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IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY **NO C17 OF 2013**

BETWEEN: **THE AUSTRALIAN ELECTORAL COMMISSION**
Petitioner

AND: **DAVID JOHNSTON**
First Respondent

JOE BULLOCK
Second Respondent

MICHAELIA CASH
Third Respondent

LINDA REYNOLDS
Fourth Respondent

WAYNE DROPULICH
Fifth Respondent

SCOTT LUDLAM
Sixth Respondent

ZHENYA WANG
Seventh Respondent

LOUISE PRATT
Eighth Respondent

NO P55 OF 2013

BETWEEN: **ZHENYA WANG**
Petitioner

AND: **DAVID JOHNSTON**
First Respondent

JOE BULLOCK
Second Respondent

MICHAELIA CASH
Third Respondent

LINDA REYNOLDS
Fourth Respondent

Filed on behalf of the Australian Electoral Commission by:

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WAYNE DROPULICH
Fifth Respondent

SCOTT LUDLAM
Sixth Respondent

LOUISE PRATT
Seventh Respondent

AUSTRALIAN ELECTORAL COMMISSION
Eighth Respondent

NO P56 OF 2013

BETWEEN:

SIMON MEAD
Petitioner

AND:

DAVID JOHNSTON
First Respondent

JOE BULLOCK
Second Respondent

MICHAELIA CASH
Third Respondent

LINDA REYNOLDS
Fourth Respondent

WAYNE DROPULICH
Fifth Respondent

SCOTT LUDLAM
Sixth Respondent

ZHENYA WANG
Seventh Respondent

LOUISE PRATT
Eighth Respondent

THE AUSTRALIAN ELECTORAL COMMISSION
Ninth Respondent

AEC'S SUBMISSIONS ON QUESTIONS OF LAW

1. These submissions are in a form suitable for publication on the Internet.

Introduction

2. The Australian Electoral Commission's (**AEC**) petition seeks a declaration that the election for Senators to serve in the Parliament of the for the State of Western Australia, held on 7 September 2013 (**Election**), is absolutely void.

3. In the circumstances of the case there is no other safe course for this Court to follow than to grant that relief. The AEC, which is statutorily charged with securing the delivery of the franchise to the electors of Western Australia, failed in that task in a significant respect by losing 1,370 ballot papers that were required by law to be examined for a re-count directed by the Commissioner in a close election.

4. The AEC contends, *inter alia*, that the electors who completed those ballot papers were "prevented from voting" in the Election within the meaning of s 365 of the *Commonwealth Electoral Act 1918* (Cth) (**Act**) and, as the relevant margin in the Election at the re-count was 12 votes and no evidence may be admitted of the way in which those electors intended to vote, then no further factual inquiry is warranted by the Court in relation to reserved ballot papers or any re-count justified in circumstances where no petitioner asserts that there are a sufficient number of other errors that would overcome the effect of 1,370 disenfranchised voters and their lost votes.[1]

Facts

5. The parties to the various petitions have filed an Amended Statement of Agreed and Assumed Facts. Those are the only facts that the Court need traverse for the purposes of the separate trial. In deciding the questions of law, the AEC contends that the key material facts from that document, read with the provisions of the Act, may be summarised as follows:

   i. There was a general election held on 7 September 2013 for all seats in the House of Representatives, and half of the available seats in the Senate.

   ii. The Election was a very close election in respect to the filling of the fifth and sixth vacancies.

   iii. The proportional representation system of voting, employed for the Senate, requires a candidate, at a half-Senate election, to receive a quota of one-seventh of the available formal votes in the State, plus one, in order to be elected.

