AUSTRALIAN ELECTORAL COMMISSION

SUPPLEMENTARY SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

PETITIONS TO THE COURT OF DISPUTED RETURNS

Canberra

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1 Introduction

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 1998 Federal Election", as advertised on 23 January 1999 in all major national newspapers, and is supplementary to:

- Submission No 88, entitled "The Conduct of the 1998 Federal Election", of 12 March 1999 (volume 3)
- Submission No 159, entitled "The Admissibility of Provisional Votes", of 23 March 1999 (volume 4)
- Submission No 176, entitled "AEC Responses to other Submissions and to Hearings", of 4 May 1999 (volume 7)
- Submission No 210, entiled "Further AEC Responses to other Submissions and to Hearings", of 23 July 1999 (volume 10)

2. Summary of Recommendations

2.1 The AEC makes one recommendation in this submission, involving no amendments to the *Commonwealth Electoral Act 1918* ("the Electoral Act") or the *Referendum (Machinery Provisions) Act 1984* ("the Referendum Act"). This recommendation is in addition to the 29 recommendations in submission No 88, the one recommendation in submission No 159, the five recommendations in submission No 176, and the three recommendations in submission No 210.

> **Recommendation 1:** That the JSCEM seek a reference to inquire into the powers and functions of the Australian Electoral Commission, as expressed in Part II of the Electoral Act and Part I of the Referendum Act, and the powers and functions of the Court of Disputed Returns, as expressed in Part XXII of the Electoral Act and in Part VIII of the Referendum Act.

3. Summary of Election Petitions

3.1 This submission reports on the proceedings and decisions in the nine election petitions filed with the High Court of Australia, within the 40 day period after the return of the writs for the 1998 federal election, under the provisions of Part XXII of the Electoral Act.

3.2 All nine petitions have now been decided by the High Court, sitting as the Court of Disputed Returns. The decision in two related petitions resulted in the disqualification of an elected Queensland Senate candidate on constitutional grounds, and the other seven petitions were dismissed by the Court. No costs were ordered against the AEC in any of the petitions.

3.3 A summary of the decisions in the nine petitions is as follows:

- *Sue v Hill, Sharples v Hill:* On 23 June 1999, a majority of the High Court decided that the Court of Disputed Returns had jurisdiction to hear the petitions, and that Ms Heather Hill was not capable of being elected as a Senator for Queensland under section 44(i) of the Constitution. The Commonwealth was ordered to pay the costs of the petitioners and the first respondent and no costs order was made against the AEC.

- On 2 July 1999, in the Sue petition, the Court of Disputed Returns ordered that Ms Hill was not duly elected and that Mr Harris was elected in her place. The Commonwealth was ordered to pay the costs of the petitioner, the first respondent and the intervening parties, in these later proceedings, and in some of the preliminary proceedings. No costs order was made against the Attorney-General or the AEC. On 28 July 1999, in the Sharples petition, the Court made similar orders.

- *McClure v AEC:* On 24 June 1999, the Court dismissed the petition with Mr McClure ordered to pay the costs of the AEC.

- *Polke v AEC, Vaughan v AEC, Garcia v AEC, Heathorn v AEC:* On 23 July 1999, the Court dismissed these four petitions, which were identical to the McClure petition. The AEC did not seek any costs orders because the petitioners agreed not to oppose the AEC application for dismissal.

- *Ditchburn v AEO Qld, Ditchburn v DRO Herbert:* On 23 July 1999, the Court dismissed these two petitions, and Mr Ditchburn was ordered to pay the costs of the AEC.

3.4 On 11 May 1999, a further petition, *Rudolphy v Lightfoot*, was filed with the Court, disputing the casual vacancy election of Senator Lightfoot in May 1997, on the basis of alleged anomalies in the Western Australian Parliament at the time.

3.5 On 16 June 1999, Justice Gummow referred the following question to the Full Bench of the High Court, which is scheduled for hearing on 18 October 1999:

> Upon their true construction, do sections 355(e) and 358 of the Commonwealth Electoral Act 1918 render the petition (a) incompetent, or (b) liable to be dismissed, or (c) liable to be struck out?

3.6 The AEC will not be providing any comment in this submission on the *Rudolphy v Lightfoot* petition, as it is still before the Court.

4. Proceedings in Sue v Hill and Sharples v Hill

4.1 *The Sue v Hill Petition*

4.1.1 On 1 December 1998, Mr Henry (Nai Leung) Sue filed a petition in the Sydney Registry of the High Court, disputing the election of Ms Heather Hill, of Pauline Hanson's One Nation Party, for the Queensland Senate at the 1998 federal election. In his petition, Mr Sue asserted his entitlement to vote at the Queensland Senate election, and made the following allegations:

> As at the date of her nomination, the Respondent was under an acknowledgement of allegiance, obedience or adherence to a foreign power, or was a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power within the meaning of section 44(i) of the Constitution…The foreign power is Britain…As such the Respondent was incapable of being chosen or sitting as a Senator.

4.1.2 The petitioner, Mr Sue, asked the Court to declare that the respondent, Ms Hill, was not capable of being chosen as a Senator, and was not duly elected as a Senator. The petitioner also asked the Court to order the Australian Electoral Officer for Queensland to conduct a recount of the Queensland Senate ballot papers in order to find a replacement candidate to be elected instead of Ms Hill. Finally, the petitioner asked the Court to order that the respondent, Ms Hill, pay his costs.

4.1.3 The request by the petitioner for a recount of the Senate ballot papers to find a replacement for Ms Hill from the candidates at the election was in line with precedent set in the *Re Wood* cases in 1988 which resulted in a recount of the ballot papers for Senator Wood's vacated position, after he was disqualified under section 163 of the Electoral Act for not being an Australian citizen at the time of his election, and the election of Senator Irina Dunn of the Nuclear Disarmament Party, the same Senate group as Senator Wood. (see *Re Wood (1988) 167 CLR 145; Re Wood [No 2] (1988) 62 ALJR 377; Re Wood [No 3] (1988) 62 ALJR 638,* and for further discussion of Senate recounts see paragraphs 45.3 to 45.5 in AEC submission No 210 of 23 July 1999.)

4.2 *The Sharples v Hill Petition*

4.2.1 On 2 December 1998, Mr Terry Sharples filed a petition in the Brisbane Registry of the High Court, also disputing the election of Ms Heather Hill for the Queensland Senate. In his petition, Mr Sharples asserted his entitlement to vote at the Queensland Senate election, and made the following allegations:

> The Respondent is by birth a British subject and under allegiance, obedience and adherence to the laws of the United Kingdom…The respondent immigrated to Australia and has lived in Australia since that date. She holds a passport as a British subject which is still current…Australian law does not recognise British subjects who are domicile or resident as citizens. The respondent applied for Australian citizenship in or about April 1998.

4.2.2 The petitioner, Mr Sharples, asked the Court to void the election of Ms Hill; to order the Queensland Governor to issue a writ for an election to fill the Senate position; and to order the Commonwealth to pay his costs. Mr Sharples was known to be a disaffected One Nation Party member, who was apparently seeking a fresh Senate election or a "by-election", so as to reduce the possibility of another candidate from the One Nation Senate group replacing Ms Hill, which would be the likely outcome of a recount.

4.3 *Preliminary Proceedings in the Petitions*

4.3.1 On 2 and 25 February 1999, solicitors for the respondent Ms Hill, Watkins Stokes Templeton, filed with the Court a summons, and an amended summons, seeking the dismissal or striking out of the petition on the following grounds

> (a) that the petition did not comply with section 355(a) and (aa) of the Electoral Act, because it did not set out the facts relied on in sufficient particularity;
> (b) that the petitioner had failed to publish the petition in the Commonwealth Gazette as required by Order 68 Rule 3 of the High Court Rules (later done and acknowledged); and
> (c) that the Court of Disputed Returns is not empowered to declare the respondent not capable of being elected or not duly elected;

4.3.2 On 10 March 199, solicitors for the respondent, Ms Hill, filed a further amended summons, again seeking dismissal of the petition on the above grounds, but also seeking the referral to the Full Bench of the High Court a question on the jurisdiction of the Court:

> … in the event that the respondent does not establish any of the grounds in (a), (b) and (c) above, the respondent seeks an order that there be referred to the Full Court the following constitutional issue:
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> That the purported vesting in the High Court of Australia by s. 354 of the Commonwealth Electoral Act 1918 of the power to try petitions and determine the validity of any election or return is contrary to the separation of powers between the Executive, Legislative and Judiciary contained in the Constitution and is therefore invalid.

4.3.3 At a directions hearing on 15 March 1999, before Chief Justice Gleeson of the High Court, the petitioner Mr Sue was represented by Mr Stephen Finch SC; the respondent Ms Hill was represented by Mr David Rofe QC. The AEC, represented by Mr Geoffrey McCarthy of the Australian Government Solicitor, sought and was granted leave to enter an appearance as a party to the petition. The AEC thereby became the second respondent to the Sue petition.

4.3.4 Where the AEC is not expressly named as respondent in an election petition, the AEC normally seeks leave to join as a party, an entitlement provided for in section 359 of the Electoral Act, in order to make submissions on the facts of the election under dispute, and submissions on the appropriate relief or remedy should the petition succeed. The AEC does not make submissions on constitutional issues raised in petitions, as this is more appropriately for the Attorney-General for the Commonwealth, who is entitled to intervene under section 78A of the *Judiciary Act 1903,* where constitutional issues are agitated in the High Court.

4.3.5 In its *amicus* role in election petitions, the AEC does not seek costs against other parties and does not expect costs to be awarded against it, as detailed in the decision of Brennan CJ in *Free v Kelly (1996) 70 ALJR 809 at 812:*

> 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 curial 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.

4.3.6 At the first directions hearing in the Sue petition on 15 March 1999, Chief Justice Gleeson indicated his intention to proceed only on the single issue, raised by the first respondent Ms Hill in her various summonses, of whether the petition complied with sections 355(a) and (aa) of the Electoral Act in providing sufficient facts and particulars to ground the petition. His Honour was critical of the petitioner's general claim of a breach of section 44(i) of the Constitution, which simply repeated the text of the provision without making any effort to identify what aspects were relevant or at issue, and described the petition as: "an uncritical spray levelled at the respondent by taking the language of the statute and not bothering to work out what your case really was." (*transcript, 15 March 1999, page 12)*.

4.3.7 The question then arose as to whether the petition could be amended to delete aspects of the petition which were not properly pleaded or which the petitioner did not intend to pursue. Section 44(i) of the Constitution provides three categories of disqualification (*Sykes v Cleary (1992) 176 CLR 77 at 109-111*) and the terms of the petition suggested that Ms Hill was in breach of all three categories, even though the only fact presented in the petition, that Ms Hill was at the relevant time a citizen of Great Britain, appeared to be a breach only of the second category in section 44(i). His Honour heard submissions from all parties on whether the deletion of part of a petition amounted to amending a petition, which precedent case law suggested was not permissible (*Nile v Wood (1988) 167 CLR 133 at 137)*.

4.3.8 On 19 March 1999, Chief Justice Gleeson delivered his decision on whether the petition was in compliance with section 355 of the Electoral Act, and if not, whether it should be dismissed or struck out (**Attachment 1**). His Honour concluded that the petition would have been dismissed but for the exercise of the discretionary power in section 358(2) of the Electoral Act, and ordered the petitioner, Mr Sue, to pay the costs of the respondent's (Ms Hill's) costs of the application, even though the respondent's application for dismissal of the petition was itself dismissed. The petition was allowed to proceed on the terms that the petitioner was prevented from placing any further reliance on any allegations that fell within either the first or the third categories of disqualification in section 44(i) of the Constitution.

4.3.9 On the same day, in further directions, Chief Justice Gleeson proposed that the Sue and the Sharples petitions should be managed separately at this stage. Mr Sharples, who was not represented, had filed his petition in Brisbane, and his petition was assigned to Justice Callinan to progress the matter in Brisbane.

4.3.10 Chief Justice Gleeson then stated his intention, consistent with the wishes of the parties, to refer the substantive questions arising under of the Sue petition to the Full Court of the High Court, pursuant to section 18 of the *Judiciary Act 1903.* Assuming the power to state a case, His Honour directed the parties to prepare a draft case stated for the consideration of the Full Court. There was general agreement between the parties that the case stated would contain a number of questions, but should at least include a question as to whether the petitioner had taken all "reasonable steps" to renounce her citizenship of Great Britain according to the test provided in *Sykes v Cleary*, and a question as to whether Great Britain is a "foreign power".

4.3.11 It was indicated that it was likely that the matter would be listed before the Full Court on 11 and 12 May 1999 in Canberra. The proceedings would involve consideration of a Stated Case in the context of an Agreed Statement of Facts. There was general agreement between the parties that the facts would be relatively few, and the parties did not anticipate any disagreement as to the facts.

4.3.12 His Honour noted tentative agreement between the parties that if the petition were successful, a recount would be the appropriate remedy and that the person placed second on the One Nation Party's group voting ticket would, in all probability, be the person who should be declared duly elected pursuant to section 360(1)(iv) of the Electoral Act. His Honour suggested that that person, Mr Len Harris, would have to have an interest in the proceedings and might wish to be heard. The matter was adjourned with costs in these preliminary proceedings.

4.3.13 On 29 March 1999, directions resumed before Chief Justice Gleeson, and the draft Case Stated in the Sue petition was settled between the parties. On 30 March 1999 His Honour signed the Case Stated, with the following questions being referred to the Full Bench of the High Court:

> (a) Does s 354 of the Act validly confer upon the Court of Disputed Returns jurisdiction to determine the issues raised in the petition?
> (b) Was the first respondent at the date of her nomination a subject or citizen of a foreign power within the meaning of s 44(i) of the Constitution?
> (c) Was the first respondent duly elected at the election?
> (d) If no to (c), was the election void absolutely?
> (e) If no to (d), should the second respondent conduct a recount of the ballot papers cast for the election for the purposes of determining the candidate entitled to be elected to the place for which the first respondent was returned?
> (f) Save for the otherwise dealt with by order, who should pay the costs of the Stated Case and of the hearing of the Stated Case before the Full High Court?

4.3.14 On 1 April 1999, a directions hearing on the Sharples petition was held by Justice Callinan in Brisbane, with Mr Sharples representing himself, and Mr Templeton representing the respondent Ms Hill. The AEC, represented by Mr Maurice Swan of the Australian Government Solicitor, was granted leave to enter an appearance as a party to the petition, and the AEC thereby became the second respondent to the Sharples petition. Justice Callinan indicated that he was inclined to follow the same course as set by Chief Justice Gleeson in the Sue petition, and asked for an Agreed Statement of Facts and a draft Case Stated from the parties. The matter was adjourned to 22 April 1999.

