

HIGH COURT OF AUSTRALIA

HAYNE J

IN THE MATTER OF AN APPLICATION BY ANDREW GREEN FOR
LEAVE TO ISSUE A PROCEEDING

In the matter of an application by Andrew Green for leave to issue a proceeding
[2011] HCA 5
25 March 2011
S88/2011

ORDER

Leave to issue the proposed proceeding is refused.

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

In the matter of an application by Andrew Green for leave to issue a proceeding

High Court – Practice and procedure – Leave to issue proceeding – Application for order to show cause against Federal Court sitting as Court of Disputed Returns – Applicant's electoral petition dismissed by Court of Disputed Returns for failure to sufficiently set out facts relied upon to invalidate election as required by *Commonwealth Electoral Act* 1918 (Cth) ("Act"), ss 355(a) and 355(aa) – Whether application to show cause raises "real question to be determined".

Administrative law – Electoral law – Electoral petitions – Applicant's electoral petition alleged contraventions of ss 184(1), 326(1)(c) and 327(1) of Act and error by Divisional Returning Officer invalidated election – Whether conclusion of Court of Disputed Returns that electoral petition does not sufficiently set out facts relied upon to invalidate election as required by ss 355(a) and 355(aa) of Act attended by doubt.

Constitutional law (Cth) – Section 368 of Act provides that decisions of Court of Disputed Returns shall not be questioned in any way – Applicant contends s 368 of Act invalid – Whether question of validity arises.

Words and phrases – "real question to be determined".

Constitution, s 75(v).

Commonwealth Electoral Act 1918 (Cth), ss 184(1), 326(1)(c), 327(1), 352(1), 355(a), 355(aa), 358, 362, 368.

High Court Rules 2004, r 6.07.

1 HAYNE J. On 27 October 2010, the applicant (Mr Andrew Green) filed in this Court, as the Court of Disputed Returns, an election petition in relation to the election held on 21 August 2010 for the Electoral Division of Lindsay. Mr Green was a candidate at that election. The first respondent to the petition, Mr David Bradbury, was declared elected and the writ returned accordingly. Mr Green's petition sought an order declaring that certain postal vote applications "were invalid and that any votes cast by such electors were invalid", an order declaring that Mr Bradbury was not duly elected, and either an order for a recount of ballots with exceptions and exclusions, or an order declaring the election in the Division of Lindsay "absolutely void".

2 On 25 November 2010, Gummow J ordered that the petition be referred for trial to the Federal Court of Australia, New South Wales District Registry.

3 In the Federal Court, the third respondent to the petition, the Australian Electoral Commission ("the AEC"), moved for dismissal of the petition on the basis that, under s 358(1) of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act"), no proceedings may be had on the petition because it did not:

"(a) set out the facts relied on to invalidate the election or return as required by s 355(a); and/or

(b) set out those facts with sufficient [particularity] to identify the specific matter or matters on which the Petitioner relies as justifying the grant of relief as required by s 355(aa) of the Act".

4 On 3 February 2011, Emmett J made orders that no proceedings be had on the petition and that the petition be dismissed. Written reasons for judgment were published on 9 February 2011¹.

5 Mr Green then sought to begin fresh proceedings in this Court. He sought to have issued an application for an order to show cause in which the Judges of the Federal Court of Australia would be named as first defendant, Mr Bradbury as second defendant, and the AEC as third defendant. On 16 February 2011, Heydon J directed the Registrar, pursuant to r 6.07 of the High Court Rules 2004, to refuse to issue or file the application for an order to show cause without the leave of a Justice first had and obtained. Mr Green now seeks that leave.

1 *Green v Bradbury* [2011] FCA 71.

Leave to issue a proceeding

- 6 The power to refuse leave to issue a proceeding is not to be exercised except in a clear case. As Dixon J said in the well-known passage of his reasons in *Dey v Victorian Railways Commissioners*²:

"A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process."

- 7 In this matter, however, it is also important to recognise that the ultimate purpose of the proceeding which the applicant seeks leave to issue in this Court is to permit prosecution of an election petition seeking to overturn the result of the election for the Division of Lindsay. And the whole structure and content of the provisions made by the Act for the hearing and determination of election petitions bespeaks the intention of the Act that such decisions be made "as quickly as is reasonable in the circumstances"³.

