Australian Electoral Commission

SUPPLEMENTARY SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

COURT OF DISPUTED RETURNS
THE SNOWDON PETITION

Canberra

23 October 1996

CONTENTS

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 Warren Snowdon, which disputed the election of Mr Nick Dondas for the Division of the Northern Territory, on the grounds that certain provisional votes were not counted that should have been counted. The petition addressed two groups of provisional votes and claimed different reasons for the alleged wrongful exclusion of each group. In respect of the first group, a question of law was formulated and was heard as a Case Stated by a Full Bench of the High Court, sitting as the Court of Disputed Returns, on 3 September 1996, and the decision was delivered on 10 October 1996 (*Snowdon v Dondas & Anor, High Court, 10 October 1996, unreported*).

2. Petition

2.1 On 8 May 1996 Mr Warren Snowdon, an unsuccessful Australian Labor Party candidate at the 1996 federal election, filed a petition in the Sydney Registry of the High Court of Australia (S95 of 1996), disputing the election of Mr Nick Dondas, of the Country Liberal Party, as the House of Representatives Member for the Division of Lindsay. Mr Dondas was named as first respondent and the Electoral Commission as the second respondent. (Attachment A).

2.2 The relevant dates provided for in the election writ issued on 29 January 1996 by 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 Northern Territory Division was returned by the Electoral Commissioner to the Governor-General on 1 April 1996.

2.3 Mr Snowdon disputed the validity of Mr Dondas' election on the grounds that certain votes were wrongly rejected by electoral officers, as follows (paragraphs 10 to 13 of the petition at Attachment A):

> 10. During the conduct of the scrutiny of provisional votes, approximately 2,200 envelopes and votes were improperly rejected by the electoral officials of the second respondent on the grounds that the electors had changed their address within the Division of the Northern Territory and their claimed address was in a different District to that in which they were previously enrolled, and such electors were not entitled to be on the Roll for the Division of the Northern Territory.

11. The actions of the electoral officials of the second respondent in the Division of the Northern Territory were contrary to section 266(3) and schedule 3 of the Commonwealth Electoral Act 1918 ("the Act") and did not correspond with the application of the provisions of the said Act in the scrutiny of provisional votes in other Divisions elsewhere in Australia for the Federal Election held on 2 March 1996.

12. Further and in the alternative during the conduct of the scrutiny of provisional votes for the Division of the Northern Territory, approximately 700 envelopes containing ballot papers were improperly rejected by electoral officials of the second respondent on the ground that the electors were allegedly not on the Roll for the said Division when in fact the said electors were on the Roll for the said Division or were entitled to be on the Roll for the said Division.

13. The petitioner claims that upon the true construction of the provision of the Act, the second respondent was required to include the provisional votes referred to in paragraphs 10 and 12 above in the scrutiny before certifying the result of the election for a member for the Northern Territory and that the exclusion of these provisional votes has affected or may affect the result of the election.

2.4 Mr Snowdon then sought the following relief (paragraph 14 of the petition at Attachment A):

14. The petitioner prays that:

1. This Court declare that upon the true construction of the provisions of the Act and in particular section 266(3) and schedule 3, the provisional votes referred in paragraphs 10 and 12 herein were improperly excluded from the scrutiny of votes in the Division of the Northern Territory and must be included and counted by the second respondent.

2. This Court declare that the first respondent was not duly elected as a member of the House of Representatives for the Division of the Northern Territory.

3. This Court declare the candidate with the greatest number of votes duly elected as a member of the House of Representatives for the Division of the Northern Territory following the inclusion of the counting of provisional votes improperly excluded from the scrutiny by the second respondent.

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

5. Such other orders as this [Court] sees fit.

3. Background to the Petition

3.1 A provisional vote may be cast by any person whose name and/or address cannot be found on the certified list of voters at the polling booth on polling day. A provisional vote is a declaration vote under section 235 of the CEA. To cast a provisional declaration vote the person must fill out a declaration certificate on the face of an envelope. The person must provide in writing certain relevant personal details and sign a declaration that they are entitled to vote at the election for that Division. The completed ballot papers are then sealed inside the declaration envelope.

3.2 After the close of the poll, provisional declaration envelopes, and all other declaration envelopes such as postals and absents, must pass through a preliminary scrutiny under section 266 and Schedule 3 of the CEA, so that the personal details and the entitlement to vote contained in the declarations may be checked against the Commonwealth Electoral Roll. If such details cannot be confirmed at the preliminary scrutiny then the person's declaration envelope is put aside as rejected, and the ballot papers do not enter the count.

