IN THE HIGH COURT OF AUSTRALIA

CANBERRA & PERTH REGISTRIES

No C17 of 2013
No P55 of 2013
No P56 of 2013

BETWEEN:

THE AUSTRALIAN ELECTORAL COMMISSION
Petitioner in C17 of 2013
Eighth Respondent in P55 of 2013
Ninth Respondent in P56 of 2013

AND:

DAVID JOHNSTON
First Respondent

JOE BULLOCK
Second Respondent

MICHAELIA CASH
Third Respondent

LINDA REYNOLDS
Fourth Respondent

WAYNE DROPULICH
Fifth Respondent

SCOTT LUDLAM
Sixth Respondent

ZHENYA WANG
Seventh Respondent in C17 of 2013 and P56 of 2013
Petitioner in P55 of 2013

LOUISE PRATT
Eighth Respondent in C17 of 2013 and P56 of 2013
Seventh Respondent in P55 of 2013

SUBMISSIONS OF THE FIRST, THIRD AND FOURTH RESPONDENTS

Filed on behalf of the First, Third and Fourth Respondents by:

Colquhoun Murphy
31 Torrens Street
Braddon ACT 2602
DX5609 Canberra

Date of this document: 17 January 2014

Contact: Ric Lucas

File ref: RL
Telephone: 02 6248 0499
Facsimile: 02 6248 9936
E-mail: ric.lucas@colquhounmurphy.com

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the Internet.

PART II QUESTIONS

2. These submissions are directed to the three questions of law identified in the orders made by Hayne J on 13 December 2013. The facts and documents necessary to enable the Court to decide those questions are contained in the Amended Statement of Agreed and Assumed Facts dated 14 January 2014 and the Agreed Bundle of Documents dated 8 January 2014.

10 3. The first, third and fourth respondents (**the LPA Respondents**) submit that the questions should be answered as follows:

Question I: No

Question II: No

Question III(a): Yes, under ss 361(1) or 360(1) of the *Commonwealth Electoral Act 1918* (Cth) (the **CEA**)

Question III(b): Yes, all petitions

Question III(c): No, all petitions

PART III ARGUMENT

20 **QUESTION I: WERE THE ELECTORS WHO CAST THE MISSING BALLOT PAPERS "PREVENTED FROM VOTING"?**

4. This question assumes that s 365 is applicable to the present case[1]. On that assumption, the AEC submits that an elector will be "prevented from voting" if their vote is not the subject of the "relevant scrutiny" (or, perhaps, if it is not "counted in" that scrutiny).[2]

5. In response, the LPA Respondents submit that:

---

1 As to which, see the submissions below in relation to question II at paragraphs 33 to 37.

2 AEC's Submissions on Questions of Law dated 14 January 2014 (**AEC's Submissions**) at [32], [38]. The AEC also suggests that an "elector who casts an informal vote" may not have been prevented from voting, but does not express a concluded view on this question: AEC's Submissions at [38], [46]. It is not clear whether the AEC is referring to a vote that is rendered informal by an official error (whether before or after the vote is placed in the ballot box), or to informal votes more generally. In the AEC's Supplementary Outline of Submissions on Summons for Directions dated 12 December 2013 (see at [13]-[14], [16] and [18(4)]), the AEC's position was that an elector would also be "prevented from voting" where his or her ballot paper was wrongly rejected as informal.

5.1. An elector will not be "prevented from voting" where he or she has completed the steps identified in s 233[3] of the CEA culminating in the ballot paper being deposited in the ballot box (unless perhaps – as some of the authorities discussed below suggest – the vote is rendered invalid by an official error or omission that occurs prior to the completion of those steps, meaning that the vote has never been valid[4]).

5.2. An elector is not "prevented from voting" by reason of an official error or omission which occurs after completion of those steps, even if that error or omission precludes the vote from being counted.

6. Here, the loss of the 1,370 ballot papers occurred not only after the completion of the s 233 process for the relevant voters, but after the close of the poll and the counting of those ballot papers in the original scrutiny and fresh scrutiny. Accordingly, the electors who cast those ballots were not "prevented from voting" on either of the possible meanings of that phrase identified in paragraph 5.1 above. That conclusion is underlined by the fact that, had the appeal against the Australian Electoral Officer (**AEO**) for Western Australia's decision to refuse a re-count been rejected, the electors who cast the missing votes would have cast votes that contributed in the ordinary way to the election of senators.

7. The AEC's argument requires the Court to accept that an elector who has cast a valid vote that has been validly counted can, as a result of an error by an official that occurs days or weeks after an election, be transformed into an elector who was "prevented from voting". That submission is contrary to: (1) the meaning of "voting" in the CEA; (2) the purpose of the s 365 proviso; (3) authority concerning provisions analogous to the proviso. The submission would also, if accepted, generate considerable uncertainty and inconvenience.

(1) The meaning of "voting" in the CEA

8. The identification of when and how an elector might be said to be "prevented from voting" turns largely upon the meaning of the verb "to vote" in the CEA and, in particular, in s 365. "Voting" is not defined in the CEA. However, its meaning can be ascertained by focusing attention upon the steps involved in "voting" and the point at which those steps are complete; once an elector has "voted", it cannot be said that he or she has been "prevented from voting" by some later event. The LPA Respondents rely upon five matters.

9. First, the question of what "voting" involves has been addressed on a number of occasions in the context of compulsory voting. The question was answered by this

---

3 See s 200DK for pre-poll voters.

4 See, e.g., ss 215 and 268(1)(a), but see s 268(2).

Court in *Faderson v Bridger*[5] by reference to "the process of voting"[6] set out in s 233:

> "Section 128A [now s 245] places a duty on every elector to record his vote. This is done by attending at a polling booth, accepting a ballot paper and, as s 119 [now s 233] provides, marking it and depositing it in the ballot box. A failure to vote therefore involves a failure to attend, accept the ballot paper and having marked it, to put it in the ballot box."

As Nagle J said in *Freeman v Cleary*, it is "essential to differentiate, as the Act does, between the act of voting, which is the designation on a ballot paper of a candidate ... for whom the elector wishes to cast his vote, and a vote actually cast which may or may not be an effective vote".[7] Further, as this Court said in *Evans v Crichton-Browne* of the phrase "in or in relation to the casting of his vote", those words:[8]

> "would appear to refer to the whole process of obtaining and marking the paper and depositing it in the ballot-box. However, the words clearly do not refer to the whole conduct of the election, which begins before and ends after the votes are cast".

10. Secondly, the structure of the CEA delineates between voting as described in paragraph 9 above (dealt with in Part XVI: "The polling"), and the later treatment of completed ballot papers by scrutiny to ascertain the result of the polling[9] (dealt with in Part XVIII: "The scrutiny"). Part XVI contains numerous sections providing for voting in the sense described above[10], while Part XVIII does not deal with voting or any activity of electors. Rather, the scrutiny under Part XVIII commences with the inspection and opening of ballot boxes[11] and subsequent activity of AEC officers.

