IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

NO C17 OF 2013
P55 OF 2013
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

MR WANG'S WRITTEN SUBMISSIONS

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Part I: Internet Certification

1. Mr Wang certifies that the submissions are suitable for publication on the internet.

Part II: Facts

2. The facts for the purposes of determining the questions stated by Hayne J on 13 December 2013 (***Stated Questions***) are set out in the Amended Statement of Agreed and Assumed Facts (***Statement of Agreed Facts***) filed on 14 January 2014.

3. In these submissions, Mr Wang adopts the abbreviations used in the Statement of Agreed Facts.

Part III: Argument

4. Mr Wang submits that the Stated Questions should be answered as follows, and for the following brief reasons:

    1. No, because all of the 1,370 electors voted, their votes were counted and (apart from informal votes) were available to be taken into account.

    2. No, because they are records of votes which the Court ought to take into account, pursuant to ss 362 and 364 of the *Commonwealth Electoral Act 1918* (Cth) (the *Act*) , in determining whether the relief sought in the petitions should be granted.

    3. (a) Yes, s 361(1) of the Act, read together with ss 281(3),353(1), 354(1) and 360.

    (b) Yes, all of them, because the result of such an inquiry will assist in determining whether the relief sought in the petitions should be granted, and in particular whether the result of the election was likely to be affected by the factual and legal issues raised in the petitions and whether the relief sought is just.

    (c) Yes, all of them, for the reasons summarised in 3(b).

Question 1 — meaning of "prevented from voting" in s 365

A. Alternative meanings

5. The proviso to s 365 applies only where "*any elector was* on account of the absence or error of, or omission by, any officer *prevented from voting*" in the election.

6. The previous cases suggest three possible meanings which could be given to the phrase "prevented from voting":

   (a) prevented from completing a ballot paper and depositing it in a ballot box (or posting the ballot paper in the case of postal voting) ("casting a ballot paper");

   (b) prevented from casting a valid vote; or

   (c) prevented from casting a ballot paper which is *included* in the final count of ballot papers conducted by electoral officials.

7. In its submissions (at [9], [31], [40] and [46]) the AEC proposes a construction, not previously suggested in any case, namely:

   (d) prevented from casting a ballot paper which is *scrutinised* in the final count of ballot papers conducted by electoral officials.

   Although never stated, it follows on the AEC's construction that the word "voting" in s 365 means "having one's ballot paper *scrutinised* in the final count of ballot papers conducted by electoral officials". This is a subtle variant of construction (c) — on that construction "voting" meaning "having one's ballot paper *included* in the final count of ballot papers conducted by electoral officials".

8. In the present case, the electors who cast the 1,370 missing ballot papers were not prevented from casting a ballot paper or a valid vote, either "on account of the absence or error of, or omission by, any officer" or at all. Each of the missing ballot papers was cast by an elector[1] and was scrutinised either at the original scrutiny or the fresh scrutiny (or both). None of the votes that were informal were invalid as a result of any action or omission of an officer of the AEC. The only relevant official error identified in the present case is that the missing ballot papers were lost and not counted in the re-

[1] See [35] and [38a] of the Statement of Agreed Facts.

count ordered by the AEO for Western Australia. Only if construction (c) or (d) were adopted could question 1 be answered in the affirmative.

9. For the reasons developed below, Mr Wang submits that only constructions (a) and (b) are reasonably open on the language of the section and in the context of the relevant parts of the Act, and that both constructions (c) and (d) should be rejected. The submissions on this question are separated into 3 parts. The first part considers the previous cases that have considered the meaning of the phrase "prevented from voting". The second explains why *Re Lack; ex parte McManus*[2] (***Re Lack***) and s 263 of the Act, the lynchpins of the AEC's submissions, are irrelevant to the questions of construction before the Court. The third addresses the proper construction of the phrase "prevented from voting".

B. Previous cases on the meaning of "prevented from voting"

10. Although a number of cases have considered the operation of the State equivalents to s 365, there are few that have considered the meaning of "prevented from voting" in detail. Other cases have considered what constitutes "voting" in the context of prosecutions for failure to vote or for double-voting, and therefore also bear on the question of whether an elector has been prevented from "voting".

11. In *Campbell v Easter*,[3] Sugerman J considered that, "Prevention from voting includes ... prevention from casting an effective vote on account of some 'error of, or omission by' an officer, and is not limited to such acts as, for example, excluding an elector from the polling booth or refusing to hand him a ballot paper." However, in that case the point does not appear to have been argued[4] and his Honour did not give reasons for his view.

12. In *Varty v Ives*,[5] Starke J approved the decision of Sugerman J but went further and concluded that "'prevented from voting' ... means prevented from casting a vote which is included in the count".[6]

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2 (1965) 112 CLR 1.
3 (NSW Court of Disputed Returns, Sugerman J, unreported, 12 June 1959), p 4.3.
4 See *Freeman v Cleary* (NSW Court of Disputed Returns, Nagle J, unreported, 31 October 1974), p 5.7.
5 [1986] VR 1 at 16.1.
6 Notably, neither Sugerman J nor Starke J appears to have considered the apparently contrary decision of *R v Carr* (1870) 9 SCR (NSW) L 55 (FC), nor did Starke J consider the other apparently contrary decisions of *Faderson v Bridger* (1971) 126 CLR 271 at 272.7 and *Douglass v Ninnes* (1976) 14 SASR 377 at 383.9. These decisions are discussed below (paragraph 27).

