

AUSTRALIAN ELECTORAL COMMISSION

**SUPPLEMENTARY SUBMISSION TO THE
JOINT STANDING COMMITTEE ON ELECTORAL MATTERS**

AEC RESPONSES TO HEARINGS OF 19 OCTOBER 1999

Canberra

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1. Preamble

1.1 This supplementary submission by the Australian Electoral Commission (AEC) is presented to the Joint Standing Committee on Electoral Matters (JSCEM) in response to its "Inquiry into the 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, entitled "Further AEC Responses to other Submissions and to Hearings", of 23 July 1999 (volume 10)
- Submission No 232, entitled "Petitions to the Court of Disputed Returns", of 28 September 1999 (volume 12)
- Submission No 239, entitled "Dual and Multiple Voting", of 15 October 1999 (not yet bound)
- Submission No 239, entitled "Second Preference How-to-Vote Cards", of 15 October 1999 (not yet bound).

1.2 The AEC also notes that a letter dated 12 October 1999, from the AEC Assistant Commissioner, Elections and Enrolment, to the Secretary of the JSCEM, responding to a request from the Secretary for various polling official appointment forms, and for comment on submission No 228 from Mr Willis and Mr Marshall, has been authorised for publication as Submission No 243.

2. Introduction

2.1 On 19 October 1999, the JSCEM called the AEC to a final public hearing, at which the AEC was asked to respond to various issues raised in the eight written submissions filed by the AEC with the JSCEM so far this year, and to issues raised by other witnesses and submissions.

2.2 At this hearing, the Electoral Commissioner made the following introductory statement:

The Committee's inquiry into the 1998 federal election was announced in January this year, and after conducting some 10 public hearings around Australia, and receiving over 200 written submissions, the inquiry is now drawing to a close. Over the past year, the Australian Electoral Commission has provided seven written submissions and made over 40 recommendations for amendments to the Electoral Act and the Referendum Act. We believe that these recommendations would, if accepted, improve the accountability and transparency of the electoral process.

The Australian community has reason to be proud of its electoral system, and this is in no small part due to the activities of this Committee, in examining the detailed conduct of each federal election, and finding politically sustainable solutions to legislative and administrative problems, as they arise.

As has been reported to the Committee in our submissions, the 1998 federal election was conducted successfully, and appropriately within the law. Despite the timing of the election during school holidays and many sporting and cultural events, there were no major problems during polling that could not be resolved administratively.

A clear indicator of the successful conduct of the election must lie in the fact that of the nine petitions to the Court of Disputed Returns after the election, not one resulted in any criticism of the AEC by the Court, and no costs were awarded against the AEC (as distinct from the Commonwealth). Seven of the petitions were dismissed, and the two petitions that succeeded, resulting in the disqualification of Ms Heather Hill, were grounded in the Constitution, rather than in the Electoral Act.

The AEC is aware that the Committee has devoted some considerable time this year to an examination of the allegations made by the Northern Territory CLP in relation to assisted voting, mobile polling, and provisional voting in Aboriginal communities. The AEC has responded to these allegations in detail in written submissions, and has advised the JSCEM that there is no credible evidence to support allegations that assisted voting, mobile polling or provisional voting has been conducted illegally or improperly in Aboriginal communities.

However, the AEC does recognise the concerns expressed by some about enrolment and voting in Aboriginal communities, and has accordingly recommended the re-establishment of the Aboriginal and Torres Strait Islander Electoral Information Service. This would be the most effective means of reducing the level of assisted and provisional voting in Aboriginal communities in the longer term.

It would appear that the majority of the submissions received by this inquiry have, in one form or another, recommended that full preferential voting at federal elections be replaced with optional preferential voting. The AEC, which has chosen not to take a position either way on this issue, regarding it as essentially a political issue, recommended to the previous Committee in 1996 that a separate inquiry be conducted into the introduction of optional preferential voting at federal elections, but the Committee did not support this recommendation.

However, the AEC is prepared to take a position on issues relating to political party campaign activities, to the extent that they impact on the franchise. For example, the AEC is concerned about the possible disenfranchisement of postal voters, as the major political parties increasingly channel postal vote applications through their own offices, and extract personal information from these applications, before they reach the AEC for the issuing of ballot papers.

Evidence from the 1998 federal election is that 174 postal voters were disenfranchised because their postal vote applications, issued and processed by the political parties, were not received in time by the AEC to allow the issue of ballot papers, or did not reach the AEC at all. This is 174 mistakes too many, and must be addressed at the very least by ensuring that the involvement of the political parties in the process of postal voting is not disguised from the voters involved, and is made subject to the same levels of accountability as are applied to the AEC.

