Australian Electoral Commission

SUPPLEMENTARY SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

COURT OF DISPUTED RETURNS
THE FREE PETITION

Canberra

23 October 1996

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APPENDICES

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 newspapers. The submission is supplementary to the major AEC submission, "The Conduct of the 1996 Federal Election" presented to the JSCEM on 29 July 1996 (submission No 30).

1.2 The submission reports on the background, proceedings and outcomes of the petition by Mr Ross Free, which disputed the election of Ms Jacqueline Kelly for the Division of Lindsay, on the grounds that she was constitutionally disqualified for election, because she held an office of profit under the Crown, and dual nationality. The petition was heard by Chief Justice Brennan, sitting as the Court of Disputed Returns, on 5 September 1996, and the decision was delivered on 11 September 1996 (*Free v Kelly & Anor, High Court, 11 September 1996, unreported*).

2. Petition

2.1 On 7 May 1996 Mr Ross Free, an unsuccessful Australian Labor Party candidate at the 1996 federal election, filed a petition in the Sydney Registry of the High Court of Australia (S94 of 1996), disputing the election of Ms Jacqueline Kelly, of the Liberal Party, as the House of Representatives Member for the Division of Lindsay. Ms Kelly was named as the respondent (Appendix A).

2.2 The relevant dates provided for in the election writ from the Governor-General for the 1996 federal election for the House of Representatives were as follows: close of rolls: 5 February; close of nominations: 9 February; polling day: 2 March; return of the writ: on or before 8 May. The writ for the Division of Lindsay was returned on 1 April 1996.

2.3 Mr Free disputed the validity of Ms Kelly's election on the grounds that she held an office of profit under the Crown and dual nationality at the time of her nomination, contrary to the Constitution, as follows (paragraphs 11 to 22 of the petition at Attachment A):

> 11. The respondent nominated as a candidate for election to the said Division by lodging a nomination form with the said Australian Electoral Commission on 2 February 1996.
>
> 12. At the time of the said nomination the respondent was a serving fulltime permanent officer of the Royal Australian Air Force holding the rank of squadron leader and the position of legal officer.

13. On 9 February the respondent made an application to the Chief of the Air Staff to cease being a fulltime permanent officer of the Royal Australian Air Force effective on 17 February 1996.

14. The respondent's application was granted and on 17 February 1996 the respondent ceased being a fulltime permanent officer of the Royal Australian Air Force.

15. Section 44 of the Commonwealth Constitution provides as follows:

> Any person who -
>
> (iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth:
>
> shall be incapable of being chosen or sitting as a senator or member of the House of Representatives.
>
> But sub-section (iv) does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

16. Further in the alternative the petitioner was born in New Zealand on 18 February 1964 and was a citizen of New Zealand pursuant to section 6 of the Citizenship Act 1977 (New Zealand) (as amended).

17. The respondent became a citizen of the Commonwealth of Australia on or about March 1985 pursuant to the provisions of the Australian Citizenship Act 1948 (Cth) (as amended).

18. At no time after becoming a citizen of Australia did the respondent make an application to renounce her citizenship of New Zealand pursuant to section 15 of the Citizenship Act 1977 (New Zealand) (as amended).

19. At no time did the respondent have registered any declaration of renouncement of her New Zealand citizenship in the manner described pursuant to the said Act.

20. At all relevant times the respondent is and was a New Zealand citizen and remains under allegiance, obedience or adherence to New Zealand.

21. Pursuant to section 44(i) of the Commonwealth Constitution provides:

> Any person who -
>
> (i) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

22. The petitioner claims that upon the true construction of section 44 of the Commonwealth Constitution the respondent is incapable of sitting as a member of the House of Representatives.

2.4 Mr Free, then sought the following relief (paragraph 23 of the petition at Attachment A):

23. The petitioner prays that:

1. This Court declare that the respondent was not capable of being chosen as a member of the House of Representatives for the Division of Lindsay at the election held on 2 March 1996 and is incapable of sitting as the said member.

2. This Court declares that the respondent was not duly elected as a member of the House of Representatives for the Division of Lindsay.

3. This Court declare Ross Vincent Free duly elected as a member of the House of Representatives for the Division of Lindsay.

4. Further or in the alternative that this Court declare the said election absolutely void.

5. In the exercise of its discretion, said order as to costs as this Court sees fit.

6. Such further other orders as this [Court] sees fit.

2.5 In the light of prayer number 3, which asked the Court to declare Mr Free elected, instead of simply voiding the election and allowing a fresh election to proceed, the AEC sought leave from the Court to enter as the second respondent, in order to assist the Court with the facts of the election, and to provide submissions on the appropriate remedy should the election be declared void.

