HIGH COURT OF AUSTRALIA

GUMMOW J

RE AUSTRALIAN ELECTORAL COMMISSION & ORS — RESPONDENTS

EX PARTE NED KELLY — APPLICANT/PROSECUTOR

Re Australian Electoral Commission; Ex parte Kelly
[2003] HCA 37
25 June 2003
S403/2002

ORDER

1. *Leave granted for the applicant to present further written submissions dated 11 June 2003.*

2. *Application dismissed with costs.*

Representation:

D C Fitzgibbon for the applicant/prosecutor (instructed by the applicant/ prosecutor)

No appearance for the first to thirteenth respondents

J Basten QC with R M Henderson for the fourteenth respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Re Australian Electoral Commission; Ex parte Kelly

Parliamentary elections (Cth) – Senate – New South Wales half Senate election – Whether date fixed for close of nominations in writ for election issued by Governor of New South Wales complied with s 156(1) of the *Commonwealth Electoral Act* 1918 (Cth) and s 4A(1) of the *Senators' Elections Act* 1903 (NSW) – Relationship between *Commonwealth Electoral Act* 1918 (Cth) and *Senators' Elections Act* 1903 (NSW) – Nature of relief by way of *quo warranto* – Whether proclamation by Governor-General proroguing Parliament may validly take effect prior to its publication in the *Commonwealth of Australia Gazette*.

1 GUMMOW J. This application for an order nisi should be dismissed with costs. The issues involved arise in the following way.

2 On 10 November 2001, elections were held for the Parliament of the Commonwealth, including an election of six Senators for the State of New South Wales. On 5 December 2001, the Australian Electoral Officer for New South Wales ("the State Electoral Officer") declared as elected to serve as such Senators those persons comprising the fourth to ninth respondents to the present application. On 6 December 2001, the Governor of New South Wales (the third respondent) certified that the writ had been returned in accordance with s 283(1)(b) of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act").

3 The writ in question had been signed by the Governor on 8 October 2001 and followed the form indicated in s 152(1) of the Act. For the purposes of that statute, a writ shall be deemed to have been issued at the hour of 6 o'clock in the afternoon of the day on which the writ was issued (s 152(2)). The writ had been addressed to the State Electoral Officer, as required by s 153(1).

4 Section 152(1) of the Act required the writ to "fix the date for" the close of the electoral rolls, the nomination, the polling, and the return of the writ. Section 156(1), subject to a qualification not presently material, required that the date fixed for the nomination of the candidates "not be less than 10 days nor more than 27 days after the date of the writ". Section 170 detailed the requisites for nomination. In particular, if a nomination was for a Senate election it would not be valid unless the nomination paper or a facsimile of it was "received by the Australian Electoral Officer after the issue of the writ and before the hour of nomination" (s 170(2)(a)(i)). Requirements also were imposed by that section upon the provision of the necessary deposit. The expression "hour of nomination" was specified by s 175 as "12 o'clock noon on the day of nomination".

5 The writ signed by the Governor on 8 October specified that she appointed "the eighteenth day of October 2001, at twelve o'clock noon to be the day and time before which nominations of Senators at and for the said election are to be made". The specification of 18 October was a day not less than 10 days "after the date of the writ" in accordance with the terms of s 156(1). The date of the writ was 8 October, one day thereafter was 9 October and 18 October was the tenth day with counting beginning on 9 October. Thus, the writ complied with s 156(1).

6 Section 36(1) of the *Acts Interpretation Act* 1901 (Cth) ("the Commonwealth Interpretation Act"), if it applied to s 156(1), would produce no different result. The sub-section states:

> "Where in an Act any period of time, dating from a given day, act, or event, is prescribed or allowed for any purpose, the time shall, unless the

> contrary intention appears, be reckoned exclusive of such day or of the day of such act or event."

The given day, act or event would be the date of the writ and, excluding 8 October, the result, beginning with counting on and from 9 October, was that the tenth day was 18 October. Thus, if indeed s 36(1) did apply to s 156(1) of the Act, which it is unnecessary to determine, the outcome, compliance with s 156(1), would be the same.

7 The applicant is a person whose nomination was rejected by an officer of the fourteenth respondent, the Australian Electoral Commission, a body established by s 6 of the Act ("the Commission"). The basis of the rejection was that the nomination failed to comply with the provisions of s 170 of the Act, to which reference has been made.

8 Part XXII of the Act (ss 352-381) is headed "Court of Disputed Returns". On 15 January 2002, the applicant filed a petition in this Court sitting as the Court of Disputed Returns under s 354(1) of the Act which disputed the validity of the election of the Senators for New South Wales. The petition named those Senators as respondents. The petition was referred for trial to the Federal Court, pursuant to s 354(1) of the Act. On 11 September 2002, a judge of the Federal Court (Madgwick J), the present first respondent, ordered that the petition be dismissed and delivered his reasons for judgment for that conclusion[1]. His Honour noted one submission for the present applicant that the date fixed for the close of nominations was one day early and should have been 19 rather than 18 October 2001.

