

**Extract from the Southern Cross Group's Submission to the
Australian Department of Immigration and Multicultural Affairs of
6 July 2001**

5. THE RIGHT TO VOTE AND OVERSEAS AUSTRALIANS

Recommendation 9: The Southern Cross Group recommends that Sections 94 and 94A of the *Commonwealth Electoral Act 1918* be amended so that all Australian citizens overseas have an unqualified right to vote and thereby participate in the Australian political process which results in laws to which they are subject.

The right to vote is one of the privileges attached to citizenship. In theory, the Australian people elect the Australian Parliament, and as such the provisions of the *Australian Citizenship Act 1948* should be viewed as a democratic expression of the will of the Australian people. With regard to Section 17 of the Act, however, it is strongly submitted that those Australian citizens who have been or are in fact directly impacted by the provision do not currently enjoy adequate democratic representation at the Australian ballot box.

Only 65,086 votes were issued in the 1998 Federal Election to the some 820,000 Australians currently estimated by the Department of Foreign Affairs and Trade to be living and working overseas.⁷¹ Even fewer overseas Australians participated in the 1999 Referendum on the Australian Republic.⁷²

While it is not compulsory for an Australian citizen to vote while overseas, and bearing in mind the fact that not all Australians overseas are 18 years or over and therefore not all would qualify to vote even if they were in Australia, the Southern Cross Group nevertheless believes that serious numbers of Australian citizens living overseas are unjustly disenfranchised as a result of Sections 94 and 94A of the *Commonwealth Electoral Act 1918*.

The SCG notes that amendments to the *Commonwealth Electoral Act 1918* were introduced just prior to the 1998 Federal Election, which made enrolment to vote from outside Australia possible for the first time. This probably explains why significantly greater numbers of overseas Australians voted in 1998 than in 1996, when only 47,698 votes were issued to Australians abroad.⁷³ The increase in

⁷¹ Figure from the Australian Electoral Commission's 1998 Federal Election Report at www.aec.gov.au/results/1998/report/appendix.htm.

⁷² Note that conflicting figures are provided on the Australian Electoral Commission's website in its 1999 Referendum Report: in the text of the Report itself it is stated that a total of 53,874 votes were issued overseas, whereas in the Appendix it is stated that 57,955 votes were issued overseas. See www.aec.gov.au/referend/report_stats99/.

⁷³ Figure from the Australian Electoral Commission's 1998 Federal Election Report at www.aec.gov.au/results/1998/report/. Note however that the AEC has also reported that the number of

overseas voting in 1998 is probably also at least partly attributable to the fact that unprecedented numbers of Australians have left Australia to live and work overseas in the last few years.

While the 1998 amendments to the *Commonwealth Electoral Act 1918* brought about a long-overdue partial extension of the franchise for overseas Australians, further amendments are needed to achieve an unqualified right to vote for all overseas Australians. Australian citizens overseas who are currently ineligible to vote under the law have had this basic political right removed in the same way as people who are incapable of understanding the nature and significance of enrolment and voting, prisoners serving a sentence of five years or more, and people who have been convicted of treason and not pardoned, other groups which the Australian legislature currently sees fit to disenfranchise.⁷⁴

5.1 Australia's International Obligation to Ensure Australians the Right to Vote

The Southern Cross Group points out that Article 25 of the International Covenant on Civil and Political Rights obligates Australia to ensure that:

Every citizen shall have the right to vote and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

It is submitted that the current restrictions on registration as an overseas voter and on enrolment from outside Australia are not "reasonable" and therefore are in violation of Australia's international obligations under this treaty. Those restrictions are examined in detail below.

As outlined under heading 2.3.2 above, Australia's ratification of the First Optional Protocol to the ICCPR means that it would be possible for an individual to bring a complaint to the Human Rights Committee if they believed that their

Australian electors who actually voted overseas in 1996 was 46,307: Australian Electoral Commission, Supplementary Submission to the Joint Standing Committee on Electoral Matters, AEC Responses to JSCEM Inquiries of 2 May 1997, Canberra, 7 May 1997, at para. 2.12.2.

⁷⁴ *Commonwealth Electoral Act 1918*, Section 93(8).

right to vote under Article 25 was being infringed by the current restrictions in the *Commonwealth Electoral Act 1918*.