- 8 This being so, it is right that close and detailed consideration be given to the proposed process in order to determine whether it reveals a real question to be tried. That will require some detailed examination of the petition that was dismissed by Emmett J.

The proposed application for an order to show cause

- 9 The application which Mr Green now seeks leave to issue differs from the application initially submitted for issue, by adding a claim for a declaration that s 368 of the Act "is invalid to the extent that it inhibits or restricts the exercise of jurisdiction" by this Court in respect of the relief otherwise sought in the application. That other relief is, in effect, certiorari to quash the orders of the Federal Court made on 3 February 2011, mandamus directed to the Federal Court to hear and determine Mr Green's election petition, and declarations: first, that the Federal Court "has not exercised its jurisdiction properly or at all" to try the

2 (1949) 78 CLR 62 at 91; [1949] HCA 1.

3 s 363A.

3.

petition and, second, that the order made on 3 February 2011 "is not an order of the Court of Disputed Returns" within s 369 of the Act.

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The grounds on which the relief is claimed are set out in 14 paragraphs of which the first three are introductory. It is as well, however, to set out the remaining paragraphs of the grounds, which are to be read as alleging jurisdictional errors by Emmett J:

- "4. That the Federal Court of Australia sitting as the Court of Disputed Returns erred in law and exceeded or failed to exercise jurisdiction in dismissing the Petition and holding that the statement of facts in the Petition did not conform to s 355(a) or s 355(aa) of the Commonwealth Electoral Act 1918 with respect to setting out facts relied on in respect of contravention by the Second Defendant of s 327, and in particular:
 - (a) erred in holding that the Petition ought, and did not 'state facts as to when, where, and how the alleged representations' in paragraph 21 were made;
 - (b) erred in holding that the Petition ought, and did not 'state any facts that would establish that any of the representations was false';
 - (c) erred in holding that the Petition ought, and did not 'suggest that any of the electors in question was prevented from voting'.
5. That the Federal Court of Australia sitting as the Court of Disputed Returns erred in law and exceeded or failed to exercise jurisdiction in dismissing the Petition and holding that the statement of facts in the Petition did not set out facts relied on to invalidate the election on account of the error of or omission by an officer within the meaning of Commonwealth Electoral Act 1918 s 365, notwithstanding that the Petition asserted the following facts - the issue by the DRO of postal ballots in Lindsay to applicants for postal votes on an embellished form which was not the approved form under s 184(1); that such form did not contain the declaration of the applicant for a postal vote as being a person enrolled to vote in the election required by s 184(1)(a) and the Act generally; nor was it authenticated as required by s 328; nor was it made to the DRO as required by s 184(2) but made to Mr Bradbury's office where with his authority the form was altered contrary to ss 197 and 219 before lodgement; and that the DRO in error upon receipt of the invalid applications issued postal ballots to applicants when the DRO had no statutory authority to do so under s 188(1)

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rendering all such postal votes invalid and disenfranchising electors.

6. That the Federal Court of Australia sitting as the Court of Disputed Returns erred in law and exceeded or failed to exercise jurisdiction in dismissing the Petition and holding that in respect of polling officer error under s 365 the Petition must, but did not, set out 'facts that could support the conclusion that the result of the election was affected' and also must, but did not, set out facts which 'would indicate that there is a real chance that the result of the election would be different'.
7. That the Federal Court of Australia sitting as the Court of Disputed Returns erred in law and failed to exercise its jurisdiction in not holding that s 360(3) was a discrete power to declare an election absolutely void on the ground of illegal practice committed by the successful candidate falling outside one or both grounds specified in s 362(3) and which facts the Petition set out.
8. That the Federal Court of Australia sitting as the Court of Disputed Returns erred in law and failed to exercise its jurisdiction in not considering properly or at all whether the Second Defendant had contravened or been concerned in contraventions of Part XV [ss 183, 184, 188, 197] and ss 328 and 329.
9. That the Federal Court of Australia sitting as the Court of Disputed Returns erred in law and exceeded or failed to exercise jurisdiction in dismissing the Petition and holding that in contravention of s 355(a) and s 355(aa) of the Commonwealth Electoral Act 1918 the Petition made 'no allegation as to Mr Bradbury's majority' nor 'that the allegedly invalid votes were cast in favour of Mr Bradbury' and in finding without a trial that 'In any event, the 2504 electors in fact voted'.
10. That the Federal Court of Australia sitting as the Court of Disputed Returns erred in law and exceeded or failed to exercise jurisdiction in dismissing the Petition and holding that the Petition ought set out facts which would otherwise involve a breach of the secrecy of the ballot in contravention of the Act, and a significant principle flowing from a relevant historical constitutional development under the Australian Constitution [cf *Rowe v Electoral Commissioner* [2010] HCA 46 at [118]] and accepted electoral law and practice.
11. That the Federal Court of Australia sitting as the Court of Disputed Returns erred in law in not following or applying properly or at all this Court's decisions in:

