Chapter Seven

One Vote, One Value : Electoral Fraud in Australia

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The phrase, `one vote, one value' was not a common catch-cry in Australia until this Century, being more appropriate once adult suffrage became universal. Its predecessor, `one man, one vote', implied a demand for adult suffrage to be universal; and, as such, was advanced by the London - born South Australian delegate, Dr Cockburn, at the 1891 Australasian Convention as an imperative for constitutional referenda and the federal franchise. His hope was realised in the Commonwealth Constitution by 1900.

Since 1900, the phrase `one vote, one value' has been given three common interpretations. The first was that the numbers of electors within electorates should be as nearly as possible equal, and thus deliver the nearest possible equality of voting. The second (in effect, a particular variant of the first) was that there should be no rural `zoned' electorates with a much smaller number of electors compared to urban areas, called `weighted' electorates by critics who considered them unfair. The third is that the Senate should not be weighted towards smaller States.

The desire to achieve `one vote, one value' was not exclusive to one side of politics. Perceived fair redistributions have been pursued by both sides. `Zoned' electorates have been created by both sides.

The phrase `one vote, one value' has never been given a fourth interpretation, which is worth consideration; namely, that if electoral fraud exists to the degree often either proved, or claimed, throughout this Century, then the value of votes cast is depreciated to the degree to which it occurs. If this is conceded, then the role of Courts of Disputed Returns, their viability and limitations in considering disputed elections and returns, and in exposing fraud and manipulation, become of considerable importance.

Parliaments as Courts of Disputed Returns

Our electoral history astonishes us today, in that legal courts were not the preferred means of deciding disputes in parliamentary elections for at least half the constitutional life of our major States; the last of the alternative forums for resolution of such disputes only disappearing in 1961. Provision for parliamentary resolution of electoral disputes was written into the Colonies' original Constitutions, following then current practice in the Mother Parliament. In each, a non-party Committee of Parliament, an Elections and Qualifications Committee, nominated by the Speaker of the House with each new Parliament, sat on all such matters, acting in commonsense and good conscience without legal technicalities to deliver `real justice'.

These Committees, surprisingly, seem to have done so, judging by the many testimonies from eminent politicians scattered through Hansard, opposing occasional moves to remit this `right and privilege' to sole judges of legal courts, as the British House of Commons had done in 1868, and then two judges in concert in 1879. They argued that courts might be too narrow, too costly, too orthodox as to onus of proof, too lacking in the experience of the subtleties and perplexities of political life, and too partisan from the close associations inevitable in colonial life.

Sir Samuel Griffith on Judges as Courts of Disputed Returns

When Sir Samuel Griffith rose in the Queensland Parliament as Premier on July 20, 1886, to introduce a Bill to transform its existing Elections and Qualifications Committee into what he

now called an Election Tribunal, he was firmly opposed to legal courts acting as Courts of Disputed Returns, instead of Parliament.

> "One reason why I have argued against the appointment of a judge to try disputed elections is that judges naturally determine a case according to the strict rules of law; technical rules which would be extremely inconvenient, or might be extremely inconvenient, in regard to matters of this kind, where to get strict legal proof may involve enormous expense. At the present time, the rule is that the Elections and Qualifications Committee `shall be guided by the real justice and good conscience of the case without regard to legal forms and solemnities, and shall direct itself by the best evidence it can procure, or which is laid before it, whether the same is such evidence as the law would require, or admit in other cases, or not.'" [1]

What was meant by best evidence? First, Sir Samuel Griffith considered, as in the law of Scotland, that it would be a `proper thing to receive hearsay evidence as to the matter in dispute so long as it did not affect the character or rights of any man'; this to be left to the discretion of the tribunal assisted by the judge, `the limited wisdom of one judge alone being no substitute for the rough justice and common sense of political experience.' [2]

Secondly, Griffith believed that an election judge should have the right to report to the Speaker `as to any matters arising in the course of the trial of which, in his judgement, an account ought to be submitted to the Assembly', including any corrupt practice which has, or has not been, proved to have been committed by, or with `the knowledge and consent of any candidate', or where `corrupt practices have, or where there is reason to believe that corrupt practices have, extensively prevailed at the election to which the petition relates.' [3]

Griffith devised his world-first model Election Tribunal not only, in his words, `to meet attacks so frequently made' upon the existing Committee, there having been two elections voided over `ballot-stuffings', but also because he thought it could be improved. His explanation was not merely that its members would be from a larger panel of twelve nominees, advanced by the Speaker, than before, but that it would be:

> ".... a Committee of this House, chosen impartially, constituted as a jury and presided over by a judge. It is not exactly a judge or a jury, but it is a Committee of the House presided over by a Judge. It is, in fact, an attempt to combine the systems of a Parliamentary Committee, and of a judge and jury, the judge deciding questions of law and the jury deciding questions of fact."