4.3.15 In negotiations between the parties on the preparation of the draft Statement of Facts and Case Stated, the petitioner, Mr Sharples, expressed his substantial disagreement with the Statement of Facts in the Case Stated already concluded in the Sue petition proceedings, despite the respondents (Ms Hill and the AEC) expressing the view that the Statement of Facts in the Case Stated in the Sharples petition proceedings should be the same (with the omission only of a paragraph that was peculiar to the Sue Case Stated).

4.3.16 On 22 April, in directions before Justice Callinan, His Honour ruled on the various points of disagreement in the draft Statement of Facts in the Case Stated between the petitioner Mr Sharples and the two respondents, Ms Hill and the AEC. This resulted in the addition of the numbers of first preference votes "above the line" and "below the line" received by Ms Hill, which Mr Sharples submitted would be pertinent to his argument for a Senate "by-election" or fresh election. However, His Honour declined to make any changes to the questions in the Case Stated that were agreed in the Sue petition proceedings.

4.3.17 At the conclusion of the directions hearing, Justice Callinan directed the parties to join in the preparation of a document to reflect the various amendments, as ordered, to the draft Statement of Facts in the Case Stated in the Sharples proceedings, and directed that the amended document be submitted to him by 27 April for certification and referral to the Full Bench. Costs in these preliminary proceedings were reserved.

4.3.18 Following these proceedings, the petitioner, Mr Sharples, wrote various letters to the other parties expressing his dissatisfaction with the proceedings, and filed an affidavit with the Court (which was not served on the other parties) complaining about the conduct of the other parties in negotiations. In the event, Justice Callinan certified the Case Stated and Statement of Facts in the Sharples petition proceedings, and the matter was listed for hearing concurrently or consecutively with the Sue petition proceedings on 11-12 May.

4.4 *Substantive Proceedings in the Petitions*

4.4.1 The hearing by the Full Bench of the High Court of the Case Stated in the Sue petition and the Case Stated in the Sharples petition took place on 11-12 May 1999 in Canberra, and, because of the number and length of submissions, was extended on the second day, for another day, into 13 May.

4.4.2 The first petitioner, Mr Sue, was represented by Mr Stephen Finch SC, with Ms Elizabeth Collins. The second petitioner, Mr Sharples, represented himself. The first respondent to each petition, Ms Heather Hill, was represented by Mr Robert Ellicott QC and Mr David Rofe QC, with Mr Anthony Tudehope. The second respondent to each petition, the AEC, was represented by Mr Maurice Swan, a barrister from the Australian Government Solicitor with considerable experience in disputed proportional representation elections. The Attorney-General for the Commonwealth (Intervening) was represented by the Solicitor-General, Mr David Bennett QC, with Mr Nye Perram and Mr Christopher Ward.

4.4.3 The first day of the hearing was occupied with the first question in the Case Stated: *"Does section 354 of the Act validly confer upon the Court of Disputed Returns jurisdiction to determine the issues raised in the petition?"* Counsel for the first respondent, Ms Hill, submitted that the purported conferral of power upon the Court under section 354 of the Electoral Act was invalid because it contravened the doctrine of separation of powers. That is, the determination of disputed elections and returns is ancillary to the legislative function of the Parliament and is not a judicial function.

4.4.4 It was also submitted by Counsel for Ms Hill that even if the Court had jurisdiction to try the petition, its powers did not extend to ruling upon whether the first respondent was incapable of being chosen by reason of section 44(i) of the Constitution. That is, when hearing a petition filed under Division 1 of Part XXII of the Electoral Act, the Court is limited to consideration of alleged illegal practices, *per* section 362 of the Act, and Division 1 does not confer power on the Court to hear claims in a petition of constitutional disqualification.

4.4.5 It was further submitted by Counsel for Ms Hill that the Court's power to consider whether a person was qualified to be a Member of Parliament arises only in Division 2 of Part XXII of the Electoral Act by means of a question referred to the Court by resolution of the relevant House of the Parliament. This is why additional powers are conferred on the Court pursuant to section 379 of the Act. Counsel for the first respondent relied on the judgment of Gaudron J in *Hudson v Lee (1993) 115 ALR 343* where Her Honour held that section 362 of the Act was an "exhaustive statement" of the circumstances in which an election might be declared invalid or void in answer to a petition filed under Division 1 of Part XXII of the Act.

4.4.6 In response, Counsel for the petitioner, Mr Sue, and the Solicitor-General for the Commonwealth, both submitted that the Court should not adopt such an unduly narrow reading of Part XXII of the Electoral Act. The Solicitor-General submitted that the view expressed by Gaudron J in *Hudson v Lee* is limited to questions of misconduct, and is authority only for the proposition that misconduct is not actionable unless it finds a source in section 362 of the Act. The AEC made no submissions in relation to this first question in the Case Stated.

4.4.7 The question whether the Court had jurisdiction to determine whether the first respondent Ms Hill was "incapable of being chosen" as a Senator by reason of section 44(i) of the Constitution inevitably drew the Court into the question whether it was sitting as the High Court of Australia, and thus having the jurisdiction conferred on the High Court by the Constitution, or whether it was sitting as a separate statutory Court, namely the Court of Disputed Returns, and thus having the jurisdiction conferred on it under Part XXII of the Electoral Act.

4.4.8 The second question in the Case Stated, *"Was the first respondent at the date of her nomination a subject or citizen of a foreign power?"*, was dealt with in two parts: whether the United Kingdom is a "foreign power" for the purposes of section 44(i) of the Constitution, and whether Ms Hill was a "subject or citizen" of the United Kingdom, irrespective of whether the United Kingdom is a foreign power. The AEC made no submissions in relation to this second question in the Case Stated.

4.4.9 There was little disagreement between the parties concerned that when section 44(i) was enacted, the framers of the Constitution did not envisage the phrase "foreign power" to include the United Kingdom. Indeed, until 1948 and the passing of the *Nationality and Citizenship Act 1948*, citizenship of the United Kingdom was the norm for the majority of Australians.

4.4.10 Counsel for the first respondent, Ms Hill, submitted that as at 1900 the phrase "foreign power" did not and was not intended to include the United Kingdom and that none of the events, circumstances or legislative enactments since 1900 have converted the special and unique relationship between the Commonwealth of Australia and the United Kingdom into a relationship now between the Commonwealth and a "foreign power". It was submitted that the relationship was like that between a parent and a child, which forever binds the child to the parent.

4.4.11 In relation to whether Ms Hill was a "subject or a citizen" of the United Kingdom, Counsel for Ms Hill endeavoured to distinguish the Court's decision in *Sykes v Cleary (1992) 176 CLR 77* on the grounds that Ms Hill was at the time of her nomination an Australian citizen. This, it was submitted, was enough to avoid the operation of section 44(i).

4.4.12 In response, Counsel for the petitioner, Mr Sue, and the Solicitor-General for the Commonwealth, both submitted that the United Kingdom is a "foreign power" for the purposes of section 44(i) of the Constitution. Counsel for the petitioner further submitted that even if the United Kingdom was not a foreign power in 1900, and even if difficulties arise in identifying the exact point in time when it became a foreign power, it can nevertheless be said with confidence that the emergence of Australia as an independent nation, and the occurrence of various relevant events, particularly the passage of the *Australia Act 1986*, mean that at least when Ms Hill was nominated for election, the United Kingdom had truly become a "foreign power".

4.4.13 Finally, Counsel for the petitioner, Mr Sue, and the Solicitor-General for the Commonwealth, both submitted that at the date of her nomination Ms Hill held British citizenship and had not taken all reasonable (or any) steps to divest herself of that citizenship. In particular, she had not made the appropriate declaration of renunciation of that citizenship, as *per Sykes v Cleary*. That is, if the United Kingdom is a "foreign power" within the meaning of section 44(i) then Ms Hill was incapable of being chosen as a Senator.

4.4.14 In relation to the third question in the Case Stated: "*Was the first respondent duly elected at the election?*" there was common ground between the parties that if the Court found that at the date of her nomination Ms Hill was incapable of being chosen as a Senator by reason of her being a subject or citizen of a foreign power, then it must follow that the first respondent was not duly elected at the election.

4.4.15 In relation to the fourth question in the Case Stated: *"If the first respondent was not duly elected, was the election absolutely void?*", the parties in *Sue v Hill* agreed with the submission by the Solicitor-General for the Commonwealth that this question should be answered in the negative, that is, the election should not be declared absolutely void and a recount would be the appropriate remedy. However the second petitioner, Mr Sharples, submitted that the question should be answered in the positive and a "whole new election" should be conducted.

4.4.16 In relation to the fifth question in the Case Stated, "*If the election should not be declared void absolutely, should the second respondent conduct a recount of the ballot papers cast for the purpose of determining the candidate entitled to be declared elected?*", Counsel for the AEC submitted that a recount of the ballot papers for the position of Ms Hill would be the most appropriate remedy, *per In re Wood (1988) 167 CLR 145*. Counsel for the petitioner, Mr Sue, Counsel for the first respondent, Ms Hill, and the Solicitor-General for the Commonwealth, agreed with the submissions of the AEC.

4.4.17 In response to questions from the Bench, Counsel for the AEC further submitted that it was highly probable that a member of the same political party as Ms Hill would be elected in her place on a recount of the ballot papers. That is, a recount would probably elect Mr Len Harris of One Nation in place of Ms Hill of One Nation, because around 99% of electors who voted 1 for Ms Hill voted 2 for Mr Harris, the second candidate on the One Nation group voting ticket. Nevertheless, until the recount was actually conducted, this remained an hypothetical proposition.

4.4.18 In opposition to the submissions of the AEC, the second petitioner, Mr Sharples, submitted that the Court could not be absolutely confident that the voters' original intentions would be reflected by a recount, given the distribution of first preferences for Ms Hill above and below the line on the ballot papers. He referred also to the fact that Ms Hill was elected third in a field of six, whilst in the precedent case, *In re Wood,* Mr Wood was elected last in a field of twelve. He submitted that a fresh election was therefore the most appropriate remedy. The Court then ordered Counsel for the AEC to provide further written submissions on the different consequences that might flow from the different order in which Mr Wood was elected in 1988 and Ms Hill in 1998.

4.4.19 The further written submissions were filed by the AEC on 18 May 1999, and showed that, in its *amicus* role, the AEC had given early consideration as to whether the election of other candidates would be disturbed by a recount if Ms Hill were to be disqualified, and had concluded that this was so unlikely that their involvement in the proceedings need not be suggested to the Court. The AEC further submitted that the different order of election in the Wood and the Hill cases would not change the fact that Mr Harris of One Nation would most probably be elected on a recount to replace Ms Hill. In the event, Mr Sharples chose to file further written submissions in response to the further written submissions of the AEC, in which he endeavoured to distinguish *In re Wood* and further argued the case for a fresh election.

4.4.20 The sixth and final question in the Case Stated was *"Save for those otherwise dealt with by order, who should pay the costs of the Stated Case and of the hearing of the Stated Case before the Full High Court?"* Counsel for the petitioner, Mr Sue, submitted that if the petition was successful, the first respondent, Ms Hill, should pay his costs. Counsel for the first respondent, Ms Hill, submitted that the Commonwealth should pay her costs because the questions raised were "of great contemporary importance". Alternatively, it was submitted that if the petition failed, then her costs should be paid by the petitioner. The AEC submitted that no costs order should be made against the AEC, and sought no costs order against the other parties.

4.4.21 The Solicitor-General for the Commonwealth submitted that no costs order should be made against the Commonwealth (under section 360(4) of the Electoral Act), and sought no costs order against the other parties. The submission that the Commonwealth should not pay the costs of the other parties was not well received by the Bench. Justice Callinan called it "an extraordinary submission".

4.4.22 Justice Gaudron cavilled at the submission by the Solicitor-General on the grounds that "one half of the argument at least is concerned with matters relating to the effect of the Act – perhaps more than one half", and went on to say that "deficiencies" in the Act "have been drawn to the attention of the Commonwealth in litigation for many years", yet "people have been content, more or less, to leave [the Act] as it is with little thought as to how it operates" *(transcript, 12 May 1999, pp 65-66*).

4.4.23 *The Decision in the Petitions:* On 23 June 1999, the Full Bench of the High Court handed down its judgment in *Sue v Hill (1999) 73 ALJR 1016* and *Sharples v Hill (B49 of 1998, High Court, 23 June 1999, unreported)* (**Attachment 2**). The majority of the Court (Gleeson CJ, Gaudron, Gummow and Hayne JJ) answered the questions in the Case Stated as follows:

(a) Does s 354 of the Act validly confer upon the Court of Disputed Returns jurisdiction to determine the issues raised in the petition?

Answer: Yes

(b) Was the first respondent at the date of her nomination a subject or citizen of a foreign power within the meaning of s 44(i) of the Constitution?

Answer: Yes

(c) Was the first respondent duly elected at the election?

Answer: No

(d) If no to (c), was the election void absolutely?

Answer: No

(e) If no to (d), should the second respondent conduct a recount of the ballot papers cast for the election for the purposes of determining the candidate entitled to be elected to the place for which the first respondent was returned?

Answer: Inappropriate to answer

(f) Save for the otherwise dealt with by order, who should pay the costs of the Stated Case and of the hearing of the Stated Case before the Full High Court?

Answer: The Commonwealth should pay the costs of the petitioner and the first respondent. The second respondent should bear its own costs.

4.4.24 In delivering the judgment of the Court in the *Sue v Hill* and the *Sharples v Hill* petitions, Chief Justice Gleeson made the following summary:

> In these two cases, which were commenced in the Court of Disputed Returns, the election of Mrs Hill as a Senator for the State of Queensland was challenged on the ground that, at the date of her nomination, she was incapable of being chosen as a Senator. The specific ground of disqualification alleged was related to section 44(i) of the Constitution, and was that, at the date of nomination, Mrs Hill was a subject or citizen of a foreign power, namely, the United Kingdom.
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> The members of the Court who constituted the Court of Disputed Returns in each case raised certain questions for the decision of the full High Court.
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> The first question was whether the Court of Disputed Returns has the jurisdiction invoked by the respective petitioners, that is to say, jurisdiction, under Division 1 of Part XXII of the Commonwealth Electoral Act 1918, to consider a challenge to an election based solely on the ground of disqualification under section 44 of the Constitution. Four members of the Court (Gleeson CJ, Gaudron, Gummow and Hayne JJ) have answered that question in the affirmative, holding that there is jurisdiction. Three members of the Court (McHugh, Kirby, Callinan JJ) have answered the question in the negative, holding that jurisdiction does not exist.

