot I would, despite my political beliefs, while continuing to advocate them, I would do so in a manner that ensured that I wasn't going to get shot, but it must be perfectly plain to you that threatening me with six month's imprisonment under the Act or whatever

> imprisonment you intend to impose on me isn't going to stop me sticking to my constitutional rights. It hasn't stopped other people either, but we're trying to see that we don't spend too much time in courts during the election campaign, so I'll be the one who - - Other people will explain what is going on which won't attract your attention and the Electoral Commission's attention....I can assure you that whatever penalty is imposed won't result in anyone ceasing to encourage people to vote against the candidates they reject (*transcript, pages 29-30*)

3.7 At the conclusion of the hearing on 14 February 1996, Justice Beach delivered his reasons for judgement and his orders as follows (in part):

> In my opinion it would be difficult to imagine a clearer or more blatant contempt of court. The defendant now contends that this Court had not jurisdiction to make the order I did on 8 February. In my opinion, such an argument cannot be sustained....
>
> It is clear to me that the defendant does not appreciate that one of the paramount features of a democracy is that its citizens obey the rule of law. If a citizen in our society wishes to challenge the validity of the law passed by Parliament, and there have been many instances in this country where such challenges have been successful, then there is ample opportunity for him to do so. But until such time as a law has been declared to be invalid by a court having jurisdiction to make such a declaration it is the duty of all citizens to obey that law and it is the duty of the courts to enforce the law.
>
> In the present case the defendant challenged the validity of s.329A of the Act before the High Court. On 7 February last the High Court dismissed his challenge and declared that s.329A was a valid enactment of the Parliament of the Commonwealth.
>
> It is clear to me that not only has the defendant breached the order I made on 8 February but that if he is not prevented from doing so he will continue to breach the order. In that situation the defendant leaves me with no alternative but to sentence him to a term of imprisonment.
>
> The defendant is hereby sentenced to be imprisoned until 30 April 1996.

3.8 On behalf of the AEC, Dr Buchanan then sought costs against Mr Langer on a solicitor/client basis. Mr Langer was asked by Justice Beach for his views and he responded as follows:

> The most effective means by which people have been intimidated by the Electoral Commission has been the order for costs. There are quite a large number of people who are particularly worried about the threat of jail but I know of several cases where they have been trying to sell people's homes and so on. It is a very effective method of intimidation. It doesn't particularly affect me. I won't pay their costs but it is quite deliberately used openly as simply a further means of making sure people don't resist their intimidation. Everybody knows in a criminal case if you do get sentences you will get sentenced, you don't get a bill for $20,000 for the people standing around pontificating on the Crown's behalf. The purpose of these costs orders and the whole purpose of injunctive proceedings is to intimidate into action but

since you have approved of that intimidation no doubt you will approve of the costs order as well, they all go together.

3.9 Justice Beach then made an order that the defendant pay the plaintiff's costs on a solicitor/client basis, and Mr Langer was escorted from the court to commence his period of detention at Pentridge jail.

4 Injunction Appeal

4.1 On 23 February 1996, Mr Langer filed in the Federal Court of Australia a Notice of Appeal to have the injunction order of 8 February made by Justice Beach of the Victorian Supreme Court set aside and discharged, with costs, on the following grounds:

> 1. The said orders were wrong in law.
>
> 2. The exercise of the Court's discretion miscarried.
>
> 3. The Court took into account irrelevant considerations and/or failed to take into account sufficiently or at all relevant considerations.
>
> 4. The Court erred when it professed to take into account that the Appellant during the course of the hearing described himself as a revolutionary communist and was seeking by his actions to achieve the result that no candidate for election will be returned with an absolute majority of votes as required by the Act, and that a supplementary election will need to be held.
>
> 5. The Court misconstrued sections 240 and 329A of the Commonwealth Electoral Act (the Act).
>
> 6. The Court wrongly took into account in the construction of s.240 of the Act the Supplementary Explanatory memorandum to the Electoral and Referendum Bill 1992.
>
> 7. The Court failed to have any or any sufficient regard to any operation of s.28 Crimes Act 1914.
>
> 8. The Court was in error in finding that the Appellant had engaged was engaging or was proposing to engage in any conduct that constituted or would constitute a contravention of the Act.
>
> 9. The Court failed to give any or any sufficient weight to the operation of s.270 of the Act.

4.2 On 26 February 1996, an affidavit sworn by Mr Gregory Smith of the Fitzroy Legal Service, acting for Mr Langer, was filed in support of the appeal. Mr Smith said that the injunction order and the contempt order restricted Mr Langer's ability to freely participate in, and ability to freely express his views concerning, the federal election.

4.3 Also filed by Mr Langer were written submissions to support the appeal against the injunction order, in the following terms (in part):

...The Appellant had argued that what he was encouraging voters to do was in accordance with s.240....The finding that the Appellant had the necessary intention was based on rejecting the Appellant's construction of s.240....The injunction granted by Beach J adds to the words of s.240 the words "consecutively and without repeating any numbers". Beach J justified that on the basis of his construction of s.240 ("the only sensible interpretation of s.240") and thus proceeded not on the basis of what s.240 says but on the basis of what in his opinion it was intended to mean. Beach J said that it was unnecessary to imply any words into s.240(b) and did not expressly do so. But the result in terms of the injunction granted amounts to reading words into the legislation, because the Appellant's material encouraged voters to do something which was open under the actual words of s.240...