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- (a) [*Moloney v McEacharn* (1904) 1 CLR 77] with respect to the legal significance of contraventions of electoral requirements of form in relation to postal voting applications, and of the resulting affectation of the election;
- (b) [*Cole v Lacey* (1965) 112 CLR 45 at 48] with respect to the requirement of a specific allegation in the case of polling officer error or omission that the result of the election was affected including the specifying of the winning margin and the voting intention of the disenfranchised electors;
- (c) [*Webster v Deahm* (1993) 67 ALJR 781 at 782] and cases that have applied it in this Honourable Court with respect to the requirements of a specific assertion as to affectation required by s 362(3) and 365.

- 12. That the Federal Court of Australia sitting as the Court of Disputed Returns erred in law and failed to exercise jurisdiction in failing to order pursuant to s 360 as sought by the Plaintiff production of documents from the possession and custody of the Second and Third Defendants which proved the facts relied on by the Petitioner in the Petition and the invalidity of the election or return.
- 13. That the Federal Court of Australia sitting as the Court of Disputed Returns erred by referring in and attaching to the published written Reasons Schedule 2 which was a document not in evidence, and was not a document referred to in the Oral Reasons delivered on 3 February 2010; the only particulars relied on by the Plaintiff at the hearing were those attached to the letter of particulars furnished by Mr Bell solicitor for the Petitioner responding to the request for particulars of the Third Defendant which letter was received in evidence.
- 14. That the Federal Court of Australia sitting as the Court of Disputed Returns erred by concluding that the Petition in its present form does not comply with s 355(a) and s 355(aa) of the Commonwealth Electoral Act 1918."

Relevant provisions of the Act

11 Section 355 of the Act provides (so far as presently relevant) that:

"Subject to section 357, every petition disputing an election or return in this Part called the petition shall:

- (a) set out the facts relied on to invalidate the election or return;

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- (aa) subject to subsection 358(2), set out those facts with sufficient particularity to identify the specific matter or matters on which the petitioner relies as justifying the grant of relief".

12 The general qualification in the chapeau to s 355 (by reference to s 357) may be put aside from consideration. Section 357 relates to petitions of the AEC. The qualification to s 355(aa) about particularity (by reference to s 358(2)) recognises that the Court of Disputed Returns may relieve against a failure to give sufficient particulars, but s 358(3) provides that the Court shall not grant that relief unless satisfied that:

- "(a) in spite of the failure of the petition to comply with paragraph 355(aa), the petition sufficiently identifies the specific matters on which the petitioner relies; and
- (b) the grant of relief would not unreasonably prejudice the interests of another party to the petition."

The reasons of Emmett J

13 In his reasons for judgment for dismissing the petition, Emmett J concluded⁴ "that the petition in its present form does not comply with s 355(a) or s 355(aa)" of the Act. He further decided⁵ that "there is no dispensation under s 358(2) that could overcome the deficiencies in complying with s 355(a)". The reasoning which Emmett J stated as leading to that conclusion can be summarised as follows:

- (a) The AEC contended that the petition alleged that there had been "illegal practice" (defined in s 352(1) as a contravention of the Act or regulations made under the Act) or "undue influence" (defined, again in s 352(1), as "a contravention of section 327 of this Act^[6] or section 28 of the *Crimes Act* 1914")⁷, but that the petition did not set out facts sufficient to

4 [2011] FCA 71 at [64].