It is also noted that Article 41 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the United Nations General Assembly in 1990, provides in Article 41:

1. Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.
2. The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.

Australia has not yet ratified this Convention, and it is not yet in force. However the international community has accepted this important principle.

5.2 Unreasonable Restrictions on Registration as an Overseas Voter

5.2.1 Intention to Resume Residing in Australia within Six Years

An Australian citizen who is already on the Electoral Roll and moves overseas cannot apply to be treated as an eligible overseas voter unless they intend to resume residing in Australia not later than 6 years after ceasing to reside in Australia.⁷⁵ This temporal restriction is arbitrary and unfair in that Australian citizens who remain overseas for a period longer than six years do not suddenly cease, after six years, to be any less connected with Australia or engaged in Australian affairs than during their first six years away. As stated in this submission elsewhere, the internet and reduced communications costs mean that Australians overseas today can always remain aware and informed, no matter how long they have been away.

The fact that the 1998 amendment extended this period from three to six years is of little comfort to the hundreds of thousands of Australians who have been away for longer than six years. In addition, the extension from three to six years is simply further evidence of the arbitrary nature of this fixed time period for return. An examination of the information on the public record documenting events which led to the 1998 amendment evidences no discussion or debate as to why the period of six years was chosen as appropriate, or why six years should be a more desirable time limit than any other period.

⁷⁵ *Commonwealth Electoral Act 1918*, Section 94(1)(c).

Although it is possible to have one's status as an overseas elector extended by one year at a time beyond the initial six years, the mechanism for doing this is clumsy and unlikely to be properly understood or known about by overseas Australians, and therefore the opportunity for extension will in many cases be overlooked.⁷⁶

5.2.2 Time Limit of One Year After Departure for Application

An Australian citizen who is already on the Electoral Roll when they move overseas has their right to vote unnecessarily restricted in that he or she has a window of only twelve months after leaving the country to make an application to be treated as an eligible overseas elector.⁷⁷ It is submitted that there should be no limitation on the period in which an application can be made. Many Australians who go overseas are simply unaware of this provision and miss the existing window of opportunity for registration because there is at present no concerted effort by the Australian Electoral Commission (AEC) to make departing citizens aware of the rules. Although information is available on the AEC's website, many overseas Australians will not turn to this until an election is imminent, even if they know that the website exists. An Australian departing just after a Federal Election is unlikely to think about the need to register until two or almost three years after his departure, if the Parliament runs its full term. At that stage the one year time limit has long expired.

The SCG notes that the booklet *Hints for Australian Travellers* contains the brief advice that Australians who are considering a lengthy absence outside the country should consider informing their electoral office. Although this booklet is issued free with Australian passports and sometimes through travel agents and is available for sale in AusInfo bookstores for a nominal price, the information contained therein is too brief to be useful. Furthermore, Australian passports are generally valid for ten years, and a person may have long since mislaid the booklet they were issued some years before when making a new overseas trip.

5.3 **Unreasonable Restrictions on Enrolment from Outside Australia**

5.3.1 Reasons for Moving Overseas

An Australian citizen who moves overseas and is not already on the Electoral Roll can now apply for enrolment from outside Australia.⁷⁸ However, the application form requires the person to declare that they are "living outside Australia for reasons related to my career or employment, or that of my spouse".

⁷⁶ Commonwealth Electoral Act 1918, Section 94(8).

⁷⁷ Commonwealth Electoral Act 1918, Section 94(1B).

⁷⁸ Commonwealth Electoral Act 1918, Section 94A(1).

The reasons for a particular Australian's absence overseas are irrelevant, and this restriction on enrolment fetters the right to vote and in addition conflicts with the basic human right of an individual to leave their country at any time, for any reason.⁷⁹ An Australian citizen should not be prevented from voting just because they have gone overseas for an extended holiday, for example.

The SCG also notes that this restriction is only applied to those who leave the country without being on the Electoral Roll. An Australian who leaves Australia already on the Electoral Roll is entitled to register as an overseas elector regardless of their reasons for moving overseas. This discrepancy results in unequal treatment between groups of overseas Australians.