13. However, in *Freeman v Cleary*[7] Nagle J, after an extensive discussion, declined to follow Sugerman J's approach and concluded that "prevented from voting" refers only to an elector who is prevented "in any way from exercising his franchise and records no vote at all".[8] Similarly, in *Fenlon v Radke*[9] Ambrose J expressed "significant reservations" about whether the views of Sugerman J and Starke J would apply in circumstances where the votes became invalid and so unable to be included in the count by reason of the returning officers failing to deal with the votes in the manner required by the legislation. In considering the reasons why evidence of voting intention might not be admitted, his Honour contrasted voter-identifying and arguably unreliable evidence that might be given by a voter prevented by an electoral officer from casting a valid vote with evidence of the votes counted from ballot papers cast as declaration votes and rendered invalid by an electoral officer's error.

14. These authorities are of limited assistance on the meaning of the phrase "prevented from voting": the cases are in conflict. The reasoning in all but *Freeman v Cleary* was limited, only *Fenlon v Radke* (which supports Mr Wang's argument) involved errors of the kind in question here (i.e. official errors during counting), and in so far as the decisions in *Campbell v Easter* and *Varty v Ives* concluded that it was not possible to consider ballot papers in wrongly rejected declaration envelopes, those decisions cannot stand with s 364A of the Act. In Mr Wang's submission it is necessary to consider the issue as a matter of principle having regard to the text, context and purpose of the Act. That consideration is also assisted by a number of decisions in which courts have considered what constitutes "voting", which will be discussed later in considering the proper construction of "prevented from voting" in s 365.

C. *Irrelevant matters raised by the AEC: Re Lack and s 263 of the Act*

15. Before turning to the text of s 365, it is convenient to deal immediately with the two matters relied on by the AEC to support its construction — the decision in *Re Lack* and s 263 of the Act. For the reasons below, neither assists in the resolution of the questions before the Court.

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7 (NSW Court of Disputed Returns, Nagle J, unreported, 31 October 1974), pp 5–13.
8 (NSW Court of Disputed Returns, Nagle J, unreported, 31 October 1974), p 12.6.
9 [1996] 2 Qd R 157 at 171.41–172.19.

Re Lack

16. *Re Lack* is, relevantly, authority for the proposition that where an administrative re-count[10] is directed the ballots must be scrutinised *de novo*, and the officer whose function it is to declare the poll or the result of the election must do so on the basis of the result of the re-count. From this obviously correct proposition, the AEC seeks to draw two conclusions.

17. The first is that because the results of previous scrutinies are irrelevant and cannot be taken into account *by the electoral officer* whose function it is to declare the poll or election, it follows that the results of previous scrutinies are irrelevant or should be disregarded *for all purposes before the Court of Disputed Returns*: AEC's Subs, [31], [41]. This reasoning is obviously false. Given the different functions which the Act reposes in polling officials and the Court of Disputed Returns, conclusions about the powers of polling officials cannot be automatically applied to the Court. There is obvious good sense why the polling officials conducting the re-count should not be able to mix and match the results of various counts. In contrast, there is nothing in *Re Lack* that even suggests why the Court of Disputed Returns should be precluded from considering the results of previous counts in determining whether, as a result of an illegal practice, the "result of the election was likely to be affected".

18. The AEC's second conclusion is that because the scrutiny on an administrative re-count must be *de novo*, it follows that if an elector's ballot paper is not available for scrutiny in a re-count then the elector has been "prevented from voting" within the meaning of s 365: AEC's Subs [31]–[32]. With respect, the premise and conclusion are totally unconnected thoughts, unless the act of "voting" is incomplete until the final scrutiny is conducted by electoral officials. Naturally enough *Re Lack* does not say that, since the meaning of "prevented from voting" was not in issue in that case. In truth, the AEC's submission that *Re Lack* explains the meaning of "prevented from voting" amounts to nothing more than an assertion of a particular construction.

Section 263 of the Act

19. Although the AEC relies on s 263 of the Act principally in relation to question 2, it also appears to rely on it to support its construction of "prevented from voting": see AEC's

[10] As opposed to a judicial re-count.

Subs [40]. In Mr Wang's submission, the section, which provides that "[t]he result of the polling shall be ascertained by scrutiny", is irrelevant to both questions 1 and 2.

20. Contrary to the AEC's submissions, s 263 does not preclude the Court of Disputed Returns from considering evidence other than the ballot papers. This is so for a number of reasons.