5 [2011] FCA 71 at [64].

6 Section 327(1) of the Act provides that:

"A person shall not hinder or interfere with the free exercise or performance, by any other person, of any political right or duty that is relevant to an election under this Act.

Penalty: \$1000 or imprisonment for 6 months, or both."

7 [2011] FCA 71 at [37].

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invalidate the election on either of those bases and therefore failed to meet the requirement of s 355(a).

- (b) The Act distinguishes, in s 362, between bribery and undue influence, on the one hand, and illegal practice other than bribery or undue influence, on the other⁸.
- (c) If the Court finds that a successful candidate has committed, or attempted to commit, bribery or undue influence, the election must be declared void under s 362(1)⁹.
- (d) The Court must not declare that a person has not been duly elected, or declare an election void on the ground of any illegal practice other than bribery or corruption, unless satisfied that the result of the election was likely to be affected *and* that it is just that the candidate should be declared not to be duly elected or that the election should be declared void¹⁰.
- (e) The petition alleged that Mr Bradbury contravened s 326(1)(c) of the Act (a contravention constituting a form of bribery) by receiving a benefit (constituted by a saving in printing costs and the use of an electorate office) on the understanding that his opposition to other candidates in the election would be influenced or altered¹¹. But the particulars given of that allegation were, in effect, that electors, not Mr Bradbury, would be influenced¹². Thus, Emmett J concluded¹³, the allegation of bribery failed to set out facts that satisfy s 355(a).
- (f) The petition alleged undue influence in a number of different ways, but only one (particularised as a series of representations that were erroneous, misleading, or likely to mislead) was said to constitute a contravention of the relevant provision of the Act (s 327)¹⁴.

8 [2011] FCA 71 at [38].

9 [2011] FCA 71 at [38].

10 [2011] FCA 71 at [38].

11 [2011] FCA 71 at [41], [45].

12 [2011] FCA 71 at [45]-[47].

13 [2011] FCA 71 at [47].

14 [2011] FCA 71 at [48], [51].

- (g) In respect of the allegation of contravention of s 327, Emmett J concluded that, although general allegations were made that false representations were made in connection with postal vote applications, which hindered or interfered with the right or duty of the persons who made the applications to vote at the election¹⁵:
- (i) the petition stated no facts showing the falsity of the representations, or that they were misleading or were likely to mislead¹⁶;
 - (ii) the petition stated no fact to support the assertion that Mr Bradbury intended to mislead postal vote applicants¹⁷; and
 - (iii) the petition alleged no fact to show that, even if the alleged representations were made, and were false or misleading, their making hindered or interfered with electors voting, or voting for their preferred candidate¹⁸.
- (h) Finally, if the petition set out facts capable of constituting illegal practice (and it did not) it was necessary that the petition also set out facts that, if proved, would show that the result of the election was likely affected by those practices¹⁹. All that the petition alleged was that 2504 persons had sent Mr Bradbury a postal vote application and had, as a consequence, submitted a postal vote. How or why that was likely to have affected the result of the election was not identified in the petition²⁰, though additional material filed by Mr Green in connection with the motion to dismiss the petition showed that Mr Bradbury's winning margin of 1026 votes was less than the number of votes alleged to be invalid²¹.

15 [2011] FCA 71 at [50].

16 [2011] FCA 71 at [51].

17 [2011] FCA 71 at [51].

18 [2011] FCA 71 at [52].

19 [2011] FCA 71 at [53].

20 [2011] FCA 71 at [54]-[55].

21 [2011] FCA 71 at [56].

Submissions in support of leave to issue

14 In support of the application for leave to issue the application for an order to show cause, Mr Green's solicitor exhibited to an affidavit written submissions of counsel. The central submission made was that "the petition sufficiently set out the grounds relied on to invalidate the election". More particularly, it was submitted that the petition sufficiently alleged contravention of s 184 of the Act, contravention of s 327, and errors or omissions by the Divisional Returning Officer ("the DRO").