It would conduct public hearings during parliamentary sessions only.

Sir Henry Parkes on Judges as Courts of Disputed Returns

Unlike Griffith, Sir Henry Parkes, as Premier of New South Wales, had not responded to criticism in 1880 with any reform, when a Bill to refer all disputes hitherto determined at the Bar of the Parliament to legal courts in the future was before the House. He was adamant that there was no evidence the Committee had `inflicted an injustice on any man.' [4] Furthermore:

> "I think it is clear beyond doubt, that if we send election petitions to the Supreme Court a much longer time will be consumed, and a much larger expense imposed on disputants than that to which they are at present subjected; and, if that be the case, it seems to me that the person who can spend the most money, and resort to the forms of law in the most ingenious way by the assistance of eminent barristers, will have the best chance of winning the seat." [5]

Election and Qualification Committees in Federation Debates

The continued existence of Election and Qualification Committees in all State Parliaments but Tasmania was reflected in decisions taken in the 1891 and 1897-98 Australasian Conventions on federation.

In the first Convention, both Sir Samuel Griffith and Sir Henry Parkes played dominant roles, the former as Vice-President; but by the time the second Convention met, Griffith was ineligible, as Chief Justice of Queensland, and Parkes was dead.

In the second Convention, Edmund Barton, one-time Speaker of the NSW Assembly, became a dominating figure,although one of the few delegates who had been neither Premier, nor Minister, in his own Parliament. This was not simply due to the fact that Sir Henry Parkes had insisted that leadership of the federal movement must devolve on Barton, nor even Barton's `proverbial patience' when Speaker of `no calm and decorous house' in New South Wales, but also because of `the breadth and power of his intellect and excellent memory'. [6]

In the first Convention, no case for vacating the powers of these Committees to Courts was argued; in the second, it was not only argued, but a potential or specific vacation of such powers to a future High Court was advanced in two conflicting clauses of the 1897 draft Constitution, Clauses 43 and 50. This was by means of a provisional option for the declared *status quo* in Clause 43, `until the Commonwealth otherwise provides'. But an immediate vacation of powers was projected in Clause 50, in what Barton called, `on the face of it, a very proper provision'.

> "Until the Parliament otherwise provides, all questions of disputed elections arising in the Senate or the House of Representatives shall be determined by a federal court, or a court exercising federal jurisdiction." [7]

According to Barton's fellow delegate from New South Wales, Mr Wise, a deliberate distinction, made between disputed elections and qualifications and vacancies, was seen as one between issues where the rights of the electors were in any way infringed, or any conflict arose as to the claims of any members to represent a particular constituency, and one where the rights and privileges of members were affected.

Barton was backed by the delegates from Tasmania, which had never had such a Committee, but not all from those States which had. However, the Tasmanian delegates were forced to concede that, if Clause 50 were adopted, there would be no body in the first Parliament which could decide any question of a disputed election pending the appointment of a High Court. The clause went back to the Constitution Committee, and emerged, after `very considerable discussion' as a reshaped Clause 43, to become Clause 47 of the Constitution, allowing the future Parliament to decide. [8]

> "Until the Parliament otherwise provides, any question respecting the qualifications of a Senator or a Member of the House of Representatives, or respecting a vacancy in either House of Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises."

Sir George Reid objected that the intent of the original Clause 50 should have prevailed, as Election and Qualification Committees had been discredited in the US Congress and Senate by scandals and outrages; protesting perhaps because hostilities between himself and Barton at that time had degenerated to the level where Barton was standing against Reid in his own seat. To what degree such clashes of personalities affected the Constitution can never be known, including intense dislike between Isaacs on the one hand and Barton and Griffith on the other. But one thing seems clear: Barton's decided preference was for the forthcoming High Court to be sole arbiter of disputed returns.