3.3 The AEC submission No 30 of 29 July 1996 entitled "The Conduct of the 1996 Federal Election" contained the following description of the special circumstances which exist in the Division of the Northern Territory in relation to the continuing existence of subdivisions in that Division and the consequences for provisional votes at the preliminary scrutiny (part 4.10 on pages S158 to S161 of Volume 1 of the JSCEM submissions):

> In the early 1990s, after a long period during which they tended to increase in size, subdivisions were formally abolished in all States and Territories except in two of the geographically largest Divisions in Australia: the Division of Kalgoorlie in Western Australia, and the Division of the Northern Territory. In the Division of Kalgoorlie, the retention of subdivisions enables the appointment of an Assistant Divisional Returning Officer to service the northern part of the Division, allowing for better client service due to proximity and local knowledge.
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> In the Northern Territory, the AEC is responsible for the Commonwealth Electoral Roll, used for both federal elections and Northern Territory Legislative Assembly elections, under the Joint Roll Arrangement with the Northern Territory. The 25 existing federal subdivisions in the Northern Territory correspond with the 25 Districts for the Northern Territory Legislative Assembly, and there are two further federal subdivisions for Christmas Island and the Cocos/Keeling Islands. As the Legislative Assembly Districts are small in population (3500-4000), the vote margins are often also small. In order to maintain enrolment accuracy for these Districts, as electors move around the Territory thereby changing their enrolled addresses, enrolment objection action for these small Northern Territory Districts should be easily facilitated. The retention of federal subdivisions allows this, and is strongly supported by the Northern Territory Electoral Office.
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> However, there is an important negative side-effect of the retention of the relatively small federal subdivisions in the Northern Territory. (Note that with

the exception of the Divisions of Kalgoorlie and the Northern Territory, the abolition of subdivisions in all federal Divisions has meant that any reference in the CEA to a subdivision is now read as a reference to the Division as a whole. That is, the Division contains one subdivision.)

Following an Electoral Roll Review or an election, and as the result of information received on the current state of enrolment in their Divisions, Divisional Returning Officers (DROs) normally take large-scale objection action under section 114(2) of Part IX of the CEA to remove the names of electors from the Roll who appear to have left their current enrolled address and who have not so advised the DRO. Before a name is actually removed from the Roll, the DRO writes more than once to the elector at the last-known enrolled address. For those electors who have moved on without leaving a forwarding address, the DRO, after repeated approaches with no response, will eventually come to the conclusion that the elector has moved to another Division and accordingly take objection action to remove the elector's name and address from the Roll for that Division. It is assumed that the elector has moved to another Division because the Electoral Roll Review process has not located the elector living anywhere else in the same Division. It is also assumed that the elector will, after the period of one month required under section 99(1) of the CEA, apply for enrolment to the DRO in the new Division.

At the next federal election, those electors who have changed address without transferring their enrolment, will then present at polling booths, believing that they are still on the Roll for the original address, only to find that their name is not listed, and they are unable to cast an ordinary vote. Such electors are automatically provided with a provisional declaration vote under section 235 of the CEA.

If the electors who cast provisional votes under these circumstances have only moved to new addresses within the same Division/subdivision, rather than across Divisions, then during the preliminary scrutiny of declaration votes under Schedule 3 of the CEA, all DROs, except those in Kalgoorlie and the Northern Territory, are able to reinstate that elector to the Roll for the original Division. Paragraph 12(b)(i) of Schedule 3 enables this action to be taken by the DRO because effectively a "mistake of fact" has led to the elector's removal from the Roll for a Division/subdivision by objection. This means that the elector now has the entitlement to vote restored, and the vote is passed into the count.

The "mistake of fact" referred to is the misapprehension as to the elector's place of residence, which led to the objection action taken before the election by the DRO to remove the elector from the Roll. Under section 114(2) of the CEA the DRO may object to the enrolment of a person for a Division/subdivision if there are reasonable grounds for believing that the person is not entitled to be enrolled for that Division/subdivision. When taking objection action, the DRO had no idea where the elector had moved to, and had to assume that the elector moved out of the Division/subdivision. It is only at the point when further information is obtained from the elector as detailed on the provisional vote declaration, that the DRO knows the full facts. That is, whether the elector has moved to another Division/subdivision, in which case the objection action was correct, or only within the original Division/subdivision, in which case the DRO made a "mistake of fact". The objection action taken by the DRO in the latter case was wrong because the

elector only moved within the one Division/subdivision and should still be entitled to cast a vote for that Division/subdivision. The DRO is then permitted to rectify this mistake during the preliminary scrutiny in order to restore the entitlement to vote.

Because of the continuing existence of a large number of federal subdivisions in the Division of the Northern Territory, the DRO for the Northern Territory is unable, under Schedule 3 of the CEA, to reinstate an elector to the Roll, who has moved between subdivisions in the Northern Territory rather than out of the Northern Territory Division into another Division. This is because the original objection action was proper and not a "mistake of fact". The elector did indeed move between subdivisions within a Division and was not entitled to remain on the Roll for the original subdivision. The result is that a provisional voter who has moved address across subdivisions within the Northern Territory (and the Division of Kalgoorlie) without advising the DRO, will have his or her vote declared invalid and not counted, whereas in all other States and the ACT, electors who have effectively done the same, by moving address within the same Division/subdivision, will have their enrolment reinstated and their entitlement to vote restored.

