

The Choice Not to Choose: Commonwealth Electoral Law and the Withholding of Preferences

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OVERVIEW

The right to cast a ballot that expresses only sincerely held preferences between the candidates on offer in a parliamentary election, is as fundamental as the right to vote itself. In contrast with the archetypic fully preferential vote, there are two ways voters can consciously, as opposed to inadvertently, withhold their preferences. The first is the deliberately informal ballot: ie ballots intentionally left blank or with some form of words inscribed, whether scatological or the name of some person not nominated as a candidate. Such ballots might express a complete dissatisfaction with all the choices available at a particular poll, or, more extremely, disapproval of the electoral process altogether. The second is the optional preferential or selective ballot, where the voter deliberately refrains from making a choice between some of the candidates about whom the voter has no opinion, or between whom the voter cannot choose, usually because those candidates are equally undesired. Whilst Commonwealth electoral law has traditionally demanded full preferential voting as a condition of validity, currently certain types of votes which repeat or omit numbers (for example a vote in the form '1,2,3,3', or '1,2,3, blank') are technically saved, and included in the count until, if at all, their preferences are exhausted.¹

The act of withholding preferences in a system that, as interpreted by the courts and promoted by the Australian Electoral Commission (the AEC), is designed to ensure full preferential voting, might at first glance seem to be wasteful — in that the vote will have less potential to influence the final electoral outcome than a fully preferential ballot — and therefore an act of self-defeating, petty political non-conformity. However the refusal to register preferences which are not genuinely held must be seen as a valid form of expression of political opinion, made within the electoral process. It should be respected and recorded as such by electoral law and practice, and can be contrasted with the failure to enrol or vote at all. The disengagement represented by the non voter neither expresses nor records any clear political statement at all. In their silence, eligible voters' failures to enrol or cast ballots

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¹ *Commonwealth Electoral Act 1918 (Cth)* ('the Act'), s 270, a saving provision inserted in 1983. Such ballots are counted and transferred as for other votes, but may end up as 'exhausted' votes if the candidates listed last remain in the count during the distribution of preferences.

can be explained away as instances of apathy or ignorance, as opposed to a conscious decision to reject the system of elections generally, or the choices on offer at any particular poll. Yet our electoral system has tended to discourage voters who 'choose not to choose' by withholding preferences (including deliberately voting informally) and even to repress those who would promote such choices.

Voting in federal elections in Australia has been compulsory since 1924; full preferential voting for House of Representatives elections has been in place since the advent of the *Commonwealth Electoral Act 1918* (Cth) ('the Act').² The compulsion to vote, under pain of fine, is a difficult issue for liberals and radicals alike. Without attempting to definitively resolve that vexed issue, I will contend that given that we have, with some good justification, a system of compulsory enrolment and attendance at the polls, and that compulsion is ostensibly designed to encourage and ensure universal adult participation in the electoral process, then there is a need for voters to understand the alternatives to casting a fully preferential vote. This article considers the historical and present practices in this area, and argues that far from attempting to mandate full preferential voting, a truly mature electoral system would be equally open to the practice and advocacy of optional preferential and informal voting.

Under current Commonwealth electoral law, the right to advocate or campaign to encourage others to cast less than fully preferential ballots is denied.³ In these circumstances, it is unsurprising that the level of this sort of voting in Australia is relatively low. Indeed it is often confused with, or explained away as, a product of ignorance of the complexities of the mechanics of voting, rather than as a reflection of electoral antipathy to the political system or prevailing political options. Given that such antipathetic feeling is a widespread and common feature of Australian political opinion, a system of truly free and fair elections must be founded on electoral laws which allow for and respect such antipathy, rather than marginalising or ignoring it.

This thesis is argued against the background of recent High Court challenges to laws restricting the right to campaign for less than fully preferential voting in *Langer v Commonwealth*⁴ and *Muldorney v South Australia*⁵. Mr Langer's case has become a *cause célèbre*, and his gaoling attracted international condemnation and concerns that in the realm of electoral law, the right to free speech in Australia is too easily trumped by the interests of parliamentary political parties in maintaining a particularly rigid electoral system. As *Langer's* case also raises important questions about the nature and extent of the nascent implied freedoms drawn from the constitutional

² The alternatives, given our single member constituency model, are chiefly first-past-the-post voting, which preceded preferential voting, and optional preferential voting, such as exists in NSW and Qld.

³ It is a criminal offence punishable by up to 6 months imprisonment: see s 329A of the Act, text infra (fn 37). (Pursuant to the *Crimes Act 1914* (Cth), an alternative sentence of a fine of up to 30 penalty units — equivalent to \$3000 in 1994 — is available).

⁴ (1996) 134 ALR 400.

⁵ (1996) 136 ALR 18.

principle of representative government, it will be canvassed in some detail in the second half of this paper.

A RIGHT OR A DUTY? — THE COMPULSION TO VOTE

The phenomenon of non fully preferential voting can only be understood in the context of compulsory voting in Australia: therefore that issue will be addressed first. My argument is that there has been a failure to build on and respect the better rationale for compulsory voting, that it is a practical attempt to render voting an inclusive act of democratic self-expression, valuable in itself. Instead, there has been a tendency to implicitly promote the utilitarian justification, that compulsory voting is desirable to legitimate the governments that result from elections. That failure, in turn, has led our system to treat 'every vote as sacred'⁶, and to undemocratically repress certain types of voting.

A common misconception is that Australia was the first, and is the only, democracy to institute compulsory voting.⁷ Whilst Australia may be the only predominantly English speaking country to have experimented with compulsory voting, it was neither the first, nor is it the only, democracy to compel voting.⁸ Compulsory voting in Australia was preceded by compulsory enrolment, pursuant to the *Commonwealth Electoral Act 1911* (Cth), a measure chiefly designed to ensure accurate and representative rolls. Within three years, the Queensland Liberal government had enacted compulsory voting in that state.⁹ In 1924, the Commonwealth Parliament followed suit, after an abortive attempt to introduce compulsory voting federally in 1915, on the recommendation of the Royal Commission into Commonwealth Electoral Law and Administration.¹⁰ The 1924 adoption of compulsory voting had a profound and continuing effect on politics and electoral law and practice in this country.¹¹ Today, all federal parties, and most of their state branches, support the retention of this compulsion. This is a remarkable concurrence of approval, given that in 1924 no party was willing to take responsibility for the

⁶ Joan Rydon's phrase.

⁷ Exploding this myth, see L Smith, 'Compulsory Voting in Australia' in *The Pieces of Politics* (R Lucy, ed, 3rd ed, 1983).

⁸ Belgium, Greece, Luxembourg and Venezuela make it an offence to not vote; Costa Rica, Singapore, parts of Switzerland and Uruguay also have some form of compulsory voting. See M Healy and J Warden, *Compulsory Voting*, Parliamentary Research Service Research Paper 24/95.

⁹ The Qld ALP initially opposed the measure, but changed its approach during the Parliamentary debates. That the liberal side of politics should have been responsible for the first compulsory voting provision is ironic, given that the preponderance of opinion since has imagined that the ALP stands to gain more from compulsory voting, and the one serious attempt to abolish compulsory voting in recent times was instigated by the South Australian Liberal government in 1994, and was only defeated in the upper house by the ALP and Democrats.

¹⁰ ALP federal policy adopted compulsory voting as early as 1915.

¹¹ For more on the general history of compulsory voting, see Healy and Warden, op cit (fn 8), and N Gow, 'The Introduction of Compulsory Voting in the Australian Commonwealth' (1971) 6 *Politics* 201–10.

measure. Indeed the bill introducing it had to be arranged, for speedy passage, as a Senator's private member's initiative from 'behind the Speaker's chair'.¹²

Debate still simmers over the rights and wrongs of compulsory voting¹³. A preponderance of academic opinion seems to favour compulsory voting¹⁴, as does community opinion when measured in Gallup polls¹⁵. On the other hand, classical liberal and libertarian arguments¹⁶, as well as a significant minority of public opinion, strongly oppose compulsory voting¹⁷.

The arguments for and against compulsory voting were neatly summarised by Colin Hughes in a seminal paper in 1968.¹⁸ The strongest arguments for compulsory voting are twofold. First, it is said that since a government in a representative democracy needs legitimacy in the form of a mandate from the people, then it is fair to treat voting as a moral and civic responsibility enforceable as a legal duty. To allow otherwise, it is claimed, would be to encourage a situation where the legitimacy of government is questioned or doubted because of the sort of apathy or voluntarism characterised in many polls in the US, where turnouts are often as low as 50–60%, or Britain, where in political folk legend changes in the weather can have a significant effect on voting turnouts and outcome.¹⁹

A second, quite different rationale for compulsory voting, is that it is not the legitimacy of the elected government that is of overriding concern, but the intrinsic fairness and inclusiveness of the process of democratic participation itself. In this conception, voting is not simply a means to an end, but an end in itself. It is a regular, public, political activity, in which geographic communities consisting of individuals with often widely disparate political leanings, come together to express their opinions in a formal process of selecting and rejecting possible representatives. Whilst voluntary voting may be a

¹² See G Reid and M Forrest, *Australia's Commonwealth Parliament, 1901–1988: Ten Perspectives* (1989) 202, citing L F Crisp.