11. The separation between polling and scrutiny is underscored by the provision in s 220(d) (in Part XVI) for ballot boxes at the close of the poll to be secured and forwarded for the purposes of scrutiny, and the provision in s 265(1)(a) (in Part XVIII) for the scrutiny to commence after the closing of the poll.

12. Thirdly, there are numerous sections of the CEA concerning time[12] and place[13] of voting which indicate that "voting" for the purposes of the Act means the process described in paragraph 9 above. It is implicit in those sections, and the provisions

---

5 (1971) 126 CLR 271 at 272 per Barwick CJ (with whom McTiernan and Owen JJ agreed). See also *Holmdahl v Australian Electoral Commission (No 2)* (2012) 277 FLR 101 at 117-124 [46]-[69] per Gray J (with whom Kourakis CJ and Sulan J agreed) and the authorities cited therein.

6 *Horn v Australian Electoral Commission* (2007) 163 FCR 585 at 595 [48] per McKerracher J.

7 *Freeman v Cleary* (Unreported, NSW Court of Disputed Returns, 31 October 1974) at 9.

8 (1981) 147 CLR 169 at 207-208.

9 See s 263.

10 Including as to such matters as time (eg, ss 220(b) and (c)), location (eg, ss 222, 224, 227, 234A) and manner (eg ss 233, 234) of voting.

11 See ss 273(2) and 274(2).

12 For example: ss 220(b) and (c); ss 226(6) and 227(11); s 234A(2); s 243; s 254; s 260(3)(b). Of particular significance is s 367 – located almost adjacent to s 365 in Part XXII – referring to evidence that a witness "was not permitted to vote in any election during the hours of polling on polling day".

13 For example: ss 222(1), (1A) and (2); s 224(2)(b); ss 234A(1) and (2); s 243; s 254; s 261(1); s 348(3)(c); clause 11(b) of Schedule 2.

concerning compulsory voting,[14] that upon completion of the process described in paragraph 9 it will be ascertainable whether or not an elector has "voted". Such sections do not admit of the notion that, in later days or weeks, miles away from the polling place, an event might occur which results in the elector being "prevented from voting".

13. Fourthly, as a matter of ordinary language, the verb "to vote" means "to express or signify choice in a matter undergoing decision, as by a voice, ballot or otherwise; give or cast a vote or votes: *who will you vote for at the election?*"[15]. Neither that definition, nor the ordinary usage of the verb "to vote", suggests that effect must be given to the expressed or signified choice in order for the act of voting to occur.

14. Fifthly, two observations of this Court concerning the s 365 proviso indicate that it is concerned with the consequences of errors of staff involved in the polling under Part XVI rather than later errors of officers involved in the scrutiny under Part XVIII. Gaudron J in *Hudson v Lee*[16] observed that s 365 is "concerned ... with what may be called polling clerk errors". In *Sue v Hill*[17], Gaudron J (in a part of her reasons with which Gleeson CJ, Gummow and Hayne JJ concurred) described s 365 as making provision concerning "certain immaterial errors, relating to the pre-election process and the conduct of the poll". Those observations suggest that, consistently with the submission above, s 365 is not concerned with errors that occur after the scrutiny has commenced.

(2) Origin of the proviso

15. Section 365 appeared in the *Commonwealth Electoral Act 1902* (Cth) (the **1902 Act**) as s 200, and was re-enacted in 1918 in the CEA as s 194, in these terms:

> "No election shall be avoided on account of any delay in the declaration of nominations, the polling, or the return of the writ, or on account of the absence or error of any officer which shall not be proved to have affected the result of the election."

16. Section 25 of the *Commonwealth Electoral Act 1922* (Cth) amended s 194 by, inter alia, replacing the words "shall not be proved to have affected" with the words "did not affect" and by inserting the proviso. The parliamentary debates[18] indicate that these amendments were made as a result of *Kean v Kerby*[19], in which Isaacs J held that "seven persons duly qualified to vote and properly seeking to vote were, by official error, prevented from voting" and went on to admit oral evidence from those persons as to their respective voting intentions. Six of the persons in question had attended

---

14 See s 245.

15 *Macquarie Dictionary*, 5th edition (2009).

16 (1993) 177 CLR 627 at 631.

17 (1999) 199 CLR 462 at 520 [148] (fn 205); see also at 484 [39] per Gleeson CJ, Gummow and Hayne JJ.

18 Australia, Senate, *Parliamentary Debates* (Hansard) (**Senate Hansard**), 26 July 1922 at 752; Australia, House of Representatives, *Parliamentary Debates* (Hansard) (**HR Hansard**), 14 September 1922 at 2268-2269, 20 September 1922 at 2467.

19 (1920) 27 CLR 449 at 457.

polling places but were not given ballot papers, while the seventh was given a ballot paper for the wrong subdivision[20]. Significantly, his Honour also later considered[21] other voters' ballot papers which had been rejected by the returning officer. Despite concluding that four such votes had been improperly rejected, Isaacs J did not suggest that the four electors had thereby been "prevented from voting" and (unsurprisingly) no viva voce evidence was called from these four electors.

17. Having regard to the abovementioned aspects of *Kean v Kerby*, it is unlikely that the words "prevented from voting" were intended to cover cases where a ballot paper was not admitted because of its loss, improper rejection or similar erroneous treatment occurring after the elector had cast a valid vote. The parliamentary debates reveal no such intention. On the contrary, the debate on other clauses of the 1922 Bill assumed that the Court would continue to have the ability to inspect ballot papers in order to decide their formality[22] and in order to adjust an election result where ineligible persons had voted[23]. The AEC's submission that the enactment in 1922 of the proviso to what is now s 365 was intended to prevent the inspection of ballot papers for those purposes is inconsistent with the parliamentary debates at the time.

18. Instead, consistent with the facts of *Kean v Kerby*, the parliamentary debates indicate that the proviso was directed at the mischief of oral evidence being called from electors as to what would have occurred had they not been unable to vote in the sense described in paragraph 9 above, and that it was not directed to the examination of completed ballot papers (or secondary evidence thereof). For example, the Minister observed[24] that the original s 194 made it necessary "to call evidence on the manner in which the votes would have been cast" and that the amendment was to "prevent evidence being called as to the way in which an elector intended to vote at an election". The provision was inserted to prevent "an elector from telling a Judge who is trying an electoral case the name of the candidate for whom he intended to vote"[25].

(3) Authorities concerning equivalents of the s 365 proviso

19. The AEC's submissions as to the meaning of the phrase "prevented from voting" are inconsistent with the weight of authority concerning State equivalents of the proviso. Of those authorities, *Fenlon v Radke*[26] is the most recent and the most factually

---

20 See (1920) 27 CLR 449 at 455-457.

21 (1920) 27 CLR 449 at 465-469 (the "Melbourne evidence").

22 In respect of clause 18 of the Bill, concerning informal ballot papers, see: HR Hansard, 20 September 1922 at 2465-2466 (Mr Atkinson and Mr McWilliams).