The problem is acute in the Northern Territory because of its large and highly mobile aboriginal population. The statistics show that the Northern Territory is particularly affected by the rejection of high numbers of provisional votes at the preliminary scrutiny: where the national Divisional average for rejection of provisional votes was 39.63%, in the Northern Territory it was 67.13%.

As a consequence of this unusual aspect of Roll reinstatements for provisional voters in the Northern Territory, the unsuccessful Australian Labor Party candidate for the Division of the Northern Territory, Mr Warren Snowdon, has filed a petition with the Court of Disputed Returns alleging the wrongful rejection by the AEC of some 2,200 provisional votes. As this matter is still before the Court the AEC will make no further comment on the particular details of the case.

To resolve this problem, the CEA could be amended to remove the barrier to reinstatement of provisional votes in the Northern Territory, while still retaining subdivisions, corresponding with the Northern Territory Legislative Assembly Districts.

In the alternative, and given that federal electors are being disenfranchised only to serve the purposes of the Northern Territory electoral system, the Joint Roll Arrangement with the Northern Territory Government could be re-negotiated to remove federal subdivisions. In order to facilitate Northern Territory Legislative Assembly elections, the Commonwealth Electoral Roll on RMANS would then be reprogrammed to allow enrolment information to be sorted by Northern Territory Districts, as is done in the States for State electoral purposes.

It is suggested that the JSCEM await the outcome of the Snowdon petition before the Court of Disputed Returns, and any relevant comment by the Court on the fairness or otherwise of the relevant CEA provisions, before moving to any resolution of this problem.

4. Court Proceedings and Preliminary Decision

4.1 On 9 July 1996 solicitors for the petitioners 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 first respondent, Mr Dondas, and for the second respondent, 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 Snowdon; Ms Banbury of James Noonan, Solicitors, appeared for the first respondent, Mr Dondas; and Dr Kenny of Counsel, instructed by the Australian Government Solicitor, appeared for the second respondent, the AEC.

4.3 After some discussion on whether the facts could be agreed in the matter, and a short adjournment for that purpose, the directions hearing resumed on the basis that the facts could be agreed, and that the question for determination by the Court would be "whether or not, in the Northern Territory, having regard to Schedule 3 or other provisions of the Act, the [provisional] votes [of persons whose names were not on the Roll, but had an address within the Division of the Northern Territory, but not in the subdivision which included their previous address] ought to have been included in the scrutiny or not."

4.4 Mr McCarthy for the petitioner, Mr Snowdon, foreshadowed a submission that if the petitioner were to be successful in his argument that these provisional votes were wrongly excluded from the scrutiny, then two consequences would arise. Firstly, arrangements would need to be made for the counting of those additional votes and their inclusion in the scrutiny. Secondly, the petitioner's "second argument", in paragraph 12 of the petition, would be pressed. Mr McCarthy acknowledged that if the petitioner were to be unsuccessful in relation to his "first argument" in paragraphs 10 and 11 of the petition, then the petition as a whole would fail, and the second argument would not be raised.

4.5 On the basis of these submissions by Mr McCarthy, his Honour postulated that a Full Bench should determine the question of law raised in the first argument in paragraphs 10 and 11 of the petition, and in the event that the petitioner succeeded on his first argument, then the remaining second argument could be remitted to the Supreme Court of the Northern Territory for trial. That is, the petition would have to be "split into two" between the High Court and the Supreme Court.

4.6 Having heard from the parties, His Honour determined that the question of the operation of the CEA, as raised in the first argument, should properly be determined by a Full Bench of the High Court. His Honour ordered that the matter be listed for a further directions hearing in Sydney on 16 August, to ensure that all parties were ready for trial by the Full Bench in September. All parties were ordered to file and serve an Agreed Statement of Facts by 13 August. It was agreed between the parties that Dr Kenny would

prepare the first draft for consideration by the petitioner and the first respondent.

4.7 Upon application from Dr Kenny for the AEC, his Honour gave leave for the AEC to serve on the petitioner a request for particulars of paragraphs 10 to 13 of the petition. Mr McCarthy for the petitioner undertook to respond to that request for particulars by 16 August.

4.8 His Honour concluded the proceedings of 29 July by indicating that he "would be grateful for some assistance from the parties as to the jurisdiction of the Court to hear and determine an aspect on reference to the Full Court

4.13 Mr Reeves for the first respondent then informed the Court that he had not yet had an opportunity to consider properly the proposed Case Stated, nor to obtain instructions with regard to it. Accordingly he sought an adjournment for this purpose. Brennan CJ adjourned the matter until 4 pm that afternoon.