The requirement for an injunction is the criminal contravention of s.329A. Persons are not to be found to be engaging in crimes on the basis of ambiguities and subtleties....Beach J's order offends against the principle that a crime should not be based on ambiguities and subtleties. The Appellant's position is that there is another construction of s.240 without adding words to the section which permits that which he advocates. The contention is that to complete a voting paper e.g. 1, 2, 3, 3, 3 is to complete it in accordance with s.240 so that his intention was not to encourage persons to vote otherwise than in accordance with s.240. On the contrary, his intention was to encourage voters to vote in accordance with s.240. On this construction there was no contravention of section 329A....Even if in the end it is determined by this Court that s.240 should be read as if it contained the words "consecutively and without repeating any number", yet the uncertainty as to whether those words should be read into s.240 attracts the principle against creating crimes by construction and the injunction should not have been granted.

Even if the necessary condition was satisfied, the exercise of Beach J's discretion miscarried....It is not only in cases of trivial or non-repeated conduct that an injunction should be declined. What had to be addressed were not the Appellant's political beliefs and aims but the likely consequences if the injunction was not granted. Beach J made no finding as to whether the Appellant had any prospect of achieving the aims to which he referred or whether serious harm was in prospect. The evidence before him did not show any necessity to grant the injunction. The Appellant should have been left to the due process and safeguards of the criminal law if s.329A was to be invoked against him....

A further factor which should have affected the exercise of the Court's discretion is that what is in issue is a restriction of the Appellant's freedom of expression. The free exercise of political rights and duties is of such importance in Australia that it is a crime to interfere with the free exercise or performance of such rights and duties under s.28 Crimes Act 1914. The High Court has implied limits on the powers of Parliament to preserve freedom of political discussion to maintain representative government....

In upholding the validity of s.329A the majority of the High Court in Langer v Commonwealth held that the section did not prohibit discussion about the operation or desirability of the method of voting prescribed by s.240 nor the advocacy of its amendment or repeal. The restriction on freedom of speech

> imposed by s.329A was regarded as an incident to the protection of the s.240 method of voting. In considering whether to grant the injunction Beach J should have weighed against the grant the fact that it would directly interfere with the Appellant's political rights. The Court should not have exercised the power to do so in the absence of any emergency or substantial risk of serious harm.

4.4 On 27 February 1996 a directions hearing was held before Chief Justice Black of the Federal Court. Mr Dwyer QC, assisted by Mr Lopez and Mr Pagone, appeared for Mr Langer, and Mr Charles Gunst appeared for the AEC. Mr Dwyer, on behalf of Mr Langer, made an application that the hearing of Mr Langer's appeal be expedited, drawing attention to the fact that the injunction expired at 6 pm on polling day, and any hearing after that date would be of an academic nature only. Mr Gunst, on behalf of the AEC, did not oppose a speedy hearing.

4.5 Accordingly, Chief Justice Black decided that the appeal against the injunction should be heard the next day. The Chief Justice also suggested to Mr Dwyer that he approach the State authorities or the Victorian Supreme Court to see whether Mr Langer could be present for the hearing. Later that day, the parties were called to the court to be informed that Mr Langer had sacked his legal representatives, and now that he had gained the approval of the authorities to attend court, he would represent himself.

4.6 At the injunction appeal hearing on 28 February 1996, before Black CJ, Lockhart J, and Beaumont J, of the Federal Court, the AEC was represented by Dr Peter Buchanan QC, assisted by Mr Charles Gunst and instructed by the Australian Government Solicitor, and Mr Langer represented himself.

4.7 Mr Ron Castan QC, assisted by Mr Pagone, on behalf of the Human Rights and Equal Opportunity Commission (HREOC), sought to intervene under section 11 of the Human Rights and Equal Opportunity Commission Act 1986 in order to argue the human rights aspects of Mr Langer's imprisonment for contempt of court, and the unconstitutionality of section 329A, as being in breach of the implied freedom of political communication. When Mr Langer was asked his views on whether HREOC should be permitted to intervene he said the following:

> My understanding is that the main question that will be argued today is the construction of section 240, whether it does or does not require that you may not use repeated numbers to indicate which candidates you reject, and I certainly think it would be very helpful to the court to have the Human Rights Commission here arguing that point....
>
> On the second question of reopening s.329A I am somewhat at cross-purposes with the Human Rights Commission on this and the legal profession generally. I think they are perfectly entitled to intervene. On that issue they would be in a sense intervening against both of us. My position all along is that this is not a question of freedom of speech, it is a question of election and the arguments I presented to the High Court were that section 329A is invalid for other reasons that are not connected with the issues before you.

> There was one major connection with the issues before you is that I did argue that because it is obvious from the debate in Parliament that their intention was to intimidate people from voting against candidates they reject, that even though the words they used were a miserable failure at drafting such an enactment, it was nevertheless invalid because they are simply in breach of trust that the powers that are given to them are not to be used to mislead and intimidate electors in an election. The High Court refused to consider that argument and they rejected or also refused to consider my other arguments that the Parliament was invalidly constituted and so on.
>
> But I did not put the argument on freedom of speech which the Human Rights Commission wishes to put, because freedom of speech is quite irrelevant if you do not have freedom of election. I mean, obviously any regime that does require voters to vote in support of candidates who they reject could not possibly tolerate freedom of speech at the same time. I mean it just would not work. So I think it would be quite pointless to bring up that argument. Since they do wish to bring that up I think they are entitled to intervene against both of us on that point. (*transcript, pages 9-10*)

4.8 After further discussion with Dr Buchanan, on behalf of the AEC, and Mr Castan, on behalf of HREOC, the Court indicated that the constitutionality of section 329A was a matter that had already been decided by the High Court, and instead allowed Mr Castan to appear on behalf of HREOC in an amicus curiae role to assist the Court.