On another matter related to political party campaign activities, the last three federal elections have thrown up examples of what have come to be called "second preference" how-to-vote cards. These are how-to-vote cards authorised by a major political party, advocating a first preference vote for the candidate from a smaller political party, but in reality seeking to secure second preference votes for the major political party candidate. There is evidence available that voters are being misled by such how-to-vote cards into thinking that they are the official how-to-vote cards for the smaller political party.

In a recent court case in Queensland, the judge recommended changes to Queensland electoral law to bring some transparency into this practice, and the AEC has made recommendations along these lines, to the effect that second preference how-to-vote cards at federal elections should clearly identify, at the top of the card, the name of the authoriser and the political party responsible.

The AEC has recommended that the Committee consider seeking a reference to inquire into Parts 2 and 22 of the Electoral Act, particularly in relation to the powers of the Court of Disputed Returns as they relate to the imposition of costs orders against the Commonwealth. The election petition involving Ms Heather Hill resulted in a substantial costs order against the Commonwealth which the AEC has been advised must be borne by the AEC.

If there were to be a number of such court cases at any one time in the future, then financial arrangements within the AEC could be seriously affected as it attempts to meet heavy cost liabilities on behalf of the Commonwealth. However, as this may raise some larger issues about powers and functions generally, it would be more appropriately dealt with under a separate reference to the Committee.

Finally, the Committee will be aware that the AEC is currently conducting the 1999 Referendums on the Republic and the Preamble, which has highlighted some machinery problems in the Referendum Act which require attention. The Committee might therefore consider whether it should seek a reference to inquire into the conduct of the 1999 Referendums in the first half of the year 2000.

In concluding, Mr Chairman, I reiterate what I said in my opening statement on 1 April 1999, that the process by which the Commission is held to account for the way in which it meets and fulfils its responsibilities is not only welcomed by the Commission, but recognised by it as fundamental to ensuring that the Parliament and the community at large can continue to place its confidence in the independent and neutral administration of elections.

2.3 This submission responds to the various issues and questions raised by members of the JSCEM at the 19 October hearing, which are recorded in the Hansard transcript, and makes the following further recommendations:

Recommendation 1: That section 328(1) of the *Commonwealth Electoral Act 1918* be amended to additionally require that any person authorising an electoral advertisement,

that recommends a second or later preference vote for a candidate from the political party with which the person authorising is affiliated, or a second or later preference vote for an independent candidate with whom the person authorising is affiliated,

must provide the name of the person authorising and the name of the political party with which the person authorising is affiliated, or the name of the person authorising and the name of the independent candidate with whom the person authorising is affiliated, in no less than 12 point font, at the top of the advertisement.

Recommendation 2: That the word “remote”, wherever appearing in the Electoral Act and the Referendum Act, be substituted with the word “mobile”, so as to allow the Electoral Commissioner discretion and flexibility in the use of mobile polling teams.

3. Second Preference HTV cards

3.1 Second preference HTV cards have been addressed by the AEC in part 6.8 of submission No 88, in paragraphs 42.41 to 42.44 and 43.46 to 43.50 of submission No 176, and in submission No 328. On page EM421 of the transcript of the hearing of 19 October, the Chairman, Mr Nairn, asked whether the recommendations of the Queensland Committee Report were unanimous. The Report was copied in relevant extract at Attachment 7 to submission No 238, and it is understood that the Secretary of the JSCEM has a printed copy. As there is no dissenting report, the recommendations must be taken as unanimous.

3.2 On page EM427 of the transcript, Senator Faulkner suggested that recommendation 1 in submission No 238 could be avoided by “a manipulative person” running a third preference candidate, with a ‘front’ second preference candidate, say an independent, who is unlikely to be a threat to the party candidate.

3.3 The AEC agreed with Senator Faulkner that parties could run ‘front’ second preference candidates in order to favour a third or later candidate from their own party, but stressed that the AEC was seeking to take one step at a time in amending the legislation to regulate an admittedly complex area of electoral behaviour. On the other hand, Senator Faulkner has now identified a potential weakness in recommendation 1 of submission No 238, and accordingly, the AEC makes an amended recommendation in this submission, which includes the words “or later”, as follows:

Recommendation 1: That section 328(1) of the *Commonwealth Electoral Act 1918* be amended to additionally require that any person authorising an electoral advertisement,

that recommends a second or later preference vote for a candidate from the political party with which the person authorising is affiliated, or a second or later preference vote for an independent candidate with whom the person authorising is affiliated,

must provide the name of the person authorising and the name of the political party with which the person authorising is affiliated, or the name of the person authorising and the name of the independent candidate with whom the person authorising is affiliated, in no less than 12 point font, at the top of the advertisement.