23 In respect of clause 12 of the Bill, inserting proposed new ss 106A to 106C providing for the individual numbering of ballot papers, see Senate Hansard, 26 July 1992 at 751, 4 August 1922 at 1142-1149, 23 August 1922 at 1579. Ultimately clause 12 was not enacted because of advice that there would be difficulties in the timely printing of numbered ballot papers: see Senate Hansard, 22 September 1922 at 2595.

24 Senate Hansard, 26 July 1922 at 752.

25 HR Hansard, 20 September 1922 at 2467 (question of Mr McGrath to the Attorney-General).

26 *Fenlon v Radke* [1996] 2 Qd R 157.

analogous to the present case. It involved votes which were alleged to have become invalid by reason of official error in the process of counting, and the attempted admission of secondary evidence in the form of the voting return. It is submitted that Ambrose J was correct in holding[27] that the legislative intent to be discerned in the proviso is "to prevent the voting intention of voters who have not cast a vote which was at any stage a valid vote within the time limited for doing so under the *Electoral Act* from being proved in this court", and that the proviso would not have prevented the Court from having regard to the return in that case. There are other several other authorities to similar effect (including the useful analysis of Nagle J in *Freeman v Cleary*) which have specifically declined to follow *Campbell v Easter*[28].

20. The AEC relies upon *Campbell v Easter*[29], but the passage which it cites must be considered in the context of the facts of that case. The ballot papers held by Sugerman J to be subject to the proviso were ballot papers[30] in respect of which official error had rendered the votes invalid prior to the completion of the voting process described in paragraph 9 above. Accordingly when his Honour spoke of "an elector whose vote ... is thrown away", he was speaking of votes which, because of official error, had never been valid and, consequently, had to be "thrown away" on the scrutiny. Sugerman J was not addressing a situation (such as the present case) where, a valid vote having been cast, some later event occurred which resulted in that vote not being counted. In this respect, it is important to note that there was a further category of ballot papers in *Campbell v Easter*[31], which the parties alleged had been erroneously rejected as informal or allowed as formal by the electoral officers. Sugerman J did not suggest that the alleged erroneous rejection of these ballot papers meant that the votes had been "thrown away" with the consequence that the proviso prevented the Court from inspecting them. On the contrary, considerable effort appears to have been expended on the Court's behalf to retrieve the ballot papers so as to permit the Court to embark upon a review of them. Far from considering such a review to be prohibited by the proviso, Sugerman J stated that that review would have been "necessary" in the absence of the decisive effect of the errors committed in respect of the other category of ballot papers.

21. The AEC also relies upon *Varty v Ives*[32], where Starke J concluded[33] that the words "prevented from voting" meant "prevented from casting a vote which is included in the count". It is respectfully submitted that his Honour's conclusion is incorrect and should

---

27 [1996] 2 Qd R 157 at 171-172.

28 *Freeman v Cleary* (Unreported, NSW Court of Disputed Returns, 31 October 1974) at 3-10 per Nagle J. See also *Dunbier v Mallam* [1971] 2 NSWLR 169 at 175D-G per Hardie J.

29 Unreported, NSW Court of Disputed Returns, 12 June 1959.

30 Namely, the 51 ballot papers, plus the additional six ballot papers incorrectly admitted, identified by Sugerman J at 3.

31 Namely, the ballot papers discussed by Sugerman J at 2-3.

32 [1986] VR 1.

33 [1986] VR 1 at 16.

not be followed for a number of reasons. First, it is contrary to the weight of judicial authority,[34] and to the leading academic commentary[35]. Secondly, Starke J does not appear to have been aware of the highly persuasive (albeit unreported) decision of Nagle J in *Freeman v Cleary*.[36] Thirdly, whilst heavily influenced by the reasoning of Sugerman J in *Campbell v Easter*, the conclusion expressed by Starke J in *Varty v Ives* went considerably further than that of Sugerman J and appears inconsistent with the treatment by Sugerman J of the further category of ballot papers discussed in paragraph 20 above. Fourthly, Starke J did not undertake any detailed consideration of the matters discussed in parts (1) and (2) above of these submissions. Fifthly, his Honour's reasons[37] for rejecting the respondent Ives' contention as to the meaning of the word "vote" in the statute are, with respect, not compelling and may be contrasted with the cogent reasons of Nagle J to the opposite effect in *Freeman v Cleary*[38]. Sixthly, it appears[39] that Starke J relied heavily upon the potential risk to secrecy of the ballot, given that the ballot papers in the case before him were contained in envelopes so that inspection could have resulted in the votes of particular electors being ascertained. His Honour's preparedness to distinguish authorities[40] in which the evidence sought to be admitted did not risk the secrecy of the ballot, suggests that *Varty* should itself be distinguished from the present case, in which there is no such risk.

22. Finally, the AEC's position is inconsistent with *AEC v Towney*[41], in which Foster J acceded to the urging of the AEC that the Court examine ballot papers so as to "enable voters who were disenfranchised by polling booth error to have their votes counted in the election as they should have been". There was no suggestion from the AEC in that case that the proviso in the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (the **ATSIC Act**), which is materially identical to s 365 of the CEA, prevented the Court from doing so.

(4) Practical difficulties

23. The AEC's proposition that an elector may be "prevented from voting" by reason of the manner in which his or her completed ballot paper is dealt with during the scrutiny sits uncomfortably with other provisions of the CEA and it would, if accepted, create

---

34 See paragraph 19 above.

35 Orr, *The Law of Politics: Elections, Parties and Money in Australia* (2010) at 221 (fn 84), which cites *Dunbier v Mallam* and *Freeman v Cleary*, rather than *Varty v Ives*, as stating the correct position. Similarly, *Halsbury's Laws of Australia* at par [345-2100] (fn 5) expresses the view that *Dunbier v Mallam* is to be preferred to *Varty v Ives*.

36 Unreported, NSW Court of Disputed Returns, 31 October 1974. It can be inferred that his Honour was not aware of this decision from [1986] VR 1 at 15.

37 [1986] VR 1 at 11.

38 Unreported, NSW Court of Disputed Returns, 31 October 1974, at 9-10.

39 [1986] VR 1 at 12, 15-16.

40 See, eg, [1986] VR 1 at 15-16, distinguishing *Dunbier v Mallam* [1971] 2 NSWLR 169 and *Fell v Vale (No 2)* [1974] VR 134.

41 (1994) 51 FCR 250 at 254D.

considerable uncertainty in practice.

24. First, difficulty arises in the operation of statutory provisions as to compulsory voting[42] and multiple voting[43] if an elector can be "prevented from voting" by reason of official error occurring after completion of the steps prescribed by s 233. Would such an elector be in breach of the compulsory voting requirement on the basis that he or she did not vote?[44] If not, in the one election the elector would simultaneously have "voted" for the purpose of some provisions of the CEA, but been "prevented from voting" for the purpose of others.

25. Secondly, whether an elector has "voted" or not could vary over time, depending upon the fate of the elector's ballot paper. As in this case, a ballot paper may be admitted and counted on the fresh scrutiny (at which time the elector would clearly have "voted"), but the later loss of the ballot paper prior to a re-count results in the elector then having been "prevented from voting". Similarly, the improper rejection of a ballot paper on the fresh scrutiny might mean an elector was "prevented from voting", although this will not be determined until a re-count,[45] at which time if the ballot paper is correctly admitted the elector will no longer have been "prevented from voting". Further, at least where ordinary voting has occurred, the secrecy of the ballot means that in most cases it will be never be possible to determine whether a particular elector has been "prevented from voting" and, hence, whether he or she has "voted".