4.14 During the adjournment, discussions occurred primarily between Dr Kenny and Mr Reeves, who agreed that the better course would be for the petition to be split in order for the High Court to resolve the first argument of the petition. If this first argument of the petition succeeded then the second argument could then be referred to the Supreme Court. The proposed Case Stated once again became operative, subject to some minor amendments made by agreement between the parties. The matter resumed before Brennan CJ at 4 pm.

4.15 Mr McCarthy informed the Court that the parties had agreed that the first argument of the petition should be referred to the Full Bench of the High Court. He said that the issue of splitting the petition therefore did not arise for the present purposes and would not arise if the petitioner was unsuccessful with his first argument.

4.16 Chief Justice Brennan then pursued the more difficult question of which Court should hear the second argument of the petition in the event that the first argument of the petition was successful. His Honour was concerned at the prospect of the court time involved if the High Court were to become involved in lengthy factual analysis and the calling of witnesses. His Honour clearly wanted the option of referring the second argument to the Supreme Court in the event that the second argument became relevant, and for the parties to unanimously support that view.

4.17 His Honour was not only concerned about the terms of section 354 of the CEA, which refers to the High Court's power to "*either* try the petition *or* to refer it for trial to the Supreme Court...", that is whether a petition can be split between Courts, but also about whether section 354 permits the referral of "issues" arising under a petition, when the High Court has already determined part of a petition. That is, assuming that part of a petition could be referred to the Supreme Court, which Court should be responsible for the final determination of the petition itself.

4.18 His Honour heard submissions from Mr McCarthy, Mr Reeves and Dr Kenny, in support of the High Court determining the first argument of the petition, and referring the second argument to the Supreme Court only if the first argument was unsuccessful. His Honour, however, remained doubtful that this could be done and reserved his decision until the next day.

4.19 On 15 August 1996 Chief Justice Brennan handed down his decision on whether it was possible to split the petition so that part of the petition could be heard by the High Court, sitting as the Court of Disputed Returns, and the factual matters could be referred to the Supreme Court of the Northern

Territory, sitting as the Court of Disputed Returns. In his decision Brennan CJ said the following, at Attachment B:

> The Courts which may sit as a Court of Disputed Returns are specified in subsection (2) of s. 354. The High Court is the Court of Disputed Returns unless the trial of a petition is referred to the Supreme Court of a State or Territory in which the election was held or return made. In respect of a petition so referred for trial, the Supreme Court of the State or Territory "shall ... be and have all the powers and functions of the Court of Disputed Returns". There is but one Court of Disputed Returns in respect of the trial of any petition: it is either the High Court of Australia or a Supreme Court of a State or Territory. The powers conferred by s.360 are intended to be exercised by the Court which has considered the issues raised in a petition that has been tried. The jurisdiction or power of the High Court under sub-s.(1) of s.354 is expressed clearly in the alternative: this Court may *either* try the petition *or* refer it for trial to the Supreme Court of the State or Territory in which the election was held or return made.
>
> If there be but one Court in respect of the trial of a petition, the trial cannot be severed into parts, one part being determined by one Court, the other part being determined by another. The Act requires that the Court of Disputed Returns in respect of the trial of that petition should hear and determine the issues raised by the petition. There is simply no provision in the Act which would permit a severing of the trial of those issues.

4.20 The Chief Justice then turned to the issue of whether the matter should be retained by the High Court or referred to the Supreme Court of the Northern Territory, given that the petition could not be split, and on the assumption that the second argument would remain a live issue. Mr McCarthy said that he thought the hearing would occupy some five days and would involve a comparison of the Roll and all paper documents, such as the declaration envelopes. Mr Reeves said that many of the electors in question were believed to be Aboriginal people who might be difficult to identify and/or contact. On this basis His Honour suggested that the petition should be referred to the Supreme Court of the Northern Territory.

4.21 Dr Kenny for the AEC submitted that the matter should be retained in the High Court, on the grounds that the petition could be resolved on questions of law rather than evidence, and was successful in persuading His Honour of this view. The Chief Justice required Mr McCarthy to give an undertaking that no evidence would be called and that the matter could be determined entirely on the ballots. The Case Stated, as settled by Dr Kenny, and except for the question of law, was then accepted by the Court.

4.22 The Chief Justice then turned to the formulation of the question of law to be put before the Full Bench of the High Court. Under questioning from the Chief Justice, Mr McCarthy had considerable difficulty in formulating his Question so as to avoid the implications of section 82 of the CEA. After a number of suggestions from the Chief Justice the following Reserve Question was agreed:

Having regard to the facts and matters stated in paragraphs 43, 44, 45 and 47 of the Stated Case -

1. Where at the time of the election the name of an elector who cast one of the 1594 provisional votes referred to in paragraph 45:

(a) was not on a Roll for a District of the Division where the elector resides; and

(b) had previously been on a Roll for a District of the Division where the elector no longer resides

was the DRO bound to have been satisfied that the elector was entitled to be enrolled for the Division and the omission of the elector's name from the Roll referred to in paragraph (a) of the Roll referred to in paragraph (b) was due to an error made by an officer or to a mistake of fact within the meaning of those terms in paragraph 12 of Schedule 3 of the Act?