3.4 On page EM428 of the transcript Senator Faulkner asked whether there was any “science” to the choice of 12 point font in the AEC recommendation. In his decision in *Re Carroll*, Justice MacKenzie said the following:

Such information should be required to be printed in a type of a size which is sufficiently large to be easily read and is not overwhelmed by other printing on the card.

3.5 The JSCEM might come to the conclusion that a larger type size should be used to meet the Judge's recommendation, and the AEC would support this.

3.6 Senator Faulkner also asked whether the AEC has produced any mock-ups to show the recommended extra authorisation on such HTV cards. At **Attachment 1**, a mock-up of the second preference HTV card authorised by the Liberal Party (WA Branch) in the Division of Stirling at the 1998 federal election has been amended to show the recommended extra authorisation.

3.7 On page EM437 of the transcript Senator Bartlett asked whether the AEC had thought of "cross fertilising...ideas with the Trade Practices Commission" on misleading and deceptive conduct, presumably with a view to amending section 329 of Electoral Act to prohibit misleading and deceptive electoral advertising, such as second preference HTV cards, on the grounds that they are "untrue".

3.8 The AEC is aware of the existence of section 52 of the Trade Practices Act and its application to misleading and deceptive trade and commercial matters, in the context of the debate over the past decade on the subject of "truth in political advertising", that has been of particular interest to the Australian Democrats.

3.9 However, section 329 of the Electoral Act is part of the regulatory framework for the democratic process of electing the Parliament, and operates within the constraints of the constitutional doctrine of freedom of political communication, and as such, is not analogous to misleading and deceptive conduct in trade and commercial matters.

3.10 As far back as 1981, section 329 was construed narrowly by the High Court, essentially to exclude "untrue" electoral advertising from the offence, and the Parliament has not chosen to change this situation in the intervening two decades. (As reported in part 6.9 of the AEC submission No 88, both the Government and the Opposition have now concluded that section 329 should not be expanded to regulate "truth" in election advertising.)

3.11 As indicated in the AEC submission No 238 on second preference HTV cards, the DPP has advised the AEC that it would be preferable, from an evidentiary point of view, to bring the regulation of second preference HTV cards in under the authorisation offence in section 328 of the Electoral Act (rather than under the misleading and deceptive offence in section 329 of the Electoral Act).

3.12 Further, the AEC recommendation to amend the authorisation offence in section 328 of the Electoral Act to include extra authorisation for second (or later) preference HTV cards, gives effect to the words of Justice MacKenzie in *Re Carroll*:

....an inexpensive measure which neither limits solicitation of preferences nor inhibits freedom of debate....”

4. Mobile Polling

4.1 On page EM426 of the transcript Senator Bartlett asked whether the AEC would “recommend a change to the criteria for mobile polling to enable it to occur in situations such as was initially proposed in Alice Springs”.

4.2 Under section 227 of the Electoral Act, a Division may be declared a remote Division for the purpose of conducting mobile polling at any location within that Division. At present, mobile polling is used to service locations that are geographically isolated and where postal services are limited, such as mining sites, pastoral properties and Aboriginal communities. For the 1998 federal election, six Divisions were declared remote: the Northern Territory, Kalgoorlie (WA), Leichhardt (QLD), Grey (SA), Wakefield (SA), and Parkes (NSW), because of worsening floods.

4.3 The AEC reported the following in part 7 of submission No 88:

7.6.8 It has long been accepted practice that mobile polling will be conducted in remote areas of Australia, and that many of these mobile polling booths service mainly Aboriginal voters who have language and literacy difficulties. For the 1998 federal election, which in the Northern Territory was complicated by the addition of a third ballot paper for the Statehood Referendum, the Australian Electoral Officer for the Northern Territory (AEO NT) decided that mobile polling should be introduced for the town camps in Alice Springs, because many Aboriginal voters from the camps are reluctant to attend the static polling booths in the town, and mobile polling would be an effective way of ensuring those people with language and literacy problems were able to discharge their duty to vote with the appropriate assistance.

7.6.9 The AEC makes no apology for seeking to provide the same convenient service to Aboriginal voters as it does for non-Aboriginal voters, and mobile polling at the town camps in Alice Springs and elsewhere would have been an effective way of meeting this objective.

7.6.10 However, following a complaint by the Northern Territory Country Liberal Party (NTCLP) about the proposed gazettal of mobile polling for the town camps, the AEC obtained legal advice to the effect that “remote” mobile polling as it is described in the Electoral Act might not be interpreted by a court to include mobile polling in an urban location such as Alice Springs. As a consequence, the AEC scrapped the mobile polling preparations for the town camps, at very late notice, and instead gazetted a static polling booth in

the most convenient location to service those Aboriginal voters from the town camps in Alice Springs.

