In defence of voting neither

Albert Langer spent polling day in jail on a charge of contempt after encouraging voters to place the two major parties equal last on their ballot papers. Here, he ponders the future of free expression in Australia.

The 'landslide' 5-6% swing from ALP to Coalition on 2 March, 1996 was less significant than the 600-700% swing from either to neither. More than 50,000 voters explicitly rejected both ALP and Coalition candidates. They cast formal votes for alternative candidates who had no chance of winning, but refused to endorse either the ALP or the Coalition governing Australia, by giving equal last preferences to both. Many others deliberately voted informal.

I was imprisoned from 14 February to 7 March, by orders of the Supreme Court of Victoria, upheld by the Full Court of the Federal Court of Australia, based on sections 240, 329A and 383 of the *Commonwealth Electoral Act 1918* (CEA). Section 329A prohibits publications encouraging voters to 'fill in a ballot-paper otherwise than in accordance with section 240' and s 383 provides for injunctions.

> 240. 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 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.

On 20 February the Full Court of the High Court, in *Langer v Commonwealth,* published its reasons for deciding that s 329A is valid. According to McHugh J:

> A ballot paper that gives the same number to more than one candidate is in breach of the directions that [s 240] addresses to the voter [...]
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> I cannot accept the plaintiff's argument that the voter would not be marking 'his or her vote on the ballot-paper' within the meaning of s 240 if the voter indicated a preference for a candidate for whom the voter did not wish to vote. The object of s 240 is to require the voter to indicate an order of preference for each candidate and the section plainly regards such an indication of preference as a vote. Whether or not the voter wishes to give a candidate a preference or vote is irrelevant. [...]
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> The plaintiff made it clear that he did not oppose compulsory voting in the sense of compelling a voter to attend a polling booth and place a ballot paper in the ballot box. His complaint is that s 24 of the Constitution prevents the Parliament from requiring an elector to record a preference for a candidate against whom the voter wishes to vote and s 240 is therefore invalid if it requires a voter to record a preference for a candidate against whom he or she wished to vote.
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> Even if, contrary to my view, s 240 does not always require a voter to express a preference for a candidate against whom he or she wishes to vote, it is clear that in some cases it does so. Thus it plainly requires a voter to give a first preference vote to a candidate even if he or she does not wish to vote for any candidate. [...]
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> Nothing in s 329A prevents the plaintiff or anybody else from arguing that the system set up by Pt XVIII is unfair, undemocratic, an attack on conscience, or riddled with inconsistencies and absurdities. [...]
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> In my opinion, s 240 does not breach s 24 of the Constitution by requiring a voter to record a preference for a candidate that he wishes to vote against. [...]
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> Those words ['directly chosen by the people'] were not intended to confer a personal right on each elector to vote for the candidate of his or her choice. [...]
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> They do not confer individual rights on electors. The 'rights' conferred by the section are given to 'the people of the Commonwealth' - not individuals [...]

The media focussed on my imprisonment, not on the 'two party system' that resorted to such ridiculous measures. But that system is now 'controversial' and will soon be recognised as 'absurd'.

Less than a week after polling day, the same Federal Court of Australia that had upheld the injunction used to imprison me for 'contempt' urgently reconvened. The main grounds for appeal were:

> My imprisonment is a direct attack on the sovereign prerogative of the Australian people to choose freely their representa-

tives in both houses of the Parliament of the Commonwealth.

If the construction placed on sections 240, 268, 274 and 383 of the *Commonwealth Electoral Act 1918* is correct then those provisions are beyond the power of the Parliament of the Commonwealth as candidates elected pursuant to the Act would not be representatives directly chosen by the people in free elections as required by the Constitution.

The concept of a court having power to enforce enactments which Parliament has no power to enact is as absurd as the concept that Parliament has power to require electors to vote in favour of candidates they reject. This nonsense could only be taken seriously in connection with a plea of insanity as a defence to a charge of criminal interference with political liberty.