21. *First*, having regard to the whole of Part XVIII of the Act it is plain that s 263 says nothing about proceedings in the Court of Disputed Returns but is instead directed towards what is required of the polling officials. Read together, sections 263, 264, 265, 266, 273, 273A, 273B, 274, 275, 276 and 277 make clear that scrutiny is the process conducted by polling officials, overseen by candidate scrutineers, to ascertain the result of the polling. The Court of Disputed Returns never engages in the process of scrutiny. Its role is to determine disputes about the validity of an election or return (s 353(1)).

22. *Secondly*, even if s 263 spoke to proceedings of the Court, it does not expressly or impliedly restrict the Court from considering secondary evidence. To the contrary, s 364 expressly requires the Court to be guided "by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not". That section expressly abrogates the "best evidence rule". Section 364 can be seen as an emphatic adoption of the sentiment famously expressed by Lord Macnaghten: "Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?"[11] Express words (e.g. those used in s 365) would be needed to overcome the effect of s 364.

23. *Thirdly*, by the very nature of the process, the Court of Disputed Returns will always proceed in part on the basis of secondary evidence of the scrutiny. The final count itself is such evidence.[12] Apart from issues of reliability, there is no difference in this respect between the count of the scrutiny of the 1,370 missing ballot papers and the approximately 1.3 million other votes. Notably, the AEC's records from the fresh

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11 *Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 at 431.

12 The AEC's contention at [44] that scrutiny records are never more than evidence of the opinions formed by various officers of the AEC is, of course, true, but irrelevant. The same can be said about the final count. If the Court can proceed on the basis of the final count, why can it not proceed on the basis of other counts?

scrutiny of the below the line ballot papers were accepted for the purpose of the final count notwithstanding that they are no more nor less reliable than the records of the 1,370 missing ballot papers and also constitute secondary evidence of the opinions of officers as to the meaning of the votes recorded in those ballot papers.

24. *Fourthly*, if s 263 had the meaning contended for, the proviso to s 365 would have been unnecessary.

25. *Finally*, if s 263 were construed as meaning that, once the process of scrutiny was ended, the result thus ascertained could not be reviewed, it would exclude the Court of Disputed Returns from any role in ascertaining the result of the election. Such a construction is not open given Part XXII, in particular s 360.

26. For those reasons, s 263 does not assist in resolving the questions before the Court.

C. *Proper construction of "prevented from voting"*

27. Contrary to the AEC's approach, it is necessary to begin and end with the statutory text in its context.[13] The meaning of the verb "vote" has been considered in various factual contexts. For example, in the context of a criminal provision against double voting, voting has been held merely to comprise the elector obtaining a ballot paper and depositing it in the ballot box with a view to influencing the election.[14] Similarly, in the context of provisions requiring compulsory voting, voting has been held merely to require the obtaining of the ballot papers, and possibly placing them marked, whether formal or not, into the ballot box.[15] In other contexts, voting may connote the recording of a formal and valid vote.[16] However, whatever the particular context, as a matter of ordinary usage it is essential that "voting" comprise some act by the elector. That is confirmed both by the obligations imposed on electors by ss 245, 239 and 240 of the Act and by the language of the proviso in s 365: "any elector was ... prevented from voting".

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13 See, e.g., *FCT v Consolidated Media Holdings Ltd* (2012) 87 ALJR 98 at [39].

14 *R v Carr* (1870) 9 SCR (NSW) L 55 (FC).

15 See *Faderson v Bridger* (1971) 126 CLR 271 at 272.7; *Douglass v Ninnes* (1976) 14 SASR 377 at 383.10 (Hogarth J); *AEC v Van Moorst* (Supreme Court of Victoria, Vincent J, unreported, 2 July 1987, BC8700552) at 6; cf *Holmdahl v AEC (No 2)* (2012) 277 FLR 101 at [45]-[51], [69] (SAFC); *O'Brien v Warden* (1981) 37 ACTR 13 at 16 (Blackburn CJ). See also s 245(1), (15) of the Act.

16 *Douglass v Ninnes* (1976) 14 SASR 377 at 383.9.

28. The Act draws a clear distinction between voting by electors, which must occur (except possibly in the case of postal voting) before the close of the poll for the election,[17] and the scrutiny which commences "as soon as practicable after the closing of the poll".[18] In the case of postal voting, the elector must mark his or her vote before the close of the poll, and must then post or deliver the envelope containing the ballot paper to the relevant DRO (or in certain circumstances to other officers of the AEC).[19] Provided the envelope is received before the end of 13 days after the close of the poll it will be subject to preliminary scrutiny.[20]

29. Thus, except in the case of postal voting where the act of posting or delivering the envelope containing the postal vote may be considered as part of the act of voting by the elector (analogous to placing an ordinary ballot paper in the ballot box), nothing done after the close of the poll constitutes voting by an elector. Importantly, nothing done in the scrutiny by officials constitutes "voting" by an elector.

30. It follows, both as a matter of ordinary usage and having regard to the Act as a whole, that "prevented from voting" refers to some conduct by officers which prevents an elector from casting either a ballot paper, or possibly a valid and effective vote, and not conduct of officers during the scrutiny which means that an otherwise valid vote is not admitted to the count.