7.6.11 This location was the Tangentyere Council Chambers (Railway Side) in Alice Springs. The Tangentyere Council is the organisation responsible for the town camps and the Council Chambers building is a natural gathering centre for Aboriginals from those camps. The AEC rented one of the Tangentyere Council buildings as a static polling booth on polling day, in precisely the same way the AEC rents or hires other council chambers or town halls as static polling booths in locations convenient to voters anywhere else in Australia.

4.4 In the legal advice mentioned above, the Australian Government Solicitor said the following:

Section 227 applies only in relation to a Division declared by the AEC to be a "remote" Division....the Divisions of Kalgoorlie and the Northern Territory have been gazetted as remote Divisions. Read literally, subsection 227(4) would enable any place within a remote Division to be determined by the AEC as a place that mobile polling teams will visit for the purposes of section 227.

However...a court might conclude, from the use of the word "remote" in section 227, that the section is available only to provide mobile booths for localities that are remote from appointed polling places. Certainly, that appears to be the purpose underlying section 227.

The insertion of the section in the [Act] was prompted by the first report of the Joint Select Committee on Electoral Reform dated September 1983. In paragraph 6.42 of its report, the committee recommended the introduction of mobile polling booths in "remote areas", and stated also that '(i) in terms of Aboriginal voters in particular, this may guard against alleged electoral malpractices associated with postal voting.' Postal voting is, of course, restricted to a person living more than 20 kilometres from the nearest polling place or remote mobile booth, or otherwise unable to utilise polling places (subsection 184A(2) of the [Act]).

These considerations suggest... that section 227 could not be safely relied upon to establish remote mobile booth facilities close to polling places.

4.5 The AEC agrees that there is merit in Senator Bartlett's suggestion, as it would allow the AEC greater flexibility to use mobile polling wherever local conditions indicate it would improve the delivery of the franchise. Further, in relation to the concerns of the 1983 JSCER to guard against alleged postal voting malpractices in Aboriginal communities, the AEC has had no evidence of any such malpractices arising since that time, and suggests that those earlier concerns may be related to historical events prior to the major reforms to the Electoral Act in 1983-84.

4.6 The word “remote” appears in the heading to section 227, and in subsections 227(3), 275(a), and 284(2)(a) of the Electoral Act, and in the heading of section 51 of the Referendum Act. If the word “mobile” were to be substituted in each relevant instance, then it would provide a discretion for the Electoral Commissioner to decide where flexibility in the provision of the franchise is required, and allow the gazettal of “mobile” Divisions in which mobile polling can be provided.

Recommendation 2: That the word “remote”, wherever appearing in the Electoral Act and the Referendum Act, be substituted with the word “mobile”, so as to allow the Electoral Commissioner discretion and flexibility in the use of mobile polling teams.

4.7 If the JSCEM is not inclined to support this recommendation, which would allow the AEC to schedule mobile polling for the town camps in Alice Springs, and other such locations, as necessary, then the Tangentyere Council polling place (with perhaps larger premises) will continue to be used to service the Aboriginal electors from the town camps.

4.8 The conclusions of Mr Mike Bowden from Tangentyere Council in his Submission No 208 are worth noting:

The offer to conduct mobile Polling Booths at different Town Camps was the original suggestion of the AEC. This proposal was obviously designed to meet ...accessibility problems....The AEC understood the “remoteness” affecting Town Campers and offered to address this need by conducting mobiles at a number of different Town Camps in the week preceding the election Saturday. When this proposal met with opposition Tangentyere offered an alternative. The proposal to use the 4 Elder Street, named Railway side for the Election because the site is proximate to the Alice Springs railway station may in fact be a superior means of addressing the difficulties experienced by Aboriginal people in accessing mainstream services. The popularity of the Polling Place in 1998 and the general sense of satisfaction felt by staff and voters on the day attest to this sense of satisfaction and utility.

The proposal to conduct a Polling Place at Tangentyere Council’s Office at Elder Street in Alice Springs was simply designed to counteract this sense of being “out of place”, of being “culturally remote”, of experiencing “access problems” that is so much the every day experience of Aboriginal people in Alice Springs as described by the Parliamentary report and in the Ombudsman’s report.

Tangentyere Council is not apologetic. The Council believes that the human, civil and political rights of Aboriginal people are protected, enhanced and promoted by the location of a Polling Place at its office site in Alice Springs. The Council will seek to ensure that Tangentyere is declared a Polling Place at all subsequent elections.

5. Party names in AEC Publications

5.1 On page EM429 of the transcript Mr Forrest noted that it is the practice for the AEC to publish election results using the term "Coalition" instead of "Liberal Party" or "National Party" against the names of elected Members of Parliament. Mr Forrest asked how this could be justified.