15 The written submissions stated that Mr Green "does not seek to pursue paragraphs 25, 26, 27 and 28 [of the petition] and the reference in paragraph 30 to paragraphs 26, 27 and 28". That is, Mr Green no longer seeks to pursue allegations, made in the petition and considered in detail by Emmett J, that there was a contravention of s 326(1)(c) of the Act (a form of bribery).

16 It is convenient to consider the three forms of allegation that were pressed (contravention of s 184, contravention of s 327 and errors or omissions by the DRO) in that order.

Section 184

17 The allegation of a contravention of s 184 of the Act was introduced in the petition by several prefatory allegations:

- "5. On 2 June 2010 the assistant electoral commissioner Ms Marie Neilson on behalf of the AEC and pursuant to section 184(1) of the Act revoked the previous approved form for postal vote applications made under Part XV of the Act form EF 048 1/1020 [(sic) 1/2010] and made approved form EF 048 5/2010 which was duly gazetted in the Commonwealth Government Gazette No 23 of 2010 on 16 June 2010 [referred to as the approved form].
6. On 17 July 2010 the First Respondent by her [(sic) his] servants or agents forwarded by post or hand delivery to every residence in the electoral division of Lindsay with a view to electors in Lindsay receiving reading and being influenced by electoral matter entitled 'To the Householder':

Particulars

- (a) Postal Voting Information for the electorate of Lindsay described as 'Important';
- (b) A postal voting 'Hotline' which gave as the telephone number the electorate office of the MHR for Lindsay;

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- (c) A simplified pictorial diagram of how to apply for a postal vote in 4 easy steps;
- (d) An adaptation of the approved form in duplicate;
- (e) The Petitioner will after discovery and interrogatories contend that the electoral matter included the Commonwealth coat of arms as occurred in similar material issued by or for other seats held in NSW by the Second Respondent or its candidates.
- (f) Part of the form was perforated.

[the whole is referred to as the adapted ALP form]

- 7. Delivered with each adapted ALP form was a pre-addressed pre-paid envelope containing the address of the federal electorate office of the MHR for Lindsay [the envelope].

Invalid Votes/illegal practice

- 8. Between about 19 July 2010 and 19 August 2010 2504 persons who had received the adapted ALP form influenced thereby apparently completed one of the duplicate sections of the form and then entrusted the application to the First Respondent by either forwarding the said section or the adapted ALP form to the electorate office of the MHR for Lindsay in the envelope.
- 9. At the electorate office under the direction of the First Respondent or her [(sic) his] servants or agents the ALP adapted form was removed from the envelope, the identity of the applicant recorded, and one portion of the duplicate section of the form removed by tearing the section from the ALP adapted form and collating same into a bundle.
- 10. Every few days after 19 July 2010 the First Respondent her [(sic) his] servants or agents delivered that part of the adapted ALP form which contained one of the duplicate sections to the DRO [referred to as the altered ALP form] and thereby and purportedly on behalf of the applicants named on each altered ALP form applied for a postal vote in writing to the DRO."

Standing alone, these paragraphs of the petition alleged no contravention of s 184 and the written submissions filed on behalf of Mr Green did not suggest they did.

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18 Rather, it was asserted, both in the petition and in the written submissions in support of the grant of leave to issue the proceeding, that the applications for a postal vote the subject of Mr Green's petition were not in the approved form referred to in s 184. More particularly, it was asserted in the petition that the disputed forms were not in the approved form because they contained no "declaration duly attested that each applicant was an elector, whether in the Division of Lindsay or for the Senate of New South Wales or at all, as required by the Act section 184(1)(a)".

19 It is evident, from a document tendered in support of the application for leave to issue the proceeding as a copy of the disputed application form, that the disputed application form substantially followed the form approved under the Act for use at the 2010 federal election. As was expressly permitted by s 184AA(1) of the Act, the form was physically attached to, or formed part of, other written material issued by another person or organisation.

20 It is important to identify what is meant when it is said that the form *substantially* followed the approved form. Two differences can be identified between the approved form and what is tendered in evidence as a copy of the disputed form. First, under the heading "Eligibility for early voting", the disputed form said that:

"You are eligible to vote before election day if, on election day, you can't get to a polling place because you:

...

- are in prison or otherwise detained".

The approved form gave as the relevant criterion being "in prison serving a sentence of less than three years or otherwise detained".