4.9 Mr Langer proceeded to put his oral submissions along the lines of his written submissions, that is, that Beach J misconstrued section 240 in granting the injunction, and then reiterated his attack on the AEC in the following terms:

> In an English speaking country, and in Australia, nobody could imagine that the order of a person's preference means other than what it says. The interpretation that is being put on this section of the Act by the Electoral Commission, is not a question of having misconstrued the Act or having misconceived the meaning of the words two, three, four and so on. It is not a problem of numerical illiteracy, it is a problem of criminal interference with political liberties. These people have worked deliberately to make sure that this election is not free by trying to intimidate people to vote for candidates who they want to vote against. And when you actually come to counting the votes and you then that there are in fact tens of thousands of people who have numbered the candidates of the ALP and the Coalition last, it would be very strange if the Courts of this country declared that that is not the order of those persons preferences.
>
> And that is precisely the finding you would have to make of you were to find that Beach J's order was a valid order of the Supreme Court of Victoria. You would have to find that people who deliberately mark their ballot papers in a manner that the Electoral Commission would rather they did not mark them, but clearly choose to mark candidates equal last because they reject those candidates, that they are not marking them with the order of their preference. And the simple fact is that what is before you is that the Electoral Commission does not want people to mark their ballot papers in accordance with the order of their preference. It wants people to mark their ballot papers

> in accordance with the order of the Electoral Commission's preference. (*transcript, pages 18-19*)

4.10 Mr Langer also made clear that he was not advocating optional preferential voting under section 270 (as he and Mr van Moorst had done in the past) but was advocating optional preferential voting on the basis that a proper construction of section 240 would allow the repetition of numbers:

> My intention is in fact very clear when you look at the High Court transcript and so on, that I have been arguing consistently that section 240 does permit these votes and I have even gone to the point here of saying that in raising the constitutional issue about 329A in these terms, the Human Rights Committee would have to be intervening against me. Right, I am not a person who has been encouraging people to take advantage of some loophole such as section 270 in order to vote otherwise than in accordance with 240. (*transcript, page 25*)

> ...section 270 is merely a safeguard for people who accidentally do something. It was never intended to weaken the compulsory requirement in the Commonwealth Electoral Act section 240 that you indicate your choice with respect to each candidate. (*transcript, page 37*)

> I completely agree with the Electoral Commission and all the members of the High Court in saying that section 270 is simply to save some votes that would have otherwise been treated as informal beforehand. That clearly was the intention in enacting section 270...(*transcript, page 51*)

4.11 Mr Langer then put his view that it would have been more appropriate for the AEC to have prosecuted him rather than obtaining an injunction against him:

> There is simply no excuse for using the injunctive process as a substitute for the ordinary process of prosecution, the ordinary process of legal argument and so on in a case like this. And if there was a possibility of grave and irreparable damage from people knowing that they can vote a certain way in a parliamentary election, then that damage has well and truly been done, and it would be obvious that the injunction could also be refused on grounds of futility, then there could be no surer way to do the grave and irreparable damage that the Electoral Commission would presumably be claiming, than to issue an injunction which you know perfectly well will be immediately breached, and which will lead to exactly the consequences that the Electoral Commission fears. So it has just never made sense to be using an injunction rather than a prosecution if there had been such a law.

> ...it is reserved to the Attorney-General to issue injunctions restraining criminal offences. And no-one else has standing to do it. This section 383 of the Electoral Act gives a standing to the Electoral Commission which they otherwise would not have. Normally it would only be the Attorney-General and the reason is that using the process of injunctions to deal with criminal offences is a highly unusual procedure which is basically reserved for certain very exceptional cases...

> Now the Electoral Commission is obviously a substitute for the Attorney-General and that is very appropriate during elections because the Attorney-General would naturally be regarded as less than impartial during an election campaign. But it is very much a political judgement to request it in the first place and then it is very much still a matter of the court's discretion whether to grant it. (*transcript, pages 46-47*)

4.12 On the conclusion of Mr Langer's submissions, Mr Castan, on behalf of HREOC, submitted that, on a proper construction of section 240, and in view of some apparent equivocation by members of the High Court, it is not impermissible to repeat numbers, and therefore advocating such a vote cannot be a breach of section 329A. In support of Mr Langer's submissions, Mr Castan observed that section 240 does not explicitly say that a person must number every square consecutively without repeating any number, and went on to say:

> If Parliament is going to make it a criminal offence under 329A to do other than that which section 240 proscribes, then Parliament has to be very explicit about what section 240 proscribes, or putting it another way, a court has to be very clear that there has been a breach of that which the section proscribes. If the section itself is capable of more than one interpretation, if the High Court judges are varied in their view of what it really means, then it is not appropriate - then urging one of those alternatives is not an appropriate occasion for the imposition of criminal penalties or the imposition of an injunction that is expressly provided for in legislation in this instance. That is really the essence of the case. (*transcript, page 64*)

4.13 Mr Castan concluded as follows:

> ...a critical component of any criminal offence...is the question of intent. This offence under section 329A requires, or puts an onus on the prosecution to demonstrate that the conduct was conduct which was undertaken with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise in accordance with section 240. It is, I think, not in controversy that the appellant believed - as he has contended forcefully before your Honours and before Beach J - that section 240 permitted the very thing he was advocating.
>
> We contend that it does so permit and it is a legitimate view, it is not some bizarre and strange view, and it is the view we think of at least three High Court judges. If he has that intent, that is to say, he believed that the people he was urging to vote in this way were voting in accordance with section 240 then he did not have the intention and it could never be said of him that he had the intention to encourage persons to vote otherwise than in accordance with section 240 even if he was wrong about the correct meaning of section 240. (*transcript, page 71*)

4.14 Dr Buchanan, on behalf of the AEC, then dealt with the construction of section 240 by Justice Beach in the context of the legislative framework of the CEA, and with the question of Mr Langer's intentions in breaching the law. He also submitted that section 274(11) of the CEA makes it clear that a supplementary election is not the necessary outcome of a large number of exhausted votes being cast in a Division, as claimed by Mr Langer.