26. Thirdly, there is an illogical asymmetry between improperly rejected and improperly admitted ballot papers. If the wrongful rejection of a ballot paper means that the elector has been "prevented from voting" then, on the AEC's argument, the proviso to s 365 operates so that the ballot paper cannot be admitted by the Court of Disputed Returns. However, the wrongful admission of a ballot paper cannot on any view be said to have prevented the elector from voting. As a result, wrongfully admitted ballot papers could be examined in the Court of Disputed Returns, but wrongfully rejected ballot papers could not be so examined.

27. Fourthly, but related to the above point, a Court could not decide whether an elector has been "prevented from voting", and a challenged ballot paper thus rendered inadmissible, until it has inspected the ballot paper to determine whether it was wrongly or rightly rejected. If the Court determines that it was wrongly rejected, then on the AEC's approach the elector was prevented from voting, but by force of s 365 the ballot paper is inadmissible, meaning that the Court is powerless to save the vote that it has found was wrongly rejected (meaning, in effect, that the Court is required

---

42 Section 245.

43 Sections 339(1A)-(1D). For example, would an elector who marked and deposited two ballot papers escape prosecution for multiple voting if one of those papers was subsequently lost or wrongly rejected as informal?

44 See also *Douglass v Ninnes* (1976) 14 SASR 377 at 379 per Hogarth J as to the difficulties which an electoral officer might face in preparing a list of persons who had not voted.

45 Section 280 provides that the officer conducting a re-count may reverse decisions as to the allowance and admission or disallowance and rejection of any ballot paper.

to perpetuate the disenfranchisement of the voter).

28. Further, if a wide view of the meaning of the phrase "prevented from voting" is adopted, that may have the result that in many cases the Court will be unable to examine ballot papers in order to take account of the preferences expressed in them for the purpose of ascertaining the impact (if any) of their improper rejection upon the election result, and so lead to an increased likelihood of elections being declared void and new elections being required. These consequences are undesirable[46] and inconsistent with ss 360(2) and 364 of the CEA. A construction of the CEA which promotes such consequences should be avoided.

29. Fifthly, the matters referred to in paragraphs 26 and 27 above belie any notion that the proviso was intended to prevent ballot papers from being open to consideration by the Court; clearly it does not achieve that objective (as least with respect to ballot papers it is alleged were improperly admitted).

30. For all the above reasons, the AEC's loss of the 1,370 ballot papers did not have the result that the electors who cast those ballots were "prevented from voting".

QUESTION II: IS THE COURT PRECLUDED, BY SECTION 365 OR OTHERWISE, FROM ADMITTING RECORDS OF THE FRESH SCRUTINY OR ORIGINAL SCRUTINY?

31. The Court is not precluded from admitting the records of the fresh scrutiny or original scrutiny (the **AEC Records**) for the purposes of any of the petitions.

32. In so far as the AEC relies upon s 365 in submitting that the AEC Records are inadmissible, its submissions should be rejected because:

32.1. Each petition alleges that the loss of the 1,370 ballot papers was an "illegal practice". Cases involving illegal practices are governed by s 362. Where a case falls within both ss 362 and 365, it is established by existing decisions of this Court that s 362 is the applicable provision (**see paragraphs 34 to 38 below**);

32.2. Further or alternatively, even if s 365 is relevant to petitions alleging illegal practices, it does not prevent admission of the AEC Records that bear on the content of the 1,370 missing ballot papers because:

(1) For the reasons advanced in answer to question I, the loss of the 1,370 ballot papers did not mean that any electors were "prevented from voting", so the proviso in s 365 is inapplicable;

(2) Further or alternatively, the LPA Respondents do not seek to rely on the AEC Records for the "purpose of determining whether [the loss of the ballot papers] did or did not affect the result of the election". That is the only purpose to which the proviso in s 365 is relevant. Rather, the LPA

---

[46] See paragraph 46 below and the authorities cited therein.

Respondents seek to rely on the AEC Records to inform both: (i) the Court's judgment as to the second limb of s 362(3); and (ii) the exercise of the Court's discretion under s 360(2) (read with s 364). Section 365 does not speak to the admissibility of evidence for either of those purposes (**see paragraphs 42 to 47 below**);

(3) Further or alternatively, the terms and purpose of s 365 indicate that it does not preclude admission of the AEC Records, because it does not exclude evidence that does not connect any particular elector with any particular expression of voting preference (**see paragraphs 48 to 51 below**).

10 33. In so far as the AEC contends that the AEC Records are inadmissible for reasons unrelated to s 365, that submission should be rejected because it wrongly assumes that the powers and functions of the Court of Disputed Returns are limited to the powers and functions that could be undertaken by the AEC when conducting a re-count (**see paragraphs 52 to 57 below**).

(1) Section 365 has no application when s 362 applies

34. The Court's power to declare an election void is conferred by s 360(1)(vii). Sections 362 and 365 are both expressed as qualifying the exercise of that power[47]. But where, as in these cases,[48] the impugned conduct involves an "illegal practice" (as defined) it is s 362 that contains the relevant qualification, this Court having held that s 362
20 provides "exhaustively as to the general grounds on which an election may be invalidated or declared void".[49]

35. The pre-eminent place of s 362 in the current scheme of Part XXII is supported by the legislative history. Relevantly:

35.1. In the 1902 Act, Part XVI (Court of Disputed Returns) contained s 197 which was in relevantly identical terms to s 360(1), save for the absence of what is now s 360(1)(iii). Sections 360(2), 360(3) and 362 did not exist. Section 365 appeared as s 200 in the form set out in paragraph 15 above.

---

47 *Sue v Hill* (1999) 199 CLR 462 at 486 [44] per Gleeson CJ, Gummow and Hayne JJ, 520 [148] per Gaudron J.

48 Each petition contends that illegal practices were committed in connection with the loss of the ballot papers: AEC petition at [44]-[45]; Mead Petition at [34(b)-(c)] and [35]; Wang petition at [31]-[32]. The AEC petition alleges (at [46]) in the alternative that the loss of the ballot papers was an error or omission for the purposes of s 365, but unless it constituted an illegal practice it would not provide any basis to declare the election void: *Hudson v Lee* (1993) 177 CLR 627 at 630 per Gaudron J; *Sue v Hill* (1999) 199 CLR 462 at 482 [34] per Gleeson CJ, Gummow and Hayne JJ, 512 [123] per Gaudron J. Some petitions also allege illegal practices in connection with the reserved ballot papers: Mead petition at [34(a)] and [35]; Wang petition at [37]-[38].