2. If yes, were the 1594 provisional votes referred to in paragraph 45 wrongly excluded from the scrutiny?

4.23 The Chief Justice formally ordered the matter be heard by a Full Bench of the High Court sitting as the Court of Disputed Returns, that the petitioner should file submissions by 21 August 1996 and that the respondents should file submissions by 28 August 1996. The Case Stated with the Questions as formulated was to be produced to the judge sitting on the trial at 9.30 am, prior to the sitting of the Full Bench at 10.15 am on 3 September.

4.24 At 9.30 am on 3 September 1996 the petition was presented for hearing before Justice Toohey, sitting as the Court of Disputed Returns. Mr McCarthy QC and Mr Hatzistergos, instructed by McClellands, Solicitors, appeared for the petitioner, Mr Snowdon. Mr Reeves of Counsel, instructed by James Noonan, Solicitors, appeared for the first respondent, Mr Dondas. Dr Kenny of Counsel, instructed by the Australian Government Solicitor, appeared for the AEC.

4.25 Justice Toohey addressed a number of procedural matters including minor amendments to the relevant documents, and the Case Stated and Question Reserved were then formally referred to the Full Bench at 10.15 am. The Full Bench comprised Brennan CJ, and Dawson, Toohey, Gaudron and Gummow JJ.

4.26 Mr McCarthy commenced his submissions on behalf of the petitioner and after some interchanges between him and members of the Bench, Brennan CJ posed a formulation of the petitioner's case. The Chief Justice suggested that the petitioner was claiming that there was a mistake on the part of the DRO for the Northern Territory in not having the names of the 1594 voters in question on the roll for the Division of the Northern Territory and that the DRO should have included their votes in the scrutiny. Mr McCarthy adopted that formulation. The Chief Justice then asked Mr McCarthy what was the "mistake of fact" and suggested that the mistake

"must either relate to the removal from the roll [of the voters' names], or a failure, after removal, to reinstate [the voters' names] on a roll".

4.27 The Chief Justice prompted Mr McCarthy to expand the possible mistakes of fact, from incorrect removal of the 1594 names from the various subdivisional rolls, to include a failure to reinstate names on the relevant roll for the District in which those persons resided at the time of voting. Justice Gummow, however, queried whether such an expansion of the claimed mistake of fact was, in substance, another way of putting the same alleged mistake, particularly having regard to paragraph 12 of Schedule 3 of the CEA, which provides for entitlement to be enrolled as the touchstone for entitlement to vote.

4.28 The Chief Justice appeared puzzled by the fact that where a person's name had been removed from roll due to a failure to notify a change of address, that person's vote could still be admitted to the count if the declared address was within the same Division as the person's last address (in cases where there are no subdivisions). His Honour asked what error or mistake of fact could have been committed by the DRO in such circumstances. Gaudron J suggested that perhaps the mistake of fact was an assumption that the voter, by changing address, had also left the Division, notwithstanding the view of the Chief Justice that that constituted a "very slender assumption".

4.29 Mr McCarthy provided the Court with copies of further written submissions which he said to be in reply to the written submissions of the first and second respondents already filed as ordered by the Court. He drew upon Articles 25 and 26 of the *International Covenant on Civil and Political Rights*, and upon section 10 of the *Racial Discrimination Act* 1975 to suggest that the CEA was denying rights to Aboriginal people. The Court did not appear receptive to these submissions.

4.30 Mr Reeves for the first respondent, Mr Dondas, submitted that the case was one of statutory interpretation and in particular, the proper interpretation of paragraph 12 to Schedule 3 of the CEA. He said that the entitlement to vote is dependent upon enrolment and that the AEC was correct in removing the 1594 names in question from the Roll.

4.31 Dr Kenny for the AEC, answered the petitioner's case as formulated by the Chief Justice. Dr Kenny also challenged the petitioner's right to submit that the exercise of power by the DRO under section 79 of the CEA was in some way an abuse, given that that argument had not been raised in the petition. Dr Kenny then led the Court through the procedures governing enrolment and objection to enrolment with particular regard to sections 4(5), 79, 82, 99, 101, 114, 116, 118, 235 and 266 of the CEA. In that context, Dr Kenny made submissions on how paragraph 12 of Schedule 3 should be properly construed.

