

HIGH COURT OF AUSTRALIA

HAYNE J

MALCOLM McCLURE

PETITIONER

AND

THE AUSTRALIAN ELECTORAL COMMISSION

RESPONDENT

AND

PHILIP JONES & ORS

PARTIES JOINED

McClure v Australian Electoral Commission [1999] HCA 31
24 June 1999
M119/1998

ORDER

Petition dismissed with costs.

Representation:

Petitioner appeared in person

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

J T Shields (instructed by GSM Lawyers) for Kelly Buzza (a party joined)

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

CATCHWORDS

McClure v Australian Electoral Commission

Elections – Senate – Court of Disputed Returns – Petition disputing validity of half Senate election – Validity of *Commonwealth Electoral Act* 1918 (Cth), ss 211, 211A – Deposit lodged pursuant to s 170 – Whether unsuccessful candidate entitled to refund – Powers of Court pursuant to *Commonwealth Electoral Act* 1918 (Cth) – Remedies.

Constitutional law – Implied constitutional rights – Freedom of communication about political matters – Whether entitles election candidate to media coverage.

The Constitution, ss 7, 24.

Commonwealth Electoral Act 1918 (Cth), ss 170, 211, 211A, 355, 358, 362, 364.

1 HAYNE J. Section 353(1) of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act") provides that:

"The validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise."

This Court is the Court of Disputed Returns¹. The petitioner has filed an election petition which, it is said, "concerns the election of the Half Senate for the Commonwealth of Australia in the State/Territory of Victoria held on 3rd October 1998". The writ for the election is alleged to have been returned on 29 October 1998. The petitioner was a candidate at that election; he was not elected.

2 The validity of Div 1 (ss 352-375A) of the Act was unsuccessfully challenged in *Sue v Hill*².

3 The respondent has applied for orders that the petition be dismissed, or that it be stayed 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.

4 More than 380 appearances have been entered, apparently on behalf of persons who claim to have voted or to have had the right to vote at the election to which the petition relates³. When the respondent's application first came on for hearing the application had not been served on any of the persons who had entered an appearance. The further hearing of the application was adjourned. I directed that notice of the application would be given sufficiently if a short form of notice were sent by post to persons appearing. That notice told the recipient that a copy of the summons, affidavit in support, and the respondent's outline of submissions could be inspected at the Registry.

5 Only two of the persons to whom notice was given appeared on the further hearing of the application. One, Mr Murgatroyd, made a short supplementary submission in support of the petitioner. The other, Ms Buzza, appeared by solicitor to say that she had not understood that the documents she had been asked to sign constituted entry of appearance to the petition.

6 When the application came on for further hearing, the petitioner sought, for the first time, to amend the petition by alleging that ss 211 and 211A of the Act are not valid laws of the Parliament because (in effect) there was no proper signification of the Royal Assent to the bills by which those sections were inserted

1 s 354(1).

2 [1999] HCA 30.

3 High Court Rules, O 68 r 6(1).

in the Act. Either in amplification of or in addition to this contention the petitioner sought to allege that Australia became a sovereign and independent nation at or after the time of its execution of the Treaty of Versailles. Accordingly (so the argument went) the signification of Royal Assent to legislation by, or on behalf of, a person who is the sovereign of the United Kingdom was of no effect.

7 I heard argument in support of the application for leave to amend but indicated that I would give my decision on that application at the same time as giving my reasons in relation to the respondent's application. The application for leave to amend is refused.

8 Leave to amend in the terms proposed would be futile. For the reasons I gave in *Joosse v Australian Securities and Investment Commission*⁴, I consider the arguments that the proposed amendment seeks to found are arguments that must fail. The immediate question presented by arguments of this kind is what law is to be applied by the courts. That question is resolved by covering cl 5 of the Constitution:

"This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State".

In so far as the petitioner relies on some alleged deficiency in the signification of Royal Assent, it is ss 58, 59 and 60 of the Constitution that deal with the ways in which the Royal Assent may be given to bills passed by the other elements of the Parliament. So far as now relevant, s 58 governs. It provides that the Governor-General "shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name". There is nothing to suggest that this was not done in the case of the Acts that introduced s 211 and s 211A into the Act. The history of international dealings to which the petitioner referred is not to the point.