49 *Hudson v Lee* (1993) 177 CLR 627 at 631 per Gaudron J, which was approved in *Sue v Hill* (1999) 199 CLR 462 at 474 [9] and 482 [34] per Gleeson CJ, Gummow and Hayne JJ, 511 [121] per Gaudron J, 540-541 [209], 548 [224] per McHugh J, with whom Callinan J agreed. See also *Webster v Deahm* (1993) 116 ALR 223 at 225 per Gaudron J; *Robertson v AEC* (1993) 116 ALR 407 at 409, where Toohey J stated that he found the reasons of Gaudron J in *Hudson v Lee* "persuasive", but it was unnecessary to express a concluded view.

35.2. The predecessors of ss 360(2), 360(3) and 362(1)-(3) were inserted by ss 55 and 56 of the *Commonwealth Electoral Act 1905* (Cth) as ss 197(2), 197(3) and 198A(1)-(3) respectively. Those insertions were made as a result of *Chanter v Blackwood*[50] in which this Court which held that it had no jurisdiction under the 1902 Act to declare an election void on the basis of illegal practices committed by a candidate. Accordingly, since 1905 the part of the Act entitled "Court of Disputed Returns" has made express reference to "illegal practices". But at that time (and continuing until 1983) the term "illegal practices" covered only a relatively narrow range of conduct and was defined in the part of each Act entitled "Electoral Offences". Other than bribery and undue influence (which were each themselves defined), "illegal practices" were defined[51] as conduct primarily involving the publication or distribution of electoral advertisements and similar documents and the contravention of the provisions imposing limitations on electoral expenses. Only two minor amendments[52] were made to the definition of illegal practices in the CEA between 1918 and 1983.

35.3. The enactment in 1918 of the CEA involved no change to the provisions referred to above, save for their renumbering. In 1922 the amendments described in paragraph 16 above were made (including the amendment to what is now s 365).

35.5. In February 1984, ss 114 and 128 of the *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) repealed the former limited definition of "illegal practices" and instead defined "illegal practice" to mean a contravention of the CEA or regulations (i.e. the definition now found in s 352). In the context of an Act which provides "an obsessive set of instructions from an attentive parliament as to the management of elections"[53], this new definition brought about a very large expansion of the types of conduct constituting an "illegal practice"[54]. Particularly when read with the definition of "contravene" in the *Acts Interpretation Act 1901* (Cth)[55], the s 352 definition captures a wide range of conduct which prior to 1984 would not have constituted an illegal practice. The effect of the amendment was therefore to bring within the operation of what is now s 362 a wide range of conduct that would otherwise have fallen only within

---

50 (1904) 1 CLR 39 at 57-58 per Griffith CJ, 63-64 per Barton J, 75-76 per O'Connor J. See the Explanatory Memorandum to the 1905 Bill in respect of clauses 49 and 50 of the Bill; House of Representatives Report from the Select Committee on Electoral Act Administration, 28 October 1904 at 7; Senate Hansard, 14 September 1905 at 2278; HR Hansard, 7 November 1905 at 4645 (incorrectly numbered as 4635).

51 In s 180 of the 1902 Act and s 161 of the CEA as enacted in 1918.

52 Section 27 of the *Commonwealth Electoral Act 1928* (Cth) inserted s 161(f) and s 5 of the *Commonwealth Electoral Amendment Act 1980* (Cth) deleted s 161(c).

53 Orr, *The Law of Politics: Elections, Parties and Money in Australia* (2010) at 223.

54 Notwithstanding the significance of the insertion of the new definition, the extrinsic materials – including the September 1983 First Report of the Joint Select Committee on Electoral Reform which resulted in the 1983 amendments – do not appear to contain any explanation of it.

55 Section 2B and, before it, s 22(1)(j).

s 365. As Gaudron J explained in *Hudson v Lee*,[56] the breadth of the new definition of "illegal practices" supports the conclusion that s 362 provides "exhaustively as to the general grounds on which an election may be invalidated or declared void".

36. The consequence of the above for the applicability of s 365 in a case involving alleged illegal practices was expressly addressed in *Sykes v Cleary*[57]. In that case, having noted aspects of the legislative history summarised above, Dawson J said that s 362 "is the more specific section and is the section which operates where applicable in preference to s 365" (emphasis added). That statement has been applied repeatedly in the Federal Court in the context of relevantly identical provisions of the ATSIC Act.[58]

37. In accordance with the approach explained by Dawson J in *Sykes*, it follows from the fact that all the petitions before the Court allege illegal practices that s 365 has no relevant application. If the limitation in the first part of s 365 is not applicable, then the proviso to s 365 is likewise inapplicable because the proviso to s 365 is just that; it is not expressed to be, and should not be read as, a proviso which operates in respect of sections of the CEA other than s 365[59]. It is significant in this regard that there is a clear linkage between the principal part of s 365 and the proviso; both use the term "did not affect the result of the election". This language may be contrasted with that of s 362(3), which requires it to be established that "the result of the election was likely to be affected". Further, having regard to that requirement in s 362(3), the Court should be slow to extend the s 365 proviso to restrict the admission of evidence which might assist in fulfilling the requirement.

38. For the above reason, the Court should conclude that s 365 does not preclude the admission of the AEC Records that bear on the 1,370 missing ballot papers.

(2) Alternatively, s 365 is inapplicable in its terms

39. Even if, contrary to the above submission, the Court finds that s 365 is relevant in a matter involving allegations of illegal practices, that section nevertheless does not prevent the admission of the AEC Records for three reasons (each of which is entirely independent of the other).

40. The first of those reasons has already been examined. It is that, for the reasons advanced in answer to question I, the loss of the 1,370 ballot papers does not mean that any elector was "prevented from voting", with the result that the proviso is inapplicable in its terms.

---

56 (1993) 177 CLR 627 at 631.

57 (1993) 115 ALR 645 at 652.

58 *Whitby v Garlett* (2000) 98 FCR 585 at 592 [20], 593 [21]-[22] per French J; *Hansen v AEC* [2000] FCA 606 at [13] per Kenny J; *AEC v Lalara* (1994) 53 FCR 156 at 165B-E per O'Loughlin J; *Pettit v Atkinson* (1994) 50 FCR 174 at 179E-F per Gray J.

59 Compare *Datt v Law Society of New South Wales* (1981) 148 CLR 319 at 334 per Brennan J.

41. The other two reasons require further explanation.

(i) The purpose for which the AEC Records are relevant

42. The AEC's Submissions paraphrase the operation of s 365 by suggesting that it prevents the Court from admitting "evidence of the way in which each of those voters intended to vote"[60] or that its effect is that "no evidence may be adduced"[61] about the missing 1,370 ballot papers.

43. Those submissions pay insufficient regard to the terms of s 365. That section does not create a general prohibition on the admission of evidence about the way in which an elector who was prevented from voting intended to vote. All that s 365 provides is that the Court shall not admit such evidence "for the purpose of determining whether the absence or error of, or omission by, the officer did or did not affect the result of the election". There is nothing in s 365 that prevents the admission of evidence of the specified kind for any purpose other than that identified in s 365.