The `Parliament of Kings' passes the *Commonwealth Electoral Act* 1902

Sir Edmund Barton's presence on the drafting Committee of the first *Commonwealth Electoral Act* , and the fact that he was Prime Minister when it was introduced in the House of Representatives in July, 1902, was undoubtedly reflected in the fact that its Clause 197 read as follows:

> "The validity of any election or return may be disputed by petition, addressed to the Court of Disputed Returns and not otherwise." [9]

The presumption, that there was an implicit definition of the Court of Disputed Returns as being the High Court, was made by Mr Mahon (WA), supported by Mr Solomon (SA) when he moved an amendment to interpret the definition of such a court in favour of an Elections and Qualifications Committee:

> "That the words `court of disputed returns' be omitted, with a view to insert in lieu thereof the words `Clerk of the House affected by such returns'."
>
> Mr Solomon argued that:
>
> "I doubt whether the cause of substantial justice, or the interests of the ordinary candidate who is returned to Parliament, would be served by referring disputes to the High Court instead of to the court of Parliament. I have a very lively recollection of the heavy costs which litigants have been compelled to pay in order to secure justice in the law courts. The law's delays and the law's expense are bywords, and anybody who has once resorted to law will never do so again.
>
> "The fairest tribunal to decide whether an honourable member has been properly elected is one consisting of his fellow-members in the House to which he has been returned. Justice will be more readily and less expensively obtained from such a court than from one composed of men who will view everything from a narrow legal standpoint." [10]

W M Hughes (West Sydney), rising Labor leader, agreed with Mr Solomon:

> "I remember not one case in the NSW Parliament in which an injustice was done, though I remember many petitions of the kind. In one case a colleague of the Minister for Home Affairs, a man brimming over with bias and prejudice, was a member of an Elections and Qualifications Committee, and yet, in spite of all the vehement declamations of that gentleman outside the Chamber as to what he would do to this unfortunate candidate, it was by his casting vote that justice was done to that particular candidate in opposition to the interests of his own party.
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> "Let a man be as partisan as he may be on the floor of the Chamber, when he is clothed with responsibility as a member of a Parliamentary committee he will put aside bias, and will do his very best to secure justice." [11]

Mr Thomson (North Sydney) agreed with Hughes, saying that he had favoured the remission of such disputes to a non-parliamentary tribunal, until he visited England after a general election there and learned the scandalous cost of such appeals. But the Irish barrister H. Higgins (North Melbourne) did not, saying that House of Commons experience proved it was "an unbearable position to have such disputes settled by a Committee of Parliament." [12]

Sir John Quick (Victoria), legal veteran of all the constitutional Conventions, saw no rationale in slavish emulation of the House of Commons:

> "I do not think the time has arrived in the history of the Commonwealth when the Federal Parliament should surrender the power vested in it by the Constitution to deal with questions of this kind. It may be that, during the very worst periods of English history, the power vested in the House of Commons, mentioned by the member for North Melbourne, was grossly abused and led to the legislation referred to. But what has the Parliament of the Commonwealth done to forfeit its right, and the confidence reposed in it by the Constitution, that it should be deprived of that power? No cause for complaint has arisen in connection with the first few cases dealt with by this Parliament.
>
> "The Court will be called upon to deal mainly with questions of fact. As a matter of practice, very few questions of law arise, and the proposed tribunal is not to decide according to the law, but according to the substantial merits of the case and good conscience.
>
> "A Parliament constituted as this is, of men representing different communities and different interests, presents a panel for a jury the like of which cannot be excelled in any part of the world." [13]

Mr Isaacs (Indi) was of the same mind:

> "The time has not arrived, and the circumstances have not arisen, when we have a right to declare our incapacity, from any cause whatever, to discharge the high function of maintaining the purity of this House." [14]

Thus battle lines were quickly drawn, with Labor men such as King O'Malley and Billy Hughes less disposed to the resolution of election disputes by a future High Court than conservatives, owing to their traditional distrust of courts and lawyers; and, in O'Malley's case, his knowledge of two cases of the kind in Tasmania, which had ruined the applicants.

The upshot was that those in favour of the High Court were victorious in the House of Representatives, where Barton presided as Prime Minister, but not in the Senate, where an Elections and Qualifications Committee, appointed immediately the first Parliament sat, served as a Court of Disputed Returns comparable to those then still current in most State Parliaments.