3. Background to the Petition

3.1 The Free petition challenged Ms Kelly's election on the basis of her alleged constitutional disqualifications, that is, section 44(i), foreign allegiance, and section 44(iv), office of profit under the Crown. Both provisions are quoted in the petition at Attachment A. A full judicial consideration of section 44 of the Constitution, as it applied to Mr Cleary (a Victorian State school teacher on leave without pay), to Mr Delacretaz (a Swiss national), and to Mr Kardamitsis (a Greek national), is to be found in the leading case on the subject, *Sykes v Cleary (1992) 176 CLR 76* at Appendix B.

3.2 A candidate for a federal election is required to make a declaration on the nomination form that he or she is not disqualified by section 44 of the Constitution. The full text of section 44 is printed on the nomination form and

the declaration is made by the candidate after reading and signing the nomination form. In accepting the nomination the returning officer is required only to check that the nomination has been properly made, that is, that all questions have been answered, that the nominees if any are enrolled, and that the nomination form is properly signed and dated.

3.3 The AEC has no role in "going behind" a candidate's nomination to query the validity of the declaration on constitutional qualifications, and nor should it. The professional expertise required, for example, to make a judgement on whether a foreign allegiance had really been renounced before nomination, would be well beyond the accepted duties and responsibilities of returning officers. Indeed, in S*ykes v Cleary*, the High Court itself found such issues complex in their resolution, because quite different rules for renunciation of nationality appeared to apply to Greece and Switzerland. Further, if the validity of all nomination declarations on constitutional qualifications were required to be investigated by returning officers, an election might require months to get underway.

3.4 Instead, it has been recognised by Parliament since Federation that nomination declarations should be accepted at face value by returning officers. Returning officers are obliged to assume that candidates have made true declarations as to their qualification to nominate. Any doubts that may arise concerning those qualifications can be dealt with after the election, through a petition to the Court of Disputed Returns, or through a reference to the Court from the Parliament. There are also penalties in the CEA for making a false declaration on a nomination form.

3.5 In paragraph 3.27.2 of the AEC submission of 20 September 1996 to the JSCEM, the AEC indicated that it has no responsibility for the provision of legal advice on the interpretation of constitutional provisions such as section 44. This is the role of the Attorney-General's Department. In addition, decisions of the High Court which directly bear on section 44, such as *Sykes v Cleary*, provide important guidance to interpretation.

3.6 The Candidates Handbook, which is issued by the AEC to intending candidates at federal elections, takes particular care to alert candidates to the constitutional disqualifications in section 44 (Appendix C). The Handbook makes direct reference to *Sykes v Cleary*, but also suggests that candidates seek their own legal advice if they are in any doubt about their personal circumstances.

3.7 Parliamentary committees, political commentators, the press and the public have over recent years been highly critical of the contemporary relevance of the section 44 disqualifications, and the expense to which the community is put in the conduct of fresh elections following disqualification. Proposals to amend or delete section 44 of the Constitution by referendum are not uncommon, and may well have widespread community support, but no serious move has yet been made towards constitutional change in this vexed area of federal electoral practice.

4. Court Proceedings

4.1 On 9 July 1996 solicitors for the petitioner served summonses for directions before Chief Justice Brennan (in Chambers), sitting as the Court of Disputed Returns, and returnable on 29 July 1996, to the solicitors for the respondent and to the solicitors for the AEC.

4.2 On 29 July 1996 at the directions hearing before Brennan CJ, Mr McCarthy QC, instructed by McClellands, Solicitors, appeared for the petitioner, Mr Free, and Mr Williams QC, instructed by Minter Ellison, Lawyers, appeared for the respondent, Ms Kelly.

4.3 Dr Kenny, instructed by the Australian Government Solicitor (AGS), sought leave pursuant to section 359 of the CEA to appear on behalf of the AEC. After hearing from Dr Kenny, the Chief Justice granted leave for the AEC to appear. An appearance was subsequently entered by AGS with the Court to join the AEC to the petition as the second respondent.

4.4 The Solicitor-General for the Commonwealth appeared on behalf of the Attorney-General, instructed by AGS, and was given leave to appear for the purposes of the proceedings on 29 July 1996 only. The leave was given due to the possibility of a “live constitutional matter” arising.

4.5 Mr Williams for Ms Kelly substantially conceded that the election should be declared void because of Ms Kelly’s lack of compliance with section 44(i) and/or section 44(iv) of the Constitution. He agreed that the matter in issue was the appropriate remedy on the voiding of the election.

