IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

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
Eight Respondent in C17 of 2013 and P56 of 2013
Seventh Respondent in P55 of 2013

SENATOR LUDLAM'S SUBMISSIONS ON QUESTIONS OF LAW

Filed on behalf of Senator Ludlam by:

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

Introduction and summary

2. Senator Ludlam submits that the answers to the questions of law set down by Justice Hayne on 13 December 2013 are as follows:

> **Question 1:** Did the loss of the 1,370 ballot papers between the fresh scrutiny and the re-count mean that the 1,370 electors who submitted those ballot papers in the poll were "prevented from voting" in the Election for the purposes of s 365 of the Act?[1]
>
> **Answer:** Yes.
>
> **Question 2:** Is the Court of Disputed Returns precluded by s 365 or otherwise from admitting the records of the fresh scrutiny, or original scrutiny, that bear on the 1,370 missing ballot papers as evidence of the way in which each of those voters intended to vote, or voted, in the Election for the purposes of each of the petitions filed in the matter, including in so far as those petitions seek relief under ss 360 and 362?
>
> **Answer:** Yes.
>
> **Question 3:** On a proper construction of the Act, including the re-count provisions, is any further inquiry regarding the manner in which the AEO[2] dealt with the ballot papers reserved for decision pursuant to s 281:
>
> (a) permitted under any, and if so which, provision of the Act;
>
> **Answer**: Although ss 281(3), 353(1) and 360 appear to confer power that would permit such an inquiry, the power could not properly be exercised by the Court in the present matter.[3]
>
> (b) relevant to the disposition of any, and if so which, petitions before the Court of Disputed Returns;
>
> **Answer**: No.

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1 The "**Act**" is the *Commonwealth Electoral Act* 1918 (Cth).

2 The "**AEO**" is the Australian Electoral Officer.

3 Because of the answers to (a) and (b), it would not be a proper exercise of power to conduct any further inquiry where such an inquiry is irrelevant and unnecessary.

(c) necessary to the disposition of any, and if so which, petitions before the Court of Disputed Returns?

Answer: No.

3. In summary, Senator Ludlam's argument is as follows:

(a) A re-count under s 278 of the Act is a *de novo* scrutiny that disregards the results of earlier scrutinies of the same category of ballot papers; only the scrutiny of the ballots on the re-count can determine the results for that category of ballot papers, leaving no scope for regard to be had to records of earlier scrutinies.

10 (b) Because of (a), there is no proper basis for the Court to consider any of the records of the fresh scrutiny.

(c) The Court is also precluded from admitting the records of the fresh scrutiny because of the proviso in s 365: The loss by AEC officers of the 1,370 ballot papers meant that 1,370 electors were "prevented from voting". The records of the fresh scrutiny may constitute secondary evidence of the way in which those electors intended to vote in the election. Therefore, the Court cannot admit those records in evidence.

(d) Accordingly, it is irrelevant and unnecessary for the Court to conduct any further inquiry as to how the AEO dealt with the reserved ballot papers – any
20 difference such an inquiry could make is rendered immaterial by reason of the number of missing ballot papers relative to the number of reserved ballot papers, and the subset of those that are the subject of challenge.

(e) Further, according to the Wang and Mead petitions, the purpose of any further inquiry would be for the Court to declare an alternative result, based on, first, a "notional re-count"[4] combining what is known of the 1,370 missing votes from records of the fresh scrutiny with the results of the re-count and, second, a further re-count by the Court of the reserved ballot papers.[5] Such a further inquiry is impermissible because, first, the "notional re-count" is not a process permitted by the Act to determine the results of an election.
30 Second, the re-count sought by the Wang and Mead petitions would be fatally compromised because it too would exclude the 1,370 missing votes.

(f) By reason of the matters set out in (a) to (e), no re-count under s 281(3) could be justified so no purpose could be served by the Court considering the ballot papers reserved for decision. Put another way, the number of the missing

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4 Amended Statement of Agreed and Assumed Facts filed 14 January 2014 (**Agreed Facts**), paragraph 59.

5 As to the alternative results contended by Mr Mead and Mr Wang respectively, see Agreed Facts, paragraphs 60 to 61.

votes in the present case make this a case which must necessarily be resolved under ss 360 (3), 362 (3) and 365, rather than s 281(3).

The results of the polling and the *de novo* nature of the re-count

4. Senator Ludlam adopts the AEC submissions at paragraphs 8, 11, 24 to 31 and 41-in support of the following propositions:

   (a) the results of the election were to be declared on the basis of the re-count together with the formal below-the-line votes that were not ordered to be re-counted; and

   (b) the re-count was a *de novo* process that required the results of the earlier scrutinies to be disregarded in so far as they pertained to the category of ballot papers ordered to be re-counted.

5. He makes the following additional submissions.

6. First, the reservation process under s 281 of the Act, which is available on a re-count under s 278 but not in the fresh scrutiny, strongly supports the proposition that the re-count wholly supplants the fresh scrutiny, in respect of that category of ballot papers ordered to be re-counted. That observation is reinforced by the rationale for a re-count, which is necessarily based on concerns about the reliability of the fresh scrutiny. The legislature's conferral on the AEO and the Electoral Commissioner of the power to direct or conduct a re-count and the requirement that the re-count be subject to the specific disputes procedure in s 281 are inconsistent with any records of any earlier scrutiny being able to be used, whether directly or indirectly, in the re-count.