Challenge to the Electoral Bill in the second Commonwealth Parliament

Both in the second and third Parliaments, the Member for Riverina, Mr Chanter, sought to restore an Elections and Qualifications Committee to the machinery of the House, owing to his experience of the High Court in *Chanter v. Blackwood* . [15] In introducing his first *Electoral (Disputed Returns) Bill* to the House in 1905, he claimed as justification that members on both sides of the House had confessed they had been beguiled in 1902 into believing the High Court would observe the intent of s.199 of the Act, namely that it should sit as a court of equity rather than a court of law, and that it would not be slow, costly or legalistic in its conduct of such cases, as it had been in his case. [16] He had found the High Court Justices to have been unable to divest themselves of their legal training, or disregard the forms of law. Mr Chanter's Bill was destined to founder owing to coincident events, related below, arising out of a Senate vacancy in South Australia.

Mr Chanter's disparagement of the High Court is of particular interest in that Sir Samuel Griffith was now its first Chief Justice, appointed by Barton immediately before his resignation as Prime

Minister on 23 September, 1903 from ill-health, when he himself could have been a candidate for that high office. "That he deliberately chose to sit under a man whom he regarded as a greater lawyer than himself, was considered a rare act of self-abnegation." [17] Thus Barton's swearing-in as a Justice of the original High Court of Australia with Griffith and Richard O'Connor was a great sentimental occasion, Griffith being his great mentor, and O'Connor his intimate friend back to school days.

In Chanter's criticism of Griffith J, he was not being altogether fair. As the latter pointed out in his judgment, the High Court had no jurisdiction to determine the leading issue in Chanter's petition, on whether candidates, guilty of an illegal practice as defined by the Act, could be disqualified from election. The *Electoral Act* had deliberately omitted any such provision, and had given him no jurisdiction as to acts amounting to bribery at common law committed by, or on behalf of, the candidate.

Problems arising in the Senate and High Court over the 1907

Senate Election in South Australia

(i) *Blundell v. Vardon* in the High Court

During 1907, a bizarre Dickensian story unfolded in the High Court, the South Australian Parliament and the Senate over the election of three Senators in South Australia on December 12, 1906. Seven candidates had nominated. At first count, Dugald Crosby won third place by a handful of votes, Joseph Vardon was fourth and Reginald Blundell fifth. But on a recount, the positions of Blundell and Vardon were reversed. Crosby meantime being on his death-bed, Blundell filed a petition in the High Court against Vardon, seeking that either Crosby or himself be declared elected, or the election of Vardon be declared void.

Blundell's petition called for a second full recount, citing 19 issues of irregularity. Not least of these was the existence of discrepancies in the tally in 66 counting centres out of 95 noted during the first recount, and the reported burning of 9,000 votes (later found) out of 70,000 in one Division. Barton J. granted a recount on the following ground:

> "The position of a petitioner applying to the Court of Disputed Returns may be thus described. It is on him to prove the allegations of the petition so far as they are not admitted. As to all things in connection with the ballot except matters of open conduct, it is manifestly difficult, if not impossible, for him to prove a case for a recount, except by a judicial examination of the ballot papers." [18]

The recount ended up with Vardon in the lead by just two votes, Barton J. having followed *Chanter v. Blackwood* on irregularities in the initialling of absentee votes by returning officers. Therefore he found that Vardon's election must be declared `absolutely void' (although he had already been sworn in as a Senator and taken his seat in the Senate), on the grounds that:

> " .... while Mr Vardon's vote was still in a majority, a number of ballot papers, if admissible, would have given Mr Crosby, now dead, a majority but were rendered invalid by the default of a returning officer in not initialling the papers."

This decision consequently left a vacancy to be filled.

(ii) The South Australian Parliament appoints a Senator

The next act in the drama was played out by the Parliament of South Australia. A copy of the High Court decision was sent to the Governor of South Australia On the advice of three South Australian constitutional lawyers, Messrs Murray, Glynn and Dashwood, he sent a message to

both Houses on July 2, 1907, informing them that they must fill the vacancy that had arisen, by a joint sitting of both Houses.
Before the Parliament, then led by a minority Labor government and Premier, could respond to the Governor, Mr. Vardon - on contrary legal advice, that s.15 of the Constitution was only intended to apply to Senators duly elected,and had no relation to a void election - asked the Governor to fill the vacancy by issuing a writ for an election at large. The Governor refused. The two Houses sat in a joint sitting on July 11, 1907, and elected Major J. O'Loghlin to fill the vacancy.