I argued that if any Australians hold a *bona fide* belief that any law does or could prohibit encouraging electors to vote against candidates they reject, they could not possibly be employed as electoral officers or judges. The Court declined to admit that they were guilty of the crime of 'interference with political liberty' prohibited by the *First Statute of Westminster 1275* and s 28 of the *Crimes Act 1914*. But they exercised their discretion, if not their valour, by ordering my immediate release after serving only 3 weeks of a 10 week sentence.

The sentence was not 'manifestly excessive', but 'manifestly futile'. The Coalition Government had already promised to repeal s 329A, although they unanimously voted for it, together with the Democrats, when it was first introduced by the ALP.

One party systems survive only by killing their opponents. A two party system that puts its opponents in prison and then has to immediately release them after continued public defiance of the solemn pronouncements of its highest courts may be twice as good. But it has about the same prospects of survival as the East German regime did once the Soviet Union announced it would not send tanks.

The real breakthrough was not my (predictable) stand, but that a number of Green and independent candidates also defied intimidation by the Parliament, Electoral Commission and Courts of Australia. They too published 'How to Vote' cards encouraging voters to put the ALP and Coalition equal last, and nobody dared to send them to prison as well. Although most of the Green leadership was successfully intimidated this time, they are likely to recommend a vote against both the parties that exclude them from representation at the next general election. The Democrats may drag their feet, but will end up having to take the same position. So will most of the other minor parties and independents.

The Coalition may try to abolish compulsory voting, so that many opponents of both major parties will not vote at all in future. But the most likely short term outcome is compulsory optional preferential voting. The usual 'two party preferred' result is 50-55% for the winner and 45-50% for the loser. Next time it may be 40-45% for the winner and 35-45% for the loser, with the remaining 10-25% clearly unrepresented in the House of Representatives. That would trigger an unstoppable demand for Proportional Representation.

Although the number of Australian voters conscious that they are deliberately excluded from representation is still very small, it has now reached a 'critical mass'. The 'Neither!' campaign was overwhelmed with support and is now establishing a national organisation.

We **do** have freedom of expression in Australia. Not because a 'radical activist' High Court reads 'implied rights' into a Constitution, nor because a 'visionary' ALP Government signed international human rights treaties and would be delighted to bestow a Republic and a 'Bill of Rights' upon us if only we would let it. We have rights because we exercise them and will not submit to arbitrary orders, whether from Parliaments, Electoral Commissions or Courts.

The mass media about which we have so much 'communications law' does nothing to protect those rights. Its legal victories such as the *Political Ads* case proclaim only that the law, with magnificent impartiality, permits rich and poor alike to pay Murdoch *et al* to be allowed to use their licensed mass media. But we have also always had an unlicensed media, even when NSW was still a prison colony under a military governor. The biography '*Sir Francis Forbes: The First Chief Justice of the Supreme Court of New South Wales*' describes what happened to Governor Darling when he tried to stamp on fundamental rights through legislation 'repugnant to the common law'. Something similar could now happen to the proprietors of the 'elective dictatorship' that has been established contrary to the Constitution.

What we **don't** have is a representative legislature open to the diverse viewpoints in Australian society. We have democratic elections every few years to decide which of two parties will run the Executive government with a rubber stamp legislature. That isn't what the Constitution requires, as I explained in another ground of appeal:

> The determination ... that each State shall be arbitrarily divided into single member electoral divisions is not a 'law for determining' authorised by the Constitution but a 'determination' made by the members of the political parties that benefit from that determination. Consequently the Constitu-

> tion requires that elections .... be held with each State voting together as one electorate in the absence of other valid provisions... Consequently it is not possible to breach any order concerning voting at an election that was not validly held.

Nor is a 'two party' legislature what the people want. In New Zealand 85 per cent of voters recently rejected the use of single member electorates designed to force voters to ultimately choose between two major parties. The next election there will establish a multi-party system with PR. All European Union countries except Britain already have PR and the British Labour party, likely to be the next government, is committed to PR.