¹³ Healy and Warden, op cit (fn 8), provide a useful overview, particularly of contemporary and newspaper debates.

¹⁴ See, for instance: C Hughes, 'Compulsory Voting' in *Readings in Australian Government* (C Hughes, ed, 1968) 225; L Smith, op cit (fn 7) 235; and R Parish, 'For Compulsory Voting' (1992) *Policy* (Autumn) 15.

¹⁵ A majority of those polled consistently support compulsory voting, and in one recent poll, 80% indicated they would be 'likely' to vote anyway, even if voting were voluntary. See 'Newspoll', the *Australian*, 28 February 1996, 6.

¹⁶ See, for example, N Minchin, 'Rights, Responsibilities and the Electoral System' in *The Heart of Liberalism: the Albury Papers* (K Aldred, K Andrews, and P Filing, eds, 1994) 83.

¹⁷ As is revealed in opinion polls, voting behaviour, and public submissions such as those received by the Qld Electoral and Administrative Review Commission prior to its *Report on the Review of the Elections Act 1983–91 and Related Matters* (Dec 91) and its *Report on the Queensland Legislative Assembly Electoral System* (Nov 90).

¹⁸ First published as C Hughes, 'Compulsory Voting' (1968) 1 *Politics* 81, since reprinted as Hughes, op cit (fn 14).

¹⁹ Recent international research on the effect of compulsory voting on turnout suggests that compulsion can effectively raise turnout, but is not a necessary condition for high levels of participation (it may not therefore, on its own, explain high levels of turnout, since legal compulsion may merely reflect a politically active culture, rather than be its cause). See W Hirczy, 'The Impact of Mandatory Voting Laws on Turnout: a Quasi-Experimental Approach' (1994) 13 *Electoral Studies* 64.

theoretically acceptable ideal, in practice it is likely that marginalised groups, whether of young people, recent migrants, unorganised ethnic minorities, dispossessed native people or the socially and economically disadvantaged (such as low income or poorly educated people), will tend to be less aware of their right to vote, the importance of voting, and the mechanics of voting. In short, the alienation of such people from society may be deepened unless voting is compulsory²⁰, and the resulting process may cease to be a fundamentally communal one, and become instead one in which only those who are relatively well empowered take part. As an adjunct to this argument, it is often noted that other, less politically fundamental (and clearly more exacting) activities are compelled — for example the payment of taxation.

The primary arguments against compulsory voting are either utilitarian, or rights-based. Examples of utilitarian arguments are that compulsory voting may distort election results by having ‘misinformed’ or apathetic voters forced to the polls, ‘diluting’ the votes of the ‘informed’, or that it costs significantly more money to administer. The strongest argument against compulsion is, however, the simple libertarian one: that nothing which is best conceived as a valuable right should be made into a duty, subject to criminal penalties. Currently the penalty is a fine of only \$50²¹, but many opponents of compulsory voting accept a short term of imprisonment after each election rather than submit to the fine. An analogy might be with the state compelling people to attend church once every three years, and go through the motions of pretending to take part in the rituals, regardless of whether they were believers, or had anything to confess. This analogy may not be inapt: voting can be seen as a secular, communal rite of selecting, from amongst the pantheon of the gods, those who are to rule over the populace for the next three years.

Unsurprisingly, the debate about compulsory voting has spilled over into the courts. Electors can only avoid a fine or prosecution if they provide a ‘valid and sufficient reason’ for their failure to vote.²² The Australian Electoral Commission (‘AEC’), in an implementational policy directive, has a list of reasons it considers valid and sufficient, to guide Divisional Returning Officers, who have the initial, and in practice usually final decision to assess excuses for not voting. Although such a list would usefully guide voters as to their legal rights, by enabling them to decide at election time whether the impediment to their voting is acceptable, or whether they should make extra

²⁰ Whether this argument is fully backed by empirical research, it remains a strong and emotive one: see, for example, the submission of the Woodridge Catholic Social Justice Committee to the EARC *Review of the Queensland Legislative Assembly Electoral System* (Nov 1990) 39, 43.

²¹ Section 245(15) of the Act. Compulsory enrolment by eligible electors and compulsory transfer on relocation are prescribed in s 101, offences which incur a \$50 fine.

²² See ss 245(4), (5), (8), (9) and (15) of the Act; s 245(14) makes it clear that a belief that it is a religious duty to abstain from voting is a valid and sufficient reason.

efforts to vote, the AEC has successfully fought a freedom of information application seeking to make that list public.²³

Two High Court challenges to compulsory voting have failed. In *Judd v McKeon*²⁴, a socialist, who chose not to vote at a Senate election because he was trenchantly opposed to all the nominated candidates, as they were all proponents, to one degree or another, of the capitalist system, had his conviction upheld. Only Higgins J accepted that conscientious political reasons — which in this case included the elector belonging to a political organisation which opposed Parliamentary democracy, instructed its members not to vote, and chose not to nominate candidates in part because it could not afford to lose their deposits — could justify not voting. The section in question levied a fine unless the elector had a ‘valid and sufficient reason’ for failing to vote²⁵, and the practice of the electoral authority, then, as now, was to allow dispensation for those who for physical reasons were unable to vote, but to scrutinise closely any other excuse. Higgins J interpreted the words ‘valid and sufficient reason’ in the context of the preferential system of voting mandated by the Act, and argued that Parliament should not lightly be ascribed the intention of forcing people ‘to tell a lie’ by expressing a preference they did not have, unless it clearly legislated the invalidity of such an excuse for not voting.²⁶ The majority, Knox CJ, Gavan Duffy and Starke JJ, joined by Isaacs and Rich JJ, accepted the argument that whilst an elector might feel unable to make a real (for them) choice or distinction between the candidates on offer, nevertheless the law could attempt to compel them to make a formal, written choice on the ballot paper, albeit one which expressed no desire or intrinsic preference on the part of the elector.

Similarly, in *Faderson v Bridger*²⁷, an elector argued that his failure to vote was motivated and excused by a lack of any genuine preference between the candidates, since to mark a preference that he did not have would have been a form of lying. His conviction for not voting was upheld. Barwick CJ, in the leading judgment, held that to have no preference is not to be in a position where one cannot do one’s legal duty to mark the paper in order of preference. The electoral system did not simply ask voters whether they had a clear, positive, denumerable preference amongst the candidates, but said to them, ‘you must have one of these candidates as your representative — given that which of them do you prefer?’ There is a curious sort of behaviourism in this reasoning. Is voting a purely physical act, understood by the law as the mere making of certain marks on a ballot paper, which do not necessarily reflect any voter intentionality and presumably must be decided upon randomly if the voter has no real preferences? In that case, a vote is just a set of marks, to

²³ *Murphy v AEC* (1994) 33 ALD 718. The AEC argued that publication of the list would give all non-voters a ready made, easily ascertainable, ‘valid and sufficient reason’. That would only be so if the AEC were unable to investigate the veracity of each such claim.

²⁴ (1926) 38 CLR 380.

²⁵ *Commonwealth Electoral Act* 1918–1926, s 128A(12). The current analogous provision is s 245(5)(b) of the Act.

²⁶ *Judd v McKeon* (1926) 38 CLR 380, 388.

²⁷ (1971) 126 CLR 271.

be mechanically interpreted and accorded the status 'valid' or 'invalid', by the rules governing formality, just as a reader of English might seek to interpret and understand the marks that monkeys, divorced from any literary intentionality, might happen to make on paper in a typewriter.

Such curiosities aside, Barwick CJ's judgment reflects what has been a strong line of political thought in Australia. Ultimately we vote not to choose the candidates we most want, but to exclude the candidates we least want. Thus, the judgments in *Judd's* case and *Faderson's* case do not seek to justify the compulsion to vote, but accept it as a political fact or axiom reflecting a Parliamentary dictate forcing voters to choose those candidates who they feel are the least worst representatives, with no room to opt-out for those who conscientiously cannot make such distinctions.

In High Court jurisprudence, the Commonwealth has a significant degree of room to manoeuvre before the Court will strike down legislation. Such is the case with compulsory voting, notwithstanding the liberal arguments against it, and the ongoing suspicion that Parliamentarians and parties support it predominantly out of self-interest. Compulsory voting frees party resources by minimising the need to 'get the vote out', and ensures that parties can rest assured, particularly in safe seats, that a minimum of campaigning or attention will be needed, since the faithful will feel duty bound to vote. More subtly, it allows for a lazy form of negative campaigning, as government and oppositions alike can scare voters or appeal to a 'protest' vote by highlighting the disadvantages of voting for the other side, knowing that in a compulsory, especially compulsory preferential system, voters will ultimately be forced to vote for them only because they are motivated to vote against the other side.

EVERY VOTE IS SACRED (BUT TO WHOM?)

An awareness of the underlying motivations of both the AEC and the various established political parties in preserving and supporting compulsory voting is essential to understanding the relatively hidden and unrecognised nature of preference withholding. If voting is more than a right or privilege — if it is a compellable duty — it is thought to follow that casting a formal and fully preferential vote may also be demanded by the system. That is, if it is necessary to legitimate government to force voters to the polls, it is acceptable to try and force them to express the type of vote that the system most fully recognises, which is a vote in valid form expressing clear preferences between all the candidates on the ballot paper.