4.6 In light of the parties seeming to agree that the election of Ms Kelly should be declared void, Mr Williams indicated support for a fresh election, and Dr Kenny for the AEC also indicated support for a fresh election, as per *Sykes v Cleary*. As it appeared that the only matter before the Court would be the appropriate remedy, the Solicitor-General made no submissions.

4.7 The Chief Justice commented that “it is not desirable that there should be a vacancy or an uncertainty with respect to the membership [of the House of Representatives] for any length of time at all”. His Honour therefore proposed hearing the question of the appropriate remedy the following day. After further discussion with the parties, the matter was set down for hearing on 2 August.

4.8 Mr McCarthy foreshadowed that the petitioner would apply for the Court to be constituted by a Full Bench, as occurred in *Sykes v Cleary*. The Chief Justice declined to determine that issue on 29 July, proposing instead that Mr McCarthy renew his application, if he so chose, on 2 August, and that His Honour would decide then whether to refer the matter to a Full Bench or to decide the matter himself. The matter was adjourned for hearing on 2 August with a direction that the parties file and exchange written submissions by noon on 1 August.

4.9 The written submissions of the first respondent Ms Kelly as filed on 1 August no longer conceded that her election should be declared void and thus retracted the in-principle agreement reached on 29 July that the only issue remaining for the Court to determine was the appropriate remedy. Instead Counsel for Ms Kelly submitted constitutional grounds on which this case was distinguishable from *Sykes v Cleary*, and submitted that Ms Kelly should be found to have been properly elected. The AEC submitted that, in accordance with *Sykes v Cleary*, if the Court found Ms Kelly had not been duly elected, then the Court should declare the election absolutely void. The AEC made no written submissions on the constitutional issues. The AEC then submitted that the appropriate remedy was a fresh election should the election be declared void.

4.10 On 2 August the matter came before Brennan CJ ostensibly for hearing on the appropriate remedy, following a declaration that the election of Ms Kelly was void. Mr McCarthy QC appeared for the petitioner, Mr Free; Mr Williams QC appeared for the first respondent, Ms Kelly; and Dr Kenny appeared for the second respondent, the AEC.

4.11 Mr Williams “stepped back from the brink” by contending that there were grounds upon which the Court should find that Ms Kelly was not in breach of section 44(i) or section 44(iv) of the Constitution, such that the petition should be dismissed. Mr Williams submitted that the matter should be referred to a Full Court for determination of those questions. Mr McCarthy similarly proposed that the matter be referred to a Full Court, but on the question of whether the appropriate relief should be a fresh election or a special count of the ballot papers.

4.12 In the light of comments from Brennan CJ, and after hearing Mr McCarthy’s submissions, Mr Williams modified his submissions regarding referral to a Full Court to the effect that Ms Kelly “would only press to have those matters determined by a Full Court if a Full Court was being convened to hear Mr McCarthy’s point”. Dr Kenny for the AEC opposed a reconsideration of *Sykes v Cleary,* but otherwise did not make submissions on whether the matter ought to be referred to a Full Court.

4.13 The Chief Justice then adjourned the matter until 2 pm that afternoon in order to consider whether the matter should be referred to the Full Court or whether he should hear the matter alone. Upon resuming His Honour gave his reasons for not referring the matter to the Full Court (Appendix D).

4.14 Primarily because of the change of position by Ms Kelly, the Court did not decide the question of appropriate remedy on 2 August. Instead the Court adjourned the matter to 5 September in Canberra for the holding of the trial of the petition.

4.15 On 5 September 1996 the trial of the petition was heard by Brennan CJ sitting as the Court of Disputed Returns. Mr McCarthy QC and Mr Hatzistergos, instructed by McClellands, Solicitors, appeared for the petitioner, Mr Free; Mr TEF Hughes QC and Mr TDF Hughes, instructed by Minter Ellison, Lawyers, appeared for the first respondent, Ms Kelly; and Dr Kenny, instructed by the AGS, appeared for the second respondent, the AEC. Mr Selway QC, Solicitor-General for the State of South Australia, instructed by the Crown Solicitor for South Australia, appeared for the Attorney-General of South Australia, intervening.

4.16 Mr Selway intervened only on the question of whether Ms Kelly was incapable of being elected by virtue of section 44(i) of the Constitution, due to her New Zealand citizenship. Mr Selway thereafter sought leave to withdraw on the basis of discussions with Mr Hughes QC where it was conceded that Ms Kelly was incapable of being elected because of her office of profit under the Crown, contrary to section 44(iv) of the Constitution, with the result that the issue of dual nationality would, in all probability, not arise.