(iii) *The King v. the Governor of South Australia*

On July 12, 1907 Joseph Vardon challenged the election of Major J. O'Loghlin by applying to the High Court for a writ of *mandamus* commanding the Governor of South Australia to cause a writ to be issued for the election of a Senator for the State of South Australia, on the ground that, the election of Senators having been declared `absolutely void' in respect of the return of Mr. Vardon, a new election must be held, and therefore it was his duty to do so.
This action was heard before the Full Bench in August, 1907 which held that:

> " .... a *mandamus* will not lie to the Governor of a State to compel him to do an act in his capacity of Governor; and the question whether, under the circumstances, there was, or was not, a vacancy in the representation of South Australia in the Senate was a question to be decided by the Senate under Sec.47 of the Constitution.
>
> "It seems to be clear that the question whether there is, or is not, now a vacancy in the representation of South Australia in the Senate is one of the questions to be decided by the Senate under Sec.47 unless the Parliament otherwise provides. Parliament can, no doubt, confer authority to decide such a question upon this Court, whether as a Court of Disputed Returns or otherwise. But until the question is regularly raised for decision we reserve our opinion on it." [19]

This judgment threw the ball squarely back to the Senate, with a clear intimation that the Senate might be advised to accord the High Court the power, which it then lacked, to determine it.

(iv) Vardon's Petition to the Senate Elections and

Qualifications Committee

Vardon now petitioned the Senate to declare the `choice' of Major O'Loghlin by the South Australian Houses of Parliament to hold the place of one Senator for the State, null and void. The Senate referred it to its Elections and Qualifications Committee, comprising five conservatives and two liberals. It was unfortunately chaired by the South Australian constitutional lawyer, Sir Josiah Symon, despite a clear conflict of interest. He had initially been elected in 1903 with Labor support; but, not re-endorsed in 1906, he had run instead on a conservative ticket he had and, therefore, campaigned with fellow-candidate Joseph Vardon.
Not surprisingly, that Committee reported, for the Petitioner, that Major O'Loghlin had been improperly elected, and called for a popular election to fill the seat, on the grounds that the essential principle of democracy, embodied in the Constitution, was that the people, and not the South Australian Parliament, should `choose' their third Senator. This provoked one Senator to say that it was strange to hear conservatives advocating populism; and two Labor/Liberal Senators, one South Australian, the other a Queenslander, to resort to an irregular addendum to urge that such difficult questions of law were involved that the matter should be referred to the High Court for decision.

The latter view prevailed. A *Disputed Elections and Qualifications Bill* was introduced into the Senate in November, 1907 to empower the High Court to hear Vardon's petition, and any future petitions. It passed by a mere 19 votes to 17 after a heated debate as to whether the surrender should only occur `by resolution' or be automatic, taunts hurled across the chamber, and caustic criticism by opposing members like King O'Malley, who called it `a panic bill', or like those, including the Chairman of Committees, Senator Pearce, who accused Sir Josiah Symon roundly of misquoting the High Court judgment for his own ends.

(vi) The High Court Decision on the Vardon Petition

The Full Bench of the High Court - Griffith CJ, Isaacs J, Barton J and Higgins J - in December, 1907 reached the same conclusion as the Senate Committee had.

> "The Houses of Parliament had no power to choose a Senator in the events that happened and the choice of the respondent was void. Sec. 108 of the *Commonwealth Electoral Act* 1902 affords the Governor sufficient authority, if any express authority be necessary, for the issue of a supplementary writ. As the election itself was void nothing can be founded upon it, or upon any act of the person who wrongly assumed to act as a Senator."

Therefore, if the Senate had adopted its own Committee's report, instead of bowing to party pressure over a State squabble, it need not have rushed into a qualified surrender of its judicial independence to the High Court without an overwhelming majority, for no greater cause than to secure an interpretation of s.47 of the Constitution. Neither Vardon nor O'Loghlin lost their careers, as both subsequently served lengthy terms in the Senate.

Disappearance of Elections and Qualifications Committees

The Senate Committee disappeared in early November, 1918, a week before the Armistice, repealed in a consolidation of all existing Acts, in a debate dominated by the introduction of preferential voting and postal ballots. Senator O'Loghlin, now a Lieutenant-Colonel, was a lone voice in complaint that it would be an invitation to those engaged in an election to ignore all restrictions, and indulge in illegal practices.

The New South Wales Committee was abolished in 1928 by the conservative Government of Sir Thomas Bavin, Barton's secretary in 1901, in the face of strong criticisms from the Leader of the Opposition, Jack Lang, and other Labor members that it was advanced without reasons given, or complaint against the record of the Committee, to justify abandonment of this ancient privilege of Parliament. Its decisions, they said, had always given satisfaction. The Queensland Election Tribunal followed in 1936. The Victorian Legislative Committee disappeared at some time between 1939 and 1961.