Joan Rydon, a senior Australian political scientist and long-time opponent of compulsory voting²⁸, has described the AEC as:

Tak[ing] the view that every vote is worth salvaging, no matter how carelessly or stupidly it may have been recorded. [I]t refuses to recognise any

²⁸ Reiterated most recently in J Rydon and M Groot, 'Compulsory Voting — a Question of Rights' in an AEC educational magazine, *The People's Say* (A Sharp and L Mackerras, eds, 1989) 6–11.

right to abstain or to acknowledge that there are electors who wish to express an absence of any preference among the alternatives presented to them. Every informal vote or blank paper is deplored though it may express a more considered and informed decision than many formal votes.²⁹

It is not, technically, an offence to fail, whether deliberately or inadvertently, to record a formal vote. The compulsion, as those who defend compulsion note, consists rather in levying fines and possible gaol sentences on citizens who do not: (1) maintain an accurate enrolment, and (2) attend a polling booth on polling day to have their name crossed off the roll (or otherwise obtain and return a pre-poll ballot paper). This is a consequence of secret voting, since no electoral official or party worker can stand over voters' shoulders in the voting compartment to ensure they cast valid votes.³⁰ Indeed it is rare to see busy returning officers or assistants even scrutinising voters to make sure they do not simply walk out of the booth with the blank ballot in hand, although in larger booths, an official will stand by the ballot boxes near the exit to ensure voters do deposit their ballots in the correct boxes.

Nonetheless, electoral officials probably do have power to force electors to actually vote, whether by stopping them leaving the polling station without depositing the ballot-paper in the ballot box, or otherwise directing them. That is a consequence of three provisions. First, s 233 provides that 'the voter upon receipt of the ballot-paper shall without delay . . . in private, mark his or her vote . . . fold the ballot-paper' and deposit it in the ballot box.³¹ Whilst there is no penalty provided for breaches of s 233, its wording is mandatory, and it is designed to authorise electoral officials to issue directions to people once they are issued a ballot-paper. Secondly, s 348(1) makes it an offence to disobey any lawful direction of the presiding officer. Thirdly, s 339(1) provides that it is an offence, inter alia, to 'fraudulently take any ballot-paper out of any polling booth or counting centre'. Whilst that provision seems primarily aimed at the theft of blank or completed ballots, it could be threatened against an elector who either accidentally or innocently of s 233 took their ballot-paper with them in their pocket, and would certainly catch an elector who sought to take their blank ballot-paper home to give to someone else to use.

Further, although secret voting and the lack of a penalty provision in s 233 means that the compulsion to have one's name marked off the roll is not strictly a compulsion to vote or vote formally, the public perception and tenor of the Act is otherwise. Section 245 is headed 'Compulsory Voting' and refers to 'a duty . . . to vote at each election'. Section 233, already mentioned, provides that voters 'shall' mark their papers. Section 240 states that:

²⁹ J Rydon, 'The Federal Elections of 1987 and their Absurdities' (1987) 59 *The Australian Quarterly* 357, 360. See also J Rydon, 'Compulsory and Preferential: the Distinctive Features of Australian Voting Methods' (1968) 6 *Journal of Commonwealth Political Studies* 183.

³⁰ Technically, no-one can accompany an elector into the voting booth — although there are no recorded convictions for having a child, relative or friend accompany an elector, whether out of companionship or to give assistance/direction.

³¹ In the ballot box, or with the presiding officer in the case of absentee votes.

In a House of Representatives election a person shall mark his or her vote on the ballot paper by:

- (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference; and
- (b) writing the numbers 2, 3, 4 (and so on, as the case may requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them.

*Langer's case*³² is now 'authority for the proposition that s 240 was intended not to impose a legal duty' on a voter, but to give a 'direction to a voter as to how the voter is to discharge the statutory duty to vote in a federal election'.³³

This raft of legislative directions, couched in mandatory legislative language, underpins a long-standing cultural and political belief that compulsory voting is just that — a requirement that everyone votes, and that voting means expressing a complete set of numerical preferences. This belief is reinforced by extensive AEC advertising before each election (e.g. 'Remember. Voting is compulsory') and in directions on the ballot-paper ('Number every square').

Preference withholding, however, is the negation of that belief. For example, a deliberately informal vote involves an elector consciously submitting an invalid 'vote', typically by depositing the ballot-paper, blank or inscribed with some words, into the ballot box. It is much more than a failure to vote: it is not the 'non-vote' of someone who simply is unaware that an election is on, or could not be bothered to turn up at the polls, but an 'un-vote', which expresses a conscious act of dissent. Similarly, but to a lesser extent, a deliberate '1,2,3,3' vote is, whilst currently technically valid, a non-conformist method of voting, which enables an elector to say 'I have no preference between the candidates listed last' and thereby to repudiate the core electoral value of full preferential voting.

All voting, in a system of secret balloting, is a private act which feeds into, and is part of the much larger, quintessentially public event which is a general election. The act of an individual marking a ballot is a secret decision, carried out in private, but finds its true meaning as an engagement with the broader public sphere of the parties, the campaign, and the nationwide day of polling, out of which is born the government of the *res publica* itself.³⁴

The Australian electoral system regards the act of casting a fully preferential ballot as a much more acceptable and desirable act than that of withholding preferences. Our system of elections, particularly in an age of constant opinion polling and well-organised party machines, is directed ultimately at deciding parliamentary majorities between the handful of 'electable' parties and their candidates. Very rarely do opinion polls ask anything other than 'if an election were held today, which of the (major) parties would you vote for?'

³² (1996) 134 ALR 400.

³³ *Langer v AEC* (1996) 136 ALR 141, 147.

³⁴ This public side of elections, however, is anything but secret or private — hence the requirement that all electoral matter be published with an authorising name and address.

If undecided, to which are you leaning?' The media's real interest is in nothing other than the bottom line, namely which of the two major groupings in the House of Representatives (or four in the Senate) is winning, where 'winning' often means 'least disfavoured' rather than 'most favoured'. All is geared to that end. Parties, lobby groups and individuals make public declarations about which party or candidate they support or oppose, and exhort others to vote similarly.

This, of course, is not necessarily to be deplored. Robust and fair public debate is essential to elections and choice. But the withholding of preferences, whether it be in the form of a deliberately informal vote, or a conscious choice to vote in optional preferential style, is not given any meaningful public space or acceptability. The AEC does not attempt to educate voters about the range of choices which are open to them in the privacy of the ballot box. It is no surprise, then, that preference withholding remains an uncommon act. On AEC figures compiled after the 1984 and 1987 elections, 1.55% and 1.29% of House of Representative ballots were returned completely blank or with scribble on them³⁵, and only 0.45% of House of Representative ballots at the 1996 election were in the '1,2,3,3' style³⁶. That such votes are not more common, however, may say nothing more than that the effect of seven decades of compulsory voting and the prohibition of advocacy of such styles of voting, has created a constituency that is highly conformist and unquestioning in this regard. It would be no news to political scientists and commentators that the Australian electorate is lacking in volatility, especially when compared to other Western countries that otherwise share similar outlooks and substantive political values. It is said that Australia as a nation rode to prosperity on the sheep's back. Politically, it could be said, we continue to act like sheep.

³⁵ See AEC, *Informal Voting 1984: House of Representatives Report*, Research Report 1/85 (1985) 29, 35, and AEC, *Informal Voting 1987: House of Representatives*, Research Report 3/88 (1988) 11, 18. The AEC argues that not all blank ballots can be seen as deliberate informality, but it is difficult to imagine what other explanation there are for them, short of electors from other cultures thinking that the ballot paper (issued by a public official) somehow represents a party list or ticket. It should be noted that the 1984 and 1987 elections were both notable for their very high overall level of informality in the House of Representatives poll, hence the AEC Reports, which essentially found the increase to consist of higher than usual defective numbering and use of ticks and crosses, explicable because of confusion caused by a simplification of Senate voting procedures which allowed 'tick a box' group voting (and which ironically achieved a great reduction in the previously high informal levels in Senate voting, a phenomena believed to be caused by the large number of candidates in the average Senate poll). Suggesting a link between informality and NESB populations, see I McAllister, T Makkai and C Patterson, *Informal Voting in the 1987 and 1990 Australian Federal Elections* (1992).

³⁶ On AEC figures, at the completion of the national count, the number of exhausted but technically formal ballots that did not express a preference between the two major groupings was 48979 (the actual total of '1,2,3,3' style ballots would have been higher, given that some people may have voted '1' for one of the major parties, but expressed no preference between minor parties and/or independents: such preferences are almost never counted. Whilst small in percentage terms, this represented a six-fold increase on the number from the 1993 election, suggesting that the AEC's attempts to silence proponents of that style of voting may have backfired in the short term, given the media publicity which attended Mr Langer's courtroom battles and gaoling.

