HIGH COURT OF AUSTRALIA

HAYNE J

DONALD KENNETH DITCHBURN PETITIONER

AND

THE DIVISIONAL RETURNING OFFICER
FOR HERBERT RESPONDENT

Ditchburn v Divisonal Returning Officer [1999] HCA 41
22 July 1999
B50/1998

ORDER

1. *Petition dismissed.*

2. *Petitioner to pay costs of respondent and of Australian Electoral Commission.*

Representation:

Petitioner appeared in person

S J Gageler for the respondent and for the Australian Electoral Commission (instructed by Australian Government Solicitor)

CATCHWORDS

Ditchburn v Divisional Returning Officer

Elections – House of Representatives – Court of Disputed Returns – Petition disputing validity of House of Representatives election – Whether preferential voting system constitutes plural voting – Whether members "directly chosen by the people".

The Constitution, ss 7, 24, 30.
Commonwealth Electoral Act 1918 (Cth), ss 240, 274.

1 HAYNE J. On 7 December 1998, Donald Kenneth Ditchburn filed an Election Petition pursuant to Div 1 of Pt XXII of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act"). The petition was said to concern "the election for the House of Representatives seat for the Division of Herbert held on Saturday 3 October 1998". It alleged that the petitioner is enrolled in the Federal Division of Herbert in the State of Queensland and it appears from other allegations in the petition that he was eligible to vote in that Division in the election held on 3 October 1998.

2 The Australian Electoral Commission seeks leave to enter an appearance in the proceeding and to be represented and be heard. It seeks an order under O 16 r 4 of the High Court Rules that the name of the respondent to the petition be struck out. It also seeks an order dismissing the petition or staying proceedings on the petition on the ground either that there is no reasonable or probable cause of action or suit or that the proceeding is an abuse of the process of the Court.

3 As was the case in the other electoral petition which was instituted by Mr Ditchburn and with which I have dealt today[1], no reason was offered why the Commission should not have the leave it sought (under s 359 of the Act) and accordingly leave was given for it to appear, be represented and heard on the petition. Again, however, I need form no view on whether the respondent named in the petition was "improperly joined" within the meaning of O 16 r 4 of the Rules.

4 The petitioner seeks to contend that the system of preferential voting for candidates in House of Representatives elections is contrary to the requirements of s 24 of the Constitution that the members of that House be "directly chosen by the people" and s 30 of the Constitution that "in the choosing of members each elector shall vote only once". In particular he alleges that ss 240(1)(b), 240(2), 274(7)(d), 274(7AA), 274(7AB) and 274(7AC) of the Act are invalid and he seeks a declaration to that effect and "[a]n order to annul the election of the Member for Herbert declared elected by the Divisional Returning Officer for Herbert" pursuant to these provisions.

5 The essence of the argument which the petitioner advances is stated in the petition in the following way:

> "Electors (like me) whose first preference for a minor party candidate was initially counted as their vote, also had their ballot papers counted for their second, third or fourth etc preference candidates, and those candidates substituted by the DRO as the electors' alternative votes.
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> As an elector's vote can be ascribed to any candidate in his/her order of preference, it follows that the elector must simultaneously vote for all

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1 *Ditchburn v Australian Electoral Officer for Queensland* [1999] HCA 40.

candidates indicated on his ballot paper. Under this construction, if electors only vote for their first preference, subsequent preferences should not be counted.

Thus Section 274 of the Act has the effect of making the preferences each elector indicates pursuant to Section 240(1)(b) into multiple votes for the one vacant seat.

This construction conflicts with the express and implied provisions of Section 30 of the Constitution of the Commonwealth of Australia which requires in part 'but in the choosing of members each elector shall vote only once'.

But if Section 274 of the Act is construed as requiring the Divisional Returning Officer to 'transfer' the first preference votes of excluded candidates to opponents, the DRO acts as an intermediary (or agent) in the voters' choosing of members of the House of Representatives.

The intervention of the DRO actually determines which of any electors preferences is finally accepted in the count of votes, and thus determines which candidate the elector actually chooses.

Consequently the intervention or agency of an officer of the Crown in the choosing of members means that such members are **indirectly chosen** by electors whose votes were transferred from excluded candidates. This requirement of the Act conflicts with the first provision of Section 24 of the Constitution".

6 In my opinion these arguments are not tenable. Some other arguments, not raised by the petition, were mentioned by the petitioner in oral argument. They were, by and large, arguments of a political rather than legal nature. Even if open to the petitioner[2] they do not assist in resolving the constitutional issues that the petitioner sought to raise.