31. That construction is supported by consideration of the legislative history of the proviso to s 365. Section 5 of the *Commonwealth Electoral Legislation Amendment Act 1984* (Cth) renumbered the provisions of the *Commonwealth Electoral Act 1918* (Cth) (***the 1918 Act***). The current s 365 corresponds to the previous s 194.

32. The proviso to s 194, in the same terms as the current proviso to s 365, was introduced in 1922 by s 25 of the *Commonwealth Electoral Act 1922* (Cth). Hansard reveals that the proviso was introduced, along with other amendments to s 194, to overcome the result of the decision in *Kean v Kerby*.[21] There, Isaacs J had allowed electors, who had been "prevented from voting"[22] at all, to give oral evidence of how they would have

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17 See ss 200C, 200D (pre-poll voting); ss 220, 233 (ordinary and declaration voting).
18 Section 265(1)(a). See also the headings to Part XVI ("The polling") and Part XVIII ("The scrutiny").
19 Section 194(1)(a)–(c), (2).
20 Section 266(1)(b).
21 (1920) 27 CLR 449.
22 (1920) 27 CLR 449 at 457.5.

voted, to assist his Honour to determine whether the result of the election had been affected.

33. It is apparent from Hansard that the mischief sought to be remedied by the introduction of the proviso was the giving of oral evidence about how an elector would have voted. In particular, in his second reading speech, the Minister for Home and Territories said:[23]

> The evidence in the case of *Kean v Kerby* ... showed that several electors were prevented from voting by reason of there being no absentee ballot-papers available for them, or through the error of officials. The learned Judge allowed these persons to give evidence as to the manner in which they voted.[24] His reason for doing this was the construction placed on section 194 of the Act. ...
>
> It is proposed, therefore, by clause 24 of the Bill to amend section 194 so as ... to prevent evidence being called as to the way in which an elector intended to vote at an election.

34. The background strongly suggests that the phrase "prevented from voting" was used to refer to conduct of officials which prevented the casting of a ballot paper for the relevant election rather than conduct by officials in the process of counting or other steps after the close of the poll. The background also explains why the words "the way in which the elector intended to vote in the election" were chosen. Those words contemplated an elector who had not voted (in the sense of completing and depositing a ballot) at all.

35. This construction is reinforced by the terms of s 367 of the Act, which was introduced as s 194A[25] at the same time as the proviso to s 194. Its purpose was to tighten up the evidential requirements for demonstrating that an elector was refused a vote.[26] The language of that section, intended to complement s 365, supports the proposition that the "voting" referred to in the proviso to s 365 is the process of an elector completing and depositing a ballot paper. An elector completes that process (and is not prevented from voting) upon depositing that ballot paper (either directly into a ballot box or, in the case of a postal vote, by posting or delivery to the AEC).

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23 Commonwealth, Senate, *Parliamentary Debates (Hansard)*, 26 July 1922, p 752 col 1–2 (Senator Pearce, Minister for Home and Territories). See also Commonwealth, House of Representatives, *Parliamentary Debates (Hansard)*, 20 September 1922, p 2467 col 2.

24 In fact, the evidence was as to the way in which they would have voted if they had not been prevented from doing so.

25 By s 26 of the *Commonwealth Electoral Act 1922* (Cth).

26 Commonwealth, Senate, *Parliamentary Debates (Hansard)*, 26 July 1922, p 752 col 2 (Senator Pearce, Minister for Home and Territories).

36. In contrast to Mr Wang's preferred construction, the AEC's construction of "prevented from voting" gives the word "voting" an unnatural and strained meaning. On the AEC's construction, a situation like the present case (i.e. where votes have been lost or destroyed before the final count) is the *only* situation where errors or omissions in the counting process will result in an elector being "prevented from voting". If Parliament had intended for the proviso to s 365 to only capture that very limited class of "counting error" it could easily have chosen more appropriate words to achieve that result.

37. Construction (c), identified in paragraph 6 above, would capture a much broader class of official "counting errors" and in principle makes more sense than the AEC's preferred construction. If counting is relevant to "voting", surely it is more important that the vote count, not simply that it is scrutinised by administrative officials? However, for the following reasons even that construction gives rise to a number of irreconcilable inconsistencies and anomalies with s 361(1) of the Act and should also be rejected:

(a) Assuming that a ballot paper is "evidence of the way in which the elector intended to vote in the election", if construction (c) were adopted, votes which were rejected during the final count by reason of official error or omission could not be considered by the Court of Disputed Returns for the purpose of determining whether the error or omission "did or did not affect the result of the election".

(b) However, as explained in paragraphs 57–64 below, s 361(1) of the Act (read with ss 281(3) and 360) allows the Court of Disputed Returns to consider ballot papers cast at the election and to determine whether those votes were improperly admitted or rejected and therefore whether the declared result of the election should be altered or confirmed.