Unsurprisingly, the AEC does nothing to promote, or even to advise electors of the fact that they cannot be prosecuted for casting, in secret, a ballot that withholds preferences. The AEC sees its primary informational role as the education of a sometimes disinterested or civically under-educated populace in the different mechanisms of our standard voting procedures, without wanting to add the complexities of explaining how to go about casting an informal or '1,2,3,3' vote. In support of this, the AEC would point to ss 233, 240 and 245, which, without providing any penalty, clearly direct people to mark their ballots in full preferential fashion. The AEC would also argue that, especially given the jurisdictional overlay of elections in Australia (most voters confront five, potentially different, voting procedures; at local, two state and two federal levels of representative government), and the large number of migrants from countries with different types of balloting, there is a need to keep electoral material simple.

Such an argument might be used to support the repression of others from advocating anything other than the paradigm, fully preferential vote. However it is difficult to see why it should override arguments based on democratic principles and freedoms. If the many different voting systems in Australia create confusion, perhaps there is a need for some national uniformity, or greater civics education at school and beyond. In any event, explaining that there may be several ways to cast one's ballot paper would still be much less confusing and complex than the average governmental or bureaucratic form. Indeed there is nothing intrinsically confusing in the concept of a deliberately informal vote; as an alternative to numbering all squares, it is a clear and simple act. Similarly, the optional preferential vote is a less involved procedure than the fully preferential vote, which in the past, especially in elections involving many candidates, such as Senate polls and some by-elections, has tended to magnify informal voting, when people get bored, forget to fill in spaces, or cannot see any point in completing all the squares when they do not know about or care for many of the candidates.

SILENCING ALTERNATIVES — SECTION 329A

If one accepts the reasoning that preference withholding votes are legitimate choices, equal to the fully preferential vote, then the law needs to be even-handed between these various forms of choice. But it is not. At the heart of the legal problem is s 329A, headed: 'Encouraging persons to mark ballot papers other than in accordance with [the Commonwealth Electoral] Act'.

Section 329A(1) states:

A person must not, during the relevant period in relation to a House of Representatives election under this Act, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240.

Penalty: Imprisonment for 6 months.³⁷

The 'relevant period' is the time between the issuing of the writ for the election, to the closing of the last polling booth³⁸ (ordinarily 6pm Western Australian time on the day of the poll). Section 240, as previously mentioned, directs voters to use full, numerical preferential voting. Sections 268 and 270 however provide saving provisions for some votes which, whilst not strictly conforming to s 240, nevertheless reveal the voters' preferences up to a point. Thus the '1,2,3,3' style vote is technically valid, although its preferences will be exhausted if the count comes down to a choice between the two candidates placed last. Curiously then, it is an offence to encourage people in the lead up to a House of Representatives election to cast a valid type of vote³⁹, as well as to encourage informal voting (since an informal vote is a vote otherwise than in accordance with s 240). The Act, whilst wishing to expand the category of formal votes, with very technical savings provisions, aims conversely to minimise the deliberate withholding of preferences.

The net effect of s 329A is to criminalise any meaningful campaign or public advocacy in the crucial lead up to any House of Representatives election to either:

- (a) encourage voting which withholds preferences (whether some preferences, or all, in the case of deliberately informal voting), or
- (b) to create accidental informal voting by confusing electors.

Whilst legally one could campaign for preference withholding when an election seems in the offing, up until the time of the issue of the writ, that is the least effective time to campaign. The majority of impressionable voters will not be in the process of seriously considering how to cast their vote, and without candidates having nominated, it is difficult for a campaigner to convincingly argue that some or all of the choices in any particular division will be undeserving of a vote.

A campaign to create accidental informal voting is clearly worth preventing. Such a campaign of disinformation about the voting system, whilst being a useful anarchistic or guerrilla-style tactic, would tend to prey on less educated or easily confused voters, especially given the common use of tick or cross voting in other electoral systems, including those used in countries from which many migrants to Australia have come. Moreover, the success of such a campaign could not be distinguished from the not uncommon inadvertence of voters who intend to vote formally but make a mistake in the polling booth.

However, to encourage the deliberate withholding of preferences is not open to the same objection, and should not be criminalised. By openly arguing

³⁷ Alternatively, pursuant to s 383 of the Act, a general power with respect to electoral offences, the campaigner can be prohibited by injunction from continuing the campaign.

³⁸ Section 322 of the Act.

³⁹ The oddity of criminalising the advocacy of a legal and valid act was questioned by Senator Parer (*Parliamentary Debates*, Senate (Cth), 1 December 1992, 3910-11); the government made no response to this point.

for the withholding of preferences, an activist is appealing to those electors who, through conscious apathy, or reasoned opposition to the electoral system or the current crop of candidates and parties, wish to withhold preferences. Such electors may, for example, wish to make choices only between those candidates they would not object to seeing elected, or to choose between those candidates between whom they can differentiate. Alternatively, in the more extreme case of ballots deliberately left blank or scribbled on, those electors are expressing a rejection of all the candidates on offer, or some wider grievance with the electoral system as a whole.

The legislative history of s 329A reveals surprisingly little substantive debate or awareness of its consequences. It was a late government addition to the omnibus *Electoral and Referendum Amendment Bill 1992* (Cth), Parliamentary debate on which centred around the now failed attempt to restrict paid political broadcasting. Curiously, Senator Kernot, Leader of the Australian Democrats, wondered why s 329A was not more draconian. She thought there was a loophole in that people were still free to advocate informal voting in the months and years which preceded the election period.⁴⁰ Senator Kernot assumed that the proposed section was directed at those who advocated optional preferential voting, a view echoed in the Explanatory Memorandum. The Joint Standing Committee on Electoral Matters' report into the 1990 election had earlier recommended 'a prohibition on the distribution of material which discourages electors from numbering their ballot papers consecutively and fully'.⁴¹ However the wider import of s 329A was not unknown: the section prevents a campaign for informal voting, because that type of voting involves not marking the ballot paper with consecutive preferences, as is mandated by s 240. Arch Bevis MHR, a government backbencher understood what was at stake: '[There should be no] loopholes for some sections of the community to seek to undermine the basic compulsory nature . . . of the voting system'.⁴² That is, compulsory voting is designed to force as many people as possible to make preferential choices between the candidates on offer, and s 329A exists to minimise the numbers of people who withhold preferences deliberately whether by voting informal or '1,2,3,3' style.

Section 329A was not the first of its kind. In 1983, major amendments were made to the voting system, including 'tick-a-box' group or list voting for the Senate designed to minimise both the cost of counting Senate preferences, and the high, mostly inadvertent, informal count in Senate elections, together with measures to relax the mandatory formality requirements for voting. As Joan Rydon reported, in the wake of these amendments:

It was made an offence to recommend that ballot papers be marked in accordance with these relaxed requirements. Before the 1987 elections the [Electoral] Commission briefed QCs and sought injunctions to prevent the distribution of how to vote cards which urged electors not to vote, to return

⁴⁰ *Parliamentary Debates*, Senate (Cth), 1 December 1992, 3925.

⁴¹ *Parliamentary Debates*, House of Representatives (Cth), 16 December 1992, 3866.

⁴² *Parliamentary Debates*, House of Representatives (Cth), 16 December 1992, 3878.

blank papers or to number those papers in accordance with the relaxed provisions for formality.⁴³

Thus, the drive to compulsory voting, which had begun in the 1910s and 1920s, was culminating in the 1980s and 1990s with a determined effort by the AEC and the Parliament to eradicate voting that is not fully preferential. Insofar as this is part of the AEC's proper educative and administrative duties to give citizens, where possible, a fair chance to have their sincerely held preferences recorded and understood, this is a laudable goal. However, in the zeal to maximise the formal and full preferential vote, the electoral system and law have been perverted. The desire to achieve maximum, forced preference expression comes at the cost of preventing the considered withholding of preferences, and even dissent, from within the system.

As the law currently stands, it is only the advocacy of such voting prior to House of Representatives elections which is criminalised. This 'protection' of lower house, but not upper house, polls is significant. It is in the House of Representatives that governments are formed and fall⁴⁴, and the House continues to be the almost exclusive domain of the two major political forces, the ALP and the Coalition. The desire to maximise and compel full preferential voting is the product of a need which is felt to maximise the perceived legitimacy of government, where government is drawn exclusively from these two forces. Sections 240 and 329A occur in the context of the continuation of a system which effectively and ultimately demands a choice between two groupings with enormous historical and institutional power, and yet very little between them in ideology or policy. The system thus promotes a certain kind of stability, by reinforcing the dominance of Labor and the Coalition as the entrenched parties of government, at the cost of denying conscious and considered withholding of preferences from those parties.⁴⁵

Although the composition of recent Parliaments has vested some review power in the minor parties in the Senate, the interests of even those parties tend to favour compulsory, full preferential voting. The minor parties, after all, derive considerable political leverage by being able to 'horse trade' their preference flows and act as lightning conductors for disaffected 'protest' voters. Their ability to do so would be undermined by a system which fully recognised the withholding of some or all preferences.

⁴³ J Rydon, 'The Federal Elections of 1987 and their Absurdities', op cit (fn 29) 358-9.

⁴⁴ The dismissal of the Whitlam government in 1975 aside.