4.17 With that preliminary issue dealt with, the Chief Justice turned to the hearing of the petition. The matter proceeded on the basis, by consent, that Ms Kelly was incapable of being chosen or of sitting as a member of the House of Representatives by virtue of section 44(iv) of the Constitution, the office of profit disqualification. The only issue remaining was what order should be made as a consequence of that incapability.

4.18 Mr McCarthy for the petitioner then submitted that a special count should be ordered on the election being declared void. Brennan CJ took particular issue with Mr McCarthy's submission that the primary votes received by Ms Kelly should be treated as a nullity and that those votes be distributed according to the preferences expressed by each voter. His Honour referred particularly to section 274 of the CEA. In spite of the reservations expressed by the Chief Justice, Mr McCarthy pressed that an order be made to effect a special count and this would be in accordance with paragraphs 274(d)(i) and (ii) of the CEA.

4.19 His Honour observed that the proposed order for a special count entailed a risk that the electoral will of the voters of Lindsay intended to be expressed would not be expressed due to the "overwhelming influence of the distribution."

4.20 Mr McCarthy endeavoured to distinguish *Sykes v Cleary* by reference to the fact that in that case over 95% of the valid votes cast were for disqualified candidates, unlike this matter where, it was said, only Ms Kelly was incapable of being chosen or of sitting as a member of the House of

Representatives. Mr McCarthy then followed with submissions regarding the cost of a fresh election as a basis for why a special count was "fair and just". He also submitted that in the light of Ms Kelly being the endorsed candidate of the Liberal Party, as a major political party with representation in the Commonwealth Parliament, and the Court having only recently, in *Sykes v Cleary*, outlined the principles surrounding section 44 of the Constitution, the Liberal Party, in effect, "had only themselves to blame", and that the greater public interest was therefore to be served by the ordering of a special count.

4.21 Mr Hughes QC for Ms Kelly submitted that the proper course was for the Court to declare the election void with the result that the statutory procedures then operate to cause a fresh election for the Division of Lindsay. In this regard, Mr Hughes applied and adopted the Court's reasoning in *Sykes v Cleary*. Mr Hughes submitted that "the basic question is always to avoid any possible distortion resulting from the unfortunate event of the disqualification - any possible distortion of the electoral will".

4.22 Dr Kenny for the AEC supported Mr Hughes' submissions to the effect that the Court should order, pursuant to paragraphs 360(1)(v) and (vii) of the CEA, that Ms Kelly be declared not duly elected and that the election be declared void. Dr Kenny similarly relied upon *Sykes v Cleary* in support of her submission. In answer to an enquiry from the Chief Justice, Dr Kenny distinguished the case *In re Wood* by reference to the fact that that case dealt with the election of Mr Wood in a Senate election which uses a different electoral system and where a special count did not cause a distortion of the electoral due to the voters electing "the party rather than the person".

4.23 Dr Kenny "parted company" with Mr Hughes' submissions in one respect, namely, on the question whether an election for a member of the House of Representatives must necessarily be declared void wherever any person has stood for an election and then has been found to be ineligible. Mr Hughes had submitted that this was the proper outcome having regard to section 274. Dr Kenny submitted instead that such an election should only be declared void where the standing of an ineligible candidate had the capacity to affect the result of the election, as in this case.

4.24 The Court then heard submissions from each of the parties on the appropriate orders on costs.

4.25 Mr McCarthy for the petitioner Mr Free sought an order for costs, with particular reliance on his inevitable success in obtaining orders that Ms Kelly was not duly elected and that the election should be declared void. Mr McCarthy further submitted that the Commonwealth should pay Mr Free's costs pursuant to section 360(4) of the CEA due to the public benefit in agitating the issue of whether the proper remedy was a special count or a fresh election.

4.26 Mr Hughes for the first respondent Ms Kelly acknowledged Mr Free's entitlement to costs against Ms Kelly, but only until the close of business on 2 August from which point it was clear that the only issue in the case was the

appropriate remedy. Mr Hughes therefore submitted that if the Court accepted his submissions opposing the remedy of a special count, then Ms Kelly should be entitled to her costs from 2 August and those costs should be set off against Mr Free's costs up to and including 2 August 1996. In respect of the AEC, Mr Hughes submitted that it should bear its own costs on the basis that the AEC chose to become a party to the case in circumstances where no imputation of fault was being made by anyone against the AEC and particularly not by Ms Kelly.

4.27 Dr Kenny for the AEC submitted that there should be no order for costs either against the AEC or the Commonwealth in any event, and that there should be an order at least for partial costs against both Mr Free and Ms Kelly. Dr Kenny submitted that the AEC should have its costs against Mr Free because of his attempt to persuade the Court to refer the matter to a Full Bench, thereby delaying the proceedings, and against Ms Kelly for similarly delaying the proceedings by not conceding that the election should be declared void.