5.2 There is a justifiable and practical reason for reporting two-party preferred (TPP) statistics under "Labor" and "Coalition" headings. In federal politics, the TPP statistics at Divisional, State and national level, have become the conventional means of analysing and predicting electoral outcomes. The AEC has used the words "Labor" and "Coalition" to report (TPP) statistics in its publications since 1994, replacing the earlier terms "Labor" and "Non-Labor".

5.3 The TPP statistics are used to provide an indication, on polling night, of which major political party or coalition of major political parties might claim Government. It is also used prior to polling day, by political analysts, in predicting swings to and from the coalition parties and the ALP, as the Government and Opposition groups in the Parliament. That is, the TPP statistics allow political commentators to analyse which major power block (Labor or Coalition) will be elected to govern.

5.4 It should be noted as an aside, that the two candidate-preferred (TCP) statistics reported by the AEC relate to the candidates who come first and second in a preference distribution in a Division of the House of Representatives (see part 9 of AEC submission No 88). All TCP statistics in AEC publications, such as the Election Statistics, show the political party from the Coalition which endorsed the candidate, such as the Liberal Party, the National Party, the Country Liberal Party. In the past, the Electoral Pocketbook has not conformed to this standard, but will do so in the future.

5.5 The AEC is of the view that it should continue to publish TPP statistics as "Labor" and "Coalition", so as to allow political analysts, commentators, and other interested persons to predict and report election results in the most meaningful manner.

6. Electoral Roll Reviews in South Australia

6.1 On page EM434 of the transcript Mr Ferguson asked about the conduct of habitation reviews, or Electoral Roll Reviews (ERRs), in South Australia, in the context of submission No 236 of 7 October 1999 from Mr David Cox, Member for Kingston.

6.2 Electoral Roll Reviews are conducted, pursuant to section 92 of the Electoral Act, in order to maintain the accuracy of the Commonwealth Electoral Roll. Previously, ERRs were conducted nationally every two years, the last in early to mid 1998. The methods available to Divisional Returning Officers (DROs) for the conduct of an ERR included doorknocking all households in a particular area, or mailing letters to households. General postal voters were reviewed by mail, as were all country enrolments, as the resources needed to doorknock country and remote enrolments were prohibitive.

6.3 At the last ERR, 12% of the State of South Australia was doorknocked. The areas included developing suburbs such as Greenwith and Golden Grove, in the Division of Makin, Seaford Rise in the Division of Kingston, and West Lakes in the Division of Port Adelaide. However, several established areas were also doorknocked, notably the Division of Sturt, which includes suburbs such as Kensington and Burnside. In fact, the Division of Sturt was the Division with the largest area doorknocked, allowing for a thorough review of established Adelaide suburbs.

6.4 The national two-yearly ERR has now been substantially replaced by Continuous Roll Update (CRU), because the single point-in-time review of all habitations has lost its effectiveness in the face of changing residential patterns, increasing population mobility, and difficulties in accessing some areas in a cost-effective manner (see part 4.4 of AEC submission No 88). Roll maintenance activity is increasingly based on indicative information from the computerised Roll Management System (RMANS), from external data sources such as Australia Post, from the regular processing of enrolment information received from local government and State/Territory and federal electoral events, and from return-to-sender constituency mail from Members of Parliament, and is targeted at those addresses where, on the basis of such indicators, enrolments may be incorrect.

6.5 As part of the developing CRU process, the AEC receives change-of-address information from Australia Post which is then used to generate AEC letters to the addresses "to" and "from" which electors have requested a redirection of mail. In addition, addresses that appear as vacant on RMANS because electors have transferred their enrolments generate targeted inquiries, as well as addresses that appear on RMANS with an excessive number of enrolments, or where there is more than one surname.

6.6 The effectiveness of the CRU procedures implemented in 1999 are currently being assessed. It may be that the traditional ERR mail reviews and doorknocks will continue in South Australia, but at a lesser level, and not during an electoral event, with Divisions reviewing 5-10% of residences per month, including targeted fieldwork if there has been no response from a particular residence for some time. Even though ERR doorknocking involves difficult issues relating to the safety and security of AEC officers, the process would continue as a complement to CRU, and would ensure that there is no systematic bias in the maintenance of the Roll in South Australia.

6.7 The introduction of CRU, and the Address-based Register (see part 4.3 of AEC submission No 88) to complement a diminishing focus on ERR, together with ongoing consultations with the State and Territory Electoral Commissions and Offices, is expected to improve the accuracy of the Commonwealth Electoral Roll for longer periods. It might be noted that the implementation of CRU in South Australia and elsewhere had the full support of Senator the Hon Nick Minchin, who circulated a letter to all Members and Senators to inform them of the benefits of the proposed changes, when he was Minister responsible for electoral matters.