⁴⁵ In this our system has much in common with electoral systems in other English speaking nations. Such electoral systems are typically classified as having, as their central purpose, strong, stable majority government, without any consideration of the non-utilitarian value of voting as an expressive act of the individual elector. See, for example, E Lakeman, *How Democracies Vote: a Study of Electoral Systems* (4th ed, 1974) 23-8.

THE VALIDITY OF SECTION 329A — RESILING FROM IMPLIED FREEDOMS

I have been arguing that the system prevents the conscious and deliberate withholding of preferences at a cost to its own authenticity and authority. The personal cost of a provision such as s 329A is illustrated by a case recently before the High Court, *Langer v Commonwealth*⁴⁶ (*Langer's case*), and related cases⁴⁷ which concerned Mr Langer's gaoling for defying an injunction forbidding his advocacy of preference withholding.

Albert Langer is an activist, well known to people associated with social justice movements in Victoria. As a member of the Council against Poverty and Unemployment, Langer was previously involved in a campaign having the declared aim of bringing down the Labor government, with a view to establishing the left as an independent force. One central aspect of this was advocating informal voting, including the distribution of 'How Not to Vote' cards. Langer was charged with breaches of the equivalent of s 329A prior to the 1987 election, and enjoined (along with one other) by the Victorian Supreme Court from continuing the campaign until after the closing of the polls. Langer sought to continue his campaigns in 1993 and 1996, through an organisation called 'Neither', by advocating '1,2,3,3' voting to withhold preferences from the major parties, but was threatened again with injunctions and prosecution. Pre-emptively, he applied to the High Court for orders restraining the AEC from prosecuting or 'intimidating' him, or others, or publishing material that was 'misleading' (ie suggesting that voters had to record a full preferential vote). Obviously unable to make a civil order restraining any future prosecution, Deane J reserved the question of the constitutionality of s 329A to the full bench.

The case was listed to be heard with *Muldowney's case*, a challenge to a similar South Australian provision.⁴⁸ Both challenges relied in large part on arguments that the constitutional structure of representative democratic government in Australia, including the states, implies certain freedoms of communication about matters concerning political affairs. Such freedoms should quintessentially embrace information, opinion-sharing and debates as part of a discourse sustaining free elections and representative government.

To put the High Court decision in *Langer's case* on this point in perspective, it is necessary to briefly review the implied freedom of communication cases which came before. These implied freedoms were first enunciated and used to invalidate the federal government's attempts to restrict paid electronic political broadcasts in the lead up to federal elections — by five of the seven justices in *ACTV v Commonwealth (No 2)*⁴⁹, with a sixth justice

⁴⁶ (1996) 134 ALR 400.

⁴⁷ *Infra*, (fns 77–78).

⁴⁸ *Muldowney v South Australia* (1996) 134 ALR 400. Not all state electoral acts have such prohibitions.

⁴⁹ (1992) 177 CLR 106. See the judgments of Mason CJ (implied freedom of communication in respect of public affairs and political discussion); Deane and Toohey JJ (implied freedom of communication about all political matters, extending to state and local government); Gaudron J (freedom of political discourse, including of state matters,

agreeing generally with the existence of an implied freedom of political communication, but disagreeing on its application in that case⁵⁰. Dawson J, the seventh justice, was alone in seeing 'no warrant in the Constitution for the implication of any guarantee of freedom of communication which operates to confer rights upon individuals or to limit the legislative power of the Commonwealth'.⁵¹

On the same day, the High Court in *Nationwide News Pty Ltd v Wills*⁵² struck down a federal law of statutory contempt, making it an offence to use writing to bring the Australian Industrial Relations Commission into 'disrepute'. Again, six justices invoked the implied right to freedom of communication about political and governmental matters. Importantly, their judgments focused on the non-absolute nature of this right. Various, the judges felt that legislation which impinged on freedom of communication could be valid if it passed certain tests: if, after anxious scrutiny by a court the restriction is seen as reasonably proportional to achieving some legitimate object (Mason CJ); if it were drawn to fulfil legitimate purposes, provided they were appropriate or adapted to the fulfilment of that purpose (Brennan J); if, in the context of the standards of our society the prohibitions are justifiable as being in the public interest, in that they are conducive to the overall availability of the effective means of free discussion on political matters, or do not go beyond what is reasonably necessary to preserve an ordered society or protect the legitimate claims of individuals to live peacefully and with dignity in such a society (Deane and Toohey JJ); if its purpose is not to impair freedom, but to secure some end within power in a manner which is reasonably and appropriately adapted to that end (Gaudron J); or, if the law provides a regime of restriction which is not grossly disproportionate to the end which is within power (McHugh J).

Later, the Court took the implied freedoms into the realm of state and common laws. In *Theophanous v Herald and Weekly Times*⁵³, a majority of four Justices extended them to create a special defence⁵⁴ to a defamation action where the publication related to a current or potential member of Parliament and his or her performance or suitability to perform such duties. However the Court in *Theophanous*' case was deeply divided, with three

flowing from free elections and representative democracy as a fundamental part of the Constitution); and McHugh J (constitutional right to convey and receive opinions, arguments and information concerning matter intended or likely to affect voting in a federal election).

⁵⁰ Brennan J agreeing that implied freedom of discussion of political and economic matters needed to sustain the system of representative government; but disagreeing that the restrictions on broadcasting were disproportionate to the legitimate objects of minimising the risks of corruption of the political process, and undue influence of wealth, associated with expensive televisual campaigns.

⁵¹ (1992) 177 CLR 106, 184.

⁵² (1992) 177 CLR 1.

⁵³ (1994) 182 CLR 104.

⁵⁴ Essentially, that the defamatory material was published honestly (ie without actual knowledge of any falsity) and reasonably (ie not recklessly uncaring of its truth, and reasonably in the circumstances).

dissenters denying any relevant implied freedom.⁵⁵ In *Stevens v West Australian Newspapers*⁵⁶, a similar majority⁵⁷ held that the implied freedom, drawn from the Commonwealth Constitution, could extend to protect certain public discussion about members of state legislatures; the same four, joined by Brennan J, were also willing to imply a similar freedom from the Western Australian constitution.

Finally, prior to *Langer's* case, *Cunliffe v Commonwealth*⁵⁸ began the process of delineating boundaries around the substance of the implied freedom of communication. In that case, a challenge to the system which prevented unregistered persons giving people who were not Australian citizens immigration assistance and advice for a fee, failed. The majority, including now Brennan, Dawson, Toohey and McHugh JJ, held that the law did not infringe the freedom of political discussion or system of representative democracy. The minority, now consisting of Mason CJ, Deane and Gaudron JJ, dissented in construing the freedom to political communication and discussion more widely, to invalidate this sort of restriction.

The essential legal question in *Langer's* case was whether a restriction such as s 329A, which effectively denies the advocacy of any vote other than one within the prescribed procedures for full preferential voting, is constitutional. One might have thought that if a law banning only one form of paid political advertising is invalid as offending an implied freedom of communication relevant to representative government, a provision criminalising non misleading advocacy of preference withholding during an election campaign must also be invalid. Such a law seems to strike at the very heart of the democratic process, being a blanket restriction on the free expression of particular, lawful ways of exercising the franchise itself. In the submissions of George Williams, counsel for the plaintiff in *Muldowney's* case, the potential reach of such a provision is to stop or close for proper discussion at election times, communications on issues such as: the wisdom of voting at all; whether any of the nominated candidates are fit or suitable for election; whether any of the nominated candidates have policies or platforms for which voters should vote; voting informally deliberately; or making a protest vote.

In this submission, the informal and optional preferential styles of voting are legitimate and should be permitted, particularly at the very time when the system of representative, democratic government is showcased: at election time.

However, the defence of the electoral commissions and of the governments in question, chiefly centred around the issue of legitimate purposes. The prohibition on the advocacy of votes that withhold preferences arguably serves at

⁵⁵ Brennan J because the implied freedom was not a personal freedom, but a limitation on legislative power; McHugh J because the freedom centred on the processes and organs whereby representative government was maintained and renewed, but did not extend to defamatory attacks on public figures; and Dawson J, seeming to agree with McHugh in limiting any freedom to that which is clearly a requirement of representative government.

⁵⁶ (1994) 182 CLR 211.

⁵⁷ Mason CJ, Deane, Toohey and Gaudron JJ.

⁵⁸ (1994) 182 CLR 272.

least two purposes considered important to our electoral system. The first is the uncontentious desire to avoid confusion, and to maximise the potential of those who have a preference, to validly state it. Under this approach, it may be necessary to curtail what can be said about the method of voting, especially just prior to an election, to avoid misleading voters. However if this is all that is being protected, the legislation⁵⁹ clearly goes too far, and is not reasonably proportionate to its aims. Any clearly worded appeal to deliberately vote informal, such as Mr Langer's original 'How Not to Vote' cards, or his later calls to partially withhold preferences by '1,2,3,3' voting, should be permitted. They are neither designed, nor likely, to confuse the elector of ordinary intelligence. On the contrary, they are express appeals to deliberately 'waste' all or part of one's vote by ensuring that it cannot be applied to the use of the disfavoured candidates. Such campaigns actually help explain what is and what is not a formal vote, and may assist in voter education. In any event, the prevention of confusion justification for s 329A is redundant, because s 329 makes it an offence to publish 'any matter or thing that is likely to mislead or deceive an elector in relation to the casting of a vote' in the lead up to an election. Even as narrowly interpreted by the High Court in *Evans v Crichton-Browne*⁶⁰, 'casting a vote' clearly refers to the act of an elector physically recording his or her choice on the ballot. Thus, concern with mischievous deceptions or indirect confusions in material that might increase inadvertent failures by voters to record their actual preferences, is already covered, and punishable under s 329(4) with a maximum fine of \$1000, 6 months' imprisonment, or both.