> The three members of the Court who held that there was no jurisdiction of the kind invoked did not, for that reason, go on to answer the remaining questions.
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> The four members of the Court who held that there is jurisdiction dealt with the remaining questions as follows:
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> (a) The United Kingdom is a foreign power within the meaning of section 44 of the Constitution;
> (b) At the time of her nomination Mrs Hill was a subject or citizen of a foreign power and was therefore incapable of being chosen as a Senator;
> (c) Mrs Hill was therefore not duly elected;
> (d) The consequence is not that the entire election of Senators for Queensland was void absolutely.
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> Those four members of the Court were of the opinion that there should be a recount.
>
> As to the manner and extent of such recount, these are matters upon which persons who have not been represented in the proceedings might wish to have the opportunity of being heard. Accordingly each case has been remitted to the Court of Disputed Returns. In the case of Sue v Hill the Court will sit at 9.30 am tomorrow for the purpose of considering the future course of the proceedings and, if necessary, giving directions.
>
> It was ordered that the Commonwealth should pay the costs of the petitioners and Mrs Hill.

4.4.25 The conclusion by the Court that other persons involved in the Queensland Senate election should be heard on the manner and extent of a recount, was in response to the submissions made by Mr Sharples that the result of a recount as hypothesised by the AEC (the election of Mr Len Harris of One Nation to replace Ms Hill) might not transpire, and the election or non-election of the other candidates might be disturbed. At paragraph 179 of the decision, Justice Gaudron expanded on the doubts about the outcome of a recount, that were raised in the Court by Mr Sharples' submissions:

> Although nothing was put to suggest that the true intention of the voters cannot be ascertained by a recount, it emerged at the hearing that there was a real question as to the manner in which the recount should be conducted. As formulated, question (e) posits that a recount should be conducted only for the third Senate position. However, it is possible that a recount of all votes might have consequences for the fourth, fifth and sixth Senators. Those persons were not represented at the hearing. It may be that that was because, having regard to the terms of question (e), they were of the view that their positions would not be affected by a recount. In the circumstances, the appropriate course is to answer question (e) in each of the cases stated "Inappropriate to answer", leaving the issue to be determined by a single Justice after hearing such submission, if any, as the persons returned as the fourth, fifth and sixth Senators wish to make.

4.5 *Later Proceedings in the Petitions*

4.5.1 On 24 June 1999, Chief Justice Gleeson sat as the Court of Disputed Returns to further progress the issues about the manner and extent of a recount. The petitioner, Mr Sue, was represented by Ms Collins; the first respondent, Ms Hill, was represented by Mr Templeton; the second respondent, the AEC, was represented by Mr Swan of AGS; and Mr Burmester QC appeared for the Attorney-General for the Commonwealth (Intervening). In addition, two other persons involved in the election appeared: Senator-elect Mason was represented by Mr Shannon, and Senator O'Chee was represented by Mr Saunders.

4.5.2 His Honour indicated from the outset that the purpose of the hearing was to address the concerns detailed in paragraph 179 of Justice Gaudron's judgment, namely that everyone who had a possible interest in a recount be given an opportunity to be heard. His Honour identified three categories of such persons. First, Mr Len Harris, the second candidate on the One Nation group voting ticket; second, the candidates elected in the fourth, fifth and sixth positions for the Queensland Senate; and third, any non-elected candidate who might possibly replace any of the candidates elected to the fourth, fifth and sixth positions. Counsel for the AEC identified Ms Jann Piasecki, Mr Drew Hutton, Senator O'Chee and Mr John Bradford as persons who might have an interest, within the categories set by the Chief Justice.

4.5.3 His Honour then directed that a letter be sent immediately by the AEC to Senator-elect Ludwig, Senator Woodley, Mr John Bradford, Mr Len Harris, Ms Jann Piasecki and Mr Drew Hutton, drawing their attention to the petition and the decision of the Court, advising the intention to conduct a recount, and that they had the opportunity to address the Court on the manner and extent of that recount.

4.5.4 The Court was advised by Counsel for the AEC that if a recount was ordered by the Court it would be done by computer, as permitted by section 273A of the Electoral Act, and could be done the following day in approximately 45 minutes, subject to the availability of scrutineers for the interested parties.

4.5.5 Towards the end of these proceedings, Counsel for the first respondent, Ms Hill, indicated that, on the finding by the Full Bench that Ms Hill was not duly elected, his client no longer had any interest in the proceedings. He was therefore granted leave to be excused from further appearance, and was not present for the costs orders at the end of these proceedings.

4.5.6 On 29 June 1999, proceedings resumed before Chief Justice Gleeson, by reference to a Notice of Motion of 28 June 1999, filed by the AEC, setting out proposed orders, and attaching a schedule for the conduct of a recount, as follows:

(1) A vote indicated on a ballot paper opposite the name of Heather Hill be counted to the candidate next in the order of the voter's preference and the numbers indicating subsequent preferences be treated as altered accordingly.
(2) The further counting and recounting be conducted, subject to direction (1), as nearly as practicable in accordance with the relevant provisions of section 273A of the *Commonwealth Electoral Act 1918* ("the Act") as if there were 6 vacancies to be filled.
(3) The further counting and recounting identify which candidate is entitled to be elected to the third place left unfilled by the ineligibility of Heather Hill.
(4) The further counting and recounting identify which (if any) candidate or candidates other than Mr Ludwig, Mr Mason or Senator Woodley is or are entitled to be elected, in the place of Mr Ludwig, Mr Mason or Senator Woodley, to any of the fourth, fifth or sixth places to be filled.
(5) Notwithstanding direction (1) any ballot paper ruled to be informal during the 1998 scrutiny be treated as informal in the further counting and recounting.
(6) Notwithstanding direction (1) any ballot paper ruled to be formal during the 1998 scrutiny be treated as formal in the further counting and recounting, except where a ballot paper is marked with a first preference for Heather Hill followed by the marking of a second preference for each of 2 or more other candidates.
(7) Notwithstanding direction (1) any ballot paper showing the same preference for Heather Hill and one or more other continuing candidates be set aside as exhausted in accordance with subsection 273(26) at the point in the scrutiny at which it would have been set aside had Heather Hill been a candidate eligible for election.
(8) Ballot papers marked with group voting ticket votes not be counted again but that the group voting tickets figures ascertained in the 1998 scrutiny be adjusted in accordance with direction (1) for the purposes of the further counting and recounting.

4.5.7 The petitioner, Mr Sue, was represented by Ms Tait; the second respondent, the AEC, was represented by Mr Swan of AGS; and the Attorney-General for the Commonwealth (Intervening) was represented by Mr Burmester QC. A number of other parties sought leave to intervene: Mr Harris, the second candidate on the One Nation group voting ticket, was represented by Mr Gageler; Senator Woodley was represented by Mr Davey; Senator-elect Mason was represented by Mr Wood; and Senator O'Chee was represented by Mr Applegarth. An affidavit of 29 June of Mr McCarthy for the AEC testified to the notification of these parties by the AEC as ordered at the previous proceedings.

4.5.8 An affidavit of 28 June of Mr Spelman of the AEC, which was read to the Court by Mr Swan for the AEC, advised the appropriateness of a full recount, computerised in accordance with section 273A of the Electoral Act, and in accordance with the directions in the schedule attached to the proposed orders, and the inappropriateness of a recount that did not take into account all formal votes cast in the election.

4.5.9 A full recount, as proposed by the AEC, was supported by Senator Woodley, Senator-elect Mason, Senator O'Chee, Mr Harris, and the Attorney-General, on the basis that the recount would resolve whether any questions arose about disturbing the election or non-election of other candidates, and that the conduct of the recount would not pre-empt any submissions they might make regarding the form of any resultant orders. His Honour then ordered the AEC to conduct a full recount according to the schedule, and report back to the Court with the results. Costs in these proceedings were reserved.

4.5.10 On 2 July 1999, proceedings resumed before Chief Justice Gleeson, with the same appearances as for 29 July, with the exception that (now) Senator Mason, and (now) Mr O'Chee were represented by Mr Wood. An affidavit of 30 June of Mr Spelman of the AEC, which was read to the Court by Mr Swan for the AEC, advised the outcome of the full recount, which was that Mr Harris achieved a quota in place of Ms Hill, and the other candidates elected were unchanged from those elected at the original election.

4.5.11 With respect to costs in these later proceedings, Mr Swan for the AEC and Mr Burmester for the Attorney-General submitted that each party should bear their own costs. The other parties present (with the first respondent Ms Hill now absent) submitted that the Commonwealth should pay their costs under section 360(4) of the Electoral Act.

4.5.12 His Honour formally granted leave to intervene to Mr O'Chee, Senator Mason, Senator Woodley and Mr Harris, and then ordered:

> 1. That Heather Hill was not duly elected at the election held on 3 October 1998.
> 2. That Mr Len Harris be declared duly elected as a Senator for the State of Queensland in the place for which Heather Hill was returned.
> 3. That the second respondent and the Attorney-General for the Commonwealth each bear their own costs.
> 4. That the Commonwealth pay the costs of the petitioner, Senator Woodley, Senator Mason, Mr O'Chee and Mr Harris and their costs on previous occasions which have been reserved.
> 5. Certify for counsel.

4.5.13 Lastly, His Honour noted that Mr Sharples was not present and directed that his petition be re-listed before Justice Callinan to make such orders as he thought appropriate having regard to proceedings in the Sue petition.

4.5.14 On 29 July 1999, proceedings in the Sharples petition resumed before Justice Callinan. The petitioner, Mr Sharples, represented himself; the first respondent, Ms Hill, did not appear; the second respondent, the AEC, was represented by Mr Swan of AGS; the Attorney-General (Intervening) did not appear; and on the question of costs, the Commonwealth was represented by Mr Belcher of AGS (instructed by the AEC).

4.5.15 His Honour ordered that:

1. The petition be dismissed.
2. The second respondent bear its own costs.
3. The Commonwealth pay the costs of the petitioner of today's proceedings and of previous occasions on which costs were reserved.

4.5.16 The outcome on costs for both petitions was that, under section 360(4) of the Electoral Act, the Commonwealth was ordered to pay the costs on a party/party basis of all the parties (except the Attorney-General and the AEC) in the proceedings, extending over a period of some six months, and involving numerous counsel and senior counsel. Whilst the public interest in these petitions was properly served in all proceedings, the award of costs against the Commonwealth will amount to a substantial cost to the public purse.

4.5.17 The AEC has now been advised by the Constitutional Unit of the Australian Government Solicitor, and the Department of Finance and Administration, that the costs awarded against the Commonwealth are the responsibility of the AEC. There is no suggestion that the AEC was at fault in the conduct of the election or proceedings on the petitions.

5 Implications of the Sue and Sharples Decisions

5.1 *Jurisdiction of the Court of Disputed Returns*

5.1.1 The majority judgment of the High Court (Gleeson CJ, Gaudron, Gummow and Hayne JJ) in the Sue/Sharples petitions held that section 354 of the Electoral Act validly conferred jurisdiction upon the Court of Disputed Returns to determine the constitutional question raised in the petitions, namely whether Ms Heather Hill was disqualified from being elected under section 44(i) of the Constitution.

5.1.2 That is, it has been concluded that the Court of Disputed Returns has jurisdiction to hear petitions raising questions of constitutional disqualifications, filed under Division 1 of Part XXII of the Electoral Act. The corollary is that the jurisdiction of the Court of Disputed Returns to hear questions of constitutional qualifications is not limited to matters referred to the Court by the Parliament under Division 2 of Part XXII the Electoral Act.

5.1.3 The jurisdictional decision in the Sue/Sharples petitions is in accordance with the conduct of proceedings in 1992 in *Sykes v Cleary (1992) 176 CLR 77*, which was initiated by way of a petition filed by Mr Ian Sykes, under Division 1 of Part XXII of the Electoral Act. The *Sykes v Cleary* decision resulted in the disqualification of Mr Phil Cleary under section 44(iv) of the Constitution, for holding an office of profit under the Crown at the time of his nomination, and a finding that other candidates in the by-election for the Division of Wills, Mr Kardamitisis (ALP) and Mr Delacretaz (Liberal Party), were disqualified under section 44(i) of the Constitution, for holding dual citizenship with Greece and Switzerland respectively.

5.1.4 The jurisdictional decision in the Sue/Sharples petitions is also in accordance with the conduct of proceedings in 1996 in *Free v Kelly (1996) 70 ALJR 809*, which was initiated by way of a petition filed by Mr Ross Free, under Division 1 of Part XXII of the Electoral Act. The *Free v Kelly* decision resulted in the disqualification of Ms Jackie Kelly under section 44(iv) of the Constitution, for holding an office of profit under the Crown at the time of her nomination.

5.1.5 The history of the separation of powers between the Parliament and the Judiciary in relation to such matters begins with the commencement of the Commonwealth in 1901 when section 47 of the Constitution prevailed:

> Until the Parliament otherwise provides, any question respecting the qualifications of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

5.1.6 The Parliament then otherwise provided, in sections 192-206 of the *Commonwealth Electoral Act 1902*, to the effect that the validity of any disputed election or return was to be decided by the High Court sitting as the Court of Disputed Returns.

5.1.7 Further, in section 6 of the *Commonwealth Electoral Act 1907* the Parliament provided that any question on the qualifications of Members of Parliament, or on a vacancy in the Parliament, could be referred to the Court by resolution of the House of the Parliament in which the question arose. In 1918, these two Acts were consolidated into the *Commonwealth Electoral Act 1918* and now appear as Divisions 1 and 2 of Part XXII of the Electoral Act.

5.1.8 The most recent example of the referral by the Parliament of a question concerning the qualifications of a Member of Parliament is the case of Senator Robert Wood in 1988, when the Senate referred the question of his qualifications, by way of Division 2 of Part XXII of the Electoral Act, to the Court of Disputed Returns. Senator Wood was subsequently found to be disqualified by section 163 of the Electoral Act, because he was not an Australian citizen.

5.1.9 During the course of the 1999 proceedings in the Sue/Sharples petitions, the matter of Mr Warren Entsch MP, and his alleged disqualification under section 44(v) of the Constitution, was raised in the Parliament. On 10 June 1999, the Leader of the Opposition moved in the House of Representatives:

> That the following question be referred to the Court of Disputed Returns for determination, pursuant to section 376 of the *Commonwealth Electoral Act 1918:* Whether the place of the honourable Member for Leichhardt (Mr Entsch) has become vacant pursuant to the provisions of section 44(v) of the Constitution.

5.1.10 In response, the Attorney-General moved in the House of Representatives that the motion be amended to read as follows:

> That the House determines that the member for Leichhardt does not have any direct or indirect pecuniary interest with the Public Service of the Commonwealth within the meaning of section 44(v) of the Constitution by reason of any contract entered into by Cape York Concrete Pty Ltd since 3 October 1998, and the member for Leichhardt is therefore not incapable of sitting as a member of this House.

5.1.11 The amendment moved by the Attorney-General was resolved in the affirmative. That is, in the Entsch matter, the House of Representatives resolved not to refer the question of the constitutional qualifications of the Member for Leichhardt to the Court of Disputed Returns for consideration, but instead resolved itself that he was not so disqualified. This action asserted the right of the Parliament to make determinations on the constitutional qualifications of its own members, without the involvement of the Judiciary.