7. Photographs on Ballot Papers

7.1 On page EM441 of the transcript Mr Forrest suggested that photographs on ballot papers might reduce the amount of assisted voting in Aboriginal communities.

7.2 For the record, it was alleged by the Northern Territory Country Liberal Party (NTCLP), in written submissions Nos 92, 157, 194, 201, and 233, and in oral submissions on 21 May and 29 June, that assisted voting in Aboriginal communities in the Northern Territory is administered in a politically biased manner by the AEC. The AEC does not accept that the NTCLP allegations have any foundation in fact, and has responded in detail in parts 7.5 and 7.6 of submission No 88; in parts 30 and 38 of submission No 176; in parts 30, 37, 47, and 49 of submission No 210; and in oral submissions on 29 June and 16 August 1999.

7.3 The NTCLP recommended amendments to section 234 of the Electoral Act, similar to section 71 of the Northern Territory *Electoral Act 1982*, which would have had the effect of allowing scrutineers into the voting compartment, with the voter and the person providing assistance, to observe the casting of an assisted vote. Proposed amendments to section 234 of the Electoral Act, of a slightly different nature, so as to require an electoral official to be present in the voting compartment at the casting of an assisted vote, were defeated in the Senate on 27 September 1999.

7.4 In response to the NTCLP allegations of AEC bias in the delivery of assisted voting, and in the interests of improving candidate recognition in Aboriginal communities so as to reduce the need for assisted voting, Mr Warren Snowdon, Member for the Northern Territory, recommended that photographs be provided on ballot papers, in his submission No 229 of 6 September 1999. Mr Snowdon said:

This would greatly improve the ability of illiterate voters to have their voting intention understood. When a voter who is assisted makes their intention clear by pointing to the photograph or name of a candidate, then that surely is a sufficient communication of a voter's intention. There should be agreement that this form of communication of voting intention be above challenge by scrutineers from any political party. There have been reports of intimidation by presiding officers of voters who had difficulty in communicating their intention,

to the point where the voter may have voted for a candidate they did not wish to do so. The ability to communicate would be greatly enhanced by the use of photographs.

The proposal for photographs on the ballot sheets was raised and supported by the Tangentyere Council during its submission on 16 August in Alice Springs.

7.5 The AEC has already stated its opposition to the inclusion of photographs on ballot papers, in AEC submission No 210, as follows:

47.4 The AEC does not support the inclusion of photographs on ballot papers, given the already expanding size and complexity of the Senate ballot paper, and because, for reasons relating to equity in access to the franchise, it would probably have to be applied to all ballot papers for the whole of Australia, not just in certain areas of the Northern Territory, or for elections only for one House of the Parliament.

7.6 Given the interest expressed by the JSCEM at the 19 October public hearing, in relation to photographs on all or some House of Representatives ballot papers, the AEC has now examined the issue in greater detail. Nevertheless, it should be said at the outset that the assumption that photographs on ballot papers will result in a reduced requirement for assisted voting in Aboriginal communities is an untested and possibly erroneous assumption. At the very least, it should be acknowledged that photographs on ballot papers will not make it any easier for illiterate or blind voters to read and mark their own ballot papers.

7.7 It may be that the voluntary provision of candidate photographs on posters at polling booths is an asset in ATSIC elections, but this is more likely to be because Aboriginal candidates for ATSIC Regional Council elections are already familiar to electors in Aboriginal communities, and because voting at ATSIC elections is optional preferential. The same degree of candidate recognition by those Aboriginal people who require assisted voting for federal elections, with a considerably larger and more varied constituency, and with full preferential voting, can probably not be assumed, with or without photographs on ballot papers.

7.8 In relation to a possible recommendation that candidate photographs be provided on House of Representatives ballot papers for **selected** Divisions (such as the Northern Territory, which has a large and identifiable Aboriginal population) in order to assist in candidate recognition and possibly reduce the need for assisted voting, legal advice was sought from the Australian Government Solicitor (AGS) and the Attorney-General's Department on whether there might be any legal difficulties with such a recommendation.

7.9 AGS has advised the AEC that while such an amendment might be open to challenge on the basis that it favoured a particular group of disadvantaged electors above others, it is unlikely that the High Court would strike down the amendment on constitutional grounds. The reasoning behind this conclusion is based on case law relating to group ticket voting for the Senate. Various Judges of the High Court have disagreed with submissions that group ticket voting is “unfair” to independent candidates, and have upheld the right of Parliament to make such laws (*McKenzie v Commonwealth* (1984) 57 ALR 747, *Abbotto v AEC* (1997) 144 ALR 352, *McClure v AEC* (1999) 163 ALR 734, and *Ditchburn v AEO for Qld* (1999) 165 ALR 147, and see parts 5-9 of AEC submission No 232).