Failure of Courts of Disputed Returns

Today, the only recourse for candidates, parties and electors is to legal courts sitting as Courts of Disputed Returns. Complaints about them are common - that they have become prohibitive in cost, in onus of proof, the nature of proof that can be offered, and the time limit for collecting proof, and therefore prohibitive of opportunity to establish proof of fraud. They must legally exclude interrogation of the electoral roll or ballot papers. They habitually exclude recounts of ballot papers, and witness or hearsay evidence. They are not hospitable arenas for petitioners to advance irregularities in the conduct of elections, despite the fact that the *Electoral Act* allows them a wider discretionary role than common law courts. They have justified early criticisms against them.

(i) Issue of Corrupt Practices

In legislating against corrupt practices, the original British and Australian Acts were targeting those committed by, or with the knowledge and consent of, any candidate. This limitation led Sir

Samuel Griffith to provide in his 1886 *Election Tribunal Act* for an election judge's report to the Speaker, which would `include not only those corrupt practices which had been committed without the knowledge and consent of any candidate, but those which have, or where there is reason to believe have, extensively prevailed at the election to which the petition relates'. [20]
W M Hughes stressed the wisdom of such a liberal view during the debate on clause 191 of the first *Commonwealth Electoral Bill* in July, 1902, as to whether a candidate should be liable for an illegal practice committed directly or indirectly by himself or by any other person on his behalf.

> "Here is an attempt to make every person liable for illegal acts committed with the candidate's knowledge and authority. I ask any honourable member who has experience of mankind, whether, when a person is obtained capable of committing illegal acts, and sufficient money be given him for that purpose, that is the sort of man to say he has proceeded with the knowledge and authority of the candidate? Is it common sense to suppose that a man who will commit such acts will admit them, and thus make it possible to sheet home a charge against him? One would imagine we were legislating for Utopia, whereas we are legislating for flesh and blood candidates. *Bribery is carried on to a greater or lesser extent at every election, in every State in the Commonwealth* .
>
> "If any other person than an agent acts, it will be absurd to make a candidate responsible for that done without his knowledge or authority." [21] (Emphasis added)

He concluded that "authority and knowledge has to be proved, and if a person be the candidate, I do not hesitate to say that proof will be absolutely impossible in 99 cases out of 100." [22]
Certain judges in federal Industrial Courts under the *Industrial Relations Act* have in practice taken a more liberal view in union election challenges than the High Court. Wilcox J., for example, found in *Johnston v. the N.S.W. Branch of the Australian Public Service Association* [23] that circumstances existed that created a "real and distinct possibility the result was affected", and voided the election. However, even those courts remain adversarial and inadequate to investigate or prevent fraud, their decisions often less liberal than his.

(ii) Voiding of Elections only if Fraud affected the Result

In the case of *Chanter v. Blackwood* already cited, Griffith CJ. ruled that the High Court had power to void an election if the number of persons entitled to vote, who have been prevented from voting, is greater than the difference between the number of votes cast for the candidate declared by the District Returning Officer to have been elected, and of votes cast for the candidate declared to have the next highest number.
In 1920, Griffith's decision was invoked by the Commonwealth Chief Electoral Officer, R.C. Oldham, in defence of his returning officers, whose official errors in the 1919 federal election had caused Isaacs J. to void the election for the Bendigo seat (won by one vote). Oldham said that "Chief Justice Griffith had adhered to British precedent". If Mr Justice Isaacs had followed Griffith's *dictum* in *Chanter v. Blackwood* , as Mr Justice Barton did in *Blundell v. Vardon* , he would have declared the Bendigo election void, on conclusive evidence that two or more persons entitled to vote had been improperly prevented from voting at the election by reason of error. [24]
Today, the 1904 ruling of Sir Samuel Griffith has become a fixed principle guiding the High Court. When linked to the clause in the 1918 *Electoral Act* , whereby the onus of proving corrupt practice, when occurring without a candidate's knowledge, is on the applicant, the law has

become a straitjacket. Fraud is now almost impossible to expose, and challenges on grounds of irregularities and manipulation extremely infrequent.

The *dictum* is also the fixed principle guiding the Australian Electoral Commission, to judge by its submission to the Joint Standing Committee on Electoral Matters:

> "Petitions must set out the facts relied on to invalidate the election, and, if alleging illegal practices, must show how these could have affected the election results." [25]

The chosen stance of the Commission is adversarial rather than facilitative, which is a frequent cause of criticism.