5.1.12 It could be suggested that such determinations about constitutional qualifications, made on the numbers in the relevant House of the Parliament, might not be entirely disinterested at a political level. And it might appear that anyone other than a Member of Parliament, who wishes to challenge the constitutional qualifications of a sitting Member, is foreclosed from doing so by the time limitation in section 355(e) of the Electoral Act, which provides that a petition must be filed with the High Court within 40 days of the return of the writ for the relevant election.

5.1.13 However, in those circumstances where the elected Parliament has already formed and the petition filing period has passed, the *Common Informers (Parliamentary Disqualifications) Act 1975* enables any person to sue the High Court for the payment of $200 per day for the period during which a Member of Parliament sits while being disqualified after being served with the originating process, and the sum of $200 only in respect of a past breach. The Act restricts such suits to a period no earlier than 12 months before the day on which the suit is instituted. In relation to the Entsch matter, this would mean that for any common informers action to be instituted, Mr Entsch must have been disqualified as alleged within the 12 months preceding the date on which the suit was filed.

5.1.14 The most significant issues arising from the related matters discussed above would appear to be twofold:

(a) whether the Electoral Act should continue to provide that the constitutional qualifications of Members of Parliament can be disputed by way of petition from any elector or candidate to the Court of Disputed Returns within 40 day days of the return of the writ for the election.

(b) whether, in the absence of either a referral to the Court of Disputed Returns by the House affected, or a petition to the Court within 40 days of the return of the writ for the election, or a common informer's suit, the Parliament should retain its authority to decide on the constitutional qualifications of its own members.

5.1.15 These issues arise out of the dispute resolution scheme provided for in the Electoral Act by the Parliament in the early part of this century, and have not before been given direct consideration by the JSCEM since the major amendments to the Electoral Act in 1983. However, given that these questions also go to the separation of powers between the Parliament and Judiciary, and may therefore require considered submissions from all interested parties, the AEC makes the following recommendation:

Recommendation 1: That the JSCEM seek a reference to inquire into the powers and functions of the Australian Electoral Commission, as expressed in Part II of the Electoral Act and Part I of the Referendum Act, and the powers and functions of the Court of Disputed Returns, as expressed in Part XXII of the Electoral Act and in Part VIII of the Referendum Act.

5.1.16 The recommendation includes reference to the powers and functions of the AEC in the context of the issues raised in part 5.3 below.

5.2 *Constitutional Disqualifications*

5.2.1 The decision of the High Court in the Sue/Sharples petitions was that any candidate who is a subject or citizen of a foreign power, such as the United Kingdom, is disqualified at the time of nomination from election to the Parliament. That is, Ms Heather Hill was disqualified from being elected under section 44(i) of the Constitution.

5.2.2 This decision was made by the majority members of the Court (Gleeson CJ, Gaudron, Gummow, and Hayne JJ) after they had decided that the Court of Disputed Returns had jurisdiction to hear the petition. The other members of the Court (McHugh, Kirby and Callinan JJ), who decided that the Court of Disputed Returns had no jurisdiction to hear the petition, were not required to form a view on the constitutional qualifications question.

5.2.3 This decision of the High Court on the interpretation of section 44(i) of the Constitution represents a highly significant statement about the constitutional relationship between the United Kingdom and Australia, and in particular, makes it very clear that persons holding dual citizenship with the United Kingdom are as equally subject to the constitutional disqualification as persons holding dual citizenship with any other foreign power.

5.2.4 This may not have been clearly apparent from *Sykes v Cleary* in 1992, for example, where, after finding that Mr Phil Cleary was disqualified under section 44(iv) of the Constitution, the Court went on to apply section 44(i) of the Constitution to two other candidates, Mr Kardamitsis (ALP) and Mr Delacretaz (Liberal Party), who held dual citizenship with Greece and Switzerland respectively, and found that they would have also been disqualified. Although the Court indicated that all “reasonable steps” should be taken by candidates to divest themselves of dual citizenship, a doubt may have remained after this case as to whether this rule applied equally to British subjects. The judgment in the Sue/Sharples petitions should now remove any such doubts.

5.2.5 However, in its publications provided to intending candidates since the 1992 *Sykes v Cleary* decision, the AEC did not find it necessary to make any such distinctions between the United Kingdom and other foreign powers in warning intending candidates to take reasonable steps to divest themselves of dual citizenship before nomination.

5.2.6 For example, on 17 July 1999, some three months before the 1998 federal election, the AEC published Electoral Backgrounder No 4, entitled “Candidate Disqualifications: Section 44 of the Constitution”, which provided a detailed discussion of the constitutional disqualifications for candidates at federal elections. The AEC included information on how British subjects could divest themselves of dual citizenship in paragraph 27. This Backgrounder was made available to the public in hard copy from all AEC offices, on the AEC Internet site (www.aec.gov.au), and was provided to all candidates as part of the AEC “Candidates Information Kit”.

5.2.7 It had previously been recommended by the House of Representatives Standing Committee on Legal and Constitutional Affairs, in its Report on Section 44 of the Constitution tabled in Parliament on 25 August 1997, that whilst the AEC should have no role in vetting the constitutional qualifications of candidates, the AEC should provide further detailed information to prospective candidates. The AEC has for many years published clear warnings in the opening pages of the "Candidates Handbook" on the constitutional disqualifications, but in response to this Committee's recommendation, also published a detailed Electoral Backgrounder for the 1998 federal election.

5.2.8 Despite the clear explanations in the AEC Candidates Handbook and the Electoral Backgrounder; the reproduction of section 44 of the Constitution and the offence provisions of the Electoral Act on the nomination form itself; and wide media reportage of candidate disqualifications at previous federal elections (Robert Wood in 1988, Phil Cleary in 1992, and Jackie Kelly in 1996); it was apparent that Ms Heather Hill, of Pauline Hanson's One Nation Party, failed to take note of these clear warnings, at the very least by taking legal advice as to her own personal circumstances prior to her nomination.

5.2.9 The AEC can do no more than warn candidates of the risks inherent in section 44 of the Constitution. It is then the responsibility of candidates to decide whether, in good faith, they can sign the declaration in the nomination form that they are not constitutionally disqualified.

5.2.10 Section 339(3) of the Electoral Act makes it an offence to:

> (a) make a statement in his or her nomination paper that is false or misleading in a material particular; or
> (b) omit from a statement in his or her nomination paper any matter or thing without which the statement is misleading in a material particular.
> Penalty: Imprisonment for 6 months.

5.2.11 The AEC is not considering any prosecution of Ms Heather Hill under this provision, given the outcome of the Sue/Sharples petitions, which resulted in her disqualification from election. In any case, under section 15B of the *Crimes Act 1914,* the time limit for any such prosecution has now expired.

5.2.12 The AEC has addressed the issue of the constitutional disqualifications in previous submissions to this JSCEM, in part 5.4 of submission No 88, and in paragraphs 41.3 to 41.4 and 42.45 to 42.55 of submission No 176, where it was stated that:

> a national referendum is needed to amend the Constitution so that the difficulties that currently face intending candidates are properly and finally addressed.

5.3 *Costs in Election Petitions*

5.3.1 During the course of proceedings in *Sue v Hill*, when the Solicitor-General for the Attorney-General (Intervening) submitted that the Court should not award costs against the Commonwealth (as is available under section 360(4) of the Electoral Act), Justice Gaudron made some critical comments from the Bench, asserting that the Commonwealth had failed to rectify deficiencies and ambiguities in the legislation that had been drawn to the Commonwealth's attention by the Bench over the years *(transcript, 12 May 1999, pp 65-66).*

5.3.2 In fact, the AEC has responded to comments about the state of the Electoral Act in past years from both Justice Gaudron and Chief Justice Brennan. For example, in *Hudson v Lee (1993)*, Justice Gaudron criticised the provisions of the Electoral Act that appeared to encourage petitioners to challenge elections without the benefit of legal advice. The AEC then made a submission to the JSCEM recommending appropriate amendments (**Attachment 3**), which were endorsed in the November 1994 JSCEM Report, and carried into law by the *Electoral and Referendum Amendment Act 1995,* as amendments to sections 356 and 370 of the Electoral Act.

5.3.3 Further, in *Snowdon v Dondas (1996),* Chief Justice Brennan commented on the difficulties of "splitting petitions" so that complex evidentiary matters could be heard by the lower courts. The AEC then made a submission to the JSCEM recommending appropriate amendments (**Attachment 4**), which were endorsed in the June 1997 JSCEM Report, and carried into law by the *Electoral and Referendum Amendment Act 1998,* as amendments to section 354 of the Electoral Act.

5.3.4 It may be that Justice Gaudron was saying in *Sue v Hill* that the Commonwealth (as distinct from the AEC) should more routinely accept costs in election petitions under section 360(4) of the Electoral Act. That is, it might be proposed that section 360(4) of the Electoral Act be amended so that the Commonwealth pays costs in all election petitions, unless the Court orders otherwise. However, this might be expected to encourage vexatious and frivolous petitioners and would seem inconsistent with comments made by Justice Gaudron in *Hudson v Lee*, which were to the effect that ill-advised petitions should be restrained from reaching the Court.

5.3.5 During the court proceedings in *Sue v Hill*, the submissions on costs made by the Solicitor-General for the Attorney-General (Intervening), were on the basis of instructions provided by the Attorney-General's office, and not by the AEC. Following the decision by the Court that the Commonwealth should pay the costs of the other parties (and the AEC bear no costs), the AEC was advised by the Department of Finance and Administration (DOFA), that under new financial arrangements, it was now confirmed that the AEC should pay Commonwealth costs in all electoral litigation.

5.3.6 Until the current financial year, the AEC's appropriations included separate financial provision for "Legal and Compensation" matters. The new financial arrangements for 1999-2000 do not include any such separately identified provision. The AEC is therefore concerned that should a number of major cases reach the court after an electoral event, and the Court increasingly exercises its power to order costs against the Commonwealth, then the AEC could be forced to draw from other internal funding priorities in order to cover the costs awarded against the Commonwealth.

5.3.7 That is, the AEC is not persuaded that it can meet Commonwealth costs in electoral litigation in the future, without specifically targeted funding. In this context, it is worth mentioning that the Government is not averse to specifically targeting funding for the AEC. In the 1996 Federal Budget, $2 million was removed from AEC funding, which resulted in the abolition of the Aboriginal and Torres Strait Islander Electoral Information Service (ATSIEIS). In the 1998 Federal Budget, the AEC was provided with additional funding specifically tied to the level of staffing in Divisional Offices.

5.3.8 In the related matter of *Sharples v Hill*, which was concluded by Justice Callinan on 29 July 1999, after the final proceedings in *Sue v Hill* were concluded by Chief Justice Gleeson on 2 July 1999, the Constitutional Unit in the office of the Australian Government Solicitor (AGS) advised that the AEC must provide instructions to counsel for the Commonwealth on costs, despite the Attorney-General's office having done so in *Sue v Hill*.

5.3.9 This advice, in relation to the provision of instructions for the Commonwealth in *Sharples v Hill*, was on the basis that the office of the Attorney-General only provided instructions in *Sue v Hill* because of the limited time frame and no-one else being available at the time; on the basis that it had been agreed with DOFA that the AEC now appears to be administratively responsible for all Commonwealth costs in electoral litigation; and on the basis that the AEC had agreed (for practical reasons) to assume responsibility for the provision of instructions on Commonwealth costs negotiations in *Sue v Hill*.

5.3.10 The outcome was that, whilst separate counsel from AGS appeared for the Commonwealth and the AEC on 29 July in the later proceedings in *Sharples v Hill*, the AEC was in fact instructing both counsel behind the scenes (the Commonwealth did not oppose an order for costs). Such legal fictions have the potential to muddle perceptions about the separate roles of the AEC and the Commonwealth in election litigation, and to the extent that the structure and provisions of the Electoral Act allow such fictions to continue, legislative amendment may be required.

5.3.11 The most significant issues arising from the related matters discussed above would appear to be as follows:

(a) Whether section 360(4) and related costs provisions of the Electoral Act should be amended to require the Commonwealth to pay costs in all election petitions unless otherwise ordered by the Court.

(b) Whether the respective roles of the AEC and the Commonwealth in court proceedings in election petitions should be expressly distinguished in the Electoral Act.

(c) Whether the Electoral Act should provide for special financial appropriations to enable the AEC to bear Commonwealth costs in election litigation in the future.

5.3.12 In the view of the AEC these questions could be properly addressed within the terms of Recommendation 1, made at paragraph 5.1.15 above in this submission.

6. Proceedings in McClure v AEC and related Petitions

6.1 *The McClure Petition*

6.1.1 On 8 December 1998, Mr Malcolm McClure, an unsuccessful independent candidate at the Victorian half-Senate election on 3 October 1998, filed a petition in the Melbourne Registry of the High Court, disputing the election of all Senators for the State of Victoria. In his petition, Mr McClure asserted his entitlement to vote and to be a candidate at the Victorian Senate election, and asserted the following two grounds for his petition:

> That the platform of candidacy of the petitioner was not given media coverage despite requests and/or demands for such coverage to the various media bodies, and that denial of such media coverage is against the principles of fair democratic elections which is a foundation of the Constitution and that were such coverage granted the result of the election, would in the greater probability, have been significantly different.
>
> That the petitioner was disadvantaged under ss. 211 and 211A of the Commonwealth Electoral Act 1918 by not having a right to a "ticket vote", and that such disadvantage has in the greater probability significantly affected the outcome of this election, and that such disadvantagement is against the interests of a true and fair democratic process which forms the foundation of our constitution.

6.1.2 The petitioner, Mr McClure, asked the Court to declare the Victorian Senate election void and the six Senators not duly elected. The petitioner also sought four other kinds of relief:

- the return from the AEC of his $700 nomination fee (the deposit claim);
- that the Court "instruct" the AEC to make provision for ticket voting for independent candidates in all future elections for the Senate (the ticket voting claim);
- that "the Chiefs of Staffs of the media bodies be informally instructed by the Court to make provision for and ensure proper coverage of press releases and policy launches by independent candidates and/or that some form of caution be given to said media bodies regarding the intrinsically incumbent responsibilities they have within our democratic process to discern and report important election issues raised by independents" (the publicity claim); and
- that leave be granted to join this petition, and certain other petitions now pending in the Court, "as a class-action before the Full Bench of the High Court" (the class action claim).

6.1.3 Mr McClure's petition was identical to four other petitions filed with the High Court in Registries around the nation, disputing the half-Senate elections in those States and the Northern Territory. The five identical petitions also sought a "class action" hearing and were as follows:

NT Senate	*Polke v AEC*	filed Darwin 2 December 1998
NSW Senate	*Vaughan v AEC*	filed Sydney 7 December 1998
WA Senate	*Garcia v AEC*	filed Perth 7 December 1998
Vic Senate	*McClure v AEC*	filed Melbourne 8 December 1998
Tas Senate	*Heathorn v AEC*	filed Hobart 8 December 1998

6.1.4 However, as it appeared that Mr McClure was willing for his petition to be actioned first as a "test case" for the other four petitions, a summons was filed by the AEC on 10 March 1999 for a directions hearing before the High Court in *McClure v AEC* in Melbourne on 29 March.

