

RE BARRY CEMINCHUK

JUDGMENT
(oral)
28 October 1993

DAWSON J.

RE BARRY CEMINCHUK

This is an ex parte summons seeking an extension of time to file an electoral petition, and waiver of the requirement that a petition be signed by two witnesses. If I grant the relief sought, the applicant intends to challenge the March 1993 federal elections.

Section 355 of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act") provides that:

"Subject to section 357, every petition disputing an election or return ... shall:

...

- (d) be attested by 2 witnesses whose occupations and addresses are stated;
- (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."

The summons seeks that I waive both these requirements.

But s.358 provides that:

"Subject to subsection (2), no proceedings shall be had on the petition unless the requirements of section[] 355 ... are complied with."

The applicant was unable to direct me to anything in the Act which gives me power to waive the requirements of s.355(d) and s.355(e). Certainly such a waiver is outside any of the powers conferred on the Court of Disputed Returns by s.360(1).

In *Cameron v. Fysh*⁽¹⁾, *Re Berrill*⁽²⁾, *Nile v. Wood*⁽³⁾, and *Sykes v. Australian Electoral Commission*⁽⁴⁾, it was held that amendment of a petition is not possible if to do so would in effect evade the requirements of s.355(e). These cases assumed that the requirements of s.355(e) cannot be dispensed with. That was the express decision of

(1) (1904) 1 C.L.R. 314, at p.316.

(2) (1978) 52 A.L.J.R. 359, at p.360; 19 A.L.R. 254, at p.255.

(3) (1988) 167 C.L.R. 133, at p.137.

(4) (1993) 67 A.L.J.R. 714, at pp.716-717; 115 A.L.R. 645, at p.648.

Toohy J. in *Robertson v. Australian Electoral Commission*⁽⁵⁾.

The applicant urged that s.364 of the Act gives me power to make the orders he seeks. That section provides that:

"The Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not."

Broad as that provision may be, it does not confer a jurisdiction on the Court which it does not otherwise have under the Act. Nor does it dispense with the requirements of the Act. It merely requires that the Court should not be unduly formal or technical in the conduct of proceedings under the Act and enables it to depart from the rules of evidence.

Under the High Court Rules, O.60, r.6, a Justice has power to "enlarge ... the time appointed by these

(5) (1993) 116 A.L.R. 407, at pp.408-409.

rules or fixed by an order"⁽⁶⁾. On its own terms, this Rule does not extend to enlarging the time appointed by an Act. In any case, as subordinate legislation, the Rules cannot override the requirements of an Act. The Act itself requires that the Rules be "not inconsistent with this Act"⁽⁷⁾. Order 60, r.6 therefore cannot be used to vary the requirement of s.355(e).

Nor is there any provision that would enable me to dispense with the requirements of s.355(d). In *Yates v. Unsworth*⁽⁸⁾, Needham J. held that the failure to comply with a provision that a petition be duly signed made it "necessary to declare that the petition cannot be proceeded upon".

It follows that the summons must be dismissed.

(6) Order 68, r.2 incorporates O.60 into the procedure for election petitions. The making of Rules for election petitions is authorized by s.375(1) of the Act.

(7) s.375.

(8) Unreported, Supreme Court of New South Wales, Court of Disputed Returns, 8 July 1988, at p.8.