5. Decision

5.1 On 11 September 1996 Chief Justice Brennan delivered the following orders:

> 1. Declare that the first respondent was not capable of being chosen as a member of the House of Representatives for the Division of Lindsay at the election held on 2 March 1996.
>
> 2. Declare that the first respondent was not duly elected as a member of the House of Representatives for the Division of Lindsay at the election held on 2 March 1996.
>
> 3. Declare that the election for the Division of Lindsay held on 2 March was absolutely void.
>
> 4. The first respondent pay two-thirds of the petitioner's costs.

5.2 In his decision at Attachment E, Brennan CJ noted that the challenge by Mr Free was based on section 44(i) and (iv) of the Constitution:

> The former basis of challenge, an allegation that the first respondent held at the time of her nomination dual citizenship as an Australian and New Zealand citizen, was not pursued at the trial of the petition. But it is now common ground that, by reason of s. 44(iv) of the Constitution, Ms Kelly was incapable of being chosen as a member of the House of Representatives while serving as an officer of the RAAF at the time of her nomination as a candidate. That is the relevant time for determining whether a person is incapable of being chosen on any of the grounds specified in s. 44 of the Constitution (*Sykes v Cleary (1992) 176 CLR 77 at 99-101*). As Ms Kelly was incapable of being chosen as a member of the House of Representatives, an appropriate declaration of incapacity must be made.

5.3 His Honour then said that the substantial issue between the parties was whether the election should be declared absolutely void, as sought by Ms Kelly and the AEC, or whether an order should be made directing a special count of the ballot papers in the poll, as sought by Mr Free. His Honour distinguished the case *In re Wood (1988) 167 CLR 145,* in which a special count was ordered by the Court on the voiding of the election of Senator Wood, by quoting from *Sykes v Cleary*, which also distinguished In re Wood as follows:

> In these circumstances, the situation in In re Wood was such as to warrant the conclusion that the special count would reflect the voters' "true legal intent". Furthermore, in the light of the group system of voting which applies in Senate elections, it was highly probable, if not virtually certain, that a person who voted for Mr Wood would have voted for another member of his group, had the voter known that Mr Wood was ineligible. The same comment cannot be made in the present case. Here a special count could result in a distortion of the voters' real intentions because the voters' preferences were expressed within the framework of a larger field of candidates presented to the voters by reason of the inclusion of the first respondent.

5.4 His Honour went on to demonstrate the principle that should be followed:

> The principle to be derived from both cases is that an election in which a person who is incapable of being chosen is purportedly returned as a member of the Senate or as a member of the House of Representatives will not warrant an order for a special count unless a special count would reflect the voters' true legal intent or, conversely, would not result in a distortion of the voters' real intentions. In In re Wood, the Court was satisfied that a special count would reflect the voters' true intentions, but in Sykes v Cleary, no special count could be ordered "because the voters' preferences were expressed within the framework of a larger field of candidates presented to the voters by reason of the inclusion of the first respondent." In other words, if the name of the disqualified Mr Cleary had not appeared on the ballot paper, the voters' preferences might have been differently expressed.
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> A similar observation can be made in the present case. Ms Kelly and Mr Free were by far the candidates who attracted the greatest number of first preference votes. If Ms Kelly's first preference ballot papers were to be distributed so as to be counted to the candidate next in order of the voters' preferences, the order of exclusion of the less-favoured candidates under par (d) of 274(7) might well have been altered. That alteration might have affected the identity of the candidate last remaining after the distribution of preferences. In other words, it is impossible to predicate of the election that the person who might be selected on a special count would have been chosen had Ms Kelly not been nominated as a candidate. There is a substantial possibility that a special count would distort the voters' intentions. Indeed, there is much to be said for the view, submitted by counsel for the Australian Electoral Commission, that, if the candidate who is returned as an elected member proves to have been incapable of being chosen, the election is necessarily void and a new election must be held. That may be too broad a proposition, at least where there are only two candidates standing, and the facts which establish the incapacity of the one chosen are known to the

electors at the time of the poll: see In re Parliamentary Election for Bristol South East.

5.5 His Honour concluded that the election was absolutely void and that a fresh election for the Division of Lindsay must be held, in the following terms:

> In my view the election in which Ms Kelly was declared elected was absolutely void. Accordingly, a declaration must be made pursuant to s. 360(1)(vii) of the Act. The consequence is that a new election for the Division of Lindsay will be held pursuant to s. 374(iii).