6.1.5 The AEC summons sought orders that the petition be dismissed, or alternatively that the petition be stayed, on the ground that there was no reasonable or probable cause of action or suit, or that the proceeding was an abuse of the powers of the Court. In support of the summons, an affidavit was filed with the Court by Mr Geoffrey McCarthy of the Australian Government Solicitor (AGS) on behalf of the AEC.

6.1.6 Because the petition might have raised constitutional matters, a Notice of a Constitutional Matter, under section 78B of the *Judiciary Act 1903*, was filed with the Court by the AEC on 17 March, and provided to the petitioner and to the Attorneys-General for the Commonwealth and the States and Territories.

6.1.7 On 29 March, Mr Geoffrey McCarthy of AGS filed an affidavit with the Court advising that he was acting on behalf of the AEC; applying for the orders sought in the summons of 10 March; and advising that the written submissions of the AEC had been forwarded to the Court and to the petitioner on 25 March.

6.1.8 At the directions hearing on the McClure petition on 29 March 1999 in Melbourne before Justice Hayne of the High Court, sitting as the Court of Disputed Returns, Mr Gageler of counsel appeared for the AEC and Mr McClure represented himself.

6.1.9 Justice Hayne immediately registered his concern that 384 people had entered an appearance in the petition, but had apparently not been advised of the hearings on that day. His Honour was concerned that these people should have the opportunity to be heard in the proceedings should they wish to do so. The respondent to the petition, the AEC, had not been made aware of these 384 appearances "in support of the petitioner" until immediately prior to the commencement of the court proceedings.

6.1.10 Justice Hayne made the following orders on 29 March 1999:

> 1. Adjourn further hearing of summons dated 10 March 1999 to 27 April at 9.30 am Melbourne.
> 2. Direct that notice of the application made by that summons shall be sufficiently given by the Australian Electoral Commission giving notice to the other parties to the proceedings upon the petition of the further hearing of that summons by posting on or before 7 April 1999 by prepaid ordinary post to the address for service of each of the parties to the proceedings upon the petition (other than the petitioner and respondent) a notice substantially in the form of the schedule to this order.
> 3. Reserve costs
> 4. Certify for counsel

6.1.11 In compliance with the orders of the Court, by letters on 31 March and 1 April, Mr Geoffrey McCarthy of the AGS, acting for the AEC, wrote to each of the 384 persons who had entered an appearance, advising them of the proceedings and attaching copy of the Court orders and the relevant notice.

6.1.12 From around 6 April, the office of the AGS in Canberra and the Court Registry in Melbourne received an avalanche of phone calls or correspondence from these persons, complaining that they knew nothing about the petition, had never met Mr McClure, and to their knowledge had not signed any document entering an appearance in the petition. Some of them recalled signing a “petition” in the street but thought it had been about other matters such as animal welfare or suburban parking restrictions. Complaints were also made to the AEC directly, in one instance claiming that the AEC had released a person’s name in contravention of the Privacy Act (which was not the case). These persons were referred by the AGS for further information either to Mr McClure, the petitioner, or to the Court Registry.

6.1.13 On 9 April, Mr McCarthy of the AGS, on behalf of the AEC, wrote a further letter to these 384 persons, outlining the grounds of the McClure petition, explaining that it was Mr McClure who had filed their Notices of Appearance with the Court on their behalf, and advising that the AEC was the respondent to the petition and had no part in them becoming involved in the matter. On 26 April Mr McCarthy filed an affidavit with the Court advising the action taken in compliance with the orders of the Court.

6.1.14 On 27 April, the hearing of the AEC summons to have the petition dismissed or stayed resumed before Justice Hayne in Melbourne. Mr Gageler of counsel appeared for the AEC, with Mr Geoffrey McCarthy, and Mr McClure represented himself. Only one of the 384 persons Mr McClure claimed supported his petition appeared in person. Mr Cecil Murgatroyd made a short submission in support of the McClure petition towards the end of the hearing. Another person, Ms Kelly Buzza, was represented by Mr Terry Shiels, who submitted that she had not understood that the documents she had signed constituted an entry of appearance to the petition.

6.1.15 Largely as a matter of procedural fairness to Mr McClure, Mr Gageler for the AEC took the Court through the various relevant provisions of the Electoral Act and summarised the arguments as to why the petition failed to comply with section 355(a) of the Act, which requires the petitioner to set out the facts relied on to invalidate the election, and section 355(aa) of the Act, which requires the petitioner to set out those facts with sufficient particularity. In reply, Mr McClure did not really address the submissions of the AEC, but instead gave more of a political speech about the alleged unfairness of independent Senate candidates being denied access to group ticket voting.

6.1.16 In the course of the hearings, Mr McClure sought to amend his petition by alleging that sections 211 and 211A of the Electoral Act, which deal with ticket voting for Senate elections, are not valid laws of the Parliament because there was no proper Royal Assent to the bills by which those sections were inserted in the Act. Mr McClure asserted that Australia became a sovereign and independent nation at or after the time of the Treaty of Versailles, and accordingly, Royal Assent to, or on behalf of, a person who is the sovereign of the United Kingdom was of no effect.

6.1.17 Justice Hayne gave Mr McClure several opportunities to ensure that he had addressed the Court on everything he wished to say, and repeated back to Mr McClure his understanding of Mr McClure's submissions to ensure that there was no misunderstanding. On each occasion Mr McClure agreed that the Court understood his point of view. On several occasions, Justice Hayne also made it clear to Mr McClure that "there would be no tomorrow" and that he should make sure he covered everything in support of his allegations and claims. Justice Hayne then reserved his decision.

6.1.18 On 24 June 1999, Justice Hayne delivered his decision, ordering that the McClure petition be dismissed, and that the petitioner, Mr McClure pay the costs of the respondent, the AEC.

6.1.19 In his decision in *McClure v AEC (1999) 73 ALJR 1086* at **Attachment 5**, Justice Hayne formally refused Mr McClure's application at the time of the hearing to amend his petition so as to allege that sections 211 and 211A of the Electoral Act were not valid laws of the Parliament. His Honour concluded that the law to be applied by the courts is to be found in covering clause 5 to the Constitution, and said further:

> In so far as the petitioner relies on some alleged deficiency in the signification of Royal Assent, it is ss 58, 59 and 60 of the Constitution that deal with the ways in which the Royal Assent may be given to bills passed by the other elements of the Parliament. So far as is now relevant, s 58 governs. It provides that the Governor-General "shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name". There is nothing to suggest that that this was not done in the case of the Acts that introduced s 211 and s 211A into the Act. The history of the international dealings to which the petitioner referred is not the point.

> It is, in these circumstances, not necessary to consider whether ss 355(e) and 358 of the Act preclude amendment because it is sought more than 40 days after the return of the writ. The respondent's reliance on those provisions assumes that they are valid. The petitioner's proposed amendment might appear to attempt to cast doubt on that validity. But, as I have indicated earlier, the arguments against validity must fail and the amendments proposed would be futile.

6.1.20 In dismissing the petition, Justice Hayne dealt firstly in his judgment with the petitioner's claims for relief, other than the actual voiding of the election. The first of these claims was the "deposit claim", for the return of the petitioner's Senate nomination deposit of $700.

> The petitioner seeks the return of the sum deposited by him in accordance with s 170(2) of the Act. … He characterises this deposit as "confirmation of a contract" between the petitioner and the respondent and says, in effect, that consideration for the contract wholly failed (or there was no meeting of minds) because the electoral process was not as he supposed it to be – one in which "no one candidate would be disadvantaged above…another".
>
> There are at least two answers to this contention. First, the statutory requirement that a deposit is paid by or on behalf of the person nominated is not a requirement that leads to the formation of a contract between the respondent and the nominee or a person who pays the deposit on behalf of the nominee. The Act prescribes the circumstances in which the deposit is to be forfeited and those circumstances came to pass in the petitioner's case – the number of votes polled in his favour as first preferences was less than 4 per cent of the total number of votes polled as first preferences. Questions of consideration, failure of consideration, or meeting of the minds, simply do not arise and the claim must therefore fail.
>
> Secondly, it may be very much doubted that the Court has power to order the return of a candidate's deposit. No such power is included in the list of powers of the Court given by s 360(1) and, although that list is not exhaustive, the petitioner was not able to point to any basis for concluding that the Court does not have the power for which he contends. This claim must fail.

6.1.21 The second of the petitioner's claims for relief, other than the voiding of the election, was the "publicity claim", which Justice Hayne dealt with as follows:

> It is not clear what the petitioner means when he says that the Court should "informally instruct" the chiefs of staff of media bodies about how they should act in the future. If he seeks to have the Court give some advice to these persons, it is enough to say that this is not the Court's function. If he seeks to have the Court make some order about future conduct, there is no basis in the Act for concluding that the Court has any power to do so. There being no power to do so, the further questions that might then have arisen about framing an order with sufficient certainty need not be considered. The relief claimed cannot be given.

6.1.22 The third of the petitioner's claims for relief, other than the voiding of the election, was the "ticket voting" claim, which Justice Hayne dealt with as follows:

> For like reasons, there is no basis upon which the Court might lawfully "instruct" the respondent about the conduct of future elections. Future elections must be conducted according to law. The relief claimed cannot be given.

6.1.23 The fourth of the petitioner's claims for relief, other than the voiding of the election, was the "class action" claim, which Justice Hayne dealt with as follows:

> The question of joining this petition to other petitions pending in the Court as some form of class action is a question that relates only to how this petition is to be dealt with; it is not a question that touches the merits of the complaints that the petitioner makes. It is, therefore, not a question that affects whether the orders sought by the respondent should now be made. That being said, however, it is to be recalled that in *Muldowney v Australian Electoral Commission* Brennan ACJ held that the jurisdiction to declare an election void on the petition of a person qualified to vote at that election is a power limited to those elections in which the petitioner was entitled to vote and did not extend to power to declare the entirety of a general election void.
>
> It may be, as the respondent contended, that the attempt to have petitions form a class action was to try to overcome these decisions. But the validity and force of the respondent's contention in this regard would depend upon what was said to follow from "joining" petitions as a "class action". The petitioner pointed to no provision of the Act or the High Court Rules that contemplates joining petitions as a class action and the point was not examined in any detail in the course of argument. Because these are not matters that affect whether the orders sought by the respondent should be made it is not necessary to explore them further.

6.1.24 The central claim for relief by the petitioner was the claim to void the half-Senate election for the State of Victoria and declare the six Victorian Senators not duly elected. Justice Hayne described the argument submitted by the AEC against the petition as follows:

> The principal focus of argument was on the petitioner's claim that the election in question should be declared void. As to that, the respondent submitted that the petition should be stayed or dismissed because: first, it does not comply with s 355 of the Act; secondly, it alleges no "illegal practice" as that term is defined in the Act (a breach of the Act or regulations) and therefore the Court has no jurisdiction to avoid the election; and thirdly, it fails to raise any ground which would justify the avoidance of the election it seeks to challenge.

6.1.25 His Honour then discussed the various relevant provisions of section 355 of the Electoral Act, which sets down the requirements for a petition, and section 362(3) of the Act, which provides for the voiding of an election for illegal practices. Justice Hayne made the following comment on section 362(3):

In *Webster v Deahm*, Gaudron J held that ….:

> "the very minimum assertion necessary to constitute a fact which will 'invalidate [an] election or return' for the purposes of s 355(a) of the Act is one raising a matter or matters by which 'the election was likely to be affected'."

No doubt it was in light of this, that the respondent submitted that a petition must be dismissed if it does not set out facts which, if proved, would establish that there are available grounds for invalidating the election and the election was likely to be affected on those grounds.

That submission proceeded from the premise that s 362(3) is an exhaustive statement of the circumstances in which the Court may declare an election void. Put in that way the submission may very well be stated too broadly. In *Hudson v Lee*, Gaudron J held that s 352(1) of the Act identified exhaustively the practices which might properly found a petition under Div 1. Nevertheless, the respondent submitted that I need not form any concluded view on that question because (so it was submitted) the facts alleged in the petition, if established, would not entitle the petitioner to an order avoiding the election.

6.1.26 Justice Hayne then turned to the facts that were alleged by the petitioner. In response to the first complaint about the lack of media coverage for the petitioner, His Honour said the following:

> The first complaint depends upon the contention that there has been some breach of an implied freedom of communication in relation to the political and electoral process…The short answer to this first complaint is that the *freedom* of communication implied in the Constitution is not an *obligation* to publicise. The freedom is a freedom from government action: it is not a right to require others to provide a means of communication. The petitioner's case depends upon him having some right to require others to disseminate his views. But as was said in *Lange v Australian Broadcasting Corporation*:
>
> > ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. *Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power*. As Deane J said in *Theophanous*, they are 'a limitation or confinement of laws and powers [which] gives rise to a pro tanto immunity on the part of the citizen from being adversely affected by those laws or by the exercise of those powers rather than to a "right" in the strict sense'. In *Cunliffe v The Commonwealth*, Brennan J pointed out that the freedom confers no rights on individuals and, to the extent that the freedom rests upon implication, that implication defines the nature an extent of the freedom. His Honour said:
> >
> > > 'The implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control.'"

6.1.27 In response to the second complaint, about the application of the provisions of the Act dealing with the grouping of Senate candidates, Justice Hayne reviewed previous court decisions on this issue as follows:

> The constitutional validity of provisions like s 211 has twice been considered – in *McKenzie v The Commonwealth* and in *Abbotto v Australian Electoral Commission*. At the time of *McKenzie*, the Act was cast in slightly different terms and did not contain s 211A. Gibbs CJ rejected a submission that the group voting system then provided for the election of Senators was contrary to s 7 or 16 of the Constitution and held that the provisions then in force did not "so [offend] democratic principles as to render the sections beyond the power of the Parliament to enact". In *Abbotto*, Dawson J held that there was no substance to the contention that the voting system provided for by ss 211 and 211A contravened s 10 of the Constitution. The petition in this matter did not explicitly challenge the constitutional validity of ss 211 and 211A. The petitioner sought to add such a challenge by the amendments I have mentioned earlier but for the reasons I have set out that challenge is not sustainable.