Exhausted votes are in fact set aside and do not count towards the formation of an absolute majority.

4.15 Mr Langer then gave his reply and concluded his submissions as follows:

> This is an English speaking people, we will vote for who we choose, we will vote against who we choose....I would not be at all averse to lecturing you as to what the true principles of the Constitution require, knowing full well that no judge will agree with me for another generation or two. But this stuff has been part of the fundamental common law of this and every other English speaking country for too many generations for it to be the subject of an argument between me as a defendant and the Electoral Commission as a plaintiff. When this comes to court as a real serious argument it will be with them as a defendant on a criminal prosecution for deliberate and wilful and malicious interference with political liberty. (*transcript, page 90*)

4.16 At 10.20 am on Friday 1 March 1996 Chief Justice Black dismissed, with costs, the appeal by Mr Langer against the injunction order of Justice Beach on 8 February. The reasons for decision were delivered at 2.15 pm that afternoon, and read in part as follows:

> Section 240:
>
> ...The appellant argued that to construe s.240 as it was construed by the Supreme Court in effect adds to the words of the section the words "consecutively and without repeating any numbers" after the words in parentheses in paragraph (b) of the section. This was said to be an impermissible course and to involve reading into an Act of the Parliament words which are not there....
>
> In our opinion the plain meaning of s.240 is that squares in a ballot paper are to be marked with as many consecutive numbers as there are candidates. The voter must place a number in each square commencing with the number "1":
>
> > and rising consecutively, so as to indicate the voter's order of preference for each candidate. A complete expression of preferences for all candidates is required irrespective of the difficulty that a voter may have in deciding the order of preference. A ballot paper that gives the same number to more than one candidate is in breach of the directions that the section addresses to the voter, although that breach is not made punishable by fine or imprisonment. (Langer v The Commonwealth per McHugh J at 32.
>
> The consecutive numbers 2, 3, and 4 precede the words "and so on" in s.240; and this means that the numbering must be carried on in the same manner, that is consecutively and without repetition of any numbers.
>
> If a voter marks a vote on the ballot paper by repeating the same number against the names of two or more candidates, the voter does not "indicate the order of the person's preferences for..." the candidates within the meaning of s.240(b). To give the same repeated number to two or more candidates fails

to express a preference between them. At least in the present context of a requirement to indicate an order of preference, the word must be taken to have been used in its ordinary meaning as involving one thing being put before another.

Mr Langer and Mr Castan submitted in effect that, for fundamental reasons, decisive force had to be given to the expression "so as to indicate the order of the person's preference" to the extent that if a person did not wish to cast any vote in favour of a candidate - the completely rejected candidate and the equally rejected candidate in Mr Langer's pamphlet - s.240 itself, on its proper construction, did not compel that and allowed for a 1, 2, 3, 3 marking on a ballot paper. In our view however this argument cannot be sustained in the context of legislation that, validly as the High Court has held, provides for compulsory voting using the preferential method: see generally Langer v The Commonwealth at 4-6 per Brennan J and at 36 per McHugh J.

Moreover, in our view, the construction of s.240 that we consider to be correct (also that adopted by Beach J) is in conformity with the views expressed by each of the members of the High Court in Langer v The Commonwealth.

It is quite clear that McHugh J specifically rejected the construction of s.240 contended for by the appellant, as appears from the passage from his Honour's reasons previously cited.

Mr Langer conceded, of course, that the observations of McHugh J were against him; but he submitted that none of the other four members of the court had expressed a view about the construction of s.240. We do not agree, and we now turn to consider each of the other judgements in Langer v The Commonwealth.

At the commencement of his judgement, Brennan J observed that the method of voting prescribed by s.240 "can be described as full preferential voting" and we take the Chief Justice to have used this description in contradistinction to the method that Mr Langer contends is allowed by s.240. That method cannot be described as optional preferential voting or selective preferential voting: see per Dawson J, especially at 12.

Moreover, the following passage in the judgement of the Chief Justice (at 6) seems to us to involve an implicit rejection of the foundation of Mr Langer's argument. The Chief Justice said:

> It follows that the Parliament is empowered to prescribe a method of voting in an election for the House of Representatives that requires a voter to fill in a ballot paper in accordance with s.240 *although that method requires a voter to choose by allocating preferences among candidates for whom the voter does not wish to vote.* It is not to the point that, if a ballot paper were filled in otherwise than in accordance with s.240, the voter would better express the voter's political opinion. (our emphasis)

Dawson J, dissenting, considered that s.329A was not a valid enactment of the Parliament. His Honour said of s.240 that it "requires numbers to be written in the squares opposite the names of all candidates so that, when the

numbers are read consecutively, the voter's order of preference of all candidates is indicated" and then (at 12) set our examples of votes that s.270 would save from informality. Those examples include the "1, 2, 3, 3" example put forward by Mr Langer as a vote that may validly be cast in accordance with s.240, as that section stands without modification by any other section. Having described the result brought about by s.270 operating together with s.240, Dawson J said (at 12):

> This result has been described as optional preferential voting or, perhaps more accurately, selective preferential voting as opposed *to the full preferential system of voting which is envisaged by s.240 standing alone.* (our emphasis)

It is of course quite true that for some purposes ss.240, 268 and 270 must be

"oblige" a voter express a preference for a candidate against whom he or she wished to vote. As we point out elsewhere, for the purposes of s.329A, s.240 does not have to read alone.