> on a petition to be "a party respondent" to the petition. It is thus, in a sense, a successful party: its submissions have largely been accepted. However, an order for costs should depend not on the deemed status of the Commission as a party but on the function which the Commission performs in being represented and heard on the trial of a petition.
>
> The Commission may be represented and heard under s. 359 in at least four categories of cases: cases where the Commission seeks to defend the conduct of an election or the conduct of an officer of the Commission in relation to an election; cases in which the Commission intervenes for the purpose of advancing a proposition for which it seeks crucial confirmation to assist it in the discharge of its statutory functions; cases where the Commission adopts a partisan stance supporting one party or another; and cases where the Commission merely makes appropriate reference to the Act and to authority in order to assist the Court to determine a petition. It may be appropriate to make an order for or against the Commission in the first three categories of case, but in the fourth category the Commission is engaged in the proper performance of a statutory function in the public interest. The appearance of the Commission in such a case ought not to enlarge the risk of costs to the other parties to the proceedings. Being incidental to the proper performance of its statutory functions, the cost of being represented and heard ought properly to be borne as a cost of the Commission's administration. This is such a case. Expressing, as I do, appreciation of the considerable assistance that the Commission offered - not least in the preparation of an agreed statement of facts - it is appropriate to make no order with respect to the costs of the Commission.

5.8 The categories of cases where the AEC may or may not consider seeking costs, as set out by Brennan CJ in this decision, are regarded by the AEC as being of considerable value for future electoral litigation.

5.9 It is of some interest that the petitioner claimed, unsuccessfully, that in the public interest his costs should be paid by the Commonwealth under section 360(4) of the CEA. The normal course of events in election petitions is that costs are paid by the unsuccessful party to the successful party to the petition. Section 360(4), however, allows the Court of Disputed Returns to award costs against the Commonwealth, where the Court considers it appropriate to do so. This provision was enacted in 1983 and has been applied by the Court in only two election petitions, the *Nile petition (1987*) and the *Hudson petition (1993*).

5.10 At Attachment F is a brief account of all federal election petitions since 1983 and the costs orders in each, in order to provide some background to the special circumstances in which section 360(4) is applied by the Court.

6. Issue of the Writ

6.1 The part of the CEA which provides for the powers and functions of the Court of Disputed Returns is Part XXII of the CEA, headed *Court of Disputed Returns*. Part XXII of the CEA is subdivided into Division 1, which is headed *Disputed Elections and Returns*, and Division 2, which is headed *Qualifications and Vacancies*.

6.2 Section 360 of Division 1 of Part XXII of the CEA lists the powers of the Court of Disputed Returns, in relation to election petitions. Sub-section 360(1)(vii) of Division 1 provides that the powers of the Court include the power to "declare any election absolutely void". It was section 360(1)(vii) that was invoked by Chief Justice Brennan in declaring the election of Ms Kelly absolutely void.

6.3 Section 379 of Division 2 of Part XXII of the CEA lists the powers of the Court of Disputed Returns, in relation to qualifications and vacancies. Section 379 provides that the powers of the Court shall include those in section 360 in Division 1, as well as the following powers:

> (a) to declare that any person was not qualified to be a Senator or a Member of the House of Representatives;
>
> (b) to declare that any person was not capable of being chosen or of sitting as a Senator or a Member of the House of Representatives; and
>
> (c) to declare that there is a vacancy in the Senate or in the House of Representatives.

6.4 Chief Justice Brennan did not invoke the power of the Court under section 379(c) of the CEA to declare that there was a vacancy in the House of Representatives.

6.5 Section 374 of Division 1 of Part XXII of the CEA provides for the effect that must be given to any decision of the Court:

> (i) If any person returned is declared not to have been duly elected, the person shall cease to be a Senator or Member of the House of Representatives;
>
> (ii) If any person not returned is declared to have been duly elected, the person may take his or her seat accordingly;
>
> (iii) If any election is declared absolutely void a new election shall be held.

6.6 Chief Justice Brennan invoked section 374(iii) of the CEA to decide that a new election for the Division of Lindsay must be held.

6.7 In considering the issue of whether the Governor-General or the Speaker of the House of Representatives should issue the writ for the new election in the Division of Lindsay, the AEC noted that the Court had not invoked any powers under section 379(c) to declare a vacancy in the House of Representatives, but had instead only declared the election absolutely void. This suggested that section 33 of the Constitution was not applicable in these circumstances. Section 33 of the Constitution provides:

> Whenever a *vacancy* (emphasis added) happens in the House of Representatives the Speaker shall issue his writ for the election of a new

> member, or if there is no Speaker or if he is absent from the Commonwealth the Governor-General in Council may issue the writ.