5.3.2 Time Limit of Two Years After Departure for Enrolment

For those seeking to enrol from overseas, the application for enrolment must be made within two years of leaving Australia.⁸⁰ For the same reasons that the one year window for making an application as an overseas elector is not acceptable, this two year time limit is also unacceptable.

5.3.3 Intention to Resume Residing in Australia within 6 Years

This restriction is the same as that which applies to those already on the Electoral Roll when they leave Australia, and its inappropriateness is discussed above in that context.

5.4 **Exclusion of Overseas Australians from the Franchise on the Basis of Irrational and Irrelevant Criteria**

Australia's international obligations to guarantee equal treatment under the law to different groups have been discussed above. In the context of voting rights for expatriates, it is apposite to note that not only does Article 25 of the ICCPR come into play, but Article 26 could also be used to mount the argument that the time limitations for applications, a person's length of time abroad, and their reasons for being overseas are all irrelevant reasons for denying large numbers of Australian citizens overseas the vote.

A formal equality approach means that no account should be taken of morally irrelevant or invidious grounds of past discrimination. Artificial barriers which impede some individuals or groups, such as the previous exclusion of Aborigines

⁷⁹ International Covenant on Civil and Political Rights, Article 12(2).

⁸⁰ *Commonwealth Electoral Act 1918*, Section 94A(2)(b).

from the vote until 1962 in Western Australia and 1965 in Queensland, or the past exclusion of women from university medical schools and from the practice of law until the early twentieth century, have to be removed.⁸¹ The restrictions on the right to vote for Australians overseas outlined above are irrational and irrelevant criteria which discriminate between Australian citizens and amount to artificial barriers which impede the exercise of a fundamental right.

5.5 Comparison with United States Arrangements for Overseas Voting

Australia fares poorly when the provisions discussed above and the lack of measures currently undertaken by the AEC to help Australians overseas exercise their right to vote are compared with the arrangements in place in the United States which ensure that expatriate Americans can exercise their fundamental right to vote.⁸²

The law on overseas voting for US citizens is found in the *Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)* of 1986. This is administered by a special federal agency, the Federal Voting Assistance Program (FVAP). Its goals are to:

- inform and educate US citizens worldwide of their right to vote;
- foster voting participation;
- protect the integrity of, and simultaneously enhance, the electoral process at the Federal, State and local levels.

The FVAP provides US citizens worldwide a broad range of non-partisan information and assistance to facilitate their participation in the democratic process - regardless of where they work or live, and regardless of how long they have been away from the United States. The FVAP provides toll free telephone numbers for US citizens in more than 55 countries.

The United States *National Voter Registration Act* of 1993 was specifically enacted to establish procedures to increase the number of eligible citizens who register to vote in elections for Federal office. In passing this legislation, Congress found that:

⁸¹ Elizabeth J Gaze, "Equality and the Rule of Law" in *Human Rights in Australia* loose leaf, The Law Book Company, 1994, para. 21.10, p. 11.

⁸² Note that the United Kingdom does not allow its overseas citizens to vote forever, but in 1989 it enacted legislation to allow the right to vote for up to 20 years after the person moves overseas: Representation of the People Act 1989.

- 1) the right of citizens of the United States to vote is a fundamental right;
- 2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and
- 3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

A US national resident overseas may vote as long as they are over the age of 18. Unlike Australia, the United States does not restrict the right to vote of its expatriates based on registration limitations or the length of time a person has lived away, or the reasons for which they are outside the United States. The only way in which a United States citizen can lose their right to vote is to be convicted of a felony or found mentally incompetent by a court.

The FVAP looks after more than six million potential overseas voters. It estimates that there are approximately 190 million US citizens of voting age in total. Eligible overseas voters comprise only around 3 percent of all voters but the measures which the US government has in place to make sure these people can exercise their fundamental right to vote are extensive.

The Australian Electoral Commission's mission is supposedly "to provide the Australian people with an independent electoral service which meets their needs, and which encourages them to understand and participate in the electoral process". Even leaving aside the legal restrictions which the Australian Parliament has imposed on the right to vote for overseas Australians, the Southern Cross Group submits that the AEC's mission is simply not being adequately fulfilled with regard to overseas voters at present. Concrete and active measures should be implemented to encourage overseas Australians to exercise their right to vote and help them better understand the formalities they must adhere to in order to be able to exercise that right.