(iii) Courts of Disputed Returns closed to Interrogation of Rolls or Papers

Section 198 of the *Commonwealth Electoral Act* 1902 read as follows:

> "The Court shall inquire whether or not the petition is duly signed, and so far as rolls and voting are concerned may inquire into the identity of persons and whether their votes were properly admitted or rejected assuming the roll to be correct, but the Court shall not inquire into the correctness of the Roll."

Such a provision was already entrenched in the Victorian *Constitution Act Amendment Act* of 1890, and was related to the existence of revision courts. It was written into the 1902 *Electoral Act* as Commonwealth revision courts were envisaged. However, when they were dropped, the provision persisted. Senator Vardon's 1909 move to have it revoked as an anomaly failed. [26] It is still in the Act.

(iv) Ballot Recounts

Ballot recounts in the High Court, such as in *Blundell v. Vardon* in 1907, are now virtually unknown, despite the case in favour argued by Barton J. in that judgment that the Court should `open the sources of proof ' to a petitioner. [27]

> "In all things in connection with the ballot except matters of open conduct, it is manifestly difficult, if not impossible, for him to prove a case for a recount, except by a judicial examination of the ballot papers. He is in such circumstances almost, if not entirely confined, to this means of proving that enough valid votes to give him a seat, or to entitle him to have been declared elected, have been cast in his favour.
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> "The order for a recount is thus the means adopted by the Court to open the sources of proof to him, by enabling him to adduce the only, or almost the only, attainable evidence." [28]

In the foregoing assertion, Barton J. exposed the inherent injustice in requiring a petitioner to prove the allegations made in his petition.

The criticisms of Marshall Cooke QC, after a two year investigation of seven Queensland unions, have relevance. He found that a private individual was at a great disadvantage in trying to investigate ballot fraud:

> "Under the present provisions of the Commonwealth Act, the Federal Court conducts the inquiry as an adversarial proceeding, relying on the opposing parties to produce evidence one way or the other before it. It does not perform any inquisitorial role other than perhaps to examine the ballot papers.... An examination of the many reported cases in the Federal Court on election inquiries demonstrates the inadequacy of the remedy provided by present legislation. A Federal Court inquiry has not proved an effective method either to detect, or deter, ballot irregularities."

(v) Mistakes of Returning Officers

As Mr Palmer (Echuca) said in the 1907 debate , he had originally supported adjudication by the High Court, but after his own case he adopted the contrary view:

> "Why should a man, who has been as careful as possible to observe the law, be called upon, owing to the fault of a government official invalidating an election, to fight for his rights in the law courts and put his hand in his pocket to meet heavy expenses in upholding his claim?" [29]

(vi) Comment

Given the foregoing, how can the Australian Electoral Commission continually insist that little or no fraud exists, when the deterrents to action or proof are so great, and when it, itself, has the power to enable recounts, but rarely exercises it?

One Vote, One Value Today

(i) *Constitutional Alteration (Democratic Elections) Bill*

Until the 1970s, the pursuit of equality of voting power in the Commonwealth remained largely a political, rather than a constitutional objective. This shift occurred when successive Labor Governments persisted with a *Constitution Alteration (Democratic Elections) Bill* five times from 1973 to 1987. This pursuit was endorsed in principle by a majority report of the 1987 Joint Standing Committee on Electoral Matters, and its achievement by Constitutional referendum. [30] However, a dissenting minority report of four - Senators Harradine and Short, Members Shack and Blunt (Deputy Chairman) - condemned it vehemently, saying that it was an unwarranted intrusion on the rights of sovereign States, in an attempt to alter the Constitution to force change in the relationship between the States and Commonwealth as a first step in dissolving the federal system. It ignored the fact that electoral laws of the States were an integral part of their Constitutions:

> "The proposal to incorporate provisions affecting State electoral laws in the Commonwealth Constitution will inevitably result in the High Court becoming involved in disputes over these issues. These disputes are invariably party political in character. This will politicise the Court. Additionally, there are some limits through Section 24 of the Constitution on the right of the Commonwealth to draw electoral boundaries." [31]