9 In his written submissions to this Court dated 21 March 2003, the applicant contends that the relevant interpretation legislation specifically excludes from the reckoning of the relevant days both "the first" and "the last" day. The submission is founded upon the text of what is said to be s 38(1) of "the Acts Interpretation Act". As indicated, the relevant provision (if any) in the Commonwealth Interpretation Act is s 36, not s 38. Further, the corresponding provision in the *Interpretation Act* 1987 (NSW) ("the NSW Interpretation Act"), which is found in s 36(1), is in terms with no material difference to those of the Commonwealth Interpretation Act. There is no reference in either provision, or in s 156(1) of the Act, which would support an exclusion from the reckoning of the 10 day period of the last day.

10 The reference by the applicant to s 38(1) appears to be to s 38(1) of the Queensland statute, the *Acts Interpretation Act* 1954 (Q). This states:

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1 *Kelly v Campbell* [2002] FCA 1125.

"If a period beginning on a given day, act or event is provided or allowed for a purpose by an Act, the period is to be calculated by excluding the day, or the day of the act or event, and –

(a) if the period is expressed to be a specified number of clear days or at least a specified number of days – by excluding the day on which the purpose is to be fulfilled; and

(b) in any other case – by including the day on which the purpose is to be fulfilled."

There is no equivalent to pars (a) or (b) of s 38(1) in the legislation of the Commonwealth or New South Wales.

11 In oral argument before this Court, for which the applicant had legal representation, reference was made to what was said to be evident disharmony between the relevant laws of the Commonwealth, found in the Act, and those of New South Wales, found in the *Senators' Elections Act* 1903 (NSW) ("the NSW Act"). However, the legislative pattern is one of symmetry rather than disharmony.

12 Section 4A(1) of the NSW Act[2] follows s 156 of the Act by stipulating that the date for the nomination of candidates shall be not less than 10 days nor more than 27 days after the date of the writ. Likewise, s 6 follows s 175 by specifying that nominations must be made before 12 o'clock noon on the day of nomination. The evident purpose of the legislation at State level, as indicated in particular by the explanatory note to the Senators' Elections (Amendment) Bill 1984 and by the Second Reading Speech thereon by the Premier[3], was to prevent uncertainty arising regarding the legal regulation of the election of Senators for New South Wales.

13 Section 10 of the Constitution made provision until the enactment of federal law[4], now found in the Act. It states:

"Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to

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2 Introduced by the *Senators' Elections (Amendment) Act* 1984 (NSW) and amended by the *Statute Law (Miscellaneous Provisions) Act (No 2)* 2000 (NSW).

3 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 September 1984 at 893-894.

4 Pursuant to s 51(xxxvi) of the Constitution.

> elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State."

The phrase "but subject to this Constitution" directs attention to s 9 of the Constitution. This provides:

> "The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.
>
> The Parliament of a State may make laws for determining the times and places of elections of senators for the State."

The second sentence in s 9 subjects State laws prescribing the method of choosing Senators to any federal law, such as the Act, prescribing a uniform method for all the States. The third sentence in s 9 preserves to the States an area of exclusive power that is not subject to Commonwealth legislative preemption. The area so preserved is for laws which make provision "for determining" (i) the times and (ii) the places of, in each case, the election of State Senators[5]. It may be added that the provisions of s 12 of the Constitution repose in State Governors the power to cause writs to be issued for elections of Senators for the States.

14 The subject was usefully explained as follows in the *Final Report of the Constitutional Commission*[6]:

> "4.447 The reason why the States were given the powers they presently have in relation to the election of senators is that, when the Constitution was being prepared in the 1890s, it was agreed that the Senate should be a House representative of States. In that House the federating colonies wanted to be equally represented. Initially the idea was that senators would not be chosen directly by the electors of a State but rather would be chosen by the Houses of the State they were to represent[7].

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5 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 427; Lane, *The Australian Federal System*, 2nd ed (1979) at 27.

6 (1988), vol 1 at 212.

7 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 2 April 1891 at 599.

> 4.448 Even though it was later decided that senators should be directly elected, it was accepted that States should be assured certain controls over the elections of their senators, namely, exclusive power to legislate on the times and places of elections of senators for the State, a concurrent power with the Federal Parliament to legislate on the method of choosing those senators, and exclusive powers in relation to the issue of writs for Senate elections."

15 After the conclusion of the oral argument, the applicant gave notices under s 78B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). However, in view of the federal-State legislative symmetry to which I have referred, there is no present occasion to enter upon any matter arising under the Constitution or involving its interpretation.

16 The Commission was added as fourteenth respondent by order made on 25 February 2003 and it appeared by counsel to oppose the application for the order nisi.