4.32 Towards the end of Dr Kenny's address, the Court again raised the question of whether the Court could find a "mistake of fact" in the DRO's alleged failure to retain the 1594 names on the subdivisional rolls. Dr Kenny

submitted that this was a matter for the DRO and relied on section 361(1) of the CEA, viz, that "the Court shall not inquire into the correctness of any Roll". Following some further short submissions from Mr McCarthy in reply the Court adjourned to consider its decision.

5. Petition Decision

5.1 On 10 October 1996, the Full Bench of the High Court, sitting as the Court of Disputed Returns, delivered the following two orders on the Question Reserved in the Case Stated:

> *Order 1:*
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> Having regard to the facts and matters stated in the Case Stated, in particular paragraphs 43, 44, 45 and 47 -
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> *Question Reserved 1*. Where, at the time of the election, the name of an elector who cast one of the 1594 provisional votes referred to in paragraph 45:
>
> > (a) was not on a Roll for a District of the Division where the elector resides; and
> >
> > (b) had previously been on a Roll for a District of the Division where the elector no longer resides
>
> was the DRO bound to have been satisfied that the elector was entitled to be enrolled for the Division and the omission of the elector's name from the Roll referred to in paragraph (a) of the Roll referred to in paragraph (b) was due to an error made by an officer or to a mistake of fact within the meaning of those terms in paragraph 12 of Schedule 3 of the Act?
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> *Answer 1.* No.
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> *Question Reserved 2*. If yes to question 1, were the 1594 provisional votes referred to in paragraph 45 wrongly excluded from the scrutiny?
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> *Answer 2*: Does not fall to be answered.
>
> *Order 2:*
>
> The petitioner pay the respondents' costs of the question reserved.

5.2 In its Reasons for Judgement at Attachment C, the Court said:

> The relevant facts are agreed by the parties. It will be necessary to say something about them, but first it is appropriate to consider various provisions of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act"), the legislation applicable to the election in question. This is not a straightforward task since the Act contains an array of sections, the relationship between some of which is not always beyond argument. In particular, the Act deals with elections in

the Northern Territory differently from those in the States in an important respect. This will become clear as these reasons progress.

5.3 The Court analysed the various provisions of the CEA which deal with Electoral Districts in the Northern Territory (sections 4(1); 4(5); 48(2A); 56A; 79(1)(a); 79(2); and 82(3)); with Electoral Rolls (sections 4(1); 4(5); 82(2); 82(3); 83(1); 99(1); 99(2); 99(3); and 101(4)(5)(5A)(6); with the Review and Alteration of Electoral Rolls (sections 4(5); 92(2); 105(1)(f)(g); 114(1)(2); and 118(3)); and with the Scrutiny (sections 200E; 235(1)(2); 266(1)(3); and Schedule 3).

5.4 Given this statutory analysis, the Court then stated the basis of the petition as follows:

> We are now at the heart of the matter. In the course of the enquiry which the DRO conducted and which led to the application of par 12(b) of Sched 3 mentioned earlier, the DRO compared the address given by each person who had signed a certificate or declaration on envelopes in the first group ("the declaration address") with the address, if any, last recorded for that person on the Roll for the Division ("the Roll address"). If the declaration address and the Roll address of the elector were within the same District of the Division, the DRO was satisfied that the name of the elector had been omitted from the Roll for the Division due to an error or mistake within par 12(b)(ii). But if the declaration address and the Roll address of an elector in the first group were in different Districts of the Division, the DRO was not so satisfied. Of the 2,587 envelopes mentioned earlier, 1,594 were placed in the group identified in par 10(d) of Sched 3, that is, "envelopes bearing certificates or declarations by persons who are not enrolled for the Division". It is those 1,594 votes with which this petition is primarily concerned.
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> The Case Stated further recites that in
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> > "All Division for the election of Members of the House of Representatives, other than for the Division of Kalgoorlie and the Division of the Northern Territory, the DRO would have been satisfied that the name of an elector had been omitted from the Roll for the Division due to an error made by an officer or to a mistake of fact if the declaration address and the last current or enrolled address of the elector was within the Division in which he or she claimed to vote.
>
> The question asked of the Court is directed at such of the persons who cast the 1,594 provisional votes and who satisfied the two criteria specified in the question, namely, that they were not on a Roll for a District of the Division where they resided and had previously been on a Roll for a District of the Division where they no longer resided.

5.5 The Court dealt with the arguments of the petitioner as follows:

> Mr Snowdon's complaint is that an elector who moves from one District to another within the Northern Territory without transferring to another Roll should not thereby be disenfranchised and that this would not happen anywhere but in the Northern Territory (or Kalgoorlie). The complaint is understandable but the issue presented to the Court is a legal one, to be

answered in terms of the Act. Accepting this, Mr Snowdon says that on the proper construction of the Act there is but one Roll for the Northern Territory and that there was a mistake of fact on the part of the DRO in not having on that Roll the 1,594 persons who, at the time they cast provisional votes, were residents of the Northern Territory.