9 It is, in these circumstances, not necessary to consider whether ss 355(e) and 358 of the Act preclude the amendment⁵ because it is sought more than 40 days after the return of the writ. The respondent's reliance on those provisions assumes that they are valid. The petitioner's proposed amendment might appear to attempt to cast doubt on that validity. But, as I have indicated earlier, the arguments against validity must fail and the amendments proposed would be futile.

4 (1998) 73 ALJR 232; 159 ALR 260.

5 *Nile v Wood* (1988) 167 CLR 133 at 137 per Brennan, Deane and Toohey JJ.

The petition

10 In his petition, the petitioner makes two kinds of complaint. The first is a complaint about the lack of media coverage of his candidacy in the election and of his platform of policies. The second is a complaint that he was disadvantaged by the application of those provisions of the Act that govern group and individual voting tickets in a Senate election⁶, and what has become known as voting above or below the line⁷. He seeks declarations that the half Senate election for Victoria was void and that none of the six candidates returned was duly elected.

11 In addition, he seeks four other kinds of relief: first, the return of the lodgment fee of \$700 that he paid on his nomination as a Senate candidate (a claim that I will call the "deposit claim"); second, that the Court "instruct" the respondent to make provision for ticket voting for independent candidates in all future elections for the Senate (the "ticket voting claim"); third, that:

"[t]he Chiefs of Staffs of the media bodies referred to in this petition be informally instructed by the [C]ourt to make provision for and ensure proper coverage of press releases and policy launches by independent candidates and/or that some form of caution be given to said media bodies regarding the intrinsically incumbent responsibilities they have within our democratic process to discern and report important election issues raised by independents"

(the "publicity claim"); and fourth, that leave be granted to join this petition, and certain other petitions now pending in the Court, "as a Class-Action before the Full Bench of the High Court" (the "class action claim").

The claims for relief other than avoidance of the election

12 The petitioner says, at the start of his petition, that he is not a lawyer and asks the Court to give him whatever assistance is necessary to ensure "the lawful and democratic conclusion" of the matter. But even giving the most generous construction to his petition, it is plain that much of the relief sought is relief of a kind that cannot be given.

The deposit claim

13 The petitioner seeks the return of the sum deposited by him in accordance with s 170(2) and (3) of the Act. Section 170(2) says that a nomination under Pt XIV of the Act is not valid unless the prescribed amount is deposited with the

6 ss 211 and 211A.

7 s 209(1).

nomination⁸ or, if the nomination is submitted by facsimile, before the latest time for valid submission of the nomination⁹. Section 170(3)(a) prescribes \$700 as the deposit if a person is nominated as a Senator.

14 The petitioner characterises this deposit as "confirmation of a contract" between the petitioner and the respondent and says, in effect, that consideration for the contract wholly failed (or there was no meeting of minds) because the electoral process was not as he supposed it to be - one in which "no one candidate would be disadvantaged above ... another".

15 There are at least two answers to this contention. First, the statutory requirement that a deposit is paid by or on behalf of the person nominated is not a requirement that leads to the formation of a contract between the respondent and the nominee or a person who pays the deposit on behalf of the nominee. The Act prescribes the circumstances in which the deposit is to be forfeited¹⁰ and those circumstances came to pass in the petitioner's case - the number of votes polled in his favour as first preferences was less than 4% of the total number of votes polled as first preferences. Questions of consideration, failure of consideration, or meeting of the minds simply do not arise and the claim must therefore fail.

16 Secondly, it may be very much doubted that the Court has power to order the return of a candidate's deposit. No such power is included in the list of powers of the Court given by s 360(1) and, although that list is not exhaustive, the petitioner was not able to point to any basis for concluding that the Court does have the power for which he contends. This claim must fail.

8 s 170(2)(b).

9 s 170(2)(c).

10 s 173.