The other member of the court, Gummow J, was quite specific in what he said about s.240. His Honour said (at 45):

> Section 240....states that electors 'shall mark' their vote on *the ballot paper in a particular fashion so as to cast a fully exercised preferential vote*. The other provisions of ss.268 and 270 are ancillary (in the manner I have described) to the primary objective of the legislation, and do not evince any legislative intent to make optional or selective preferential voting available as an alternative to full preferential voting. (our emphasis)

We should note too that his Honour said (at 46) that s.329A was a law that prohibited conduct of the nature and quality identified in it by reference to s.240, which had the tendency to undermine the efficacy of the system in accordance with which the vote of an elector is to be recorded and counted. He added:

> *That system does not include optional preferential or selective preferential voting.* The key to that system is provided by the expression 'shall mark' in s.240 and it is in aid of this that s.329A operates. (our emphasis)

Beach J did not, of course, have the benefit of the High Court's reasons in Langer v The Commonwealth since, although the High Court published its order on 7 February 1996, before Beach J delivered judgement, the High Court's reasons for judgement were not delivered until 20 February 1996, by which time the injunction had been granted.

We should add that we reject the submission that this is a case for the application of the principle against reading into an Act of Parliament words that are not there. The construction that we consider to be correct does not involve any such process. The additional words used in the injunction granted by beach J are desirable for the purpose of making it clear beyond any reasonable argument what it is that the injunction prohibits, but as a matter of statutory interpretation the language of the section is perfectly clear, in our opinion, without any such words.

Whether or not the views expressed by the members of the High Court about the construction of s.240 are, as a matter of the strict operation of the doctrine of precedent, binding upon us as part of the ratio of the Court's decision in Langer v The Commonwealth, what their Honours have said about the section must, quite obviously command great respect.

Section 329A:

We turn to s.329A....In our opinion the intention of which s.329A speaks is an intention of the accused to encourage persons voting at the election to fill in ballot papers in a manner which in fact contravenes s.240, whether the accused believed that the form of ballot paper advocated by the accused accorded with s.240 or not.....

If the intention required by s.329A was an intention that the person encouraging persons to fill in ballot papers in a particular manner must believe that the manner advocated is otherwise than that prescribed by s.240, the conclusion must follow that an injunction cannot be obtained under s.383 to restrain contravention of s.329A unless the person understands the proper construction of s.240. It would follow that the only persons who could be restrained by such injunction would be those who correctly construe s.240. This would be a surprising result, and thus supports our interpretation of s.329A

Discretion:

There remains the question whether Beach J erred in exercising his discretion in favour of granting the injunction. The power of a prescribed court (in this case the Supreme Court of Victoria) to grant an injunction pursuant to s. 383 is a power, exercisable in the public interest, to ensure that federal elections are properly conducted and that ballot papers are marked and votes cast by voters in accordance with the method laid down by the Parliament in s. 240.

The evidence before Beach J satisfied his Honour, in our opinion correctly, that it was the intention of the appellant to encourage electors at the forthcoming federal election to fill in their ballot papers by not writing the numbers 2,3,4 and so on consecutively without writing any particular number more than once.

Beach J perceived that the appellant had clearly evinced an intention to act in the future in accordance with the construction of s. 240 for which he contended, namely, permitting a repetition of a particular number in the square opposite the names of candidates.

His Honour concluded that it was necessary to prevent the commission of the acts proscribed by s. 329A by injunctive relief. We are not persuaded that his Honour erred in the exercise of that discretion. Mention was made at one stage of his Honour's reference in the course of his reasons for judgement on the question of discretion to the fact that the appellant had during the courts of the hearing before the Supreme Court described himself as "a revolutionary communist". Notwithstanding such reference by his Honour, we are far from persuaded that it could have played a material role in the exercise of his Honour's discretion. His Honour's reasons for judgement must be read as a whole to determine the circumstances that were regarded by him as relevant in deciding to grant the injunction against the appellant. We perceive no error of principle in the exercise of that discretion.

It should be noted that, on behalf of Mr Langer, reference was made to the principles of the general law that limit the grant of injunctions to enforce the criminal law.....But those principles can have no direct application in the present case since the Parliament has specifically legislated for the grant of injunction in the present context.

Conclusion:

> As mentioned earlier, the appellant informed us that he wished to appeal against the order of the Supreme Court made on 14 February that he be imprisoned for contempt. We indicated in the course of argument that it was not possible at this stage to deal with that question, the appeal having been brought on for hearing within a matter of says after the filing of the notice of appeal and no prior notice of an appeal against the order for imprisonment having been given to the Commission.
>
> In the opinion of the Court leave to appeal from the judgement of the Supreme Court of Victoria given on 8 February 1996 should be granted, in so far as the same may be necessary.
>
> The appeal should be dismissed except with respect to the question whether this court has jurisdiction concerning the proceeding for contempt heard and determined by the Supreme Court on 14 February 1996, including any appeal against the sentence of imprisonment imposed on 14 February in that proceeding.