Mr Snowdon faces the hurdle presented by s 4(5) of the Act. The sub-section is set out earlier in these reasons. Subject to the contrary intention appearing, a reference to a "Division" in the Act includes, relevantly, a reference to the Northern Territory. And, relevantly, a reference to "Subdivision" includes a District of the Northern Territory.....

Counsel for Mr Snowdon sought to meet the apparent operation of the Act in two ways. The first was by invoking principles relating to the right to vote as a fundamental right which should not be cut down by the operation of anything other than a uniform franchise. The other was by focussing on the words "unless the contrary intention appears" in s 4(5) and contending that a contrary intention did appear from other sections of the Act.

On the first point counsel argued that the 1,594 electors who cast provisional votes have been disenfranchised for what was described as "non-Commonwealth purposes". The importance of maintaining unimpaired the exercise of the franchise hardly need be stated....

It is important to state that there was no attack by Mr Snowdon on the validity of any provision of the Act. There was a recognition that the power of the Parliament is to deal with the Northern Territory differently from the States arose from s 122 of the Constitution and that the Constitution did not demand that the voting provisions, so far as the Territory was concerned, be uniform. Rather, the submission was that, in the construction of the Act, the importance of a uniform franchise should be kept firmly in mind.

Authority makes it clear that the Parliament is empowered to determine, not only the extent of representation of the Northern Territory in the Parliament, but also the terms of representation including matters germane to the franchise, enrolment and the adoption of District boundaries for the purposes of enrolment on the Roll for the Division of the Northern Territory....

The protection of a right to vote contained in s 41 of the Constitution does not avail Mr Snowdon. To begin with, it relates only to the right to vote in a State. Furthermore, the provision does not prescribe a qualification to vote. It assumes the existence of a right and ensures that the right is not taken away. In any event the practical effect of s 41 is now spent...

There can be no quarrel with the approach to the Act for which Mr Snowdon contended if there be doubt or ambiguity in the language of the Act. But if there be none, the approach does not avail him. Likewise, if the contrary intention to which s 45(5) refers can be demonstrated, effect must be given to that contrary intention. But if it cannot be demonstrated, the plain language of sub-s 5 must take its course. In that regard the question is one of the relationship between the various provisions of the Act.

5.6 The Court then proceeded to further statutory interpretation in the search for any possible doubt or ambiguity in meaning of the various relevant provisions, sections 4(5), 79, 81, 82, 99, 229 and 235, and went on to say:

> Mr Snowdon's complaint, as already mentioned, is that the 1,594 persons who cast provisional votes were disenfranchised. The response of Mr Dondas and the Electoral Commission is that they were not disenfranchised. They were not qualified electors who were denied the vote. They were not qualified to vote because their names did not appear on the Roll for the Division, that is, they did not appear on the District Rolls that made up the Roll for the Division that were applicable to those persons.
>
> In the light of those observations, the issue narrows to whether the language of the Act, read in the light of s 4(5), yields to a contrary intention.
>
> At the risk of some repetition, s 82(1) and (2), read with s 4(5), require that there be a Roll for the Division of the Northern Territory and separate Rolls for each District. The District Rolls together form the Divisional Roll. To qualify for enrolment on a District Roll, a person must live in the relevant District. An elector who moves from one District to another is entitled to transfer his or her enrolment but is not entitled to have his or her name placed on the Roll for a District other than the District in which the person lives.
>
> Where then is a contrary intention to be found in terms of s 4(5)? The difficulty facing Mr Snowdon in this regard is that the Act provides for the division of the Northern Territory into Districts and requires that those Districts will have their own Rolls, with the consequence that those Rolls will be the foundation upon which the right to vote is constructed. There can be no right to vote without enrolment and enrolment depends upon being on the Roll of the District in which the person lives.
>
> The contrary intention must be found in the Act, not in extrinsic circumstances; that is clear enough. Power to divide the Northern Territory into Districts was conferred by s 10(1) of the *Commonwealth Legislation Amendment Act* 1983 (Cth). The Joint Roll Arrangement was made pursuant to s 84(1) of the Act. It exists as a matter of convenience; its existence cannot distort the otherwise clear meaning and operation of the Act. Indeed, counsel for Mr Snowdon argued that the notion of districts was relevant to Northern Territory elections rather than federal elections. The argument came close to asserting a misuse of the power conferred by s 79(1) of the Act. But there is nothing before the Court to support such a contention. In any event, the Court is called upon to answer the question referred to it upon agreed facts.....

5.7 The Court then dealt with the human rights issues that were submitted by Mr Snowdon:

> Counsel ... referred to Art 25 of the Covenant which speaks of the right of every citizen, without unreasonable restrictions, to vote and Art 26 which requires the law to prohibit discrimination. The respondents' answer was that the language of the Act is clear, that the provisions of the Act concerning enrolment and voting are uniform throughout Australia and that it is the application of the principles contained in the Act to the particular facts of the case that is in issue here. We accept that answer.