The publicity claim

- 17 It is not clear what the petitioner means when he says that the Court should "informally instruct" the chiefs of staff of media bodies about how they should act in the future. If he seeks to have the Court give some advice to these persons, it is enough to say that this is not the Court's function. If he seeks to have the Court make some order about future conduct, there is no basis in the Act for concluding that the Court has any power to do so. There being no power to do so, the further questions that might then have arisen about framing an order with sufficient certainty need not be considered. The relief claimed cannot be given.

The ticket voting claim

- 18 For like reasons, there is no basis upon which the Court might lawfully "instruct" the respondent about the conduct of future elections. Future elections must be conducted according to law. The relief claimed cannot be given.

The class action claim

- 19 The question of joining this petition to other petitions pending in the Court as some form of class action is a question that relates only to how this petition is to be dealt with; it is not a question that touches the merits of the complaints that the petitioner makes. It is, therefore, not a question that affects whether the orders sought by the respondent should now be made. That being said, however, it is to be recalled that in *Muldowney v Australian Electoral Commission*¹¹ Brennan ACJ held that the jurisdiction to declare an election void on the petition of a person qualified to vote at that election is a power limited to those elections in which the petitioner was an elector entitled to vote and did not extend to power to declare the entirety of a general election void¹². It may be, as the respondent contended, that the attempt to have petitions form a class action was to try to overcome these decisions. But the validity and force of the respondent's contention in this regard would depend upon what was said to follow from "joining" petitions as a "class action". The petitioner pointed to no provision of the Act or the High Court Rules that contemplates joining petitions as a class action and the point was not examined in any detail in the course of argument. Because these are not matters that affect

11 (1993) 178 CLR 34.

12 See also *Pavlekovich-Smith v Australian Electoral Commission* (1993) 67 ALJR 711; 115 ALR 641; *Sykes v Australian Electoral Commission* (1993) 67 ALJR 714; 115 ALR 645; *Robertson v Australian Electoral Commission* (1993) 67 ALJR 818; 116 ALR 407; *Abbotto v Australian Electoral Commission* (1997) 71 ALJR 675; 144 ALR 352.

whether the orders sought by the respondent should be made it is not necessary to explore them further.

The claim to avoid the election

- 20 The principal focus of argument was on the petitioner's claim that the election in question should be declared void. As to that, the respondent submitted that the petition should be stayed or dismissed because: first, it does not comply with s 355 of the Act; secondly, it alleges no "illegal practice" as that term is defined in the Act (a breach of the Act or regulations¹³) and therefore the Court has no jurisdiction to avoid the election; and, thirdly, it fails to raise any ground which would justify the avoidance of the election it seeks to challenge.

Section 355 of the Act

- 21 So far as presently relevant, s 355 provides:

"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;
- (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;

...

- (e) be filed in the Registry of the High Court within 40 days after the return of the writ; or, in the case of the choice or the appointment of a person to hold the place of a Senator under section 15 of the Constitution, within 40 days after the notification of that choice or appointment."

(Section 357 concerns petitions by the Australian Electoral Commission; it has no application to the present matter.)

13 s 352(1).

22 So far as relevant, s 358 provides:

- "(1) Subject to subsection (2), no proceedings shall be had on the petition unless the requirements of sections 355, 356 and 357 are complied with.
- (2) The Court may, at any time after the filing of a petition and on such terms (if any) as it thinks fit, relieve the petitioner wholly or in part from compliance with paragraph 355(aa)."

(The provisions of s 358(3) governing when relief may be granted under sub-s (2) are not relevant.)

23 The relationship between s 355(a), requiring that a petition "set out the facts relied on to invalidate the election", and s 355(aa), requiring that the petition "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", may be obscure¹⁴. It is, however, clear from s 358(1) that no proceedings may be had on the petition unless it sets out the facts relied on to invalidate the election.

24 Section 362(3) provides that:

"The Court of Disputed Returns shall not declare that any person returned as elected was not duly elected, or declare any election void:

- (a) on the ground of any illegal practice committed by any person other than the candidate and without the knowledge or authority of the candidate; or
- (b) on the ground of any illegal practice other than bribery or corruption or attempted bribery or corruption;

unless the Court is 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 void."