An even more disturbing aspect of this proposal was that the Joint Standing Committee on Electoral Matters seriously considered submissions urging the Commonwealth to legislate for equality of voting by invoking its power to enforce treaties to which it was a signatory under s.51 (xxix), the treaty in question being the *International Covenant on Civil and Political Rights* . [32] However, fortunately, a restraining factor appeared to be that the parties responsible for the drafting of that treaty had specifically *not* meant the words `equal suffrage' to mean `one vote, one value', since some potential signatories had indicated at that time that they would not sign the *International Covenant on Civil and Political Rights* if anything relating to an insistence on `one vote, one value' was put in. [33]

(ii) *McGinty and Others v. State of Western Australia*

This case, heard in the High Court, by members of the Legislative Assembly and Legislative Council of Western Australia in September, 1995, objected to disparities between the number of enrolled voters in city and rural districts. They argued that the Constitutions of both the Commonwealth and Western Australia incorporated representative democracy as the central principle of government, and that equality of voting power was mandated by the Commonwealth

Constitution. The defendants submitted that neither required equality of voting power, and were upheld by four of the six judges in a brilliantly argued judgment (Toohey and Gaudron JJ. dissenting).

Dawson J. (Gummow J. concurring) ruled that there can be no implication that a particular electoral system, of the many available, is required by the Constitution, and the Constitution does not contain by implication the principle expressed in the words `one vote, one value'. [34]

(iii) Redistributions

Redistributions have always been a political battleground on several fronts over whether they deliver `one vote, one value', due to margins of variation (20 per cent in 1900); forecasts of population growth; principles adopted (once electoral subdivisions); manipulation by redistributors; and potential for swinging the vote, and results thus incremented or neutralised irrespective of the wishes of the voter.

Democracy is then perceived as resting not on `one vote, one value', but on the decisions of just three people on redistribution panels. Further distortions in the value of results can occur through non-voters (6 per cent or more), fraudulent enrolments (largely undetected for want of means or staff to do so), dead wood on the roll, and other factors making arguments of equality by `one vote, one value' difficult to sustain.

Conclusion

Last century, colonial Parliaments (except for Tasmania) retained their Elections and Qualifications Committees on British lines, rejecting the British shift to judicial courts in 1879 as unnecessary and unsuitable, as did the 1890s Conventions which ensured the principle became entrenched in the Constitution. Certain conservative lawyers caused the early Commonwealth shift to courts, largely opposed by Labor, but the Constitution remained unchanged, so it is arguable that it could, and should, be reversed. It can also be contended that the record of courts in electoral jurisdiction have more than fully justified the forebodings of Sir Samuel Griffith in 1888 that they could not deliver electoral justice.

Endnotes :

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1 . Queensland *Hansard* , 12 August, 1886, p.356.
2 . *Ibid.*
3 . *Ibid* , p.357.
4 . New South Wales *Hansard* , 1880, Vol. III, p.2224.
5 . *Ibid* , p.2221.
6 . *Edmund Barton* , Reynolds, J; pp.21, 43Ä4, 84.
7 . *Hansard* , 1897 Convention Debates, Vol. 2, 13 September, 1897, pp.464Ä5.
8 . *Op.cit.* , p.680.
9 . Commonwealth *Hansard* , 29 July, 1902, p.14664.
10 . *Ibid.*
11 . *Op.cit.* , p.14673.
12 . *Op.cit.* , p.14669.
13 . *Op.cit.* , pp.14673Ä4.
14 . *Op.cit.* , pp.14684Ä5.
15 . No. 1 (1904) 1 CLR 39.
16 . *Hansard*, 30 November Ä 21 December, 1905.
17 . *Edmund Barton, op.cit.* , p.190.
18 . (1907) 4 CLR 1469.

19 . (1907) 4 CLR 1497.
20 . Queensland *Hansard* , *op.cit.* .
21 . Commonwealth *Hansard,* 1902, p.14657.
22 . *Ibid.* , p.14658.
23 . (1989) ALR 134.
24 . Commonwealth *Parliamentary Papers,* 14 June, 1920.
25 . Joint Standing Committee on Electoral Matters, *Report,* 1993, Submission S.0843.
26 . Commonwealth *Hansard* , 1909, p.4009.
27 . (1907) 4 CLR 1469.
28 . *Ibid* .
29 . Commonwealth *Hansard* , 1907, p.6378.
30 . Joint Standing Committee on Electoral Matters, *Report* , 1987, Clause 1.14.
31 . *Op.cit.* , Minority Report, Point 8.
32 . *Op.cit.* , *Report* , Clauses 5. 24Ä26.
33 . *Op.cit.* , Clause 5. 31.
34 . 4 ALR 289.