(c) Construction (c) therefore creates an irreconcilable inconsistency between s 365 and s 361(1) of the Act. Consistently with conventional principles of construction, the Court should avoid adopting the construction of s 365 which

gives rise to that inconsistency.[27] That is particularly so when it is recognised that the proviso is a proviso. The general rule is that a proviso should not be construed "as if it were a substantive provision independent of the provisions to which it is a proviso".[28]

(d) Construction (c) would also introduce significant anomalies into the operation of the Act. One anomaly is that under s 364A of the Act, the Court may expressly have regard to certain rejected declaration and postal ballot papers. The legislative material does not reveal why s 364A was introduced, but it appears clearly enough that the provision was intended to overcome the decision in *Varty v Ives* about the Court's ability to have regard to rejected declaration votes.[29] It would be odd if the Court could have regard to rejected declaration and postal votes, but not to rejected ordinary votes.

(e) Another anomaly that would be created is that, whilst the Court could not admit an improperly rejected ballot paper to the count, nothing in the proviso to s 365 would prevent the Court from rejecting an improperly admitted ballot paper: an elector whose ballot paper was improperly admitted to the count would not have been "prevented from voting". Such a result is completely irrational. There is no possible reason why the Court should be able to prevent "over enfranchisement" (i.e. by rejecting improperly admitted votes) but be powerless to prevent disenfranchisement (i.e. by admitting improperly rejected votes).

38. For the above reasons, Mr Wang submits that question 1 should be answered "No".

Question 2 — admissibility of records of fresh scrutiny and original scrutiny

39. Question 2 should be answered "No" because:

(a) the proviso to s 365 does not prevent the Court from admitting the records of either the fresh scrutiny or the original scrutiny; and

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27 It is trite that the Court should strive to construe the Act so as to render its provisions harmonious: see, e.g., *Ross v The Queen* (1979) 141 CLR 432 at 440.5 per Gibbs J (the other members of the Court agreeing).

28 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 274.

29 The provision was inserted by the *Electoral and Referendum Amendment Act 1989* (Cth) (No 24 of 1990). See Explanatory Memorandum to Electoral and Referendum Amendment Bill 1988, cl 115.

(b) no other provision of the Act expressly or impliedly prevents the Court from admitting the records of either the fresh scrutiny or the original scrutiny.

A. Proviso to s 365

40. The AEC's argument that the proviso to s 365 prevents admission of records of both the fresh scrutiny and the original scrutiny should be rejected for three reasons.

Electors not prevented from voting

41. The first reason is that none of the electors who cast the 1,370 missing ballot papers was prevented from voting. That is so for the reasons developed in paragraphs 5–37 above.

42. For the purposes of the second and third reasons developed below it is assumed that the first argument is incorrect and that the electors who cast the 1,370 missing ballot papers were prevented from voting by reason of their votes not being recounted.

Proviso only applies to evidence of a particular voter's intention

43. The second reason is that the proviso only prevents the Court from receiving the evidence of a particular, identifiable, elector's voting intention. It does not prevent the Court from receiving evidence of the votes cast, or the count of votes cast, by a number of unidentifiable voters.

44. By the proviso, the Court is prevented, for a specific purpose, from admitting "any evidence of the way in which *the* elector intended to vote in the election" (emphasis added). "*The* elector" concerned is, of course, "*any* elector" prevented from voting.

45. In Mr Wang's submission, the definite article and the use of the singular are significant. They direct attention towards the evidence of the intention of a particular identifiable elector. This is borne out by the decision of Nagle J in *Freeman v Cleary* where his Honour held that the NSW equivalent to the proviso was intended to avoid identification of any particular voter with his or her vote. After expressing his view that

"prevented from voting" was limited to circumstances where an elector was prevented from voting at all, his Honour stated:[30]

> Nevertheless, I do not think it essential for me to found my decision merely on this interpretation of this part of the section, for no matter what is meant by the phrase "prevented from voting in any election", what in my view the proviso inhibits the court from doing is to admit any evidence of the way in which the elector intended to vote in the election. It will be noted that the proviso is in the singular and is suggestive of the avoidance of the evil which might come about if any particular voter is to be identified with his vote.

46. To like effect are the comments of Starke J in *Varty v Ives* and his consideration of the decision in *Dunbier v Mallam*[31] where Hardie J examined certain rejected ballot papers. After first observing that "[t]he obvious intention" behind the proviso was "to preserve the secrecy of the ballot box",[32] Starke J distinguished *Dunbier v Mallam* noting that, "The secrecy of the ballot box did not arise for the evidence did not disclose the intention of 'the elector'."[33]

47. That the proviso is directed towards the evidence of the intention of a particular identifiable elector is also evidenced by the background to the introduction of the proviso in 1922 set out in paragraphs 32–33 above. Mr Wang adopts the statement of Nagle J in *Freeman v Cleary* that:[34]

> It seems to me evident that the mischief at which the legislature aimed to eliminate was the identification of an elector with his vote and particularly with the procedure adopted by Isaacs J [in *Kean v Kerby*] long after an election calling an elector, who had been debarred from physically registering his vote into the witness-box to speak of the intentions he had at the time of the election. One need only pause for a moment to envisage the undesirable results which could arise from this situation and the circumstances which well might motivate the legislature to attempt to avoid them.