In *Webster v Deahm*, Gaudron J held that (leaving aside from consideration certain kinds of case not then relevant, and not relevant in the present matter):

"the very minimum assertion necessary to constitute a fact which will 'invalidate [an] election or return' for the purposes of s 355(a) of the Act is

14 *Sykes v Australian Electoral Commission* (1993) 67 ALJR 714 at 717 per Dawson J; 115 ALR 645 at 648.

one raising a matter or matters by which 'the election was likely to be affected'"¹⁵.

No doubt it was in light of this, that the respondent submitted that a petition must be dismissed if it does not set out facts which, if proved, would establish that there are available grounds for invalidating the election and the election was likely to be affected on those grounds.

- 25 That submission proceeded from the premise that s 362(3) is an exhaustive statement of the circumstances in which the Court may declare an election void¹⁶. Put in that way the submission may very well be stated too broadly. In *Hudson v Lee*, Gaudron J held that s 352(1) of the Act identified exhaustively the practices which might properly found a petition under Div 1¹⁷. Nevertheless, the respondent submitted that I need not form any concluded view on that question because (so it was submitted) the facts alleged in the petition, if established, would not entitle the petitioner to an order avoiding the election. I therefore turn to the facts that are alleged.

The petitioner's complaints

- 26 As I have noted earlier, the petitioner makes essentially two complaints: the first about media coverage (or the lack of it) and the second about the "above the line" voting system. I deal with them in turn.
- 27 The first complaint depends upon the contention that there has been some breach of an implied freedom of communication in relation to the political and electoral process. As counsel for the respondent pointed out, much of this part of the petition is copied from the report of the argument of Sir Maurice Byers QC in *Australian Capital Television Pty Ltd v The Commonwealth*¹⁸. Central to the petitioner's case in this respect is the assertion in his petition that representative and responsible government:

"requires that every person and every political candidate have the entitlement to make his or her views known on political issues not only between elections but also especially during election campaigns. It requires that all political

15 (1993) 67 ALJR 781 at 782; 116 ALR 223 at 225.

16 *Hudson v Lee* (1993) 177 CLR 627; *Robertson v Australian Electoral Commission* (1993) 67 ALJR 818 at 819 per Toohey J; 116 ALR 407 at 409.

17 *Sue v Hill* [1999] HCA 30 at [9] per Gleeson CJ, Gummow and Hayne JJ, [121] per Gaudron J.

18 (1992) 177 CLR 106 at 109-113.

candidates have an equal opportunity to be elected and that the voting process should unfairly disadvantage no political candidate."

That assertion must then be understood in light of other provisions of the petition in which it is made plain that the conduct of which complaint is made is the decision of persons associated with radio or television stations not to give coverage to the petitioner's platform or press releases.

28 The short answer to this first complaint is that the *freedom* of communication implied in the Constitution is not an *obligation* to publicise. The freedom is a freedom from governmental action; it is not a right to require others to provide a means of communication¹⁹. The petitioner's case depends upon him having some right to require others to disseminate his views. But as was said by the Court in *Lange v Australian Broadcasting Corporation*²⁰:

"ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. *Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power.* As Deane J said in *Theophanous*²¹, they are 'a limitation or confinement of laws and powers [which] gives rise to a pro tanto immunity on the part of the citizen from being adversely affected by those laws or by the exercise of those powers rather than to a "right" in the strict sense'. In *Cunliffe v The Commonwealth*²², Brennan J pointed out that the freedom confers no rights on individuals and, to the extent that the freedom rests upon implication, that implication defines the nature and extent of the freedom. His Honour said²³:

'The implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control.'" (Emphasis added)

19 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

20 (1997) 189 CLR 520 at 560.

21 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 168. See also at 146-148.

22 (1994) 182 CLR 272 at 326.

23 (1994) 182 CLR 272 at 327.