4.17 After the delivery of the judgement Mr Langer said that he might not pursue his appeal against the contempt order if the AEC was intending to press for costs in the event of him failing in the appeal. The AEC advised the Court that it intended to pursue costs under the circumstances, and the Chief Justice directed that the issue of costs would be reconsidered when the court met in the next week to hear the contempt appeal. Mr Langer was then escorted back to jail.

5 Contempt Appeal

5.1 On 4 March 1996 Mr Langer filed with the Federal Court a Notice of a Constitutional Issue pursuant to section 78B of the Judiciary Act 1903 on the constitutional issues raised, and a Supplementary Notice of Appeal against the contempt and costs orders of Beach J of the Victorian Supreme Court on 14 February 1996, on the following grounds:

> 1. My imprisonment is a direct attack on the sovereign prerogative of the Australian people to choose freely their representatives in both houses of the Parliament of the Commonwealth. So are the proceedings and orders for costs made against me. Any enactment purporting to authorise such proceedings is beyond the power of the subordinate legislature established by Chapter 1 of the Constitution.
>
> 2. If the construction placed on sections 240, 268, 270, 274 and 383 of the Commonwealth Electoral Act 1918 is correct then those provisions are beyond the power of the Parliament of the Commonwealth as candidates declared elected pursuant to the Act would not be representatives directly chosen by the people in free elections as required by the Constitution.
>
> 3. The determination made by the Parliament of the Commonwealth that each State shall be arbitrarily divided into single member electoral divisions is not a “law for determining” authorised by the Constitution but a “determination” made by the members of the political parties that benefit from that determination. Consequently the Constitution requires that elections for the House of Representatives be held with each State voting together as one

electorate in the absence of other valid provisions. No writs to hold a valid general election in 1996 for the House of Representatives have been issued. Consequently it is not possible to breach any order concerning voting at an election that was not validly held.

4. Alternatively if the Writs for an unrepresentative "two party" legislature based on single member electorates were valid, the direction of coercing electors to vote in favour of candidates they opposed was invalid and no court has jurisdiction to restrain or punish anybody for encouraging electors to vote freely instead of participating in an invalid election.

5. Beach J erred in holding that "until such time as a law has been declared invalid by a court having jurisdiction to make such a declaration it is the duty of all citizens to obey that law and it is the duty of the courts to enforce the law."

(a) The duty to obey the law is not limited to citizens.

(b) No court has jurisdiction to declare a law invalid. The power to dispense with existing laws was denied to the Crown by the Bill of Rights in 1689 and has never been granted to any court.

(c) An enactment made beyond power is not and never has been a law at all. Anyone may disregard it and no court has the power to enforce it.

(d) The concept of a court having power to enforce enactments which Parliament has no power to enact is as absurd as the concept that Parliament has power to require electors to vote in favour of candidates they reject. This nonsense could only be taken seriously in connection with a plea of insanity as a defence to a charge of criminal interference with political liberty.

6. Beach J erred in holding that "one of the paramount features of a democracy is that its citizens obey the rule of law."

(a) The rule of law is a pre-condition, not a "paramount feature" of democracy and dates back to the Papal Revolution in Medieval Europe. It simply requires Government through known and ascertainable laws rather than the arbitrary orders of Government officials.

(b) Resistance to usurped or tyrannical authority is an essential component of the rule of law formerly recognised as such since the Magna Carta.

(c) The paramount feature of a democracy is that the courts enforce only laws authorised by the citizens, either directly or through representatives chosen freely by the citizens.

(d) The citizens are ultimate guardians of both democracy and the rule of law. Their maintenance depends on precisely that resistance to usurped authority which Beach J seems to punish.

(e) The first Statute of Westminster was directed to the "great men" who as lords and magistrates constituted the Government of the day. Its modern equivalent, section 28 of the Crimes Act 1914, is binding on the courts and judges of every State. It prohibits orders interfering with political liberty as a serious crime and authorises defiance of such orders.

7. Beach J erred in holding that distribution of a leaflet to journalists at a press conference immediately following his order constituted a breach of the order and erred in taking into account the fact that I had stated and continued to state that I would not comply with his order. No evidence was given and no finding was made that the leaflet was distributed to the journalists with the intention of encouraging electors to vote contrary to the orders of Beach J. It was equally open for Beach J to interpret the distribution of a leaflet as informing the journalists as to the case they were reporting and what it was that Beach J had just prohibited distributing. The power to punish for breach of an order does not authorise preventative detention to avoid an anticipated breach of an order. Alternatively, if such preventative detention is authorised as a natural corollary or usurpation of the right of the Australian people to choose freely their representatives in Parliament then there is no basis for continuing the imprisonment after polling day on 2 March 1996.

8. As construed section 383 of the Commonwealth Electoral Act 1918 is invalid as a violation of the constitutional separation of powers.

9. The order for costs against me was made on behalf of the Australian Electoral Commission by a court authorised by statute to nominate the presiding officer of that commission and therefore cannot be a valid order of a court of law.

10. The said orders were wrong in law.

11. The summons dated 12 February 1966 filed by the Australian Government Solicitor in matter number 4287 of 1996 in the Supreme Court of Victoria did not particularise sufficiently the allegations that the Appellant had committed a contempt of court.

12. The Appellant had insufficient notice to prepare or properly prepare for the hearing of this matter.

13. The Court had no evidence or insufficient evidence before it that the Appellant breached the orders of the Court made on 8 February 1996.

14. The Court erred in not adjourning this matter on 14 February 1996.

15. The Court erred in finding that the conduct by the Appellant on 8 February 1996 constituted a breach of the orders made by the Court on 8 February 1996.

16. The order of the court punishing the Appellant for contempt of court by a period of imprisonment until 30 April 1996 was excessive.