44. The LPA Respondents do not seek to rely on the AEC Records for the purpose of determining whether the loss of the 1,370 ballot papers "did or did not affect the result of the election". They say, instead, that even if the AEC discharges its onus of satisfying the Court that the result of the election was "likely to be affected" by the alleged illegal practices, that is not the end of the inquiry because:

44.1. pursuant to s 362(3), the power to declare an election void nevertheless cannot be exercised unless the Court is also satisfied "that it is just that the ... election should be declared void"; and

44.2. further, even when that precondition is satisfied, it remains for the Court to decide which of its powers under s 360(1) it is appropriate to exercise. Section 360(2) provides that those powers may be exercised "on such grounds as the Court in its discretion thinks just and sufficient".[62] The exercise of that discretion is informed by s 364, which provides that "[t]he Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities".

45. At the appropriate stage of these proceedings, the LPA Respondents will contend that the AEC Records are relevant to each of the matters identified in the previous paragraph. Those records establish that:

45.1. only 23 of the 1,370 missing ballot papers contained votes that were relevant to the margin at the 50th exclusion point;[63]

---

60 AEC's Submissions at [42].

61 AEC's Submissions at [52].

62 As to the effect of s 360(2), see *Sue v Hill* (1999) 199 CLR 462 at 486 [45] per Gleeson CJ, Gummow and Hayne JJ, 520-521 [148]-[149] per Gaudron J, 547-548 [222]-[224] per McHugh J (with whom Callinan J agreed).

63 Amended Statement of Agreed and Assumed Facts at [42(f)].

45.2. two different officers of the AEC, at different times and different places, examined the 1,370 missing ballot papers before they were lost. Those officers reached relevantly identical conclusions as to the votes that were recorded in those ballot papers in so far as those papers are relevant to the margin at the 50th exclusion point[64].

46. In circumstances where the Court has reliable evidence from which it can determine the result of the election that the AEC would have been required to declare had the ballot papers not been lost, it is not "just" that the election be declared void, particularly as the consequence of such a declaration is to invalidate the election of four senators who the AEC accepts were properly elected[65]. A declaration that the election was absolutely void should be a remedy of last resort, to be ordered only where a reliable outcome cannot be determined in any other manner.[66] That is not the position here, the use of records of ballot papers that have been lost between an original scrutiny and a re-count to assist in determining the result of a re-count being supported by precedent both in Australia[67] and overseas.[68] The AEC Records are relevant to the Court's discretion because they contain reliable evidence that should lead the Court to exercise its power under s 360(1)(vi), rather than under s 360(1)(vii). The use of the AEC Records for that purpose is consistent with judicial observations that the ballot should be a means of protecting rather than defeating the franchise[69], that courts will strive to uphold an election where possible[70], and that the "enormity"[71] of ordering of a new election is "not a perfect answer" and can itself harm the integrity of an electoral system[72].

---

64 Amended Statement of Agreed and Assumed Facts at [58(e)]. See also at [42(a)] and [42(b)]. See also Annexures A and B.

65 Note that, in refusing a supplementary election for all 12 NSW Senators in *In re Wood*, one reason the Court gave for considering such an election inappropriate was that it was "unreal" to suggest that the presence of the disqualified Senator's name on the ballot paper had "falsified the declared choice of the people of the State for any of the first eleven candidates": (1988) 167 CLR 145 at 167 (the Court).

66 See, e.g., *Dunbier v Mallam* [1971] 2 NSWLR 169 at 176D-E per Hardie J; Prof Stephen Heufner, "Remedying Election Wrongs" (2007) 44 *Harvard Journal on Legislation* 265 at 317-319, cited in *Opitz v Wrzesnewskyj* [2012] SCR 76 at [48]. In that case the Supreme Court recognised, at [56], "the principle that elections should not be lightly overturned, especially where neither candidates nor voters have engaged in any wrongdoing".

67 *Blundell v Vardon* (1907) 4 CLR 1463 at 1470. While this decision preceded the 1922 amendments that introduced the proviso, for the reasons already advanced the proviso is not relevant to this argument, and that amendment is therefore immaterial to the authority of this decision.

68 See, for example, *Sheehan v Franken*, 767 NW 2d 453 (Minn 2009) at 470-471, which involved an election for the United States Senate. The Supreme Court of Minnesota upheld the use of records of 132 ballots that were counted, but then went missing after election day and were not available for a re-count. There are other decisions to like effect: e.g. *McDunn v Williams* 156 Ill 2d 288 (Ill 1990) at 321-322.

69 See, eg, *Langer v Commonwealth* (1996) 186 CLR 302 at 347 per Gummow J; *Mitchell v Bailey (No 2)* (2008) 169 FCR 529 at 549 [52] per Tracey J.

70 *Fitch v Stephenson* [2008] EWHC 501 (QB) at [43]; *AEC v Towney* (1994) 51 FCR 250 at 255G-256C per Foster J; *Freeman v Cleary* (Unreported, NSW Court of Disputed Returns, 31 October 1974) at 3, 4 and 10 per Nagle J.

71 *Freeman v Cleary* (Unreported, NSW Court of Disputed Returns, 31 October 1974) at 10 per Nagle J.

72 *Opitz v Wrzesnewskyj* [2012] 3 SCR 76 at [48]-[50].

47. It is not presently necessary for the Court to examine the merits of the above argument (which will, of course, be further developed at the appropriate time). The argument is summarised only for the purpose of demonstrating the relevance of the AEC Records to the determination of the petitions. That argument does not use the AEC Records for "the purpose of determining whether" the loss of the missing ballots "did or did not affect the result of the election". As that is the only purpose to which the prohibition in the proviso to s 365 is directed, s 365 does not preclude the admission of the AEC Records.

(ii) Alternatively, the AEC Records do not fall within the proviso

48. Further or alternatively, even if each of the arguments advanced above is rejected, the proviso to s 365 nonetheless does not preclude the admission of the AEC Records because those records are not evidence falling within the scope of the proviso.

49. The history of, and rationale for, the introduction of the s 365 proviso was discussed in paragraphs 15 to 18 above. As that discussion indicated, the history of the proviso is inconsistent with the proposition that it was intended to preclude the admission of ballot papers themselves or secondary evidence of their contents. It was directed to reversing what occurred in *Kean v Kerby*, but not to preventing the Court from scrutinising ballot papers or secondary evidence thereof.

50. Further, even if the proviso does extend to ballot papers or secondary evidence thereof, the singular language of the proviso indicates that it was intended only to preclude evidence as to the voting intention of a particular identified elector[73], rather than evidence which does not connect any particular elector with any particular expression of voting preference. That intention is consistent with the parliamentary debates concerning the proviso (see paragraph 18 above) and with the legislature's awareness at the time of both the need to preserve the secrecy of the ballot to the extent possible[74] and the dangers of a witness giving uncorroborated oral evidence about his or her vote[75].

51. Accordingly, the AEC Records are not "evidence of the way in which the elector intended to vote" within the meaning of s 365 proviso, because they do not disclose anything about the way any particular elector voted. The proviso therefore does not preclude the admission of those records.