The second arguably legitimate purpose justifying s 329A is the more controversial one of requiring people to vote in a fully preferential and formal manner to maximise the 'value' of that vote to the system itself. As suggested above, this is the natural extension of compulsory voting in the opinion of both the AEC and the established parties. It reinforces and helps justify their existence. It is this line of reasoning which the High Court accepted.

According to the majority of five justices to one⁶¹, s 329A was a valid exercise of the legislative power of the Commonwealth to regulate parliamentary elections. Although the Constitution implied a right to freely choose one's representatives, within the framework of representative democracy, s 240's direction to voters to number all squares on the ballot consecutively, was a valid prescription of that right to choose. Section 270, which deemed '1,2,3,3' votes to be formal, was read as merely a saving provision, that did not affect the essentially compulsory, fully preferential voting scheme intended by the Act. In that context, a restriction on free speech, such as s 329A, was prima

⁵⁹ Especially *Electoral Act* 1985 (SA), s 126, which explicitly prohibits advocating abstaining from voting, marking a ballot paper informally, or refraining from marking a ballot paper at all. Whilst the first category may be legally defensible (given that voting is compulsory, and non-voting an offence), the second and third activities are not illegal.

⁶⁰ (1981) 147 CLR 169, considering the then s 161(e) of the Act.

⁶¹ *Langer v Commonwealth* (1996) 134 ALR 400. Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ all found for the Commonwealth. Ironically, only Dawson J, previously a conservative opponent of implied rights jurisprudence, found for Langer.

facie valid. The constitutional right to political discussion found in the earlier cases was not absolute, but could be reasonably circumscribed to allow laws which 'curtail freedom of communication, where that curtailment is reasonably capable of being viewed as appropriate and adapted to furthering or enhancing the democratic process.' To allow the encouragement of the withholding of preferences would be to allow the encouragement of less than 'full, equal and effective participation', which involved all electors casting valid, fully preferential ballots.⁶² The problem with this argument is that it encompasses both a coerced and narrow sense of participation, one that requires electors to express choices where they may have none, and wrongly denies that a conscious withholding of preferences (including a deliberately informal vote) is an act of full participation, when such votes are expressions of an elector's full and considered choice.

Oddly, the consequence of the majority decision is that Mr Langer and others are free to criticise the law, and even to carefully inform voters about the formality rules (such as s 270), but not to 'encourage' preference withholding and informality. Only Dawson J dissented from this, finding it untenable to distinguish between advocacy and mere information giving. Dawson J concluded that s 329A was not proportionate to any legitimate regulatory aim for elections, but was an infringement of what he now recognises as a limited constitutional guarantee of freedom of communications necessary to the conduct of direct elections.⁶³ As far as it goes, Dawson J's decision is preferable to the majority's reasoning. The distinction between merely supplying information about the possibility of certain electoral choices and encouraging particular voting behaviours is pedantic. Aside from the evidentiary problems of interpreting intentions from the material in question, there is Dawson J's common sense dictum that 'to make available useful information is ordinarily to encourage its use'.⁶⁴ Further, it is submitted, it is destructive to the substance of the implied guarantee of freedom of communication to introduce such distinctions in the realm of political and electoral speech, simply because such speech is by its nature not simply the exchange of factual information, but involves the arts of rhetoric, encouragement, persuasive debate and the expression of opinions.

However, Dawson J's judgment is not beyond criticism. Putting aside whether his narrow doctrine of implied rights generally is acceptable, the flaw is his finding that 'if s 240 stood alone, s 329A would be supportable'.⁶⁵ That is, if the validity of '1,2,3,3' votes were not saved by s 270, no one could advocate them. It follows that in Dawson J's view, no one presently could advocate deliberately informal voting either. The thread on which the liberty preserved by Dawson J's decision is a thin one, which can easily be removed by Parliament.

Whilst it was not fully argued by Mr Langer (a litigant in person), nor was it part of the question stated to the full High Court in that case, the validity of

⁶² (1996) 134 ALR 400, 418–9 per Toohey and Gaudron JJ.

⁶³ (1996) 134 ALR 400, 410–2 per Dawson J.

⁶⁴ (1996) 134 ALR 400, 412 per Dawson J.

⁶⁵ (1996) 134 ALR 400, 411 per Dawson J.

s240 in establishing a system of fully preferential voting also came under discussion by some of the judges. Langer contended that certain basic voting rights underpinning free elections were guaranteed, including the right not to vote for a particular candidate. In this submission, '1,2,3,3' style or optional preferential voting had to be allowed, regardless of the wording of the Act, because only the widest possible choice amongst the nominated candidates could be considered a 'free' method of election. None of the justices acceded to this line of argument.

Since s 24 of the Commonwealth Constitution merely provides that the House of Representatives must be directly chosen by the people, it could not follow that a system whose primary purpose was to mandate fully preferential voting was outside Commonwealth power. Any suggestion that the words 'directly chosen' militated against a system which required some voters to make choices that they may not wish or be able to make, was rejected in line with the traditional High Court approach that voters could be forced to choose between all candidates, since a forced choice was nonetheless a choice.⁶⁶ Brennan CJ, for example, simply pointed to *Judd's case*⁶⁷ and *Faderson's case*⁶⁸ and declared that 'provided the prescribed method of voting permits a free choice among the candidates for election', it did not matter that that method of choice was not as free as it could be, or as the voter might wish.⁶⁹ Compelling voters to make full preferential choices, was thus not an unconstitutional limitation on the democratic concept of free elections. What this argument fails to address, is that a requirement that voters stipulate preferences between candidates that they cannot choose between, or wish to withhold their vote from in all circumstances, is hardly a 'free choice'. The voter who is not free to choose not to choose, is forced to make choices which suggest preferences that are simply not held, nor freely expressed.

Finally, a statutory interpretation argument put by Langer, that the use of the words 'so as to indicate the order of the [voter's] preference for [the candidates]' in s 240 of the Act implied that a voter without a genuine preference between candidates could number them equally, was also rejected, implicitly, by all the justices, in their finding that s 240 did prescribe full preferential voting.

Muldowney's Case

The decision in *Muldowney's case* to reject a challenge to the South Australian provision prohibiting the advocacy of other than full preferential voting⁷⁰, in a system which compelled full preferential voting, reflected the findings in

⁶⁶ (1996) 134 ALR 400, 405 per Brennan J, 417 per Toohey and Gaudron JJ, 420–1 inferentially per McHugh J, and 430–1 per Gummow J.

⁶⁷ (1926) 38 CLR 380.

⁶⁸ (1971) 126 CLR 271.

⁶⁹ (1996) 134 ALR 400.

⁷⁰ *Electoral Act* 1985 (SA), s 126(1). Whilst this section differs from the Commonwealth equivalent in explicitly outlawing advocacy of abstention from voting and failure to mark the ballot, these textual differences were not relevant to the case: indeed the judgments in *Langer's case* indicate that the High Court understood the Commonwealth

Langer. Even Dawson J merely applied the precedent of *Langer* to uphold the provision. However the decision in *Muldowney* entails its own peculiar and unfathomable consequences. The South Australian system is not simply silent as to whether it is unlawful to vote informally, thereby only allowing voters 'in the know' to go through the motions of casting a ballot, in secret, without necessarily doing so in the prescribed manner, but explicitly requires each ballot paper to include the statement, 'You are not legally obliged to mark the ballot paper'.⁷¹ Thus, as in *Langer*, the consequence of banning the free advocacy of preference withholding is that forms of voting, which are not unlawful, cannot be encouraged.

Muldowney also argued that the *Constitution Act* 1934 (SA), ss 11 and 27, in requiring Parliament to be 'elected by the the inhabitants of the State legally qualified to vote', required a level of freedom of electoral choice that was denied by a provision requiring full preferential voting as a pre-condition to formality.⁷² Similar arguments to those used in *Langer's* case were applied to dispense with this challenge. Although formality depended on expressing a full set of preferences, it was not an offence to not do so. Since the system provided *some* measure of choice, it provided a valid method of free elections, notwithstanding that many voters might be forced to express preferences they did not hold if they wished to cast a valid vote⁷³.

The consequence of *Langer's* case and *Muldowney's* case, together with *McGinty v Western Australia*⁷⁴, which denied one-vote one-value the status of a constitutional principle, is that the Commonwealth Parliament has two significant discretions: (a) to choose the very system of voting for elections to it; and (b) to legislate any reasonably adapted or proportionate means of implementing and mandating that system, even when those means deny otherwise basic communicative freedoms at election time.