5.2 At the contempt appeal hearing on 7 March 1996 before Black CJ, Lockhart J, and Beaumont J of the Federal Court, Dr Buchanan QC, assisted

by Mr Webster and instructed by the Australian Government Solicitor, appeared for the AEC; Mr Pagone appeared for the Human Rights and Equal Opportunity Commission (HREOC) in an amicus curiae role; and Mr Langer represented himself.

5.3 Mr Langer elaborated on his written submissions, indicated that he thought that many other people were now distributing an identical leaflet to that which he had distributed, and then went on to say:

> The consequence of jailing me of course was that much larger numbers of people have publicly advocated what I was publicly advocating and that the inevitable consequences of this will be this particular legislation will be repealed. But I think it will be much more interesting as to whether they get away with repealing it or whether there is a more general movement to get rid of the two party system.
>
> ...I pointed out that in any regime that does have censorship it is traditional for people to make a mockery of what is being censored by pretending to comply with it, by expressing it in various ways like this how-to-vote petition is an example of making a mockery of it. But you would get a very complex jurisprudence in which, as the cases flow through the courts, you would have to work out was this person wearing a T-shirt about Tweedledum and Tweedledee, was that done with the intention of encouraging people to vote in a certain way....
>
> And quite obviously it was quite ineffective in ensuring compliance. I mean I was still broadcasting from within the prison and being interviewed on both radio and TV, and certainly large numbers of other people were doing exactly what the Judge sought to prevent. (*transcript, pages 118-119*)

5.4 Mr Langer argued that it had not been established that he had the requisite intention to break the law when he was distributing his leaflets outside the court on 8 February, and concluded by saying:

> ...it would be very desirable for you to let me go at once. I have achieved my objectives. There is no further useful purpose that you can serve on my behalf by continuing to make a complete mockery of the judicial system and the electoral system in this country, and I have better things to do. Thank you. (*transcript, page 131*)

5.5 Dr Buchanan, on behalf of the AEC, then submitted that the AEC's interest was limited to the due conduct of elections, and its interests were not served by the imprisonment of Mr Langer after the date of the election. Mr Pagone, on behalf of HREOC, rested on his written submissions to the court. The court adjourned at 12.30 pm and handed down its reasons for decision and orders at 4 pm, which read as follows (in part):

> On this appeal, Mr Langer contended that the evidence before the Supreme Court, although not contested as to its factual accuracy, was insufficient to support the inference that he had the requisite intent. We do not accept that argument. To the contrary, we consider that the finding of intent was fully justified. Accordingly, we would dismiss the appeal against the conviction for contempt of court. We turn now to the appeal against the sentence...

> On the hearing of the appeal, the Commission [AEC] informed the Court that "its interest is limited to the due conduct of elections, and its interests are not served by the imprisonment of the appellant after the date of the election". This statement is not, of course, by any means determinative of the present question.
>
> Assuming that it was proper to order immediate imprisonment, it does not appear from the reasons given by his Honour [Justice Beach] why a term of as much as ten weeks was thought to be appropriate in the circumstances. As we have said, any term of imprisonment, particularly a term of ten weeks, should be imposed only in a serious case. In our view, a term of that length is, on its face, too long and it is appropriate that an appellate court should now intervene.
>
> We are further of the view that it is appropriate that this Court now address the exercise of the sentencing discretion. In this connection, we note that none of the relevant facts could seriously be disputed. In exercising our discretion, we take into account the attitude of Mr Langer in his rejection of the authority of the judicial system to grant the present injunction which, however, stems from a belief he holds that the laws sought to be enforced against him are not valid and destructive of true freedom of electoral choice. We have concluded that, in all the circumstances, a term of imprisonment is the appropriate sentence. This would, we think, reflect the gravity of the contempt, given the public importance of compliance with the laws made by the Parliament for the conduct of elections. The imposition of a fine would not adequately reflect this. The question remains of the term of than imprisonment.
>
> We have referred earlier to the attitude of the Commission [AEC] on sentence, but in our opinion, it is proper that a broader view be taken of the whole matter. Although the Commission's responsibilities may be seen to be limited to the period expiring at 6 pm on 2 March, there are other considerations to be taken into account. In particular, as we have said, an important element in the contempt is the attempt by Mr Langer to challenge the authority of the court system to grant the injunction in the enforcement of a law made by the Parliament for the conduct of elections. This should be reflected in the term of imprisonment. In our view, a term of imprisonment of 21 days is proper.
>
> We would vary the order of the Supreme Court accordingly. Since Mr Langer has already served a term of that period, we propose to order his release forthwith.

5.6 The court then ordered that there be no order for costs on any aspect of the injunction appeal or the contempt appeal and Mr Langer was freed from jail on the rising of the Court.

6 High Court Appeal

6.1 On 22 March 1996 Mr Langer delivered to the Australian Government Solicitor, acting on behalf of the AEC, an Application for Special Leave to Appeal to the High Court, and a Statement in Support of the Application. Mr

Langer is seeking leave to appeal to the High Court against the whole of the judgement of the Federal Court on 1 March 1996 (the injunction appeal) and the order dismissing his appeal on 7 March 1996 (the contempt appeal), on the following grounds:

2. The Court wrongly held that it is lawful for a Court or a Judge to order a person not to encourage electors to vote against candidates they reject at a Parliamentary election and lawful to summarily imprison a person to prevent resistance to such an unconstitutional usurpation of authority or to punish such resistance, contrary to the First Statute of Westminster 1275 and section 28 of the Crimes Act 1914.