---

73 In particular, the reference to "the elector" in the final line of the proviso. See, eg, *Freeman v Cleary* (Unreported, NSW Court of Disputed Returns, 31 October 1974) at 8, 10 per Nagle J; *Fenlon v Radke* [1996] 2 Qd R 157 at 172 per Ambrose J; *Varty v Ives* [1986] VR 1 at 15.33-15.34 per Starke J.

74 See, eg, Senate Hansard, 4 August 1922 at 1142-1155, 23 August 1922 at 1570-1579.

75 See Senate Hansard, 23 August 1922 at 1579, in relation to the proposed insertion by clause 12 of provisions for the numbering of ordinary ballot papers.

(3) The admission of evidence of the fresh scrutiny and original scrutiny is not otherwise prevented by the CEA

52. The AEC places considerable emphasis upon the characterisation of the re-count as a *de novo* exercise rendering the fresh scrutiny (and, hence, any records of it) irrelevant[76]. However, the matter presently in issue is not whether the AEC could have determined the result of the re-count by a combination of the AEC Records (in relation to the 1,370 missing ballot papers) and a *de novo* scrutiny of the ballot papers still in its possession. Rather, the context in which the admissibility of those records falls to be considered is that of the Court deciding (at the next phase of the hearing of the petitions) the matters identified in paragraph 44 above.

53. The Court of Disputed Returns does not stand in the shoes of the AEC, as is implied by the AEC's submission that if the AEC Records "could not be taken into account on the re-count, it is difficult to see that they could or should be taken into account by this Court".[77] That submission is misconceived because the questions whether the Court is satisfied that the relief sought is "just" under s 362(3), and how the Court should exercise its discretion under s 360(2), are quite different to the question of whether the AEC could have employed the AEC Records on the re-count in determining the result.[78] Whether or not it was necessary for the AEC to disregard the results of the fresh scrutiny for that purpose, there is nothing in the CEA or in *Re Lack; ex parte McManus* – which was not a case dealing with the powers of the Court of Disputed Returns – to suggest that the Court's power is circumscribed so as to require it to disregard those results for the purpose of deciding whether or not to grant the relief sought.

54. On the contrary, the CEA suggests that the AEC Records can, and indeed should, be taken into account by the Court in making that decision. Reference has already been made in paragraph 44.2 above to s 364, which is headed "Real justice to be observed". This provision guides the Court as to the approach it should adopt when undertaking its task of deciding the issues under the Act which a petition presents[79]. Here, the AEC contends that the Court should exercise its power to declare an election void. But even if satisfied that the alleged illegal practices were likely to have affected the result of the election, by reason of s 362(3) the Court has power to make such a declaration only if it is satisfied that doing so is "just". It would be antithetical to s 364 and the notion of "real justice" for the Court in that context to be prevented from considering evidence which has the potential to lead the Court to the conclusions identified in paragraph 46 above, obviating a declaration that the election is void.

---

76 AEC's Submissions at [8], [21], [24]-[33], [39], [41], [54(iii)], [59].

77 AEC's Submissions at [31].

78 The Court of Disputed Returns may make orders that require things be done that could not have been done by the AEC absent those orders: see, e.g., *Re Wood (No 2)* (1988) 167 CLR 145 at 172-173 per Mason CJ. Indeed, the AEC has previously invited the Court to adopt that very course: see, e.g., *AEC v Towney* (1994) 51 FCR 250 at 255-256 per Foster J.

79 *McClure v AEC* (1999) 163 ALR 734 at 742 [32] per Hayne J.

55. Technical evidentiary arguments of the kind advanced by the AEC[80] are also inconsistent with the further requirement of s 364 that the Court not have regard to "whether the evidence before it is in accordance with the law of evidence or not". It is instructive that the parliamentary debates in relation to the 1902 Act reveal strong disagreement as to whether the power to determine disputed returns should be vested in a Court rather than a committee of the parliament[81]. Section 364[82] was referred to in that context as addressing concerns of members who considered that a Court would take an unduly technical and legalistic approach[83]. Arguments of the kind now advanced by the AEC are, it is submitted, the very thing which the legislature was concerned about and sought to address by s 364. There is nothing in the scheme of the CEA that requires the Court in effect to pretend that "nothing can be known"[84] about the 1,370 ballot papers.

56. Section 360(2) has also been referred to in paragraph 44.2 above. Whilst that section must be read subject to the qualifications of the Court's power expressed elsewhere in Div 1[85], it too indicates that the Court should have the AEC Records before it in making its decision whether or not to declare the election void.

57. When the admissibility of the AEC Records is considered in the correct context, it is clear that those records are relevant to the Court's decision whether to exercise its power and, therefore, cannot be inadmissible on the basis of irrelevance merely because, once the re-count was undertaken, it involved a *de novo* process. That is sufficient to conclude this aspect of the inquiry for the purpose of answering question II. The weight which the Court might give to those records, and the decisions which it should reach in light of them, are questions for the next phase of the hearing.

QUESTION III

(a) Is further inquiry regarding reserved ballot papers permitted?

58. As the AEC now recognises[86], the Court has the power under the CEA to inquire further as to the manner in which the AEO dealt with the reserved ballot papers and there is no provision of the CEA which precludes such inquiry. Section 361(1),[87] or alternatively (as the AEC contends) s 360(1), empowers the Court to inspect and rule

---

80 AEC's Submissions at [41] and [44] (the second and third points raised in the paragraph).

81 See, eg, HR Hansard, 29 July 1902 at 14664-14693.

82 Clause 204 of the Bill, which was enacted as s 199 of the 1902 Act.

83 HR Hansard, 29 July 1902 at 14665, 14671, 14686-14687.

84 AEC's Submissions at [51].

85 See, eg, *Sue v Hill* (1999) 199 CLR 462 at 486 [44] per Gleeson CJ, Gummow and Hayne JJ.

86 AEC's Submissions at [45] and [46]; cf AEC's Supplementary Outline of Submissions on Summons for Directions dated 12 December 2013 (see at [13]-[14], [16] and [18(4)]), where the AEC's position was that the s 365 proviso would prevent the Court from examining the reserved ballot papers.

87 Section 361(1) appeared in the 1902 Act as s 198, and was re-enacted in 1918 in the CEA as s 190. Save for its renumbering and the insertion of s 361(2) in 1983, the section has been in the same form since 1902.

on the admission or rejection of the ballot papers. The existence of that power is supported by the fact that this Court has examined and ruled on the formality of ballot papers in a number of cases, albeit without identifying the specific source of the power being exercised[88]. Tracey J also did so in *Mitchell v Bailey (No 2)*[89], but made passing reference[90] to the "Court's powers under Div 1 of Pt XXII of the [CEA]" and to powers implied in ss 360(1)(v), (vi), (vii) and 361(1).

59. Section 361(1) is specifically suggested by a number of authorities[91] as empowering the Court to examine ballot papers and rule on their formality. It is also plain from the language of the opening clause of s 361(2) that the inquiries referred to in s 361(1) include inquiries in relation to ballot papers themselves.