7. Second, the process of the scrutiny, set out in Part XVIII of the Act, determines the result of an election,[6] without any intermediate step that would permit regard to other matters, such as records of an earlier count in respect of the same category of ballot papers. "*The scrutiny is spoken of in the Act as a count, or as a counting of the votes*"[7] and the votes counted on a re-count are the results, in respect of the category of ballot papers ordered to be re-counted. Therefore, the statutory scheme does not permit the results of a re-count of a particular category of ballot papers to be supplemented by a consideration of other matters, such as the records of an earlier scrutiny.

Relevance of the records of the fresh or original scrutiny

8. Even if it were permissible to have regard to the records of the original scrutiny or fresh scrutiny, those records would merely confirm what is known from the mere fact of the missing ballot papers and their number, namely that the result of the election

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6 Act, s 263.

7 *Blundell v Vardon* (1907) 4 CLR 1463 at 1478.9 (Barton J).

could have been or was likely to have been affected. In that regard, Senator Ludlam adopts the AEC submissions at paragraphs 52 to 59.

9. In turn, that also confirms that this is an occasion where the Court has the power under s 362(3) to declare that the election was void.

10. In this case, satisfaction of the grounds and matters set out in ss 360(3) and 362(3) does not enliven the power to declare any candidate duly elected who was not returned as elected. Section 362, which "*governs the grant of relief when an election is challenged on the ground of bribery, corruption, undue influence or illegal practice*",[8] does not refer to relief in the form of a declaration that an unsuccessful candidate was duly elected who was not returned as elected.

The proviso in s 365 and the expression "prevented from voting"

11. As to the effect of s 365, Senator Ludlam respectfully adopts the AEC submissions, paragraphs 9 to 11, 31 to 40 and 42 to 44.

12. The argument that "prevented from voting" is limited to the situation in which an elector is excluded from the polling booth or is refused a ballot paper is without logical foundation. As a matter of substance, there is no distinction between the following scenarios:

    (a) an elector being denied a ballot paper, or otherwise being denied the right to complete a ballot paper;

    (b) the elector's ballot paper being destroyed or misplaced before it was counted in any scrutiny; and

    (c) the elector's ballot paper being lost before a re-count that determines the result of an election.

13. In each case, by reason of the AEC's officers having lost the 1,370 ballot papers, the votes of 1,370 electors were not the subject of any scrutiny in the re-count and determination of the election result. There is nothing in the text, context or objective of the proviso in s 365 that would justify any distinction to be drawn between the above scenarios.

The re-count sought in the Wang and Mead petitions

14. In Senator Ludlam's submission, while it may generally speaking be permissible for the Court to consider ballot papers under s 281, it is not permissible in this matter.

    (a) The objective of the Wang and Mead petitions in asking the Court to consider the reserved ballot papers is for the Court to declare that unsuccessful candidates were duly elected. The first step in their argument is to persuade

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[8] *Sue v Hill* (1999) 199 CLR 462 at [123] (Gaudron J).

the Court to rely on the "notional re-count".[9] The next step is to ask the Court to conduct a re-count of the reserved ballot papers.

(b) For the reasons set out above, there is no statutory basis upon which the Court could rely on a "notional re-count", combining what is known of the 1,370 missing votes from records of the fresh scrutiny with the results of the re-count, it being impermissible to supplement the results of the re-count under s 278 with records of earlier scrutinies of the same category of ballot papers.

(c) For the reasons given below, any Court-ordered re-count would be compromised by the exclusion of the 1,370 missing votes.

15. Where a petition claims a seat for an unsuccessful candidate, alleging that he or she had a majority or quota of lawful votes, "the inquiry becomes a *scrutiny*", by way of a re-count by the court or pursuant to its order.[10]

16. Were the Court to undertake the re-count sought in the Wang and Mead petitions, that re-count would be compromised, because it too would exclude the 1,370 missing ballot papers – whether the re-count were limited to, or extended beyond, the papers reserved under s 281(3).

(a) The reservation process in s 281 did not apply to the original scrutiny and therefore the 1,370 missing ballots were not subject to that process and do not form part of the reserved ballots.

(b) The 1,370 would likewise be excluded from any further re-count ordered under s 281(3).

17. Therefore, the illegal practice or practices that led to the 1,370 ballot papers being excluded from the re-count would also compromise any Court-ordered re-count. In Senator Ludlam's submission, a re-count in such circumstances cannot be justified as it is not permitted by the Act and would in any event be precluded by s 281(3).

18. Further, an inquiry into how the AEO dealt with the ballot papers reserved under s 281 is irrelevant and unnecessary to the disposition of any of the petitions, for the reasons given in paragraphs 12 and 49 to 59 of the AEC's submissions. For that reason alone, such an inquiry would not be justified and it would not constitute a proper exercise of power.

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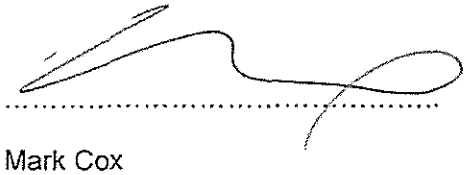
9 Agreed Facts, paragraph 59.

10 *Rogers on Elections*, Part II (16th ed, 1892) p 255 (see also p 259); See also Act, s 281(3) (which refers to the Court's consideration of ballot papers as a re-count); *Blundell v Vardon* (1907) 4 CLR 1463 (in which Barton J ordered a re-count); *Cole v Lacey* (1965) 112 CLR 45 (in which Taylor J dismissed the petition but described it as one seeking a re-count).

Conclusion

19. By reason of the arguments advanced or adopted above, Senator Ludlam submits that the questions should be answered as set out in paragraph 2.

Dated: 17 January 2014



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These submissions were prepared by Ron Merkel and Frances Gordon, Counsel for Senator Ludlam. A version of these submissions signed by Counsel will be filed prior to the hearing of the questions of law.