7.10 The Attorney-General’s Department has provided legal advice to the AEC on whether such an amendment would be contrary to the *Racial Discrimination Act 1975*, the *Human Rights and Equal Opportunity Commission Act 1986*, the *International Convention on the Elimination of all Forms of Racial Discrimination*, and the *International Covenant on Civil and Political Rights*. The following is a summary of that advice:

The introduction of photographs on ballot papers to address high levels of illiteracy in Divisions having a high Aboriginal population is likely to be not incompatible with Australia’s international and domestic human rights obligations. It could be seen as a special measure designed to overcome the effects of past disadvantage and, as such, would not constitute unlawful discrimination. However, any provision implementing such a measure needs to be carefully framed so as not to be seen to be enabling the selection of a Division solely on the basis of its racial composition, unless it could be shown that illiteracy was a greater problem for one particular race than for any other. If the selection of Divisions is to be by way of the exercise of a discretion by the Electoral Commissioner (or other official), it is important that any such discretion is exercised on the basis of reasonable and objective criteria such as illiteracy.

7.11 The AEC also notes the reported findings of the Commonwealth Ombudsman in relation to the provision of Department of Social Security services to Aboriginal town camps in Alice Springs, as outlined in Submission No 208 from Mr Mike Bowden of the Tangentyere Council. The Ombudsman drew a distinction between “equitability” and “equality” in the provision of essential services, and concluded that special measures could be taken to assist in the provision of such services to Aboriginal communities in order to improve equitability of access.

7.12 That is, on the advice available to the AEC, an amendment to the Electoral Act to allow for photographs on ballot papers in **selected** House of Representatives Divisions would not appear, in theory, to raise any legal difficulties under either the Constitution, the *Racial Discrimination Act 1975*; the *Human Rights and Equal Opportunity Commission Act 1986*; the *International Convention on the Elimination of all Forms of Racial Discrimination*; the *International Covenant on Civil and Political Rights*; and might well find support from the Commonwealth Ombudsman. However, there

are various practical issues that need to be addressed, and these are discussed below.

7.13 Photographs on ballot papers are required for Northern Territory Legislative Assembly elections under sections 36(f) and 60(c) of the *Northern Territory Electoral Act 1995* (the NT Act), and Regulation 32 and Form 7 of the Northern Territory Electoral Regulations. At **Attachment 2** is a sample ballot paper for the last Northern Territory Legislative Assembly by-election for the Division of Wanguri. The ballot paper measures 147 x 230 mms, which according to industry sources is a non-standard international paper size. However, it will be noted that image readability is facilitated by the size of the photographs, which in turn is allowed by the larger size of the ballot paper.

7.14 A mock-up of the smaller House of Representatives ballot paper, with photographs included, is provided at **Attachment 3**. It will be noted that the photographs are virtually unreadable, suggesting that the House of Representatives ballot paper would have to be increased in size, possibly to B5 or A4, to allow image readability.

7.15 Under the NT Act, there is a minimum number of 7 days available for candidates to lodge nomination forms, photographs included, with the NT Chief Electoral Officer. The Office is then required to print some 160,000 ballot papers for 27 Divisions in the Northern Territory, with an average of 3 candidates nominating for the Legislative Assembly in each Division. That is, the printing and distribution of ballot papers within the permitted time frame is not an insurmountable problem for the Northern Territory.

7.16 By contrast, under the Electoral Act, there is a minimum number of 10 days available to candidates to lodge their nomination forms, at any of 148 Divisional Offices or the State Head Offices in the case of bulk nominations, and under section 200D of the Electoral Act, ballot papers must be available for pre-poll voting 48 hours after the declaration of nominations. Some 24 million House of Representatives ballot papers must be printed for 148 Divisions, with an average of 6 to 7 candidates nominating for each Division. They are then immediately despatched to 148 Divisional offices, and some 99 overseas posts, to allow for pre-poll, postal and mobile polling to commence.

7.17 That is, there is a quantum difference in the bulk number of ballot papers that must be printed and distributed for a federal election, within a time period not much longer than that available in the Northern Territory. This suggests that the minimum election timetable of 33 days for federal elections would not allow sufficient time for the production and distribution of House of Representatives ballot papers with photographs. Other legislative and logistical issues associated with the production of photographs on House of Representatives ballot papers, as detailed below, also suggest that the minimum election timetable of 33 days would have to be extended.

7.18 The nomination process under the Electoral Act would have to be amended to require a photograph of the candidate to be provided with the nomination form. Unless the provision of a photograph were to be made voluntary (which would leave blank spaces on some ballot papers), the failure to provide a photograph would become grounds for the rejection of a nomination. The type of photograph would also have to be specified in the legislation or regulations, on similar terms to the specifications for passport photographs, for example. Finally, the risk of bulk nominations being rejected because a single photograph is not provided, or is of the wrong type, would have to be addressed in the legislation.