60. Sections 360(1)(v) and (vii) confer powers which require the Court to examine and rule upon ballot papers as a necessary antecedent to those powers being exercised in cases where a petition alleges the wrongful rejection or admission of ballot papers[92]. Accordingly, a power to examine and rule upon ballot papers may be seen to be conferred as an incident of the powers enumerated in ss 360(1)(v) and/or (vii). Such conferral of power is also consistent with the presence in Div 1 of ss 360(2) and 364 and with the decision of Mason CJ in *Re Wood*[93].

61. The presence and terms of s 281(3) provide a strong further indication that the CEA confers a power to examine and rule on the admission or rejection of the reserved ballot papers. Further, the legislative history of that provision supports the conclusion that s 361(1) or s 360(1) provides the source of that power to examine the reserved ballot papers:

    61.1. Section 281(3) did not appear in the 1902 Act when it was first enacted. However, s 157 of the 1902 Act provided that the decision of the officer conducting the scrutiny as to the admission or rejection of a ballot paper objected to by a scrutineer "shall be final, subject only to reversal by the Court of Disputed Returns". The presence of a section in those terms suggests that the power currently under consideration existed as early as 1902, notwithstanding the absence of any equivalent to s 281(3). Both ss 360(1) and 361(1) appeared in the 1902 Act (as ss 197 and 198 respectively).

---

88 *Chanter v Blackwood* (1904) 1 CLR 39; *Chanter v Blackwood (No 2)* (1904) 1 CLR 121; *Blakey and Findley v Elliott* (1929) 41 CLR 502; *Kane v McClelland* (1962) 111 CLR 518 (in which the Court acted upon descriptions in the petition of the manner in which the ballot papers had been marked by voters).

89 (2008) 169 FCR 529 at 539-542 [21]-[29].

90 (2008) 169 FCR 529 at 553 [62] and 552 [61] respectively.

91 *Kennedy v Palmer* (1907) 4 CLR 1481, especially at 1482 per Barton J; *Kean v Kerby* (1920) 27 CLR 449 at 459 per Isaacs J; *Fell v Vale (No 2)* [1974] VR 134 at 151 per Gowans J (speaking of the equivalent provision in s 286 of the *Constitution Act Amendment Act 1958* (Vic)).

92 *Mitchell v Bailey (No 2)* (2008) 169 FCR 529 at 556 [82] per Tracey J. The wrongful rejection or admission of a ballot paper may amount to an "illegal practice": *Mitchell v Bailey (No 2)* (2008) 169 FCR 529 at 534 [9] and 538 [19] per Tracey J.

93 (1988) 167 CLR 145 at 172. See also *AEC v Towney* (1994) 51 FCR 250 at 255-256 per Foster J.

61.2. The *Commonwealth Electoral Act 1909* (Cth)[94] substituted a new s 157 which no longer referred to the decision on the scrutiny being final subject only to reversal by the Court[95]. However, there is no indication that the legislature intended the removal of that reference to deprive the Court of its power to determine the formality of a ballot paper, suggesting that the reference in the original form of s 157 to reversal by the Court was reflective of, but did not confer, that power[96]. The 1909 parliamentary debates reflect a view that the Court had the power to review and rule upon the formality of ballot papers, and that s 198 of the 1902 Act was the source of that power[97].

10 61.3. As the AEC acknowledges, in 1911, when the predecessors of s 281 first appeared,[98] they were intended to increase efficiency by regulating the exercise of a power which the Court was recognised as already possessing[99] by virtue of s 198 (now s 361(1)) or s 197 (now s 360(1)).

(b) Is further inquiry regarding reserved ballot papers relevant?

62. Much of what the AEC submits under this heading appears to relate to the question of whether the Court should declare the election void, having regard to the alleged effect on the election of the number of lost ballot papers. That is a question to be addressed in detail at the next phase of the hearing. For present purposes, it is sufficient to note that none of the authorities referred to at [54] of the AEC's
20 Submissions concerned the question of whether or not either limb of s 362(3) or its predecessors was satisfied.

63. Further inquiry is relevant to the disposition of all petitions. It is clearly relevant to the Mead and Wang petitions, which each expressly challenge the decisions of the AEO on the reserved ballot papers. Further inquiry is also relevant to the AEC petition because of the contentions[100] of Messrs Mead and Wang that acceptance of their allegations as to the reserved ballot papers would in effect render irrelevant the loss of the ballot papers upon which the AEC founds its claims for relief.

---

94 Section 26.

95 Presumably this was because of the insertion by the same Act of sections permitting the officer conducting the re-count to reverse any decision made on the scrutiny as to the admission or rejection of a ballot paper: see ss 28 and 29 of the *Commonwealth Electoral Act 1909* (Cth), inserting ss 161A(2) (Senate) and 164A(2) (House of Representatives).

96 See HR Hansard, 27 October 1909 at 5088 (especially Mr Fuller's response to Mr Brown).

97 Senate Hansard, 8 September 1909 at 3111, 3126-3127, 3135.

98 Sections 26 and 29 of the *Commonwealth Electoral Act 1911* (Cth) inserted ss 161B (Senate) and 164B (House of Representatives). Those sections were later consolidated and enacted in 1918. Section 140(3) of the CEA as enacted in 1918 was relevantly identical to the present s 281(3).

99 See Senate Hansard, 25 October 1911 at 1788-1790, 22 November 1911 at 2957-2959, 2963; HR Hansard, 4 December 1911 at 3636.

100 Mead petition at [33(b)] and Mr Wang's outline of submissions dated 10 December 2013 at [6].

(c) Is further inquiry regarding reserved ballot papers necessary?

64. The LPA Respondents contend that, if the Court accepts in answer to question II that the AEC Records are admissible for the purposes identified in paragraphs 44 to 46 above, it is not necessary to conduct a further inquiry into the reserved ballot papers, as it would be possible for the Court to determine the petitions without doing so. That follows because once the AEC Records are admitted, it would be open to the Court to find that, irrespective of the correctness of the allegations in the Mead and Wang petitions concerning the reserved ballot papers, it would be appropriate to dispose of the petitions by exercising its power under s 360(1)(v) and (vi) to declare that Messrs Dropulich and Ludlam were not duly elected, and to declare that Mr Wang and Ms Pratt were duly elected. It could proceed in that way because the evidence would establish that this is the result that the AEC would have declared had the 1,370 votes not been lost by the AEC prior to the re-count.

65. If the Court takes that course, further inquiry regarding the reserved ballot papers is not necessary because such an inquiry will:

65.1. make no difference to the disposition of the petitions if the Court rejects the allegations made in the Mead and Wang petitions in relation to the reserved ballot papers;

65.2. simply serve to give the Court additional confidence in its disposition of the petitions by reference to the AEC Records, if the Court accepts the allegations made in the Mead and Wang petitions in relation to the reserved ballot papers.

Date of filing: 17 January 2014

Stephen Donaghue
Telephone: (03) 9225 7919
Fax: (03) 9225 6058
Email: s.donaghue@vicbar.com.au

David Bennett
Telephone: (03) 9225 8425
Fax: (03) 9225 7623
Email: dwbennett@vicbar.com.au

Counsel for the First, Third and Fourth Respondents