3. The Court should have held that it is lawful to resist unconstitutional usurpation of authority and unlawful to imprison a person to prevent or punish such resistance.

4. The Court should also have held that it is unlawful and a contempt of the High Court to prevent a litigant obtaining relief from electoral intimidation in the High Court by prevailing on a lower Court to imprison the litigant.

5. The Court misconstrued section 240 of the Commonwealth Electoral Act 1918 ("the Act") when it held that s.240 requires voters to cast a positive vote in favour of candidates rejected by the voters as follows:

> If a voter marks a vote on the ballot paper by repeating the same number against the names of two or more candidates the voter does not "indicate the order of the person's preference for..." the candidates within the meaning of s.240(b). To give the same repeated number to two or more candidates fails to express a preference between them. At least in the present context of a requirement to indicate an order of preference, the word must be taken to have been used in its ordinary meaning as involving one thing being put before another. (Langer v AEC, No VG 96 of 1996, unreported judgement, p16)

6. The Court should have held that the words "order of the person's preference" must be taken to be used in their ordinary meaning as the order of preference which a voter wishes to express in exercising an elector's constitutional sovereign prerogative to choose freely the representatives of the people in Parliament by indicating which candidates the elector chooses and which candidates the elector rejects.

7. The Court should have held that s.240 of the Act requires, authorises or permits voters who support at least one of the candidates at an election for the House of Representatives and who reject more than one of the other candidates, to mark their ballot papers by numbering the candidates they choose in the order of their choice, using all of the consecutive numbers from 1 to the number of candidates, rejected by the voter, with a consecutive equal last preference, namely the preference number equal to the number of candidates supported by the voter plus 1.

8. The Court should have held that such votes indicate the voter's first preference for 1 candidate and an order of preferences for all the remaining candidates pursuant to s.268(1)(c) and consecutively the voter's repeated

equal last preference for rejected candidates cannot be disregarded pursuant to sections 270)2)(c), 270(2)(g) and 274(8).

9. In the alternative the Court should have held that s.270 of the Act requires, authorises or permits such votes and that s.329A does not prohibit encouragement of such votes.

10. In the alternative, if the Court correctly construed section 240 in the context of the Act then the electoral system set up by Part XVI, Part XVIII, Part XXI and XXIII of the Act is unfair, undemocratic, and an attack on conscience and riddled with inconsistencies and absurdities and the whole of the Act is invalid as it is beyond the power of the Commonwealth Parliament insofar as it does not provide for members of either House of Parliament to be directly chosen by the people in free elections as required by the Constitution.

11. The Court wrongly held that valid writs were issued for a purported general election for the House of Representatives and half-Senate elections to be held on 2 March 1996.

12. The Court should have held that no valid writ can be issued for an election that is not fair and free.

13. The Court should have held that section 58 of the Act is a determination by the members of the political parties that benefit from the determination to prevent the election of other candidates to the House of Representatives, contrary to the Constitutional requirement for a representative legislature and without any power granted by the Constitution to make such a determination. No valid determination has been made pursuant to an valid Commonwealth or State law for determining electoral divisions and the number of members to be returned for each electoral division of the House of Representatives. Consequently section 29 of the Constitution requires that each State shall vote as one electorate.

14. The Court should have held that any valid writ for a general election for the House of Representatives must provide for each State to vote as one of electorate.

15. On the grounds set out above, the Court should have held that it was not possible to disobey the order made by Beach J on 8 February 1996 with respect to encouraging persons voting at a federal election for the House of Representatives to be held on 2 March 1996 to fill in a ballot paper in any particular manner, even if such an order could have been lawful, as no such election was to be held on 2 March 1996.

16. The Court should have held that section 240 and other sections of the Act that prescribe the “method of choosing” members of the House of Representatives are invalid as sections 9, 10 and 31 of the Constitution grant the Parliament of the Commonwealth a power to prescribe the method of choosing only for the Senate and require that the method of choosing members of the House of Representatives be the same in each State as the method of choosing members of the lower House of Parliament of that State, as prescribed by the Parliament of that State.

17. The Court wrongly held that s.383 of the Act authorises the use of interlocutory or final injunctions and proceedings for contempt as a routine alternative to criminal prosecution in the absence of proof that such an injunction is necessary to prevent grave and irreparable damage.

18. The Court should have construed 2.383 of the Act as not permitting the use of injunctions to bypass the procedural safeguards for presenting a defence required in a criminal prosecution.

19. In the alternative the Court should have held that s.383 of the Act is invalid as involving the judiciary in the exercise of non-judicial functions.

20. The Court wrongly held that evidence that the applicant had distributed copies of the subject matter of the injunction granted by Beach J, immediately following the hearing to journalists who were present at the hearing, with statements that the injunction was invalid, is sufficient to infer that the order had been breached.

21. The Court should have held that there was not evidence, or insufficient evidence to conclude that the material was distributed with the intention of encouraging electors to vote in particular way and no inference that that the order had actually breached could be drawn.

6.2 As Mr Langer has not yet filed the additional documents required by the Court, his application for special leave to appeal to the High Court has not progressed.

APPENDIX D: INFORMAL VOTE SURVEY (extract)

APPENDIX E: EXHAUSTED VOTE SURVEY (extract)

APPENDIX F: POST ELECTION SURVEY (extract)

APPENDIX G: FEDERAL LAW REVIEW ARTICLE ON LANGER

Australian Electoral Commission

SUPPLEMENTARY SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

ADVOCACY OF OPTIONAL PREFERENTIAL VOTING

COURT DECISIONS

Canberra

30 August 1996

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