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2 ss 355, 358.

7 In *Langer v The Commonwealth*[3], at least four members of the Court held[4] that s 240 of the Act was a valid law within ss 31 and 51(xxxvi) of the Constitution and was not inconsistent with the requirement of s 24 that the House of Representatives shall be comprised of members "directly chosen by the people of the Commonwealth"[5]. And it may well be that the other two members of the Court were of the same opinion[6]. The argument which the petitioner seeks to advance is, at least to the extent that he relies on s 24, an argument which I am bound to hold would fail. Even if *Langer* does not decide the further point on which the petitioner seeks to rely (that under the preferential voting system a voter votes more than once, contrary to s 30) that contention is one which must fail.

8 Prior to federation, plural voting related to property qualification was allowed in Tasmania, Western Australia and Queensland[7]. It is clear from the Debates at the 1891 Convention in Sydney that the question of plural voting was well in the minds of the members of the Constitutional Conventions from which the terms of the Constitution emerged[8]. But the plural voting then under consideration permitted a voter to cast more than one expression of his or (in South Australia and Western Australia) her choice of candidate.

9 The preferential voting system was provided for House of Representatives elections by s 124 of the *Commonwealth Electoral Act* 1918 and for the Senate by s 7 of the *Commonwealth Electoral Act* 1919. As McHugh J noted in *Langer v The Commonwealth*[9], "Compulsory preferential voting does not appear to have been introduced into Australia until 1911 when it was introduced in Western Australia. But optional preferential voting was used in Queensland after 1892". Even so, the Constitution that emerged from the Constitutional Conventions "did not entrench the secret ballot, compulsory voting, preferential or proportional

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3 (1996) 186 CLR 302.

4 (1996) 186 CLR 302 at 316-317 per Brennan CJ, 333 per Toohey and Gaudron JJ, 348-349 per Gummow J.

5 See also *Judd v McKeon* (1926) 38 CLR 380; *Faderson v Bridger* (1971) 126 CLR 271.

6 (1996) 186 CLR 302 at 323 per Dawson J, 340-341 per McHugh J.

7 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 19 per Barwick CJ; *McGinty v Western Australia* (1996) 186 CLR 140 at 281-282 per Gummow J.

8 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 2 April 1891 at 613-617.

9 (1996) 186 CLR 302 at 342.

voting"[10]. All that was said (so far as presently relevant) was that the members of the House of Representatives were to be "directly chosen by the people"[11], that until the Parliament otherwise provides "the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State"[12] and that "in the choosing of members each elector shall vote only once"[13].

10 The petitioner placed some emphasis on what was said by McHugh J in *Australian Capital Television Pty Ltd v The Commonwealth*[14] about "representative government". But as Brennan CJ pointed out in *McGinty v Western Australia*[15], the expressions "representative government" and "representative democracy" are not found in the Constitution and although they are useful terms to describe the effect of ss 7 and 24 "[i]t is logically impermissible to treat 'representative democracy' as though it were contained in the Constitution, to attribute to the term a meaning or content derived from sources extrinsic to the Constitution and then to invalidate a law for inconsistency with the meaning or content so attributed."

11 The requirements that members be "directly chosen" and that "each elector shall vote only once" do not preclude the Parliament from providing (as it has) for a compulsory preferential voting system[16]. Under that system each elector casts but one expression of his or her choice of member in one electoral division. The choice is expressed in a complex way but it remains a single expression of the will of that voter. And, perhaps more relevantly, the voter cannot cast a vote in more than one electoral district as voters could in those Colonies that permitted plural voting related to property qualifications. The voter votes only once.

12 No doubt it is right to say, as the petitioner does, that the distribution of preferences requires electoral officers to undertake the process prescribed in those parts of s 274 which deal with that subject. But the performance of those tasks

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10 *McGinty v Western Australia* (1996) 186 CLR 140 at 283 per Gummow J.

11 s 24.

12 s 30.

13 s 30.

14 (1992) 177 CLR 106 at 228-233.

15 (1996) 186 CLR 140 at 169.

16 *Langer v The Commonwealth* (1996) 186 CLR 302; *Soegemeier v Macklin* (1985) 58 ALR 768.

does not mean that the member is not "directly chosen" as that expression is used in s 24.

13 The petition cannot succeed. It should be dismissed.