48. In Mr Wang's submission, the words "intended to vote" were deliberately chosen and do not apply to votes actually cast in the election. It is one thing to accept that retrospective evidence as to how a person intended to vote should not be given. The elections in which such evidence would be sought to be led will naturally be very close. In such cases, there are obvious dangers that such evidence could be unwillingly given

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30 (NSW Court of Disputed Returns, Nagle J, unreported, 31 October 1974), p 13.3.
31 [1971] 2 NSWLR 169.
32 [1986] VR 1 at 12.5.
33 [1986] VR 1 at 15.33.
34 (NSW Court of Disputed Returns, Nagle J, unreported, 31 October 1974), pp 10.9–11.2.

or be unreliable.[35] However, those dangers do not exist in relation to votes cast in the election. As Ambrose J observed in *Fenlon v Radke*,[36] there is no apparent purpose achieved by preventing the Court of Disputed Returns from considering the votes, or a count of votes, actually cast in the election.

49. Once the notion, implicitly advanced by the AEC, that the Court of Disputed Returns has the same function and powers as polling officials, is rejected there is really nothing to support the AEC's construction of the proviso. To construe s 365 in the way proposed by the AEC dramatically reduces the Court's powers in a manner contrary to the text and historical context of the provision for no apparent purpose. General principle requires that provisions conferring jurisdiction or granting power to a court are construed as liberally as their terms and context permit.[37] Likewise, provisions restricting the powers of a court should not be read more broadly than their terms and context permit.

50. In summary, to construe the proviso to s 365 as not applying to evidence of ordinary votes actually cast in the election, or a count of such votes, gives best effect to the text, context and purpose of the provision. The proviso only applies to evidence which would tie a particular elector who had not voted to his or her voting intention. Such a construction is also consistent with the overwhelming bulk of the authorities: the decisions in *Freeman v Cleary* and *Dunbier v Mallam* and the dicta in *Varty v Ives* and *Fenlon v Radke*. The single contrary decision, in the early case of *Campbell v Easter*, was wrong in this respect.

Section 362(3) excludes the proviso

51. The third reason why s 365 does not prevent the admission of the evidence is that in the circumstances of the present petitions, either s 365 does not apply at all, or the proviso to s 365 has no effect on s 362(3). In short, s 362(3) excludes the operation of the proviso.

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35 See *Kean v Kerby* (1920) 27 CLR 449 at 461–462.

36 [1996] 2 Qd R 157 at 172 lines 4-15, summarised at paragraph 13 above.

37 See, e.g., *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313.4. See also *The Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421.1 ("It is quite inappropriate to read provisions conferring jurisdiction or granting powers to courts by making implications or imposing limitations which are not found in the express words").

52. Both ss 362(3) and 365 contain partially overlapping prohibitions on the circumstances in which the Court may avoid an election. Section 362(3) contains an additional prohibition on the circumstances in which the Court may declare that a person returned as elected was not duly elected. The partial overlap arises by reason of the now broad definition of "illegal practice" in s 352(1). Many (although not necessarily all) official errors caught by s 365 will also be "illegal practices". This was not necessarily so in 1922. Section 161 of the 1918 Act listed a number of "illegal practices", but it was not until 1983 that the broad definition now contained in s 352(1) was introduced.[38]

53. There are two possible ways of resolving the overlap between ss 362(3) and 365.

54. The first is that suggested by Dawson J in *Sykes v AEC*.[39] In short, in a case of an illegal practice which is also an official error or omission of the kind specified in s 365, only the more specific provision contained in s 362(3) applies. The result for the present petitions would be that s 365 has no operation at all, and the proviso, being merely a qualification to s 365, would not apply.[40]

55. The alternative method of resolution is for the Court to apply both ss 362(3) and 365 but to recognise that the proviso to s 365 only applies in relation to the prohibition contained in s 365 and has no operation in respect of s 362(3). On that analysis:

(a) In the Mead and Wang petitions, neither petitioner's primary relief is to avoid the election. As a result, s 365 has no application to the petitioner's primary case. Accordingly, the only relevant prohibition is that contained in s 362(3), which is not subject to the proviso.

(b) In the AEC petition, s 365 prevents the Court from avoiding the election "on account of ... the error of or omission by any officer which did not affect the result of the election". The proviso to s 365 applies only in respect of that prohibition, but does not apply to the prohibition contained in s 362(3). The result is that the Court can, in assessing the s 362(3) prohibition, admit the evidence of the records of the fresh scrutiny and the original scrutiny.

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38 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth), s 128.

39 (1993) 115 ALR 645 at 652.3.

40 This proposition also finds support in the views expressed by Gaudron J in *Hudson v Lee* (1993) 177 CLR 627 at 631, that s365 was concerned with what may be called polling clerk errors. See also her Honour's views in *Sue v Hill* (1999) 199 CLR 462 at [121], [148], with which the plurality agreed at [9], [39].

