Chapter Three
When "Maybe" means "No"

Hon Justice Kenneth Handley, AO

Immediately before the referendum on the Republic, which was held on 6 November, 1999, I had a close look at the voting provisions in s.128 of the Commonwealth Constitution to see if there was any point that could be taken on behalf of Australians for Constitutional Monarchy in the event of a cliff hanger result. As they say, the rest is history, but I have been asked by the Society to share with you what I discovered. I should first mention that although the absolute majority for the "No" case was 1,137,763, some 602,272 electors did not vote at all and another 101,189 recorded informal votes.

The relevant part of s.128 is short and, in my view, reasonably clear. It reads as follows:

> "And if in the majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's Assent".

It is clear then that the relevant majorities approving a proposed law, if the referendum is to be carried, must be "of the electors voting". Voting in a referendum is compulsory, but clearly those electors who ignore their duty to vote are excluded from the relevant calculations. But what of those electors who did obtain ballot papers and placed them in the ballot boxes whose votes were informal for some reason?

It seemed to be that an informal vote is, as the expression itself indicates, nevertheless, a vote. The fact that it is informal means that it cannot be recorded as either a vote of approval or as a vote of disapproval. Nevertheless, it seems on the language of this part of s.128 that informal votes had to be counted in order to determine whether "a majority of all the electors voting approved" the law.

Quick and Garran's *Annotated Constitution of the Australian Commonwealth* published in 1901 is not particularly helpful on this point. The authors simply state at p.992 that "more than half the electors voting must vote yes". The authors also referred to the cognate provisions in the Constitution of Switzerland, which required the approval of the majority of the electors to amend that Constitution. This is a more demanding requirement than that found in s.128 of our Constitution, as can be demonstrated by a simple example.

Assume that in Switzerland and Australia there were 12 electors, 6 of whom voted in favour of the referendum, 4 voted against it, and 2 failed to vote. The referendum would be lost in Switzerland because the 6 votes in favour did not constitute a majority of the electors, but the referendum would be carried in Australia 6 votes to 4 on the votes actually cast.

Thus under the Swiss Constitution, at least in its form in 1901, electors who failed to vote, or who voted informal, were effectively voting "No". The founding fathers were aware of the referendum provisions in the Swiss Constitution and they clearly rejected its requirement for approval by a majority of the electors. Under s.128 electors who fail to vote are ignored in the tally. On the other hand, it seems to me from the text of the section that informal votes, the "Maybe" in the title of this talk, cannot be ignored and are effectively "No" votes.

A search of the legal dictionaries brought to light the decision of the Court of Session in Scotland in the case of *Latham v. Glasgow Corporation*, [1921] SC 694. The case arose under the local option provisions in the *Temperance (Scotland) Act* 1913. Section 2(3) of that statute provided that a no-licence resolution, or a limiting resolution, put to the electors in a local government district should be deemed to be carried if certain percentages of "the votes recorded"

were in favour of the resolution. The Act provided in effect for a mini-referendum to determine whether there should be no licensed hotels in a local government district, or no more than a particular number. The Lord President, the equivalent of our Chief Justice, said at 712-3:

> "What is the meaning of the expression 'votes recorded'? According to one contention 'votes recorded' are those ballot-papers which, when submitted to the Returning Officer at the count, are passed by him as good and effective votes. If this contention is correct, spoilt ballot-papers, which the Returning Officer rejects at the count as either unmarked, or as marked ineffectually, are excluded in the computation of the statutory proportions. The other view is that by 'votes recorded' is meant all votes in the form of a ballot paper put into the ballot-box by a voter in the exercise of his right or duty to vote. If this view is the right one, it matters nothing whether on examination the vote so recorded turns out to be 'spoilt', because the ballot-paper is unintelligible to the Returning Officer or – not being marked at all – is purely neutral and ineffective. Between these two views we have to decide …
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> "I think a voter records his vote when he puts his ballot-paper into the ballot-box; and I do not think it is material that, owing to carelessness or ignorance, or inexperience he has failed so to mark his ballot-paper as to make the vote he thus 'records' an effective exposition of his opinions. Moreover, having regard to the requirement of certain proportions and majorities of votes contained in sub-section (3) of section 2, I have difficulty in construing that sub-section on any other basis than that those proportions or majorities relate to the total number of persons who come and exercise their privileges at the poll, whether those privileges have been exercised effectively or ineffectively.
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> "The view which the Lord Ordinary (the trial judge) took was that 'votes recorded' meant ballot-papers passed by the Returning Officer at the count. For the reasons stated, it seems to me that this view is unsound".

A computer search through case law databases for any later decision in which *Latham v. Glasgow Corporation* has been considered proved fruitless.

We are therefore left with the text of s.128 and this Scottish decision. Different minds may reach different conclusions on the question, but I find it hard to get away from the description of an informal vote as a vote. Section 45 of the *Referendum (Machinery Provisions) Act* 1984 makes voting at a referendum compulsory. I ask you this rhetorical question: "could a voter who voted informal be prosecuted for failing to vote?".

I raised the question with Professor Flint prior to the referendum and at that time in all events he seemed to think the point a good one. He raised the matter in correspondence with the Electoral Commissioner, who would not accept the point. Needless to say, we did not take the matter any further, and for the time being there the matter rests.

The point could be critical in a future referendum if there were cliff hanger results in the nation or in particular States. If the question were to come before the High Court, some of the Justices might wish to avoid a decision which would make it harder to get a referendum passed. Some of them may be tempted to read in, or imply, the word "validly" before voting. However, words should not be read into a Constitution where the text is clear, and the provision in question is workable as it stands.

In my opinion there is no justification for reading into s.128 any requirement that the votes must be valid.