6.1.28 His Honour then dismissed the petitioner's arguments in relation to ticket voting for Senate elections as follows:

> The petitioner alleges that the provisions are "unfair" and asserts that s 211 (and perhaps, s 211A) is not a reasonably proportionate regulation of the subject matter. He prays in aid of this submission that the Court is obliged by s 364 to be "guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities".
>
> Read in the context of the Act s 364 and its reference to "substantial merits and good conscience" is to be understood as directing the Court about *how* it should set about its task of deciding the issues presented under the Act by the petition; it does not give the Court some power to rewrite the Act to accord with some abstract standard of fairness. If the provisions made in the Act for election of Senators are valid laws of the Parliament, it is not to the point for the Court to attempt to characterise those provisions as "fair" or "unfair". In particular, s 364 gives no warrant for the Court declaring void an election conducted in accordance with valid legislative requirements.
>
> Thus, if ss 211 and 211A are valid laws of the Parliament, an election conducted in accordance with these provisions (and the other applicable provisions of the Act) cannot be held to be void. The asserted challenge to validity is, as I have said, without foundation. It follows that the second of the petitioner's complaints fails.

6.1.29 Finally, Justice Hayne made comment on the conduct of the proceedings by the petitioner in entering appearances for 384 other persons, who he claimed supported his petition:

> Before parting with this matter it is as well to say something of the way in which the provisions permitting the entry of appearance by persons entitled to vote at the election in question have operated in this case. As I have noted earlier, more than 380 appearances were filed. It goes without saying that the number of persons appearing made the conduct of the proceeding more difficult and costly than it would have been if the only parties to it were the petitioner and the respondent. More troubling were the suggestions in an affidavit filed on behalf of the respondent, first, that some of those who entered an appearance may have been misled about what they were doing (or at least may not have understood the significance of the step they were taking) and second, that some persons given notice of the proceeding because notice of appearance had been given in their name denied that they knew anything at all about the matter and denied entering an appearance. I have, however, embarked on no inquiry about these assertions, and make no finding about them.

6.1.30 His Honour concluded his judgment by dismissing the petition and ordered that the petitioner pay the costs of the respondent, the AEC.

6.1.31 Following the conclusion of this case, the AGS referred the matter of the 384 appearances filed with the Court by Mr McClure, ostensibly in support of his petition, to the Australian Federal Police for investigation of a possible offence under the *Crimes Act 1914*.

6.2 *The Related Petitions*

6.2.1 The *McClure v AEC* petition was identical to four other petitions filed with the High Court in Registries around the nation, disputing the half-Senate elections in those States and the Senate election for the Northern Territory. The five identical petitions also sought a “class action” hearing and were as follows:

NT Senate	*Polke v AEC*	filed Darwin 2 December 1998
NSW Senate	*Vaughan v AEC*	filed Sydney 7 December 1998
WA Senate	*Garcia v AEC*	filed Perth 7 December 1998
Vic Senate	*McClure v AEC*	filed Melbourne 8 December 1998
Tas Senate	*Heathorn v AEC*	filed Hobart 8 December 1998

6.2.2 On the dismissal of the *McClure v AEC* petition by Justice Hayne on 24 June 1999, Mr Geoffrey McCarthy of AGS, acting on behalf of the AEC, filed summonses and affidavits on 8 July 1999, seeking orders in each of remaining four petitions, that the petitions be dismissed or stayed.

6.2.3 On 9 July 1999, the four petitioners, all unsuccessful independent Senate candidates, were served by Mr McCarthy of AGS, on behalf of the AEC, with similar summonses and affidavits to those filed in the McClure petition by the AEC. The petitioners were further advised that should they notify Mr McCarthy before 16 July 1999 of their intention not to oppose the application by the AEC for dismissal of the petitions, then the AEC would not seek costs against them.

6.2.4 The petitioners, Mr Garcia, Mr Polke and Mr Vaughan advised Mr McCarthy on 14 July 1999 that they would not oppose the applications by the AEC for the dismissal of their petitions. The fourth petitioner, Mr Heathorn, advised Mr McCarthy on 21 July 1999 that he would not oppose the AEC application for dismissal. The petitioners also advised the Court of their intentions not to oppose the AEC application.

6.2.5 On 22 July 1999, before Justice Hayne of the Court of Disputed Returns in Canberra, a video-link was established with Perth, Darwin, Sydney and Hobart, to enable the petitioners to be heard if they so wished. Mr Gageler of counsel represented the AEC, with Mr Geoffrey McCarthy, and there was no appearance by the petitioners, or by any of the other persons who had filed appearances in support of the petitioners. Justice Hayne delivered the same decision in each of the petition, as follows:

> The petition is not materially different from the petition I considered in the matter of *McClure v Australian Electoral Commission (1999) 163 ALR 734*. For the reasons I gave in that matter, this petition cannot succeed. It is dismissed. The respondent does not seek costs and there is no order as to costs.

7. Implications of the McClure Decision

7.1 *Senate Group Ticket Voting*

7.1.1 It is not unusual for independent Senate candidates to belatedly discover, generally at the time of nomination, that they are not entitled to appear on the ballot paper as a group "above the line", and thereby take advantage of the ticket voting system for the Senate. This may give rise to some protest at the "fairness" of sections 211 and 211A of the Electoral Act, and can result in petitions to the Court of Disputed Returns after the election, on the grounds that the law is both unconstitutional and "unfair" to independent candidates.

7.1.2 In *McKenzie v The Commonwealth (1984) 59 ALJR 190*, and in *Abbotto v AEC (1997) 71 ALJR 675*, the High Court has confirmed that the Senate group ticket voting system is not unconstitutional. In *McKenzie*, Gibbs CJ held that that the relevant provisions did not "so offend democratic principles as to render the sections beyond the power of the Parliament to enact". In *Abbotto*, Dawson J held that the relevant provisions did not contravene section 10 of the Constitution. *McClure v AEC (1999) 73 ALJR 1086* is in accordance with these previous decisions in relation to the constitutionality of the Senate group ticket voting system.

7.1.3 Further confirmation of the validity of the Senate group voting system is evidenced by the dismissal by the Federal Court of an injunction application on similar grounds by Mr Hodgetts, just prior to polling day for the 1998 federal election (*Hodgetts v AEC, Dowsett J, 2 October 1998, unreported*) (see paras 12.2.6 to 12.2.8 of AEC submission No 88 of 12 March 1999).

7.1.4 In the McClure petition and proceedings, it was also claimed that the provisions are "unfair" to independents, and that section 364 of the Electoral Act required the Court to make a finding that the election was therefore void. Section 364 of the Electoral Act is entitled "Real justice to be observed", and provides as follows:

> The Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not.

7.1.5 Petitioners occasionally invoke this provision in their submissions to the Court, arguing that it means that elements of the rule of law should not apply to proceedings in election petitions, and that the Court should take into its consideration whether or not a particular law is "fair" or "unfair". As noted by Gleeson CJ, Gummow and Hayne JJ in *Sue v Hill (1999) 73 ALJR 1016* at 1025:

> Provisions of this type….do not exonerate the Court from the application of substantive rules of law and are consistent with, and indeed, require the application of, the rules of procedural fairness.

7.1.6 In his decision in *McClure v AEC*, Justice Hayne elaborated on the proper interpretation of section 364:

> …s 364 is to be understood as directing the Court about how it should set about its task of deciding the issues presented under the Act by the petition; it does not give the Court some power to rewrite the Act to accord with some abstract notion of fairness. If the provisions made in the Act for election of Senators are valid laws of the Parliament, it is not to the point for the Court to attempt to characterise those provisions as "fair" or "unfair".
>
> In particular, s 364 gives no warrant for the Court declaring void an election conducted in accordance with valid legislative requirements.

7.1.7 That is, section 364 of the Electoral Act does not allow the Court to make its decisions on petitions on the basis of what might or might not be considered "fair" in relation to the conduct of elections. Petitioners cannot avoid the application of the rule of law by the Court by invoking section 364.

7.2 *Freedom of Political Communication*

7.2.1 Justice Hayne held that there had been no breach of the implied freedom of political communication in the Constitution, as alleged by Mr McClure in his petition, in relation to the lack of press coverage of his election campaign. As His Honour stated, in short:

> …the freedom of communication implied in the Constitution is not an obligation to publicise. The freedom is a freedom from government action: it is not a right to require others to provide a means of communication.

7.3 *Class Actions in Petitions*

7.3.1 Mr McClure and the other four petitioners sought leave from the Court for their petitions to be heard "as a class action before the Full Bench of the High Court". Justice Hayne noted in his decision that there is no provision in the Electoral Act or the High Court Rules which would enable class actions in election petitions.

7.3.2 In declining to hear the petitions as a class action, Justice Hayne applied the decision in *Muldowney v AEC (1993) 178 CLR 34*, that petitioners can only dispute elections at which they were entitled to vote (effectively, a Senate election for any one of the six States or two Territories, and an election for any one of the 148 House of Representatives Divisions). That is, petitioners cannot join with other petitioners enrolled in different Divisions to mount a class action disputing any number of elections in which they were not entitled to vote.

7.4 *Validity of Royal Assent to Bills*

7.4.1 During the proceedings, Mr McClure sought to amend his petition to include a challenge to the validity of the Electoral Act on the basis that:

> Since we signed the Treaty of Versailles and we became an independent and sovereign nation in that respect…it is not within the powers of the Parliament to pass laws that have not been given royal assent…Indeed, we have signed other acts of independence such as on 10 January 1920, when we assigned to the Covenant of the League of Nations, and, similarly, also the Charter of the United Nations on 26 June 1945…*(transcript, 16 August 1999, p 23)*

7.4.2 On occasion, the AEC receives correspondence presenting similar arguments from individuals challenging the validity of provisions of the Electoral Act, such as compulsory voting. It is unclear how such fundamentally confused arguments manage to maintain currency in the community, but Justice Hayne has made it clear in his decision in the McClure petition that they do not constitute a meaningful challenge to the laws of the Commonwealth.

7.4.3 Justice Hayne noted that covering clause 5 of the Constitution provides that: "This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding the laws of any State…..". This means that the Court will apply the law as provided by the Parliament within the terms of the Constitution.

7.4.4 His Honour then went on to note that the Constitution provides the mechanism for Royal Assent to bills, and that section 58, in particular, provides that the Governor-General "shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name". His Honour concluded that there was nothing to suggest that this was not done in relation to the Electoral Act.

8. Proceedings in the Ditchburn Petitions

8.1 *The Ditchburn v AEO Qld Petition*

8.1.1 On 3 October, Mr Donald Ditchburn, an elector for the Division of Herbert in Queensland, filed a petition in the Brisbane Registry of the High Court, disputing the election of all Senators elected at the half-Senate election for the State of Queensland. In his petition, Mr Ditchburn asserted his entitlement to vote at the election, and asserted the following grounds for his petition (*inter alia*):

> While sections 211 and 211A carefully avoid using the words "choose", "choice" or "chosen", it is an unavoidable pre-requisite of lodging statements specifying orders of preference that candidate or party officials choose the orders of preference given in the statements lodged with the Australian Electoral Officer.
>
> Where voters mark their Senate ballot papers "above the line", ie in accordance with subsections 239(2) or (3), they select a political party or group which has lodged a group voting ticket pursuant to section 211 or section 211A.
>
> Section 272 creates a statutory fiction by "deeming" those ballot papers to have been marked according to an order of preference specified by that political party or group of candidates.
>
> No Senator is directly chosen by people who vote "above the line" (refer to Senate ballot paper) – voters merely select the political party or group of candidates whose previously chosen order of preference is then attributed to the voter by the statutory fiction created under section 272.
>
> Consequently the provisions of the Commonwealth Electoral Act 1918 referred to above prescribe a method of electing Senators which resembles an electoral college, and where Senators are indirectly chosen by the people of the State…….
>
> Hence those provisions conflict with section 7 of the Constitution of the Commonwealth and are therefore ultra vires the powers of Federal Parliament under sections 8 and 51(xxxvi) of the Constitution.
>
> The legislation also conflicts with the findings of the High Court in *Attorney-General of Australia (ex re McKinlay) v Commonwealth (1975) 135 CLR 1*, per Gibbs J, at p 44, Stephen J at p 56, Mason J at p 61, and Murphy J at p 68.
>
> Of note is the decision of Gibbs CJ in *McKenzie v Commonwealth (1984) 59 ALJR 190* which was limited to the arguments presented in that case and did not allude to whether Senators were directly or indirectly chosen by electors. It is questionable whether this decision conflicts with the findings of the full bench of the High Court referred to in the preceding paragraph.

8.1.2 The petitioner, Mr Ditchburn, asked the Court for the following orders:

> 1. A declaration as to the validity of sections 211, 211A and subsections 239(2), 239(3) and 273(5) paragraphs (c) (d) and (f) of the Commonwealth Electoral Act 1918.
>
> 2. An order to annul the election of any Senator declared elected by the Australian Electoral Officer for Queensland pursuant to sections 211, 211A, 272 and subsections 239(2), 239(3) and 273(5) paragraphs (c) (d) and (f) of the Commonwealth Electoral Act 1918.

8.1.3 On 22 and 31 March 1999, a summons and affidavit was filed with the Court by Mr Maurice Swan of the Australian Government Solicitor on behalf of the AEC, seeking orders that the AEC have leave to enter an appearance in the proceedings, that the name of the respondent (AEO Qld) be struck out, and that the petition be dismissed or that proceedings be stayed, on the grounds that there was no reasonable or probable cause of action or suit, or that the proceeding is an abuse of the process of the Court.

8.1.4 At the hearing on 22 July 1999 in Canberra before Justice Hayne of the High Court, sitting as the Court of Disputed Returns, Mr Gageler of counsel appeared for the AEC, with Mr Geoffrey McCarthy, and Mr Ditchburn represented himself on video-link.

8.1.5 Mr Ditchburn did not opposed the application by the AEC to enter an appearance and leave was granted by the Court. Mr Gageler, for the AEC, relied on the previous decisions of the Court in *McKenzie v The Commonwealth (1984) 59 ALJR 190; Abbotto v AEC (1997) 71 ALJR 675; Soegemeier v Macklin (1985) 58 ALR 768;* and most recently, *McClure v AEC (1999) 73 ALJR 1086*.

8.1.6 In the course of interchange with Justice Hayne, the petitioner agreed that basis of his argument was that “above the line” voting amounts to electors choosing a party by means of a group voting ticket, rather than direct election of Senators. The petitioner submitted that this system contravened section 7 of the Constitution which requires that the Senate be composed of Senators for each State directly chosen by the people of the State. The petitioner referred to and relied upon sections 8, 9 and 51(xxxvi) of the Constitution, and submitted that the effect of group voting tickets provided for under sections 211 and 211A of the Electoral Act was to establish an “electoral college”, the members of which are the party officials or group candidates listed on the ticket. The petitioner submitted that group ticket voting “above the line” means voting for a college rather than individual candidates.

8.1.7 In support of his argument, the petitioner also referred to the entitlement of parties, under sections 211(2)(3) and 211A(2)(3), to lodge with the AEC a group ticket voting statement indicating two or three different orders of preference for the election of candidates. The petitioner stated, rightly, that where a statement is lodged indicating two or three different ways in which a party directs preferences to be allocated, the returning officer randomly distributes ballot papers into two or three equal piles (as the case may be).