TEN WEEKS GAOL FOR A DISSIDENT CAMPAIGNER — THE STRANGE CASE OF ALBERT LANGER

Repression creates martyrs. Within one day of the High Court bringing down its orders, Albert Langer was enjoined from continuing the 'Neither'

provision to prohibit advocacy of informal votes, and not simply '1,2,3,3' style optional preferential votes.

⁷¹ *Electoral Act* 1985 (SA), s 61(2).

⁷² *Electoral Act* 1985 (SA), s 76. The constitutional arguments on both the implied guarantee of communication, and the validity of full preferential voting arguments were potentially made more complex by the presence of two Constitutions- the Commonwealth and the South Australian. However nothing turned on this, since the two Constitutions were similar enough that whatever implications were to be drawn from the one, could be drawn from the other. (More authoritatively, and generally denying that Commonwealth Constitutional implications can extend to the electoral systems of the states, see *McGinty v Western Australia* (1996) 134 ALR 289.

⁷³ A point which Dawson J explicitly conceded, *supra* (fn 5), 25.

⁷⁴ (1996) 134 ALR 289. This case has been the subject of a paper by one of the barristers for the plaintiff: P Johnson, 'Representative Democracy and its Relationship to Political Equality under the Commonwealth Constitution', paper presented to Australian Society of Legal Philosophy Conference, University of Queensland, 7 July 1996.

campaign, by Beach J of the Victorian Supreme Court, at the suit of the AEC.⁷⁵ Defiantly, Langer continued his campaign on the steps of the courthouse, and was quickly cited for contempt of the injunction. Brought back before Beach J, Langer maintained that he would continue his campaign, which by now was becoming more than simply a marginal campaign for alternative voting, but a matter of fundamental civil liberties. Langer told Beach J that 'the only way you can constrain me is to lock me up'. Beach J declared that he 'found it difficult to imagine a clearer or more blatant contempt'⁷⁶, and promptly sentenced Langer to ten weeks imprisonment for (civil) contempt, a term due to end more than seven weeks after election day.

Langer unsuccessfully sought to appeal the substance of Beach J's findings and the grant of the injunction, before a Full Court of the Federal Court, in *Langer v AEC*.⁷⁷ In a second hearing before the same Full Court, however, he was successful in gaining his release, on a finding that the ten week sentence was excessive, being of the order normally reserved for 'serious' contempts. Nonetheless, the Full Court reaffirmed that a prison sentence was warranted, on the paradoxical basis that the arduous and determination of Langer to pursue what he sincerely believed were fundamental political rights, rendered his contempt a significant one for which a fine alone would be inadequate. The Full Court substituted a twenty-two day sentence, which he had already served.⁷⁸ His release, then, came only after polling day, and after the intervention of the Human Rights and Equal Opportunities Commission, which acted as *amicus curiae* in support of his Federal Court action.

It may be overstating the case to compare the activism of a quixotic figure such as Mr Langer with the great and successful challenges and reform movements of Australian political history.⁷⁹ But in an ideal democratic system, might and numbers do not necessarily make right, and sincerely held and compelling arguments that capture the sentiments of a group of citizens, no matter how marginalised, are as important to the process as the dictates and policies of the major parties. Langer's activism, it should be noted, has not simply been a negative or anarchic platform⁸⁰. It is a political tactic of one

⁷⁵ Unreported, Supreme Court of Victoria, 8 February 1996. The injunction was to last 'until 6 pm on 2 March 1996', ie close of polling on election day.

⁷⁶ Unreported, Supreme Court of Victoria, 14 February 1996. Throughout, Langer voiced the slightly naive, natural law belief that the injunction was 'unlawful' because he believed the Act and the judicial interpretations of it to be in breach of fundamental political rights.

⁷⁷ (1996) 136 ALR 141.

⁷⁸ Unreported, Federal Court of Australia, 7 March 1996, 11. In both this and the previously noted hearing, the Full Court comprised Black CJ, and Lockhart and Beaumont JJ.

⁷⁹ Such as the campaigns for universal male suffrage, for the institution of a parliamentary wing of the labour movement, for voting rights for women, and the (in some parts ongoing) push for substantively equal voting rights for Aboriginal Australians.

⁸⁰ Although the tactic of encouraging '1,2,3,3' votes could have led to re-elections in some very marginal seats, since on one interpretation of ss 181 and 247 of the Act, if no candidate could claim an 'absolute majority' of formal votes, a supplementary election should be held. There were no such supplementary elections after the 1996 poll, although at least one defeated ALP MHR (Barry Cunningham, McMillan) blamed his defeat on former ALP voters withholding preferences from him by voting '1,2,3,3'.

seeking to challenge the existing two party hegemony from within, in part by encouraging the disgruntled disadvantaged to stop reflexively voting Labor and instead register only those preferences which the voter actually holds. In Langer's vision, this tactic was designed to help lead to the downfall of the then electorally dominant Labor government. In its wake, an even more reactionary government would be elected — a short term inconvenience that would spark the rebirth of a more truly working class party than the Labor party.⁸¹

One cannot expect the High Court to share Mr Langer's political goals (Mr Langer might well be concerned if it did!). However, one would have expected, on classical liberal reasoning, that s 329A would be struck down, thereby making an incremental improvement in the democratic nature of our electoral system. That the High Court did not do so more than hints at a significant winding back of implied rights jurisprudence under the Chief Justiceship of Brennan CJ, in the wake of the retirements of Mason CJ and Deane J.⁸²

Certainly we should be wary of becoming too dependent on High Court review to achieve progress, even if in the last decade the Mason High Court became a more reformist institution than the Labor party in government. *ACTV v Commonwealth (No 2)* itself is a case in point: why should Parliament, from an egalitarian perspective, not have the power to ban or limit paid political broadcasting, given the overweening power of money and the electronic media?⁸³ On the other hand, even the most ardent majoritarian would accept that democratic values necessitate judicial review of core electoral laws, if only to prevent those groups currently holding power from legislating anti-majoritarian and anti-free and fair electoral laws.⁸⁴ In the long term then, the stifling of implied rights jurisprudence may not be an altogether negative development, if one agrees with arguments that it is generally undemocratic for unelected judges to strike down legislation which was voted on by Parliament. However it was to be at least hoped that, in the field of basic electoral rights, the Court would exercise greater scrutiny of parliamentary action, given the fundamental importance of elections to the very constitution of representative government, and the obvious suspicion that political parties will legislate for electoral rules that suit them, rather than ones that are necessarily cognisant with ideal democratic practices. In any event, it is to the

⁸¹ The tactic, or dream, will sound familiar to old socialists. But in Langer's campaign, note that there is no revolutionary vision of overthrowing Parliamentary democracy, rather a dramatic, but important, reworking of the power balance and ideologies within that structure.

⁸² Peter Johnston, a leading academic and barrister in this field believes that although recent cases indicate some rethinking of implied rights, *Langer's* case would have been decided in Langer's favour had it not been overwhelmed by the one-vote one-value case heard and decided around the same time, *McGinty v Western Australia*, in which the High Court applied the brakes to implied rights' jurisprudence. See *supra*, (fn 74).

⁸³ Even accepting Mason CJ's arguments that the bans might tend to entrench the current political parties, by making it harder for newer movements, and even lobby groups such as trade unions etc, to gain public attention for their viewpoints.

⁸⁴ See, for eg, D Wood, 'Judicial Invalidation of Legislation and Democratic Principles', paper presented to NILEPA Constitutional Law Workshop, Griffith University, 3 December 1995.

even less certain milieu of Parliament, and popular opinion, rather than judicial interpretation, that we must look for repeal of s 329A and reform of the conformist culture of electoral law.

'NONE OF THE ABOVE': HEARING AND RECORDING THE FULL RANGE OF ELECTORAL PREFERENCES (OR LACK OF THEM)

Public and press response to the use of s 329A against Albert Langer was almost unanimously condemnatory. Amnesty International (London), Chris Sidoti for the Human Rights and Equal Opportunities Commission, the Victorian chapter of the International Commission of Jurists, the Greens, the Australian Democrats, the then Leader of the Liberal Party in opposition, and sundry columnists and editors all expressed views ranging from serious disquiet at the gaoling and contempt law⁸⁵, to calls for the repeal of s 329A. Other candidates and activists took up the cause, openly campaigning for '1,2,3,3' style voting, both in the electorate at large, and in such public places as the steps of the AEC office in Sydney, without being arrested.

Having to enforce, or ignore, s 329A is now a matter of some embarrassment for the AEC. Inevitably, calls for its reform will reach the Joint Standing Committee on Electoral Matters.⁸⁶ Whilst it is to be hoped that the objections so forcefully raised in the 1996 election campaign will ensure its repeal, it is entirely possible that the saving provision, s 270, which ensures the validity of '1,2,3,3' votes, will also be amended, so that the Act returns to an unambiguously non-optional preferential system.⁸⁷ It is to be hoped, however, that political self-interest aside, there will be enough interest on all sides of politics to consider shaping any new provisions to achieve the electoral ideal of allowing and encouraging preference withholding.