5.6 The Extent to Which Overseas Australians are Disenfranchised

As at 31 May 2001, 12,529,579 persons were on the Electoral Roll in Australia. The Southern Cross Group has no information as to how many of these individuals are registered as overseas electors.⁸³ Logically, that number would be in excess of the number of votes issued overseas in the 1999 Referendum, as some registered overseas electors would have chosen not to vote at that time since voting is not compulsory for overseas Australians.

⁸³ The Southern Cross Group made several verbal and written requests to the AEC asking if this figure could be supplied. As at the date of this submission, no information had been forthcoming.

DFAT figures indicate that there are approximately 820,000 Australians overseas. Of these, approximately 615,000 would be 18 years of age or over, and therefore eligible to vote if they were resident in Australia.⁸⁴ The fact that only 65,086 of these 615,000 had votes issued to them in the 1998 Federal Election is a crude indication of the extent to which overseas Australians are presently disenfranchised by the *Commonwealth Electoral Act 1918*.⁸⁵ The Southern Cross Group estimates that in the order of a half a million Australian citizens may be disenfranchised by the unreasonable legal restrictions on registering as an overseas voter and applying from overseas to enrol, coupled with the insufficient administrative measures in place to publicise the current rules on overseas voting and facilitate overseas voter participation.

The SCG is of the opinion that this extraordinary level of disenfranchisement lies at the heart of why, despite successive reviews over a number of years which have concluded that Section 17 of the *Australian Citizenship Act 1948* was no longer appropriate, the provision remains to this day on the statute books.⁸⁶ If any government had to reckon with an additional 500,000 voters in the next election from overseas, would Section 17 still be on the statute books next election day?

Just as citizenship is not constitutionally protected in Australia, the inadequate protection afforded to the fundamental right to vote under the Australian Constitution as interpreted by the High Court means that the Australian Parliament is able to exclude from the franchise a significant percentage of its citizenry.⁸⁷ The right to vote is the most fundamental of democratic rights, and a right which is indeed one of the privileges of Australian citizenship. Australia's international obligations dictate that this privilege of citizenship should only be curtailed in reasonable circumstances. It is ironic that around half a million overseas Australian citizens have already lost this privilege of citizenship as they struggle to have a provision repealed which may strip them of their Australian citizenship. Even if Section 17 is repealed, the value of Australian citizenship is severely diminished for overseas Australians, while ever the right to vote for most of them is absent.

⁸⁴ Approximately 25 percent of the Australian population is aged under 18. Without more detailed information, we are assuming that approximately the same percentage of overseas Australians would be minors.

⁸⁵ We have no way of knowing how many overseas Australians would currently be entitled to enrol from overseas or register as overseas electors from overseas but simply do not chose to exercise that right. It is impossible to estimate how long the average overseas Australian has been resident outside Australia.

⁸⁶ For a discussion of the various reviews of Section 17, see Kim Rubenstein, "Let's face it, today we're citizens of the world", *The Australian*, 22 May 2001.

⁸⁷ Anne Twomey, "The Federal Constitutional Right to Vote in Australia", *Federal Law Review*, v 28 no 1, page 125; Davidson, Op cit, Chapter 7. Also Alastair Davidson "Democracy and Citizenship" in Wayne Hudson and John Kane (eds), *Rethinking Australian Citizenship*, Cambridge University Press, 2000, pp. 45-55.

The question must be asked whether it is appropriate or acceptable to exclude from the Australian franchise a group of Australian citizens which is probably more extensive in numerical terms than Australia's indigenous population. The fact that hundreds of thousands of expatriate Australian citizens do not have the right to vote for those that continue to govern them and enact the laws which they are subject to despite their physical presence outside Australia's territorial boundaries must be a matter of deep concern to all Australians.

Section 17 of the *Australian Citizenship Act 1948* is a prime example of a law which applies to Australians outside Australia's territorial boundaries, and yet the severely diminished political voice of those Australians most immediately affected by the provision has to date been ignored. Overseas Australians are the object of governance, just as Australians in Australia are the object of governance. Expatriate Australians should be able to legitimately assert claims against those that govern them. From Aristotle to the most up-to-date of theorists of democratic citizenship, there has always been a wide acceptance that it is the vote, in the long run, that guarantees all other rights.