> As to the *Racial Discrimination Act*, there is simply no factual foundation upon which the Court could have regard to the position of Aboriginal persons in the Northern Territory in answering the question which has been put to it.
>
> In any event it does not appear that reliance upon the Covenant or the *Racial Discrimination Act* falls within the terms of the petition. There is no provision in the Act for extending the time allowed by s 355(e) for the filing of a petition and there is no power in the Court of Disputed Returns to dispense with that provision.

5.8 The Court then concluded:

> It follows from what has been said in these reasons that the DRO was not bound to have been satisfied that any of the 1,594 persons who cast provisional votes was entitled to be enrolled for the Division of the Northern Territory. Accordingly, the first part of the question asked of the Court should be answered "No". The second part of the question does not fall to be answered.

5.9 The Court also ordered that the petitioner, Mr Snowdon, pay the costs of the first respondent, Mr Dondas, and the second respondent, the AEC in respect of the question reserved. This order was made without the Court taking any submissions from the parties on costs

6. Implications of the Preliminary Decision

6.1 During the course of the proceedings, it appeared as if evidentiary matters might have to be resolved in the petition, by the examination of declaration envelopes and the calling of witnesses. This could have involved up to 1594 individual investigations. The High Court, sitting as the Court of Disputed Returns, has made it clear on at least one recent occasion (the *Webster v Deahm* petition in 1993) that it is not amendable to dealing with such a load, and would, if such evidentiary matters were to be pressed, refer the petition to the relevant State Supreme Court. This option is available to the Court under section 354 of the CEA.

6.2 However, it became clear during proceedings in this petition, that there was a preference by the Bench for the questions of law to be resolved by the High Court, with only questions of evidence being determined by the Supreme Court, rather than the whole of the petition being heard and determined by the Supreme Court. It was also the preferred position of the AEC that if a petition were to be split, and any questions of evidence were to be remitted to the Supreme Court, then the evidentiary determinations should be sent back to the High Court for final decision on the appropriate relief.

6.3 It is the view of the AEC that the High Court, and not a Supreme Court of a State, should make final determinations on the proper outcome of challenges to a federal election, for example, whether or not a federal election should be voided. The interpretation of section 354 of the CEA by the Chief Justice on 15 August 1996 means that it is not possible for the evidentiary and determinative matters in a petition to be "slit" between the High Court and a Supreme Court under the legislation as it currently stands.

7. Conclusion

7.1 The Court of Disputed Returns rejected the challenge by Mr Snowdon to the election of Mr Dondas for the Division of the Northern Territory, and ordered Mr Snowdon to pay the costs of Mr Dondas, the first respondent to the petition, and of the AEC, the second respondent.

7.2 The AEC submission No 30 to this JSCEM of 29 July 1996 entitled "The Conduct of the 1996 Federal Election" contained a full description of the unusual circumstances which led to the AEC lawfully rejecting 1,594 provisional votes (see part 4.10 on pages S158 to S161 of Volume 1 of the JSCEM submissions). The AEC concluded by suggesting that the JSCEM await the decision of the Court in the Snowdon petition before moving to address the circumstances relating to provisional voting in the subdivisions of the Northern Territory. **Now that the Court has rejected the petitioner's claim that the AEC incorrectly applied provisions of the CEA, the JSCEM might consider the options for change provided by the AEC in that earlier submission.**

7.3 The Snowdon petition also gave rise to a procedural issue about the "splitting" of petitions, and the remitting of questions of evidence from the High Court to inferior courts.

> **The AEC recommends that section 354 of the CEA be amended to enable the High Court to remit aspects of a petition to a Supreme Court, but so that the High Court retains final jurisdiction on relief.**

7.4 Finally, the AEC brings to the attention of the JSCEM the policy questions and operational problems involved in the whole area of enrolment reinstatements for the purposes of declaration voting under Schedule 3 of the CEA. It is of some relevance that Chief Justice Brennan, during the court proceedings on the Snowdon petition, expressed more than once his puzzlement that the Parliament had seen it appropriate to allow the reinstatement to the Roll, and the consequent automatic restoration of the right to vote, of persons who had failed to observe their duty to remain correctly enrolled, regardless of whether they lived in the Northern Territory or any other State or Territory of Australia (see, for example, paragraph 4.28 above).

7.5 **The JSCEM might give some consideration to the underlying policy question of whether the enrolments of declaration voters should continue to be reinstated during the preliminary scrutiny, despite the fact that such persons have failed to ensure their enrolments are correct before the close of rolls.** The AEC has already indicated that it is reviewing the operational problems involved in the administration of Schedule 3 of the CEA.