21 The second difference is that at the foot of the approved form there is printed, in very small type, "EF048 05/2010" whereas on the disputed form there appears, in equally small type, "EF048 01/2010".

22 The better view of the petition may be that it alleged no more than that there was a contravention of s 184 because the disputed form contained no declaration that the applicant for a postal vote was an elector. If that is how the petition should be read, it discloses no arguable contravention of s 184(1). Neither the approved form nor the disputed form provided for any express declaration in the terms alleged. Both forms required an applicant to declare only that he or she was "entitled to apply for a postal vote". The instructions on the form in each case asked applicants to "read the information on eligibility before you sign this declaration" and warned that there is a penalty for making a false statement.

23 Read in the context of the whole form, which included, in each case, not only the instructions referred to above, but also a requirement to state the applicant's "enrolled address", the declaration to be made in the disputed form (as it was in the approved form) – that the applicant was "entitled to apply for a postal vote" – was, as s 184(1)(a) required, "a declaration by the applicant that he or she is an elector entitled to apply for a postal vote". It is not arguable that there was a contravention of s 184(1) on this account.

24 If, however, the petition is to be read as alleging contravention of s 184 on account of either of the two differences between the two forms that have been identified, it still disclosed no case fit to go to trial.

25 No direct and express reference was made in the petition, in the written submissions or, so far as the reasons of Emmett J reveal, in the proceedings in the Federal Court to either of the differences that have been identified. (All that was said in the petition was, in effect, that the disputed form did not state accurately the qualifications for eligibility for a postal vote.) No fact was alleged in the petition, and no argument was advanced in support of the application for leave to issue, that would show how, or why, stating (in effect) that *any* person in prison (as distinct from those prisoners serving a sentence of less than three years) was eligible for a postal vote had any effect on the outcome of the election which it is sought to dispute. If, as Mr Green contended in the petition, none of the disputed postal votes should have been counted, no fact was alleged, as required by ss 355(a) and 362(3), that showed that the result of the election was likely to be affected, or that it would be just that Mr Bradbury should be declared not to be duly elected or that the election should be declared void. For these reasons and for the reasons given by Emmett J it follows that, even if the petition is read as making the point now under consideration, the petition disclosed no case fit to go to trial. And any complaint about the difference between reference numbers printed at the foot of the form should for the same reasons be dismissed from further consideration.

Section 327

26 Mr Green submitted that the petition alleged, in par 21, matters which fall within the provisions of s 327(1) concerning undue influence. It will be recalled that Emmett J concluded²² that, although the petition made general allegations that false representations were made in connection with postal vote applications which hindered or interfered with the right or duty of the persons who made the applications to vote at the election, those allegations were not stated in sufficient detail to meet the requirements of s 355(a) or s 355(aa). The particulars given in the petition of the allegation of contravention of s 327(1) were:

22 [2011] FCA 71 at [50].

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- "(a) The First Respondent represented to the householders and electors of Lindsay that the adapted ALP form was an approved form of application for a postal vote which was in error and misleading or deceptive or confusing and likely to mislead or deceive the recipient of the said electoral material;
- (b) The First Respondent represented to the householders and electors of Lindsay that the adapted ALP form was an effectual form of application for a valid postal vote which was in error and misleading or deceptive or confusing and likely to mislead or deceive the recipient of the said electoral material;
- (c) The First Respondent represented to the applicants for a postal vote receiving the ALP form that in the circumstances in which it was issued that the adapted ALP form was issued with the approval of the Commonwealth or was an official document in relation to postal voting and the election in Lindsay or that the First Respondent was properly affiliated with or associated with the Commonwealth and/or the AEC which was in error and misleading or deceptive and confusing or likely to mislead or deceive the recipient of the said electoral material;
- (d) The First Respondent represented to the applicants for a postal vote receiving the adapted ALP form that the First Respondent had the right to the use of the Commonwealth coat of arms which official marks were not approved for use by the First Respondent in the election campaign in Lindsay by the grantor of the said coat of arms or by any protocol of the Commonwealth or at all such that the use of the said official marks and coat of arms was misleading or deceptive and confusing or likely to mislead or deceive the recipient of the said electoral material;
- (e) The First Respondent represented to the householders and electors of Lindsay that the information provided to electors by the 'Voting Hotline' was as equally independent and informative and accurate as that of the AEC, which was confusing in the context of the electoral material and the misuse of the approved form in the adapted ALP form and which was in error and misleading or deceptive or likely to mislead or deceive the recipient of the said electoral material;
- (f) The First Respondent represented to the householders and electors of Lindsay that the First Respondent was lawfully entitled to use the electorate office facilities as the First Respondent's campaign office and the office contact details and facilities as a 'Voting Hotline' and that the electoral material including the adapted ALP