8.1.8 For this reason, any elector who voted "above the line" by reference to a statement indicating two or three different orders for distribution of preferences had no control over how his or her preferences were distributed because the elector did not control on which "pile" his or her ballot paper was placed. It was submitted by the petitioner that the intervention of the returning officer, when distributing the ballot papers, contravened the requirement that Senators be chosen directly by the people.

8.1.9 In the course of the interchange between Justice Hayne and the petitioner, it became clear that His Honour was not attracted by any of the arguments put by the petitioner. Relying upon earlier decisions of the Court, Justice Hayne expressed his view that Parliament's provision for a complex system of Senate voting does not contravene section 7 of the Constitution. It only addresses the manner in which direct voting is conducted. His Honour rejected the proposition that the group voting ticket system interposes an electoral college between the choosers and the chosen.

8.1.10 The petitioner also sought to rely on section 8 of the Constitution despite express findings in *McKenzie* and *Soegemeier* that section 8 had no bearing on the validity of the group ticket voting provisions of the Electoral Act. On several occasions, Justice Hayne commented that the matters raised by the petitioner were more in the realm of political science than the legal question before the Court, namely whether the group voting ticket system contravened the Constitution. After some two hours of submissions, Justice Hayne then reserved his decision

8.1.11 Later on the same day, 22 July, Justice Hayne delivered his decision, ordering that the petition be dismissed, and that the petitioner, Mr Ditchburn, pay the costs of the respondent, the AEC. In his decision in *Ditchburn v AEO Qld* (unreported), Justice Hayne said the following:

> On 30 November 1998, Donald Kenneth Ditchburn filed an Election Petition pursuant to Div 1 of Pt XXII of the *Electoral Act* (Cth) ("the Act"). The petition was said to "[concern] the election for Senators held in the State of Queensland held on Saturday 3 October 1998"…..
>
> The petition named as respondent the "Australian Electoral Officer for Queensland". The Australian Electoral Commission ("the Commission") sought leave to enter an appearance in the proceeding and to be represented and be heard and it sought an order under O 16 r 4 of the High Court Rules that the name of the respondent be struck out as improperly joined. It has also sought an order that the petition be dismissed on the ground that it does

not set out facts which would justify any relief under the Act, or in the alternative, that it be stayed on the ground either that there is no reasonable or probable cause of action or suit or that the proceeding is an abuse of the process of the Court.

Section 359 of he Act provides: “The Electoral Commission shall be entitled by leave of the Court of Disputed Returns to enter an appearance in any proceedings in which the validity of any election or return is disputed, and to be represented and heard thereon, and in such case shall be deemed to be a party respondent to the petition.”

No reason was offered why the Commission should not have the leave it seeks and accordingly leave was granted. Because I consider that the petition cannot succeed and should be dismissed, I need form no view on whether the respondent named in the petition was “improperly joined” within the meaning of O 16 r 4 of the Rules.

The central complaint of the petitioner relates to what has come to be known as the “above the line” and “below the line” voting, or “group voting”, system in Senate elections. That is dealt with in ss 211, 211A, 239 and 272 of the Act and finds reflection in the provisions of s 273 governing scrutiny of votes in Senate elections…

Section 211 of the Act provides (in effect) that where the names of candidates nominated in a Senate election are included in a group, the candidates may lodge a written statement that they wish voters in the election to indicate their preferences in relation to all the candidates in the election in an order (or any of up to three different orders) specified in the statement, being an order that gives preferences to the candidates lodging the statement before any other candidate. Section 211A of the Act makes like provision for candidates who are Senators or, if there has been a dissolution of the Senate, were Senators immediately before the dissolution and who are not members of a group. There is no like provision for other candidates not part of a group.

The constitutional validity of provisions like s 211 has twice been considered - in *McKenzie v Commonwealth* (1984) 59 ALJR 190; 57 ALR 747 and in *Abbotto v Australian Electoral Commission 72* (1997) 71 ALJR 675; 144 ALR 352. At the time of *McKenzie,* the Act was cast in slightly different terms and did not contain s 211A. Gibbs CJ rejected a submission that the group voting system then provided for the election of Senators was contrary to s 7 or s 16 of the Constitution -

Section 7 provides (so far as relevant): “The Senate shall be composed of senators for each Sate, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.”

Section 16 provides: “The qualifications of a senator shall be the same as those of a member of the House of Representatives.”

- and held that the provisions then in force did not ‘so [offend] democratic principles as to render the sections beyond the power of the Parliament to enact (1984) 59 ALJR 190 at 191; 57 ALIl 747 at 749. In *Abbotto,* Dawson J held that there was no substance to the contention that the voting system provided for by ss 211 and 211A contravened s 10 of the Constitution.

Section 10 provides: “until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of tile State shall, as nearly as practicable apply to elections of senators for the State.”

The present petition suggests that the provisions of the Act dealing with above the line and below the line voting conflict with what was held by the Court in *Attorney-General (Cth*); *Ex rel McKinlay v The Commonwealth (1975*) 135 CLR 1. Particular reference was made to those parts of the reasons of Gibbs J (at 44), Stephen J (at 56), Mason J (at 61) and Murphy J (at 68) in which their Honours consider what is meant in s 24 of the Constitution when it says that “the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth”.

Like s 24, s 7 of the. Constitution also uses the expression “directly chosen by the people” and as Stephen J said in *McKinlay* (at 56): “Each [s 7 and s 24] calls for a system of representative democracy in the sense that the Houses of the legislature are to be composed of members whom the people choose; in each the method of choice is required to be that of direct choice, there is to be no interposition of an electoral college between the chooser and the chosen.”

The petitioner contended that neither *McKenzie v The Commonwealth* nor *Abbotto v Australian Electoral Commission* can be read as dealing directly with the arguments he now seeks to advance. I think the better view is that Gibbs CJ did consider these matters in *McKenzie* and that the decision of Dawson J in *Abbotto* is inconsistent with the petitioner’s contentions.

However that may be, as I said in *McClure,* I do not accept that the provisions for above the line and below the line voting in Senate elections are contrary to s 7 of the Constitution. See also *McKenzie v The Commonwealth (1987*) 59 ALJR 190; 57 ALR 747; *Abbotto v Australian Electoral Commission* (1997) 71 ALJR 675; 144 ALR 352. In particular, l do not accept the contention that those provisions “prescribe a method of electing Senators which resembles an electoral college, and where Senators are indirectly chosen by the people of the State”.

The petition cannot succeed. It should be dismissed.

8.1.12 The second Ditchburn petition was heard and decided on the same day.

8.2 *The Ditchburn v DRO Herbert Petition*

8.2.1 On 3 October, Mr Donald Ditchburn, an elector for the Division of Herbert in Queensland, filed a petition in the Brisbane Registry of the High Court, disputing the election of the Member for Herbert in Queensland. In his petition, Mr Ditchburn asserted his entitlement to vote at the election, and asserted the following grounds for his petition (*inter alia*):

> …Electors (like me) whose first preference for a minor party candidate was initially counted as their vote, also had their ballot papers counted for their second, third or fourth etc preference candidates, and those candidates substituted by the DRO as the electors' alternative votes.
>
> As an elector's vote can be ascribed to any candidate in his/her order of preference, it follows that the elector must simultaneously vote for all candidates indicated on his ballot paper. Under this construction, if electors only vote for their first preference, subsequent preferences should not be counted.
>
> Thus Section 274 of the Act has the effect of making the preferences each elector indicates pursuant to Section 240(1)(b) into multiple votes for the one vacant seat.
>
> This construction conflicts with the express and implied provisions of Section 30 of the Constitution of the Commonwealth of Australia which requires in part "but in the choosing of members each elector shall vote only once".
>
> But if Section 274 of the Act is construed as requiring the Divisional Returning Officer to "transfer" the first preference votes of excluded candidates to opponents, the DRO acts as an intermediary (or agent) in the voters' choosing of members of the House of Representatives.
>
> The intervention of the DRO actually determines which of any electors preferences is finally accepted in the count of votes, and thus determines which candidate the elector actually chooses.
>
> Consequently the intervention or agency of an officer of the Crown in the choosing of members means that such members are indirectly chosen by electors whose votes were transferred from excluded candidates. This requirement of the Act conflicts with the first provision of Section 24 of the Constitution:
>
> "24. The House of Representatives shall be composed of members *directly chosen by the people of the Commonwealth ..."*
>
> As Subsections 240(1)(b), 240(2) and 274(7) para (d), 274(7AA), 274(7AB) and 274(7AC) of the Commonwealth Electoral Act 1918 either conflict with Section 24 or with Section 30 of the Constitution of the Commonwealth (or with both), those provisions of the Act should be ultra vires Parliaments' legislative power under Section 31 and Section 51(xxxvi).
>
> (It is not contended that MHR's elected by gaining an absolute majority of first preference votes pursuant to Subsection 240(1)(a) of the Act are affected.)

> The facts and inferences referred to above also apply to comparable legislation with respect to the election of Senators filling the final Senate positions for each State. Thus Subsection 239(1)(b) and Section 273 Subsections (13), (13AA), (13A), (13B), (13C), (14), (15) and (16) of the Commonwealth Electoral Act 1918 conflict with either Section 7 or Section 8 of the Constitution of the Commonwealth. These provisions of the Act should similarly be ultra vires Sections 9, 10 and 51(xxxvi) of the Constitution….

8.2.2 The petitioner, Mr Ditchburn, asked the Court for the following orders:

> 1. A declaration as to the validity of Subsections 240(1)(b), 240(2) and 274(7) para (d) 274(7AA), 274(7AB) and 274(7AC) of the Commonwealth Electoral Act 1918.
>
> 2. An order to annul the election of the Member for Herbert declared elected by the Divisional Returning Officer for Herbert pursuant to the provisions of the Act referred to in 1 above.

8.2.3 On 22 and 31 March 1999, a summons and affidavit was filed with the Court by Mr Maurice Swan of the Australian Government Solicitor on behalf of the AEC, seeking orders that the AEC have leave to enter an appearance in the proceedings, that the name of the respondent (DRO Herbert) be struck out, and that the petition be dismissed or that proceedings be stayed, on the grounds that there was no reasonable or probable cause of action or suit, or that the proceeding is an abuse of the process of the Court.

8.2.4 At the hearing on 22 July 1999 in Canberra before Justice Hayne of the High Court, sitting as the Court of Disputed Returns, Mr Gageler of counsel appeared for the AEC, with Mr Geoffrey McCarthy, and Mr Ditchburn represented himself on video-link.

8.2.5 Mr Ditchburn did not oppose the application by the AEC to enter an appearance and leave was granted by the Court. Mr Gageler, for the AEC, relied on the decision of the Court in *Langer v The Commonwealth (1996) 186 CLR 302*, where all members of the Court, including Justice Dawson, who otherwise dissented, held section 240 of the Electoral Act valid.

8.2.6 In reply, the petitioner submitted that his petition was different in principle from the matters considered in *Langer* because his petition relied on the word “directly” appearing in section 24 of the Constitution. This, he submitted, was not a matter raised or considered by the Court in *Langer*. Justice Hayne listened to the petitioner at length but frequently commented that the issues being raised by the petitioner were matters of political science, not constitutional validity. His Honour then reserved his decision.

8.2.7 Later on the same day, 22 July 1999, Justice Hayne delivered his decision, ordering that the petition be dismissed, and that the petitioner, Mr Ditchburn, pay the costs of the AEC. In his decision in *Ditchburn v DRO Herbert* (unreported), Justice Hayne said the following:

On 7 December 1998, Donald Kenneth Ditchburn filed an Election Petition pursuant to Div 1 of Pt XXII of the *Electoral Act* (Cth) ("the Act"). The petition was said to concern "the election for the House of Representatives seat for the Division of Herbert held on Saturday, 3 October 1998". It alleged that the petitioner is enrolled in the Federal Division of Herbert in the State of Queensland and it appears from other allegations in the petition that he was eligible to vote in that Division in the election held on 3 October 1998.

The Australian Electoral Commission seeks leave to enter an appearance in the proceeding and to be represented and be heard. It seeks an order under O 16 r 4 of the High Court Rules that the name of the respondent to the petition be struck out. It also seeks an order dismissing the petition or staying proceedings on the petition on the ground either that there is no reasonable or probable cause of action or suit or that the proceeding is an abuse of the process of the Court.

As was the case in the other electoral petition which was instituted by Mr Ditchburn and with which I have dealt today, *Ditchburn v Australian Electoral Officer for Queensland* [1999] HCA, no reason was offered why the Commission should not have the leave it sought (under s 359 of the Act) and accordingly leave was given for it to appear, be represented and heard on the petition. Again, however, I need form no view on whether the respondent named in the petition was "improperly joined" within the meaning of O 16 r 4 of the Rules.

The petitioner seeks to contend that the system of preferential voting for candidates in House of Representatives elections is contrary to the requirements of s 24 of the Constitution that the members of that House be "directly chosen by the people" and s 30 of the Constitution that "in the choosing of members each elector shall vole only once". In particular he alleges that ss 240(1)(b), 240(2), 274(7)(d), 274(7AA), 274(7AB) and 274(7AC) of the Act are invalid and he seeks a declaration to that effect and "an order to annul the election of the Member for Herbert declared elected by the Divisional Returning Officer for Herbert" pursuant to these provisions…..

In my opinion these arguments [in the petition] are not tenable. Some other arguments, not raised by the petition, were mentioned by the petitioner in oral argument. They were, by and large, arguments of a political rather than legal nature. Even if open to the petitioner, sections 355, 358, they do not assist in resolving the consyitulional issues that the petitioner sought to raise.

In *Langer v The Commonwealth* (1996) 186 CLR 302 at least five members of the Court held, at 316-317 per Brennan CJ, 333 per Toohey and Gaudron JJ, 348-349 per Gummow J, that s 240 of the Act was a valid law within ss 31 and 51(xxxvi) of the Constitution and was not inconsistent with the requirement of s 24 that the House of Representatives shall be comprised of members "directly chosen by the people of the Commonwealth". See also Judd v McKeon (1926) 38 CLR 380; *Faderson v Bridger* (1971) 126 CLR 217. And it may well be that the other two members of the Court were of the same opinion, at 323 per Dawson J, 340-341 per McHugh J. The argument which the petitioner seeks to advance is, at least to the extent that he relies on s 24, an argument which I am bound to hold would fail. Even if *Langer* does not decide the further point on which the petitioner seeks to rely (that under the

preferential voting system a voter votes more than once, contrary to s 30) that contention is one which must fail.