B. Other relevant provisions of the Act

56. In Mr Wang's submission there are no other provisions of the Act which would prevent admission of the records of the original scrutiny or the fresh scrutiny. The AEC's reliance on s 263 is answered in paragraphs 19–26 above.

Question 3 — inquiries in relation to reserved ballot papers

A. Permissibility of examining reserved ballot papers

57. For the reasons given below, question 3(a) should be answered "Yes, s 361(1) of the *Commonwealth Electoral Act 1918* (Cth), read together with ss 281(3), 353(1), 354(1) and 360."

10 58. The Court's role, established by ss 353(1) and 354(1), is to try and determine any petition by which a person disputes the validity of any election or return. The other provisions of Part XXII must be construed to enable the Court to fulfil that role.

59. A provision in the same terms as s 361(1) was originally enacted as s 198 of the *Commonwealth Electoral Act 1902* (Cth) (***the 1902 Act***). Despite the reference to "their votes", it is clear that this provision does not limit the Court to only enquiring into whether a particular elector's vote was improperly admitted or rejected.[41] This was confirmed in the 1902 Act by a number of sections which made reference to the Court of Disputed Returns' "review" or "reversal" of a decision made on the scrutiny in relation to any vote.[42] This construction is also consistent with the general proposition
20 that provisions conferring jurisdiction or granting power to a court are construed as liberally as their terms and context permit. It is a necessary consequence of the power conferred by s 361(1) and the Court of Disputed Returns' general powers under ss 360(1)(v)–(viii) that if the Court determines that a vote has been improperly admitted or rejected it may reject or admit the vote to the count for the purposes of determining what orders to make in relation to a petition.

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41 *Cleary v Freeman* (NSW Court of Disputed Returns, Slattery J, unreported, 23 May 1974), p 40.1 (considering the NSW equivalent of s 361(1), s 163 of the *Parliamentary Electorates and Elections Act 1912* (NSW)). For the modern formulation in relation to Commonwealth referenda, see *Referendum (Machinery Provisions) Act 1984* (Cth), s 104(1).

42 See ss 120 (postal votes) and 157 of the 1902 Act. Section 120 of the 1902 Act was replaced with an equivalent provision by s 18 of the *Commonwealth Electoral Act 1909* (Cth) (***the 1909 Act***), which provision remained in force until the enactment of the 1918 Act. The reference to the Court of Disputed Returns in s 157 of the 1902 Act was removed in 1909 by s 26 of the 1909 Act.

60. The Court's power to inquire into whether *any* ballot paper was "improperly admitted or rejected" was limited by the introduction in 1911 of what is now s 281(3) of the Act. Sections 26 and 29 of the *Commonwealth Electoral Act 1911* (Cth) introduced identical provisions into the 1902 Act (ss 161B and 164B) relating to the reservation of ballot papers in elections for the Senate and House of Representatives respectively. In 1918, those sections were replaced with a single provision, s 140, which is in relevantly identical terms to the current s 281.

61. To understand the effect of s 281(3) on the Court's power to make inquiries as to voting under s 361(1), it is necessary to have regard to the practice by which the Court of Disputed Returns conducted a judicial re-count prior to the introduction of the equivalent to s 281(3) in 1911. As explained by Barton J in *Blundell v Vardon*:[43]

> 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. ... 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. Ordinarily, therefore, the Court will not be astute to resist a recount, especially as that course cannot prejudice a respondent where the election has been efficiently and accurately conducted, except so far as he may be in a sense prejudiced by the doing of justice. The fact that in the present case the votes were counted a second time under sec 161[A] before the declaration of the poll does not, in my opinion, stand in the petitioner's way, even supposing what I may call the mechanical conduct of that process to have been correct. The recount by this Court is a totally different matter. It is a recourse to judicial methods for the purpose largely of ascertaining whether votes have been allowed or rejected according to the law of elections; that is to say, for the determination of questions of law as applicable to the polling, by what Parliament deems to be the best constituted authority. The effort to remove mistakes, mainly arithmetical, solely by a computation conducted by the officers who made the first calculation, can by no means be considered a bar to the interposition of the Court for the determination of disputed questions of law arising out of decisions of these officers, complained of as grievances by candidates who may not have been really defeated.

62. In *Blundell v Vardon*, and in the contemporaneous case of *Kennedy v Palmer*,[44] the re-count was conducted by an officer of the Court, and doubtful ballots reserved for consideration of the Court.

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[43] (1907) 4 CLR 1463 at 1468.9–1469.7.
[44] (1907) 4 CLR 1481.

63. Against that background, the purpose and effect of s 281(3) are apparent.[45] Reserved ballots are available for the Court to consider, and the Court may determine pursuant to s 361(1) whether those votes have been "improperly admitted or rejected". However, except if the Court is satisfied that it is justified, the Court is not permitted to make enquiries under s 361(1) in relation to the unreserved ballots by ordering a "further re-count".

64. Thus, s 361(1), read together with ss 281(3) and 360 in the light of the Court's role, provides the power for the Court to determine whether individual ballot papers have been "improperly admitted or rejected" during the scrutiny by polling officials.

