

HIGH COURT OF AUSTRALIA

HAYNE J

SCOTT LUDLAM

PETITIONER

AND

DAVID JOHNSTON & ORS

RESPONDENTS

Ludlam v Johnston
[2014] HCA 1
21 January 2014
P59/2013

ORDER

1. *No proceedings be had on the petition.*
2. *Petition dismissed.*
3. *The petitioner pay the costs of the first to seventh respondents.*

Representation

F I Gordon for the petitioner (instructed by MDC Legal)

D W Bennett for the first, third and fourth respondents (instructed by Colquhoun Murphy)

E M Heenan for the second and seventh respondents (instructed by Slater & Gordon Lawyers)

J A Thomson SC with D B Shaw for the fifth respondent (instructed by DLA Piper Australia)

T O Prince for the sixth respondent (instructed by Hopgood Ganim Lawyers)

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A S Bell SC with P Kulevski for the eighth respondent (instructed by Australian Government Solicitor)

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

CATCHWORDS

Ludlam v Johnston

Parliamentary elections (Cth) – Senate – Petition – Petition did not dispute validity of election or return – Whether petition authorised by *Commonwealth Electoral Act* 1918 (Cth) – Whether proceedings could be had on petition.

Words and phrases – "petition disputing an election or return".

Commonwealth Electoral Act 1918 (Cth), ss 355, 358(1).

1 HAYNE J. An election of six senators for the State of Western Australia to
serve in the Senate of the Parliament of the Commonwealth was held on
7 September 2013. On 4 November 2013, the Australian Electoral Officer for
Western Australia ("the AEO") declared the result of the election and the names
of the candidates elected. Pursuant to s 283(1)(b) of the *Commonwealth
Electoral Act* 1918 (Cth) ("the Act"), the AEO certified that the candidates
elected were Senator David Johnston, Mr Joe Bullock, Senator Michaelia Cash,
Ms Linda Reynolds, Mr Wayne Dropulich and the petitioner, Senator Scott
Ludlam. The writ for the election was returned on 6 November 2013.

Three other petitions

2 By an amended petition dated 13 December 2013, the Australian Electoral
Commission ("the AEC") has petitioned the Court for an order declaring,
pursuant to s 360(1)(vii) of the Act, that the election of six senators for the State
of Western Australia to serve in the Senate of the Parliament of the
Commonwealth held on 7 September 2013 is absolutely void.

3 By an amended petition dated 16 December 2013, Mr Zhenya Wang, a
candidate at the election, has petitioned for an order, pursuant to s 360(1)(v) of
the Act, declaring that Mr Dropulich and Senator Ludlam were not duly elected
at the election and an order, pursuant to s 360(1)(vi) of the Act, declaring that
Mr Wang and Senator Louise Pratt were duly elected at the election. In the
alternative, Mr Wang seeks a declaration that the election is absolutely void.

4 By an amended petition dated 16 December 2013, Mr Simon Mead, a
person qualified to vote at the election, has petitioned for orders substantially to
the same effect as those sought by Mr Wang.

The present petition

5 By petition dated 16 December 2013, Senator Ludlam has petitioned the
Court seeking relief which is described as follows:

"In the even[t] that, for any reason, the Court is satisfied that the Petitioner
was not duly elected at the election, the petitioner asks the Court to make
the following orders:

1. Declare that, pursuant to para 360(1)(vii) of the Act, the election of
6 Senators for the State of Western Australia to serve in the Senate
of the Parliament of the Commonwealth held on 7 September 2013,
is absolutely void.
2. The Commonwealth pay the Petitioner's costs.
3. Such further or other orders as the Court deems fit."