7.19 Following the declaration of nominations, candidate information is entered into the computerised Election Management System (ELMS) and then checked and verified. Following verification, camera-ready ballot paper artwork is automatically down-loaded from ELMS to printing sites located in each capital city across Australia. The introduction of candidate photographs into this computerised production process would require additional time in the production schedule (industry sources suggest at least another day), to allow for proofing, to ensure that each photograph is properly matched with each candidate's name.

7.20 There is a high risk factor associated with late nominations, that would be compounded by the requirement for photographs. If only one photograph failed to arrive at a central scanning site this would delay the entire ballot paper print run. Further, if a photograph is lost in transit, despite the candidate complying with the requisites for nomination, any attempt to recover the situation would only delay the production process even more.

7.21 In relation to the production costs involved, at the current House of Representatives ballot paper size of one-third A4, and for the 1998 federal election, it cost \$530,365 to produce 23,920,225 ballot papers with a total of 1,109 candidates (and note that the number of candidates increases at every election). If photographs were to be added to House of Representatives ballot papers, it would cost \$25 per candidate photograph to scan the image, and add \$27,725 to the cost of production (that is, an estimated total of \$558,080 for production costs alone).

7.22 As demonstrated in the mock-up at **Attachment 3**, the one-third A4 size House of Representatives with photographs does not allow easy image readability. It would therefore probably be necessary to increase the size of the House of Representatives ballot paper from one-third A4 to either B5 or A4. This would mean an additional \$8 per thousand B5 ballot papers, or an additional \$21 per thousand A4 ballot papers. This equates to a further increase of \$191,362 for B5 ballot papers (that is, an estimated total of \$749,452 for production costs alone), or a further increase of \$502,325 for A4 ballot papers (that is, an estimated total of \$1,060,415 for production costs alone).

7.23 In addition to these estimated production costs, other costs, not estimated, would be incurred for larger ballot paper stock, larger declaration envelopes, increased postage, increased freight and storage, and additional casual staff wages. A further consequence could be that more time is required for the preliminary scrutiny of declaration votes and determining the formality of ballot papers, with the flow-on effect of slowing the provision of election results.

7.24 In summary, whilst there would appear to be, in theory, no legal obstacles to an amendment to the Electoral Act to allow for photographs of candidates to appear on all House of Representatives ballot papers, or selected House of Representatives ballot papers, the following practical issues must be weighed in the balance:

- added complications in the nomination process, particularly for bulk nominations;
- an increase in the size of the ballot paper, probably to B5 or A4, to allow for image readability;
- an increase in the size of the declaration envelope (already under pressure from the size of the Senate ballot paper) and consequent increases in postage costs;
- added complications in the ballot paper production process, requiring an increase of perhaps 2 to 3 days in the minimum election timetable of 33 days;
- increased production costs, including image scanning, paper stock, freight, storage, and casual staff wages.

7.25 The AEC does not oppose in principle the provision of photographs on ballot papers for the House of Representatives. However, if the JSCEM is minded to pursue this option, and given the remaining lead-time into the next federal election, it is suggested that any recommendation be confined to the provision by the AEC to the JSCEM of a possible implementation plan for the following federal election, so that the legislative and logistical issues can be examined with greater precision.

8. Correction to AEC Submission

8.1 On page EM439 of the transcript, Mr Nairn noted that in Table 3 of AEC submission No 239 on “Dual and Multiple Voting”, his Division of Eden-Monaro is listed as marginal ALP when it should be marginal Liberal. The AEC regrets this transcription error and has provided the JSCEM Secretariat with an amended page for the record.

ATTACHMENTS

Mock-up of HTV card with additional authorisation

Authorised by **PETER WELLS, LIBERAL PARTY OF AUSTRALIA (WA)**

HOW TO VOTE ONE NATION IN STIRLING AND PUT LABOR LAST

MAKE YOUR VOTE COUNT
WITH A PREFERENCE TO
LIBERAL

Don't help Labor
sneak into
Government.

Number your
ballot paper in this
order and **make
your vote count.**

7	McNEILL
2	CAMERON
6	HILLEL
1	EVANS
5	LOCKETT
8	McFARLANE
3	MARKHAM
4	TABACZYNSKI

Remember - number every square

AUTHORISED BY PETER WELLS, LIBERAL PARTY OF AUSTRALIA (WA DIV INC), 640 MURRAY STREET, WEST PERTH, 6005
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Attachment 2

Northern Territory ballot paper for a Legislative Assembly by-election

See attached

Attachment 3

**Mock-up of (standard sized, one-third A4) House of Representatives
ballot paper with photographs**

See attached