10 ***B. Relevance of reserved ballot papers to disposition of the petitions***

65. The relevance of the inquiries in relation to reserved ballot papers to the disposition of the petitions can be stated briefly.

66. The result of the fifth and sixth Senate vacancies for the Election was crucially dependent on which of Mr Bow and Mr van Burgel was excluded at the 50th exclusion point.[46] If Mr van Burgel was excluded, Mr Wang and Senator Pratt would be elected to the fifth and sixth vacancies respectively; if Mr Bow was excluded, Mr Dropulich and Senator Ludlam would be elected.

67. At the 50th exclusion point on the re-count, Mr van Burgel had 12 more votes than Mr Bow,[47] with the result that Mr Bow was excluded and Mr Dropulich and
20 Senator Ludlam were elected to fill the fifth and sixth Senate vacancies.

68. In the Wang and Mead petitions, Mr Wang and Mr Mead respectively challenge the decision of the AEO for Western Australia in relation to the formality of reserved ballot papers. If the challenges made in the Wang petition are successful, then on the basis of the results of the re-count at the 50th exclusion point Mr Bow would have had at least 62 more votes than Mr van Burgel.[48] If the challenges made in the Mead petition are

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45 See also Commonwealth, House of Representatives, *Parliamentary Debates (Hansard)*, 4 December 1911, p 3636 col 2 (Mr King O'Malley, Minister of Home Affairs).

46 Statement of Agreed Facts, [26], [39].

47 Statement of Agreed Facts, [38(g)].

48 Statement of Agreed Facts, [53].

successful, then on the basis of the results of the re-count at the 50th exclusion point Mr Bow would have had at least 165 more votes than Mr van Burgel.[49]

69. Accordingly, subject to the impact of the 1,370 missing ballot papers, if the challenges made in the Wang and Mead petitions in relation to the reserved ballot papers are successful, Mr van Burgel should have been excluded at the 50th exclusion point and Mr Wang and Senator Pratt would have been elected to the fifth and sixth Senate vacancies respectively.

70. Assuming Mr Wang's or Mr Mead's challenges in relation to the reserved ballot papers are successful, what is the impact of the 1,370 missing ballot papers?

71. In the AEC petition, Mr Wang submits that the Court cannot be satisfied that the result of the election was "likely to be affected" by the loss of the 1,370 missing ballot papers and accordingly the AEC's petition to avoid the entire election must fail. As explained in relation to questions 1 and 2, Mr Wang submits that the Court can have regard to the evidence which is available of the count of the 1,370 missing ballot papers. On the basis of that evidence, had the missing ballot papers been added to the count, at the 50th exclusion point Mr Bow would have had an additional 18 votes and Mr van Burgel would have had an additional 5 votes, increasing Mr Bow's margin over Mr van Burgel by an additional 13 votes.[50] On Mr Wang's petition, Mr Bow's margin over Mr van Burgel at the critical exclusion point would have been at least 75 votes; on Mr Mead's petition, Mr Bow's margin over Mr van Burgel would have been at least 178 votes. In those circumstances, even accounting for some possible errors in decisions leading to the records which are available, Mr Wang submits that at a final hearing the Court would easily be satisfied that the loss of the missing ballot papers was not likely to have affected the "result of the election".[51]

72. Even if the Court cannot have regard to the evidence of the missing ballot papers, Mr Wang submits that the Court at a final hearing could be in a position to assess the likelihood of the 1,370 missing ballot papers overcoming Mr Bow's margin over Mr van Burgel (which on the basis of the allegations in the Wang and Mead petitions is at least 62 and 165 votes respectively). Depending on the state of satisfaction required

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49 Statement of Agreed Facts, [51].

50 Statement of Agreed Facts, [42(f)].

51 The "result of the election" means the return of a particular candidate, not the amount of the majority: *Kean v Kerby* (1920) 27 CLR 449 at 458.6; *Cole v Lacey* (1965) 112 CLR 45 at 49.1.

by the phrase "likely to have affected", the Court could rely on statistical evidence or draw its own conclusion as to the likelihood of, for example, Mr van Burgel receiving 62 or more votes in a random sample of 1,370 votes drawn from the entire voting population. In what circumstances, if any, the Court could rely on such statistical evidence is, in Mr Wang's submission, bound up with the legal question of what "likely to be affected" means and, to Mr Wang's knowledge, has not previously been considered by any Australian court. Contrary to [53]–[54] of the AEC's submissions, s 365 merely imposes one prohibition on the Court avoiding an election. It does not preclude the Court from determining that an election should not be avoided because it is unconvinced that an "illegal practice" was likely to have affected the result of the election.

73. For those reasons, the resolution of the challenges made in the Wang and Mead petitions is clearly relevant to the determination of the AEC petition. Plainly the resolution of those challenges is relevant to the disposition of the other petitions.

C. Necessity to consider reserved ballot papers

74. For the reasons given in paragraphs 65–72 above, question 3(c) should be answered "Yes, all of them".

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