17 The applicant, by an amended draft order nisi dated 25 February 2003, seeks prohibition, mandamus and injunctive relief under s 75(v) of the Constitution, coupled with declaratory relief and what is described as a writ of leave to exhibit *quo warranto*. That step would be taken presumably in exercise of the Court's powers under s 32 of the Judiciary Act and in aid of the exercise of the jurisdiction it otherwise possesses. Provision is made in the High Court Rules, O 55 rr 47-53, respecting *quo warranto*. The particular procedures to be observed upon an application for an order for leave to exhibit an information of *quo warranto* are specified in those rules. There also are substantive barriers in the path of the applicant.

18 The history of the remedy of *quo warranto* is detailed by Dixon J in *Liston v Davies*[8], where reference is made to various authorities, including *R v Speyer*[9]. The subject is further discussed by Brennan J in *Re Skyring's Application*[10] where his Honour cites authorities indicating that the remedy is concerned essentially with the usurpation of an office of a public nature.

19 The applicant seeks a range of relief by way of *quo warranto* which goes beyond alleged usurpation of public office. Further, in so far as the relevant facts upon which the applicant relies relate to the Senate election in question, the present application cuts across the prescription in s 353(1) of the Act that the

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8 (1937) 57 CLR 424 at 431-444.

9 [1916] 1 KB 595.

10 (1984) 59 ALJR 123.

validity of the elections in question may be disputed by petition under Pt XXII of the Act and not otherwise[11].

20 In oral submissions, counsel for the applicant correctly accepted that his client could only have standing with respect to the election for Senators for New South Wales[12]. He correctly also did not press complaints in the applicant's written submissions of 16 April 2003 concerned with the validity of the appointment of the Governor of New South Wales[13].

21 It is not apparent whether counsel for the applicant withdrew reliance upon the ground concerning the proclamation by the Governor-General of 5 October 2001[14]. His Excellency (the second respondent) prorogued the Parliament from 11.59 am on Monday, 8 October 2001 until Saturday, 10 November 2001, and dissolved the House of Representatives at noon on Monday, 8 October 2001. The contention seems to be that because the Parliament was not validly prorogued it continued until expired by fluxion of time with, so it is said, the consequence that steps taken in the election and the constitution of the succeeding, and present, Parliament were invalid.

22 The argument would seem to be based on the proposition that the proclamation purported to take effect before it was published in the *Gazette* of 8 October 2001. Section 5 of the Constitution states that the Governor-General, among other things, may from time to time "by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives". The applicant appears to rely upon s 17(j) of the Commonwealth Interpretation Act. This defines the term "Proclamation" as it appears "[i]n any Act" as meaning proclamation published in the *Gazette*. Section 17 cannot control the meaning of s 5 of the Constitution.

23 Section 368 of the Act states:

> "All decisions of the Court [of Disputed Returns] shall be final and conclusive and without appeal, and shall not be questioned in any way."

24 The Commission did not seek to argue that s 368 precludes relief in this Court under s 75(v) of the Constitution, where the Court of Disputed Returns has been constituted by a judge of the Federal Court and the complaint is one of

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11 *Sue v Hill* (1999) 199 CLR 462 at 475-476 [13], 506-507 [108].

12 Transcript, 23 April 2003, line 700.

13 Transcript, 23 April 2003, lines 380-395.

14 *Commonwealth of Australia Gazette*, No S421, 8 October 2001.

failure to exercise jurisdiction or a decision made which is infected by jurisdictional error.

25 However, consideration of the draft order nisi, and the written and oral arguments advanced in its support, leads to several conclusions. The first is that there has been shown in the reasons and order of Madgwick J no error going as to the exercise of the Court's jurisdiction under Pt XXII of the Act. In so far as the applicant urges grounds disputing the election of the Senators for New South Wales which travel beyond those involved in the petition which was dismissed, two things are to be said. The first is that such steps cannot be taken in the face of s 353(1) of the Act. The second is that, in any event, there are no prospects of success for those grounds to support any grant of an order nisi. It may be added that the order nisi is proposed in terms which are unsatisfactory and embarrassing in the technical sense and that, in any event, no order would be made upon a document so expressed.

26 I should add that the Quebec decision upon which the applicant relied[15] is of no assistance either to the applicant or the Commission. The case turned upon particular Quebec legislation providing for municipal elections.

27 After reservation of my decision, the applicant, with notice to the Commission, sought leave to amend the written submissions dated 21 March 2003 by further written submissions dated 11 June 2003. That step requires leave[16]. I would grant that leave and have had regard to the amendments and to the points made in answer thereto by the Commission's reply filed 17 June 2003.

28 The leave to the applicant to present the further submissions dated 11 June 2003 is granted. However, the application for the order nisi is dismissed with costs.

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15 *Grandchamp v Masse* (1938) 65 Quebec Reports (KD) 539.

16 *Eastman v Director of Public Prosecutions (ACT)* [2003] HCA 28 at [27]-[31], [143].