29 The second complaint, about the application of the provisions of the Act dealing with the grouping of Senate candidates, requires some further reference to those provisions. Section 211 of the Act provides (in effect) that where the names of candidates nominated in a Senate election are included in a group, the candidates may lodge a written statement that they wish voters in the election to indicate their preferences in relation to all the candidates in the election in an order (or any of up to three different orders) specified in the statement, being an order that gives preferences to the candidates lodging the statement before any other candidate. Section 211A of the Act makes like provision for candidates who are Senators or, if there has been a dissolution of the Senate, were Senators immediately before the dissolution and who are not members of a group. There is no like provision for other candidates not part of a group.

30 The constitutional validity of provisions like s 211 has twice been considered - in *McKenzie v The Commonwealth*²⁴ and in *Abbott v Australian Electoral Commission*²⁵. At the time of *McKenzie*, the Act was cast in slightly different terms and did not contain s 211A. Gibbs CJ rejected a submission that the group voting system then provided for the election of Senators was contrary to s 7 or s 16 of the Constitution²⁶ and held that the provisions then in force did not "so [offend] democratic principles as to render the sections beyond the power of the Parliament to enact"²⁷. In *Abbott*, Dawson J held that there was no substance to the contention that the voting system provided for by ss 211 and

24 (1984) 59 ALJR 190; 57 ALR 747.

25 (1997) 71 ALJR 675; 144 ALR 352.

26 Section 7 provides (so far as relevant):

"The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate."

Section 16 provides:

"The qualifications of a senator shall be the same as those of a member of the House of Representatives."

27 (1984) 59 ALJR 190 at 191; 57 ALR 747 at 749.

211A contravened s 10 of the Constitution²⁸. The petition in this matter did not explicitly challenge the constitutional validity of ss 211 and 211A. The petitioner sought to add such a challenge by the amendments I have mentioned earlier but for the reasons I have set out, that challenge is not sustainable.

31 The petitioner alleges that the provisions are "unfair" and asserts that s 211 (and, perhaps, s 211A) is not a reasonably proportionate regulation of the subject-matter. He prays in aid of this submission that the Court is obliged by s 364 to be "guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities".

32 Read in the context of the Act, s 364 and its reference to "substantial merits and good conscience" is to be understood as directing the Court about *how* it should set about its task of deciding the issues presented under the Act by the petition; it does not give the Court some power to rewrite the Act to accord with some abstract standard of fairness²⁹. If the provisions made in the Act for election of Senators are valid laws of the Parliament, it is not to the point for the Court to attempt to characterise those provisions as "fair" or "unfair". In particular, s 364 gives no warrant for the Court declaring void an election conducted in accordance with valid legislative prescriptions.

33 Thus, if ss 211 and 211A are valid laws of the Parliament, an election conducted in accordance with those provisions (and the other applicable provisions of the Act) cannot be held to be void. The asserted challenge to validity is, as I have said, without foundation. It follows that the second of the petitioner's complaints fails.

34 Before parting with this matter it is as well to say something of the way in which the provisions permitting the entry of appearance by persons entitled to vote at the election in question have operated in this case. As I have noted earlier, more than 380 appearances were filed. It goes without saying that the number of persons appearing made the conduct of the proceeding more difficult and costly than it would have been if the only parties to it were the petitioner and the respondent. More troubling were the suggestions in an affidavit filed on behalf of the respondent, first, that some of those who entered an appearance may have been

28 Section 10 provides:

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

29 *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422 at 438 per Isaacs J; *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26 at 29-31 per Gleeson CJ and Handley JA.

misled about what they were doing (or at least may not have understood the significance of the step they were taking) and, second, that some persons given notice of the proceeding because notice of appearance had been given in their name denied that they knew anything at all about the matter and denied entering appearance. I have, however, embarked on no inquiry into these assertions and make no finding about them.

- 35 The petition is one that cannot succeed. Although the petitioner contended that the respondent should pay its own costs, I do not consider that there is any reason to depart from the ordinary rule that costs follow the event. I will therefore order that the petition is dismissed; the petitioner will pay the costs of the respondent - the Australian Electoral Commission.