form and envelope were properly and lawfully funded publicly or paid for by the Commonwealth which was in error or confusing and misleading or deceptive or likely to mislead or deceive the recipient of the said electoral material;

- (g) The First Respondent represented to the householders and electors of Lindsay that an application for a postal vote entrusted to the First Respondent or a communication made to the MHR for Lindsay's electorate office would be treated as if it were received by the AEC which was in error or confusing and misleading or deceptive or likely to mislead or deceive the recipient of the said electoral material.
- (h) The First Respondent misrepresented to the electors the grounds of eligibility for obtaining a postal vote and the entitlement to obtain a postal vote in the adapted ALP form.
- (i) As a consequence of each such representation and / or taken together the electors and applicants were hindered or interfered with the free exercise or performance of political right or duty relevant to the election."

27 I consider that the conclusions reached by Emmett J about the insufficiency of the allegations of contravention of s 327(1) are not attended by doubt. It is as well, however, to go on to make some further points about this aspect of the petition.

28 First, to the extent that the particulars allege that the disputed forms of application for postal vote were not in a form that complied with s 184(1), I have already rejected that allegation.

29 Second, to the extent that the particulars allege that there was some unauthorised use of the Commonwealth coat of arms, it is enough to notice that the form tendered by Mr Green as a copy of the disputed forms of application does not bear the Commonwealth coat of arms.

30 Third, to the extent to which the particulars complain of material that was attached to the disputed form of application (such as reference to a "Voting Hotline"), it is to be recalled that s 184AA expressly allows for an application for a postal vote to be physically attached to or form part of other written material issued by any person or organisation.

31 Fourth, the form tendered as a copy of the disputed form does not, on its face, make any of the several representations alleged.

32 The claim of contravention of s 327, as that claim is made and particularised in the petition, is not arguable. As Emmett J rightly concluded,

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further allegations of fact would be necessary to reveal an arguable case. For the reasons his Honour gave, it was, at the time of the proceedings before Emmett J, too late to seek to add such allegations even if, contrary to the fact, it had been argued or demonstrated that such allegations were open.

Error or omission by the DRO

33 Mr Green submitted that the petition had alleged, in pars 11, 15, 17 and 19, errors or omissions by the DRO. Each of those allegations depended (in some cases explicitly, in others implicitly) upon establishing that applications for postal votes made on the disputed forms were invalid. For the reasons already given, that premise cannot be established.

Other proposed grounds

34 No written submission was advanced in support of either ground 12 or ground 13 in the proposed application for an order to show cause. If it is intended that those grounds would be pressed, it is enough to say that the material filed shows no arguable ground of jurisdictional error by Emmett J.

35 No ground in the proposed application for an order to show cause deals expressly with the question of the validity of s 368 of the Act²³ which it is now sought to agitate in this Court. In the written submissions, it was said, in effect, that s 368 cannot oust this Court's jurisdiction under s 75(v) of the Constitution. So much may readily be accepted. But if it is, no question of the validity of s 368 would fall for consideration if leave to issue the proposed application were granted.

Conclusion and order

36 Having regard to what has been said about the petition, it is not arguable that Emmett J made any of the errors alleged in the proposed application for an order to show cause that, if established, would be a jurisdictional error entitling the applicant to relief of the kind which he seeks to claim in this Court. The question of validity of s 368 which the applicant now seeks to raise would not arise if leave to issue the application were granted. There being no real question to be determined, leave to issue the proposed application is refused.

23 Section 368 provides: "All decisions of the Court [of Disputed Returns] shall be final and conclusive and without appeal, and shall not be questioned in any way."