6.8 The AEC also noted that in declaring that Ms Kelly was not capable of being chosen at the election, and that no remedy was possible through a recount of the original ballot papers as occurred in *In Re Wood (1988*), the Court had decided that the election was void *ab initio*, that is, the election had never effectively taken place. This situation suggested parallels with the death of a candidate after nomination and before polling day for a House of Representatives election. Under section 181 of the CEA this is known as a failed election, and a new writ must be issued for a supplementary election. In the Division of Dickson at the 1993 federal election, a candidate died after nomination and before polling day. A supplementary election was held and the Governor-General issued the writ.

6.9 The AEC therefore came to the preliminary view that the Governor-General should be called upon to issue the writ and this view was conveyed informally to the office of the Speaker of the House of Representatives.

6.10 As a consequence, the day after the decision was handed down by the Court, and the Parliament had been formally advised of this by the Court, the Acting Speaker of the House of Representatives made the following statement in Parliament (*Hansard, House of Representatives, 12 September 1996, pp 4031-4032*):

> Yesterday, after receiving advice from the Chief Executive and Principal Registrar of the High Court of Australia that the High Court, sitting as the Court of Disputed Returns, had ordered the election for Lindsay held on 2 March 1996 was absolutely void and having received legal advice that the Acting Speaker could exercise the powers of the Speaker in relation to the issue of writs, the Acting Clerk contacted the Australian Electoral Commission with a view to ascertaining appropriate dates for the election which might form the basis for consultation with party leaders and Independent members.
>
> During discussions with the Electoral Office, it became apparent that there seemed to be an emerging opinion which questioned the right of the Speaker to issue a writ for an election in such circumstances, primarily due to doubt as to whether there was a 'vacancy' in the House of Representatives for the purposes of section 33 of the Constitution. The House should be aware that, of the five similar circumstances where elections have been declared null and void, the Speaker had issued a writ on four occasions. In the fifth instance, involving Mr Cleary in 1992, the by-election would have been subsequent to the resignation from the House of Mr Hawke. A writ was not issued in the light of an impending general election, although the Speaker's authority to act after the High Court's decision was not called into question.
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> Honourable members should be aware that section 33 of the Constitution provides:
>
> > Whenever a vacancy happens in the House of Representatives the Speaker shall issue his writ for the election of a new member, or if

there is no Speaker or if he is absent from the Commonwealth the Governor-General in Council may issue the writ.

As the Speaker is currently absent from the Commonwealth on parliamentary business, the Governor-General in Council may, of course, issue a writ in the present case. However, I repeat that the larger issue is whether the Speaker, if present, would be empowered to issue the writ, as occurred in the past. Moreover, without in any way reflecting on the office of Governor-General, I believe that the process normally followed in respect of such elections has been appropriate.

Members would be aware that the Speaker, having ascertained from the Electoral Office dates which might be considered, has consulted with the party leaders and Independent members before making a decision. The treatment of the issue is clearly as a parliamentary matter. For the Governor-General to issue the writ, the decision would be one made by the government.

I have requested that the situation be investigated as a matter of urgency. I will, of course, keep the House informed of future developments in the matter as I become aware of them.

6.11 The AEC understands the Acting Speaker then sought formal legal advice on the issue from the Attorney-General's Department. On 13 September 1996 the Chief General Counsel of the Attorney-General's Department advised the Acting Speaker that on the basis of precedent it was appropriate for him to issue the writ for the new election for the Division of Lindsay, and this was accordingly done on 16 September 1996.

7. Conclusion

7.1 **The Court of Disputed Returns found that Ms Kelly, by her own admission, was not qualified to be elected because she held an office of profit under the Crown at the time of her nomination, contrary to section 44(iv) of the Constitution.** The second ground of the petition, that Ms Kelly was disqualified under section 44(i) of the Constitution because she was allegedly a New Zealand citizen at her nomination, was not argued or decided. The Court ordered Ms Kelly to pay two-thirds of the costs of Mr Free.

7.2 The Free Petition is not the first election petition, based on section 44 of the Constitition, to reach the Court of Disputed Returns in recent years. The Sykes petition following the Wills by-election in 1992 led to the disqualification of Mr Phil Cleary because, as a Victorian State school teacher on leave without pay, he held an office of profit under the Crown contrary to section 44(iv) of the Constitution (*Sykes v Cleary (1992) 176 CLR 76*). In the Sykes petition the Court of Disputed Returns also decided that, in relation to section 44(i) of the Constitution, candidates should take “all reasonable steps” to divest themselves of any foreign allegiance before nominating.