The basis on which this claim is made is described in the first three paragraphs of the statement of facts set out in the petition. There, the petitioner says:

- "1. In the election held on 7 September 2013, the Petitioner was elected as a Senator for the State of Western Australia to serve in the Senate of the Parliament of the Commonwealth. *He does not dispute the validity of his election or return.*
2. However, this Petition sets out the facts on which he will rely in response to allegations made in [the AEC, Wang and Mead petitions].
3. This Petition petitions for an order that the election the subject of the petition be declared void, in the event that, for any reason, the Petitioner is declared not to have been [duly] elected." (emphasis added)

6 Taken together, the first three paragraphs of the statement of facts and the statement of relief make plain that the petitioner (adopting his own words) "does not dispute the validity of [the] election or return". Rather, Senator Ludlam seeks to allege (in effect) that, for reasons which he sets out in his petition, if any of the other three petitioners were to establish the facts on which that petitioner relies, no order should be made either disturbing the return which was made to the writ or declaring the election void and, further or alternatively, that no order should be made which would declare to have been elected any candidate other than those named in the return to the writ.

7 In his petition, Senator Ludlam does not dispute many of the facts alleged by the AEC in its petition. In particular, he does not seek to controvert the AEC's allegation that 1,370 ballot papers were lost before a re-count directed by the Electoral Commissioner took place and that those missing ballot papers were not brought within the re-count. Nor does Senator Ludlam dispute that those ballot papers remain lost and are unlikely to be found at all or under conditions in which the integrity of the ballot papers could be established "without real doubt as to whether they could be safely counted for the purposes of any power that this Court might exercise".

8 The central points which the petitioner seeks to make in his petition are described by him as a "[r]esponse to errors in [the] recount alleged in the Mead and Wang petitions". In both the Mead and Wang petitions the petitioner alleges that decisions the AEO made in relation to some of the ballot papers which had been reserved for his decision in accordance with s 281 of the Act were wrong.

9 By his petition, Senator Ludlam seeks to respond to these allegations by saying, first, that the AEO did not make the mistakes alleged in either the Wang or the Mead petition but that if the AEO did make those mistakes, or some of

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them, "then it is likely that the same or substantially the same mistakes were made in respect of the same or similar number of ballot papers" (as I would understand it, reserved or unreserved). If these are responses which may be made in answer to the allegations in the Mead and Wang petitions, they may be made in those proceedings. Whether they are responses which may be made in those petitions is a matter to be determined in those proceedings. I express no opinion on that question now.

10 In accordance with the requirements of the High Court Rules 2004, the petitioner has applied for directions about the further conduct of his petition. Section 358(1) of the Act provides that, subject to an exception which is not presently relevant, "no proceedings shall be had on the petition unless the requirements of sections 355, 356 and 357 are complied with". Section 355 provides in part that, subject to s 357 (concerning petitions by the AEC), "every petition disputing an election or return" shall meet the requirements set out in s 355. The first of those requirements is that the petition "set out the facts relied on to invalidate the election or return".

11 This petition does not seek to dispute the petitioner's return as a senator for Western Australia. The petition does not seek to dispute the validity of the election. Indeed, the central propositions implicitly advanced in the petition are that the return which was made to the writ should be left unaffected by this Court and that no order should be made declaring the election void. Although the petition makes a number of allegations contingent upon rejection of those central propositions, the petition, when read as a whole, is not a petition *disputing* the validity of any election or return.

12 Further, the petitioner sets out no facts on which he would rely to invalidate the election or return. That being so, the requirements of s 355 of the Act are not met. It follows that s 358(1) requires the conclusion that no proceedings shall be had on the petition. For these reasons, there will be an order that no proceedings be had on the petition dated 16 December 2013 filed on behalf of Scott Ludlam as petitioner. The petition is dismissed.

13 The first to seventh respondents seek orders that the petitioner pay their costs of the petition. The eighth respondent, the AEC, makes no application for costs. The petitioner submits that the course which was adopted was both prudent and desirable as a means of informing both the Court and opposite parties of the position which the petitioner sought to adopt in answer to the AEC, Wang and Mead petitions.

14 Whatever may be the force that is to be given to these considerations of prudence and frank disclosure of hand, the fact remains that the petition is one which was not authorised by the Act. It was not authorised by the Act because it is not and was not a petition disputing an election or return. That being so, costs

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should follow the event. The petitioner will pay the costs of the first to seventh respondents.