My contention is that the debate boils down to what justification (if any) one accepts for compulsory voting. If compulsory voting is undemocratic, then people should be free to 'express' their disinterest, apathy or protest by not enrolling or attending the polls; and it follows that there should be no restriction either, on people advocating either non-voting, or deliberate informal voting (the latter being a more unequivocal act of dissent than the 'silent' inaction of simply not enrolling or voting).

If compulsory voting is justifiable, on the other hand, because it is necessary to legitimate governments, and the electoral process is therefore seen not as an end in itself, but always as a means of ensuring the most representative government possible, then many restrictions on voter freedoms are possible

⁸⁵ See, generally, K Derkley, 'Go Directly to Jail: the Langer Affair and Contempt of Court' (1996) 70(5) *Law Institute Journal* 12.

⁸⁶ Where, in 1994, Liberal Party and Green representatives on that committee objected to s 329A: see, N Minchin MHR, 'ALP wants s 329A retained', the *Australian*, 21 February 1996.

⁸⁷ For reasons outlined earlier, any party with support significant enough to be represented in Federal Parliament, will also tend to wish to preserve its preference trading ability and hence prefer full preferential voting.

and justifiable. Enrolment and voting will remain compulsory. Misleading/confusing statements about how to vote will be unlawful, as will statements exhorting people not to vote. Full preferential voting will be mandated, and the advocacy of any form of preference withholding will be unlawful, because that will be seen as subversive of the ultimate goal of the system: the return of a government which can claim to be preferred by the majority of the people, where 'preferred' need mean nothing more than 'least unpopular compared to the other groupings on offer'. Under such a system it is always possible to attempt to undermine a government's claim to complete legitimacy by saying 'we have no way of knowing how many voters were forced to choose you, without having any real preference between you and the other parties'. However the very fact that the number and destinations of such votes remain unknowable, undermines any such argument in practice. Rather, those elected will simply point to the piles of votes they received, and assert that they were preferred, in pencil on paper, by a majority of all voters over their rivals.

However there is a middle path, which best captures the ideals of democratic elections. Compulsory enrolment and voting is practically and theoretically justifiable to ensure the active and continued involvement of all classes of people in the fundamental democratic process of regular elections. The electoral process is not a purely utilitarian mechanism, or a pragmatic means of choosing rulers who can thereby claim legitimacy and mandates. It should be the coming together, in the most public of exercises, of the otherwise usually privately held political opinions of all citizens, in a way that is sensitive to the full range of possible beliefs about the value of parliamentary democracy in general, and the parties and candidates standing at any particular election. A more robust, less conformist polity and electoral system would provide for optional preferential voting, up front. It would not feel the need to silence people like Albert Langer, any more than it would prohibit candidates committed to radical reform of the electoral system.⁸⁸ Nor would it feel squeamish about informal voting, a category of votes which the AEC has sought only to minimise, or hide, when those who deliberately vote informal may be making a more considered electoral choice than many voters who instinctively and loyally, but often unthinkingly, vote for one major party or the other.

Instead, the AEC would publish and analyse categories of votes that withhold preferences, as a barometer of changes in public disregard and displeasure with contemporary party and parliamentary politics. Inevitably in a mass democracy, the popularity of all voting options are partly determined by the size of the campaign, and the sense of tradition and loyalty, behind them. Campaigns to withhold preferences will never be likely to rival the power and cohesion of the organisations that have grown out of the labour and liberal movements. Indeed, given that such forms of voting are never a vote directly

⁸⁸ Such as the No Self Government Party in the ACT, which advocated the abolition of the very Parliament to which it sought election.

for an identifiable interest or candidate, it is not easy to envisage any sustained, widespread political organisation forming to advocate them.⁸⁹

Nonetheless, we know, statistically and anecdotally, that there are significant levels of voter disdain for the established political parties, and for the political process more generally.⁹⁰ Perhaps a relaxation on the treatment of campaigning for preference withholding, and a reappraisal of its democratic role, could lead, one day, to an even fairer system — one where every ballot paper has an extra box under the last candidate's name, marked: 'None of the Above'.⁹¹

ELECTRONIC VOTING, SECRET BALLOTS AND THE FUTURE OF COMPULSORY PREFERENTIAL VOTING

There is an as yet unresolved tension between the legal compulsion to vote, the technical right to vote informal, and the systematic discouragement and denial of preference withholding as a meaningful voting choice. Calls for the use of more modern technology⁹² are increasing and the AEC response, that the capital cost would be too great, and that postal votes would still delay final counting and declaration⁹³, will not remain acceptable forever. Comments by members of the public and politicians after each election reveal a high level of frustration at the traditional pencil and paper system of balloting and counting. But the move to computerised or mechanised voting may force the electoral system to face and reconcile the tension between its desire to compel and maximise valid voting, and deliberate preference withholding.

⁸⁹ This is not to deny the relative success of the 'Neither' campaign, although the novelty and controversy it experienced in 1996 are unlikely to be repeated. The only significant campaign one could imagine would have to come from a spoiler figure, *a la* Ross Perot, or perhaps an association opposed to compulsory voting, or coalition of radical right or left wing groups opposed to the hegemony of the Liberal-Labor forces, mounting such a campaign.

⁹⁰ A recent opinion poll showed that a majority of voters are motivated to express a voting preference at elections more because of their disliking of the other parties than a liking of any particular party. See M Gordon, 'Voters Swing Towards Desire to Register Protest', the *Australian*, 16 October 1995. This phenomenon has been linked to negative campaigning, and the phenomena of the protest vote, where traditional supporters of a governing party switch their vote to an opposition grouping, not out of any desire to see the latter elected, but to protest the inadequacy of the government. The electoral system argued for in this paper would open up a more meaningful sort of protest voting, where those who wish to withhold preferences (including informal voters) to express dissatisfaction with certain candidates, all the candidates, or the system of elections itself, could be informed, encouraged, and their votes statistically analysed so that more notice might be taken of their voices by both political parties and the press.

⁹¹ Although only a fledgling democratic process, elections for the Presidency of the Russian Federation allow for such an option. Voters at the July 1996 second round run-off between Boris Yeltsin and Gennady Zyuganov were able to choose a box rejecting both candidates. If a plurality of votes cast had rejected both candidates, fresh elections would have been called no sooner than a month later.

⁹² Voting machines and/or computerised voting apparatus.

⁹³ J Mahoney, Assistant Commissioner, Information and Education, AEC, 'Computer Voting: Don't Count on It!', *The People's Say*, op cit (fn 28) 43-44.

One of the advantages of such technology is the prospect of eliminating inadvertent informal votes, which are wasted expressions of preferences actually held. The voting machine would instantly reject the vote, alerting the voter to try again. But would such machines also allow a voter to deliberately enter an informal vote? If not, such voters would be denied what is presently their secret option (thanks to the process of secret balloting, where votes are not counted until well after they are made), or be stuck in an endless quarrel with a machine telling them 'your vote is not valid, try again'. The same problem would occur with respect to '1,2,3,3' voting. Thus the advent of new technology will force the AEC to confront an issue which our electoral law and practice has tended to evade: the conscious snub of the voter who objects to the undemocratic demands of a compulsory preferential voting system. This brave new world may not be far off — the TAB in Queensland is likely to take a proposal for the use of its computer network to the Queensland Electoral Commission in 1996⁹⁴.

Whether the end of paper ballot voting procedures is a welcome one or not, and whether it forces the electoral system to re-confront the relatively hidden practice of preference withholding, and the issue of optional preferential voting and deliberate informal voting, it may also see a loss of something cherishable. Anyone who has been a scrutineer or polling official knows the simple joy of encountering, amongst thousands of neatly numbered ballot papers which diligently follow party how to vote cards, a ballot paper on which is scrawled the words '1 — Donald Duck' or 'Aggro for PM'. (Lest this sound too flippant it is worth noting that in 1989, Judge Harrison L Winter of the United States Court of Appeals announced that 'under "appropriate circumstances" a write-in vote for Donald Duck would be constitutionally protected as an exercise of a citizen's right to vote'⁹⁵!)

POSTSCRIPT

Whilst this article was going to press, the Joint Standing Committee on Electoral Matters released *The 1996 Federal Election: Report of the Inquiry into the conduct of the 1996 Federal Election and matters related thereto*. It recommends the repeal of ss 270(2), 329(3) and 329A of the Act, and the amendment of s 240 of the Act to provide for full preferential voting by not saving votes with repeated numbers. If adopted by Parliament, these recommendations will be a victory for free speech, but not for the ideal of freedom of elections which preference withholding entails.

⁹⁴ C Johnstone, 'A Vote For Change', the *Courier-Mail*, 11 December 1995.

⁹⁵ D Perney, 'The Dimensions of the Right to Vote: the Write-In Vote, Donald Duck and Voting Booth Speech Written-Off', (1993) 58 *Missouri Law Review* 945. Perney notes that the broad parameters set by decisions such as Judge Harrison's in *Dixon v Maryland State Admin Bd of Election Laws* (1989) 878 F 2d 776, 785 were 'eased back' in *Burdick v Takashi* (1991) 937 F 2d 415.