Australia will soon catch up. Already 65 per cent of ACT voters rejected single member electorates in favour of PR. An overwhelming majority of Australians refused to endorse the Parliament's definition of what amounts to 'fair and democratic elections' in the 1988 Constitutional referendum.

Most of the High Court concluded that the refusal of electors to endorse any Constitutional referendum proposed by Parliament at all permitted a wider role for the High Court, as a substitute for a representative legislature in maintaining checks and balances on the Executive power. In fact the High Court is held in much the same esteem as the legislature. The real check and balance to Executive power is refusal to 'cheerfully obey our parents, teachers and the laws'. That is what wrecked conscription during the Vietnam war, that is what has already wrecked conscription of voters to endorse candidates they reject, and that is what will eventually wreck the two party system.

Section 270 of the CEA specifies how to count ballot papers that are not formal according to sections 240 and 268 as far as possible. In *Langer v Commonwealth* the Solicitor-General for the Commonwealth (SG) argued that s 329A was intended to prevent voters being encouraged to exploit the savings provisions of s 270 to subvert the system established by s 240.

I did not rely on s 270, but on the absence of any explicit prohibition of assigning an equal last preference to candidates rejected by voters in s 240. When a voter rejects more than one candidate, 'the case requires' giving more than one candidate an equal last preference, or the vote would be counted in favour of a candidate who was in fact rejected by the voter.

I argued that there must have been some means by which voters could indicate which candidates they rejected under s 240 in the period from the introduction of compulsory preferential voting in 1919 to the addition of s 270 in 1983, or s 240 would have been invalid. The provision for supplementary elections in case no candidate received an 'absolute majority' under s 274(7)(d)(iii) would be meaningless unless such votes were accepted as indicating the 'order of the person's preference'.

The Court refused to hear argument on the validity of s 240 as the Question Reserved was about s 329A only. However an equivalent provision in s 76 of the South Australian *Electoral Act 1985* was challenged at the same time in *Muldowney v South Australia* and the Court has not yet given its decision on that. The main argument there was as follows:

> Perhaps in the former police states of Eastern Europe a citizen could be expected to know that the words 'order of the voter's preference' mean the exact opposite of what they say, and that voters are expected to vote for candidates whether or not they choose them as their representatives, or that they will be 'deemed' to have done so. But no Australian could know that. No Australian could be expected to know from reading either s.126(1)(b) of the Act, or s.329A of the CEA, that it is supposed to be a crime to encourage or publicly advocate that voters mark their ballot papers in accordance with their own order of preference for the candidates they actually choose or reject.
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> Countries that actually have such edicts do not use the drafting techniques of our Electoral Acts. If Australia was such a country, the concept the SG puts forward would be expressed by a general offence related to 'anti-Soviet propaganda' or 'subversion of State interests' or 'hostility to the will of the people'.

The Full Court of the Federal Court of Australia has endorsed McHugh's view. But none of the other four members of the High Court majority that upheld the validity of s 329A have explicitly stated that the use of repeated numbers is not permitted by s 240, nor was the validity of s 240 before them.

McHugh's position is certainly consistent with the view that the CEA is 'unfair, undemocratic, an attack on conscience, or riddled with inconsistencies and absurdities'. Whether the High Court will ultimately determine that a valid 1996 general election was held under such legislation remains to be seen.

Meanwhile I still stand convicted for 'contempt' and face heavy legal costs. I have applied for Special Leave to Appeal to the High Court. Urgent assistance from anyone interested in joining the legal team working on this or helping with other research etc would be most welcome, as would donations.

Please contact 'Neither!' at PO Box 1288, North Fitzroy 3068. Phone (03) 9482 1239. More information will soon be at **http://www.aardvark.apana.org.au/~albertl** on the unlicensed World Wide Web of the Internet. ❑