Prior to Federation, plural voting related to property qualification was allowed in Tasmania, Western Australia and Queensland, *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 19 per Barwick CJ; *McGinty v Western Australia (1996) 186 CLR 140* at 281-282 per Gummow J. It is clear from the Debates at the 1891 Convention in Sydney that the question of plural voting was well in the minds of the members of the Constitutional Conventions from which the terms of the Constitution emerged, *Official Record of the Debates of the Australasian Federal Convention, (Sydney)* 1891, vol 1, 613-617. But the plural voting then under consideration permitted a voter to cast more than one expression of his or (in South Australia and Western Australia) her choice of candidate.

The preferential voting system was provided for House of Representatives elections by s 124 of the *Commonwealth Electoral Act 1918* and for the Senate by s 7 of the *Commonwealth Electoral Act 1919 .* As McHugh J noted in *Langer v The Commonwealth* at 342 "Compulsory preferential voting does not appear to have been introduced into Australia until 1911 when it was introduced in Western Australia. But optional preferential voting was used in Queensland after 1892". Even so, the Constitution that emerged from the Constitutional Conventions "did not entrench the secret ballot, compulsory voting, preferential or proportional voting", *McGinty v Western Australia* (1996) 186 CLR 140 at 283 per Gummow J. All that was said (so far as presently relevant) was that the members of the House of Representatives were to be "directly chosen by the people", section 24, that until the Parliament otherwise provides "the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the Slate as the qualification of electors of the more numerous House of Parliament of the State", section 30, and that "in the choosing of members each elector shall vote only once", section 30.

The petitioner placed some emphasis on what was said by McHugh J in *Australian Capital Television Pty Ltd v The Commonwealth (1992*) 177 CLR 106 at 228-233 about "representative government". But as Brennan CJ pointed out in *McGinty v Western Australia* at 169 the expressions "representative government" and "representative democracy" are not found in the Constitution and although they are useful terms to describe the effect of ss 7 and 24 "[i]t is logically impermissible to treat 'representative democracy' as though it were contained in the Constitution, to attribute to the term a meaning or content derived from sources extrinsic to the Constitution and then to invalidate a law for inconsistency with the meaning or content so attributed."

The requirements that members be "directly chosen" and that "each elector shall vote only once" do not preclude the Parliament from providing (as it has) for a compulsory preferential voting system, *Langer v The Commonwealth; Soegemeier v Macklin* (1985) 58 ALR 768. Under that system each elector casts but one expression of his or her choice of member in one electoral division. The choice is expressed in a complex way but it remains a single expression of the will of that voter. And, perhaps more relevantly, the voter cannot cast a vote in more than one electoral district as voters could in those Colonies that permitted plural voting related to property qualifications. The voter votes only once.

No doubt it is right to say, as the petitioner does, that the distribution of preferences requires electoral officers to undertake the process prescribed in those parts of s 274 which deal with that subject. But the performance of those tasks does not mean that the member is not “directly chosen” as that expression is used in s 24.

The petition cannot succeed. It should be dismissed.

9 Implications of the Ditchburn Decisions

9.1 *Senate Group Ticket Voting*

9.1.1 As discussed in part 7.1 above in this submission, it is not unusual for independent Senate candidates to belatedly discover, generally at the time of nomination, that they are not entitled to appear on the ballot paper as a group "above the line", and thereby take advantage of the ticket voting system for the Senate. This may give rise to some protest at the "fairness" of sections 211 and 211A of the Electoral Act, and can result in petitions to the Court of Disputed Returns after the election, on the grounds that the law is both unconstitutional and "unfair" to independent candidates.

9.1.2 In *Ditchburn v AEO Qld (unreported)* Justice Hayne has confirmed the decisions in *McClure v AEC (1999) 73 ALJR 1086,* in *Abbotto v AEC (1997) 71 ALJR 675*, and in *McKenzie v The Commonwealth (1984) 59 ALJR 190*, that the Senate group ticket voting system is not unconstitutional, and that it is not for the Court to decide whether the Senate group voting system is "fair" or "unfair" to independent candidates.

9.1.3 In *Ditchburn v AEO Qld*, Justice Hayne dealt with the further contention that the Senate group ticket voting is contrary to section 7 of the Constitution, which requires that senators be "directly chosen by the people". His Honour said that he did not accept the contention that sections 211 and 211A of the Electoral Act "prescribe a method of electing Senators which resembles an electoral college, and where Senators are indirectly chosen by the people of the State".

9.1.4 *Full Preferential Voting*

9.1.5 In *Ditchburn v DRO Herbert (unreported)* it was contended that full preferential voting is contrary to section 24 of the Constitution, which requires that members be "directly chosen by the people", and section 30 of the Constitution, which requires that "in the choosing of members each elector shall vote only once".

9.1.6 Justice Hayne did not accept that full preferential voting under section 240 of the Electoral Act is contrary to section 24 of the Constitution, which requires that members be "directly chosen by the people". In coming to this decision, His Honour relied on the decision of the High Court in *Langer v The Commonwealth (1996) 186 CLR 302*. In *Langer* the High Court held that section 240 of the Electoral Act is a valid law within sections 31 and 51(xxxvi) of the Constitution, and not inconsistent with the requirements of section 24 of the Constitution. Justice Hayne noted that the decision in *Langer* was consistent with the decisions in *Judd v McKeon (1926) 38 CLR 380* and *Faderson v Bridger (1971) 126 CLR 217*.

9.1.7 Further, Justice Hayne did not accept that full preferential voting is contrary to section 30 of the Constitution, which requires that "in the choosing of members each elector shall vote only once". In coming to this decision, Justice Hayne relied on *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth (1975) 135 CLR 1; McGinty v Western Australia (1996) 186 CLR 140; Langer v The Commonwealth (1996) 186 CLR 302;* and *Soegemeier v Macklin (1985) 58 ALR 768*.

9.1.8 His Honour noted that prior to Federation, plural voting on the basis of property qualifications was allowed in Tasmania, Western Australia and Queensland. It was clear from the Debates at the 1891 Convention in Sydney that the question of plural voting was well in the minds of the members of the Constitutional Conventions from which the terms of the Constitution emerged, and hence the phrase, "in the choosing of members each elector shall vote only once". It is notable in this context that the Constitution that emerged from the Constitutional Conventions did not entrench either the secret ballot, compulsory voting, preferential voting, or proportional voting.

9.1.9 His Honour concluded that under the full preferential voting system, each elector casts but one expression of his or her choice of member in one electoral Division. The choice is expressed in a complex way but it remains a single expression of the will of that voter. That is, at federal elections, with full preferential voting, the voter votes only once. All that the Constitution appears to proscribe is plural voting based on property qualifications, as was permitted in colonial times.

10. Summary of Outcomes in the 1998 Election Petitions

- The Court of Disputed Returns has jurisdiction to hear election petitions disputing the constitutional qualifications of candidates.

- The United Kingdom is a "foreign power" under the terms of section 44(i) of the Constitution

- Ms Heather Hill, a elected candidate for the Senate in Queensland, was disqualified under section 44(i) of the Constitution, as a British subject at the time of her nomination.

- The Senate group voting system is a valid law of the Parliament under the terms of the Constitution, including sections 7 and 24, which require that senators and members be "directly chosen by the people".

- It is not for the Court to decide whether or not the Senate group voting system is fair or unfair to independent candidates.

- There is no provision for class actions in election petitions, and in any case, electors can only dispute the elections for which they were entitled to vote.

- The Court will apply the law as provided by the Parliament within the terms of the Constitution, and there is nothing to suggest that Royal Assent was not properly given to the Electoral Act and its amending Acts.

- Section 240 of the Electoral Act, which provides for full preferential voting, is a valid law within the terms of the Constitution, including sections 7 and 24, which require that members and senators be "directly chosen by the people", and sections 8 and 30, which require that "each elector shall vote only once".

ATTACHMENTS

Attachment 1

Sue v Hill (S179/1998, Gleeson CJ, 19 March 1999, unreported)

See attached

Attachment 2

Sue v Hill (1999) 73 ALJR 1016

See attached

Attachment 3

***Extract from AEC submission No124 of 15 November 1993* re costs**

4.3.2 During the hearing on 1 October 1993 on the question of costs, Justice Gaudron made a number of observations on the ease with which election petitions, which may have no legal merit, can be lodged with the Court of Disputed Returns under the current provisions of the *Commonwealth Electoral Act 1918.* For example, on page 54 of the transcript Justice Gaudron said the following:

The Act is by no means of model of clarity as to who can bring petitions .... it sets it up so that a person can come without the benefit of legal advice which might deflect it. In fact, it discourages, positively prohibits, legal representation without leave, so that the Act is virtually inviting people ... to bring petitions which have not had the benefit of legal analysis.

4.3.3 Her Honour then appeared to agree with the proposition of Mr Gageler for the Commonwealth that whilst the $100 security for costs required under section 356 of the Act in order to lodge a petition may have been a deterrent to vexatious or frivolous petitioners when it was first legislated in 1902 (when it was 50 pounds), it can hardly be regarded as a meaningful deterrent these days.

4.3.4 In discussing with Mr Gageler the scheme of the Act which appears to encourage unimpeded access to the Court of Disputed Returns by any and all petitioners, Justice Gaudron said at page 55 of the transcript:

Virtually unimpeded access, and as you tell me five out of six [of the petitions] have failed. One well knows that some of the grounds that have been advanced in these petitions - and I put Mr Hudson's to one side - have been grounds that one would think would not have survived legal advice...

4.3.5 In reference to section 370 of the Act which provides that "no party to the petition shall, except by consent of all parties, or by leave of the Court, be represented by counsel or solicitor... [and] ... in no case shall more than one counsel or solicitor appear on behalf of any party, Justice Gaudron went on to say:

But very rarely do you have a provision such as this - you do in some Acts, but not commonly - no legal representation except by leave. So what you are doing is you are in fact encouraging people to come to the Court with arguments that do not necessarily have a basis in law.

4.3.6 And finally, on page 58 of the transcript, Justice Gaudron said:

I was hoping maybe that the legislature might see fit to do something with respect to the provisions as they stand. It is by no means a model of clarity is it, that part of the Act?

4.3.7 These comments from the Bench are directed to petitions that “would not have survived legal advice”, that is, vexatious and/or frivolous petitions, and not to the Hudson petition in particular, as is obvious from Justice Gaudron’s comment that the ease of access to the Court for petitioners of limited means such as Mr Hudson is “commendable” (see paragraph 4.2.7 above).

4.3.8 If any review of the provisions of the Act relating to costs and legal representation were to be undertaken, it would need to be in the context of the following considerations.

4.3.9 For the average petitioner it costs a total of $900 in set fees and charges to lodge a petition, made up of the $100 deposit as security for costs under section 356 *of* the *Commonwealth Electoral Act 1918,* and the $300 filing fee and the $500 hearing fee under regulations 4(1) and 5(1) respectively of the *High Court of Australia (Fees) Regulations.* If a petitioner can provide a health care card or a health benefit card or provide other reasons acceptable to the High Court Registry that indicate financial constraints, then the High Court Regulations allow the $800 High Court fees to be waived. There is no waiver under the *Commonwealth Electoral Act 1918* for the $100 deposit as security for costs.

4.3.10 In addition to these set fees and the deposit, under Order 68 rule 3 of the *High Court Rules,* forthwith after filing a petition, the petitioner must arrange for the petition to be published in the *Commonwealth Gazette* and the relevant State *Gazette,* and in the case of an election for the House of Representatives, the petitioner must publish a notice giving details of the petition in a newspaper circulating in the relevant electoral Division. Further, under Order 68 rule 5 of the Rules, the petitioner must, 28 days after the filing of the petition, serve a copy of the petition upon every person whose election or return is disputed by the petition. These requirements under the *High Court* Rules for publication and service can clearly add up to a considerable financial burden to the petitioner.

4.3.11 The Commission has no difficulty with the fees, service and advertising requirements of the *High Court Rules* in so far as they apply to petitions disputing elections. The Commission does however agree with Justice Gaudron that the provisions in the *Commonwealth Electoral Act 1918* relating to costs and legal representation are dated and inconsistent.

4.3.12 The history of the introduction in 1902 to 1905 of the provisions of the *Commonwealth Electoral Act 1918* relating to costs and legal representation in the Court of Disputed Returns will not be canvassed in detail in this Submission. However it is worth noting that the two Houses of Parliament were divided at that time over whether to legislate for a non-judicial parliamentary Elections and Qualifications Committee, or a Court of Disputed Returns with full judicial powers, to settle election disputes. The primary cause of concern was the high cost of legal fees for respondents required to defend their election before a court against wealthy and possibly vexatious petitioners.

4.3.13 In the outcome, a Court of Disputed Returns was agreed upon as being more impartial in the settling of election disputes than a Parliamentary committee. However, as a trade-off, a provision was inserted in the Act limiting legal representation in order to protect elected parliamentarians from the costs of vexatious challenges. Section 370 of the *Commonwealth Electoral Act 1918,* which provides that, except by consent of all parties or by leave of the Court, no party shall be represented by counsel or solicitor, was therefore inserted by section 57 of the *Commonwealth Electoral Act 1905.*

4.3.14 As a corollary, the deposit to be paid by the petitioner as security for costs was held at a low level, in the expectation that court costs for the respondents would be contained by the limitation on legal representation. The further trade-off was that by holding the deposit to a low level, access to the court was not limited for the impecunious petitioner with a genuine dispute. Section 195 of the *Commonwealth*

Electoral Act 1902 provided that the deposit for security for costs should be 50 pounds. That amount has not substantially changed in the intervening 90 years and now stands at $100 in section 356 of the Act.

4.3.15 Despite the concerns of the early legislators to protect elected parliamentarians from wealthy and vexatious petitioners, modern day realities are that respondents will rarely appear without legal representation, and more often than not will hire a Queen's Counsel whose fee is guaranteed from party or other sympathetic resources. It is also unlikely that the court would decline to consent to such representation if there were to be any objection from the petitioner. This suggests that section 370 of the Act, limiting legal representation, no longer serves any practical purpose.

4.3.16 The provision does not appear in any way to either advantage or disadvantage the petitioner. The impecunious petitioner, by obtaining waivers on fees and by appearing without legal representation, has ready access to the court. The problem that Justice Gaudron has highlighted is that petitioners are encouraged by the apparent limitation on legal representation to bring disputes to court which might never have survived proper legal advice.

4.3.17 If section 370 were to be deleted from the legislation then the logical nexus between that provision and section 356 which sets a low $100 as the petitioner's deposit for security for costs would fall away. However, there are other provisions relating to costs in the Act, sections 360 (1)(ix), 360(1)(4), 372 and 373 for example, which would need to be considered as part of any general review of the issue of costs and legal representation that the Committee might recommend.

Attachment 4

Extract from AEC submission No 96 of 23 October 1996 on Federal Court

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 "split" between the High Court and a Supreme Court under the legislation as it currently stands….

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.

Attachment 5

McClure v AEC (1999) 73 ALJR 1086

See attached