7.3 **The AEC will continue to bring to the attention of candidates for federal election the provisions of section 44 of the Constitution, and advise them to seek legal advice if they are in doubt about their own personal circumstances. Beyond this, the AEC cannot and should not go. In the final analysis it is the responsibility of each and every candidate to ensure that their nomination declaration, which refers directly to section 44 of the Constitution, is a true statement**.

Costs in Election Petitions

The following is a brief account of all federal election petitions since 1983 and the costs orders in each, in order to provide some background to the special circumstances in which section 360(4) is applied by the Court.

The Nile Petition (1987): A petition was filed by Mrs Elaine Nile, a NSW Senate candidate, challenging the election of Senator Robert Wood, on the grounds that he was constitutionally disqualified. The AEC was named as the second respondent. The Court dismissed the petition as incurably defective, and ordered Mrs Nile to pay Senator Wood's costs. *In a later decision specifically on the question of the costs ordered in the petition decision, the Court ordered the Commonwealth to pay Mrs Nile's costs, to be paid to Senator Wood. It was apparent that the Court was of the view that although Mrs Nile's petition failed, she should not be financially penalised because the petition did have some merit in the grounds claimed, as was subsequently established by the voiding of Senator Wood's election on a reference to the Court from the President of the Senate under section 376 of the CEA*.

The Sykes Petition (1992): A petition was filed by Mr Ian Sykes, an elector, challenging the by-election of Mr Phil Cleary, an independent, for the Division of Wills, on various constitutional grounds. The AEC was named as the fifth respondent. The Court voided the election of Mr Cleary and by consent made no order on costs.

The Webster Petition (1993): A petition was filed by Mr Alasdair Webster, an unsuccessful Liberal Party candidate, challenging the election of Ms Maggie Deahm, of the ALP, to the Division of Macquarie, on the grounds, inter alia, of fraudulent enrolment and voting. The Electoral Commissioner was named as the second respondent. The Court dismissed the Webster petition and ordered Mr Webster to pay the costs of Ms Deahm.

The Robertson Petition (1993): A petition was filed by Mr John Robertson, an elector, challenging the whole election on the grounds that there was no media coverage of his "Money Solution". The Electoral Commissioner was named as the respondent. The Court dismissed the Robertson petition and on the application of the AEC ordered Mr Robertson to pay the costs of the Electoral Commissioner.

The Sykes Petition (1993): A petition was filed by Mr Ian Sykes, an elector, challenging the whole election on a number of grounds including constitutional disqualifications. The AEC was named as respondent. The Court dismissed the Sykes petition and on the application of the AEC ordered Mr Sykes to pay the costs of the AEC.

The Pavlekovich-Smith Petition (1993): A petition was filed by Mr Pavlekovich-Smith, an unsuccessful independent candidate, challenging the whole election on the grounds that incumbent Members of Parliament had an advantage over other candidates because of their parliamentary allowances.

The AEC and the Electoral Commissioner were named as respondents. The Court dismissed the Pavlekovich-Smith petition and made no order on costs.

The Muldowney Petitions (1993): Two petitions were filed by Mr Patrick Muldowney, an unemployed person, challenging the whole election, on the grounds, inter alia, that sections 329A and 329(3) of the CEA were unconstitutional. The AEC was named as the respondent. The Court dismissed the Muldowney petitions because Mr Muldowney was not enrolled to vote and therefore had no standing to petition, and made no order on costs. Mr Muldowney then appealed the dismissal of his petitions. His appeal was dismissed and on the application of the AEC he was ordered to pay the costs of the AEC.

The Hudson Petition (1993): A petition was filed by Mr Robert Hudson, an unsuccessful independent candidate, challenging the election of Mr Michael Lee of the ALP to the Division of Dobell, on the grounds that parliamentary allowances were put towards Mr Lee's election campaign, giving him an unfair advantage. The AEC was named as the second respondent. The Court dismissed the Hudson petition. *The AEC made no application for costs, but Mr Lee submitted that the Commonwealth should pay his costs and those of the AEC, pursuant to section 360(4) of the CEA. The Commonwealth then entered the proceedings and submitted that the Commonwealth should not pay the costs of Mr Lee and the AEC. The Court ordered the Commonwealth to pay the costs of Mr Lee. It was apparent that the Court was of the view that Mr Hudson should not be financially penalised as an invalid pensioner with a genuine if misguided grievance.*

The AEC believes that section 360(4) has been applied by the Court consistently in these cases, and as Parliament originally intended. The claim made in *Free v Kelly* that the costs owed to him by Ms Kelly should be paid by the Commonwealth in the public interest was rejected by the Court, in the view of the AEC, quite appropriately.