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1 The AEC's principal contention in these proceedings is that the Court should declare the election void pursuant to ss 360 and 362 of the Act.

iv. If all available vacancies are not filled on a count of the first preferences, or on the transfer of the surplus votes of elected candidates beyond his or her quota to those candidates that are to receive the elected candidate's preferences (either because a voter has specifically chosen the next preference in a "below-the-line" vote or because the preferences are directed in accordance with the group ticket preference of the group voted for in an "above-the-line" vote), then the Act requires a progressive exclusion of the candidates with the fewest votes and the distribution of that candidate's preferences to the appropriate remaining candidate or candidates until six candidates have the required quota of votes.

v. There was a critical juncture at the 50th exclusion point in the Election. Mr van Burgel and Mr Bow were the candidates with the lowest number of votes at that point. The question of which of those candidates was to be excluded was decisive in the filling of the fifth and sixth vacancies. The first four vacancies had already been filled.

vi. If Mr van Burgel was excluded this would lead, with the distribution of his preferences and the subsequent effect of further exclusions, to the success of Mr Wang and Ms Pratt. If Mr Bow was excluded this would lead, with the distribution of his preferences and the subsequent effect of further exclusions, to the success of Mr Dropulich and Senator Ludlam.

vii. On the "fresh scrutiny" of votes, at the 50th exclusion point, Mr Bow had 14 more votes than Mr van Burgel. Mr Dropulich and Senator Ludlam, who would have been defeated by that result, requested a re-count. That request was ultimately given by the Commissioner, and a re-count of all above-the-line votes was directed, due to the narrow margin at the critical exclusion point.

viii. At some point between the fresh scrutiny and the re-count, the AEC lost 1,370 ballot papers (120 of which were marked informal on the fresh scrutiny), and they have not been found. A re-count must be conducted under the Act on the basis of a scrutiny of all ballot papers within the scope of the re-count. On the re-count, at the 50th exclusion point, Mr van Burgel had 12 more votes than Mr Bow and Mr Bow was excluded.

ix. The exclusion of Mr Bow led to the success of Mr Dropulich and Senator Ludlam and the declaration of the poll in their favour and the certification of their return.

x. As part of the re-count, 949 ballot papers were reserved for the decision of the AEO for Western Australia in accordance with s 281 of the Act (**the reserved ballot papers**). There is dispute between various parties, apart from the AEC, as to whether all of these decisions were made in conformity with the relevant provisions of the Act.

xi. Mr Mead asserts that due to alleged errors made by the AEO for Western Australia in his rulings on the reserved ballot papers, at least 87 votes should be added to Mr Bow's count in the re-count and at least 90 votes

should be subtracted from Mr van Burgel's count in the re-count, so that Mr van Burgel should have been excluded at the 50th exclusion point in the re-count, not Mr Bow.

xii. Mr Wang asserts that due to alleged errors made by the AEO for Western Australia in his rulings on the reserved ballot papers, at least 56 votes should have been added to Mr Bow's count in the re-count and at least 18 votes should be subtracted from Mr van Burgel's count in the re-count, so that Mr van Burgel should have been excluded at the 50th exclusion point in the re-count not Mr Bow.

xiii. It is not presently known, with any certainty, whether, and if so, to what extent, the errors claimed by Mr Mead overlap with the errors claimed by Mr Wang. While in some respects the grounds of the review of the various ballot papers appear to be similar, and it is likely that some will overlap, that cannot presently be determined with any certainty.

xiv. Senator Ludlam asserts if the errors that are contended for in the Wang petition and the Mead petition as being errors made by the AEO on the reserved ballot papers erroneously in favour of Mr van Burgel that should have favoured Mr Bow, were in fact errors, then at least the same number of errors was made by the AEO that favoured Mr Bow that should have favoured Mr van Burgel.

Questions reserved and proposed answers

6. The questions of law that have been set down for separate trial by the order of Hayne J dated 13 December 2013, with the answers the AEC would propose set out in bold typeface, are as follows:

i. **Question 1:** Did the loss of the 1,370 ballot papers between the fresh scrutiny and the re-count mean that the 1,370 electors who submitted those ballot papers in the poll were "prevented from voting" in the Election for the purposes of s 365 of the Act?

Yes.

ii. **Question 2:** Is the Court of Disputed Returns precluded by s 365 or otherwise from admitting the records of the fresh scrutiny, or original scrutiny, that bear on the 1,370 missing ballot papers as evidence of the way in which each of those voters intended to vote, or voted, in the Election for the purposes of each of the petitions filed in the matter, including in so far as those petitions seek relief under ss 360 and 362?

Yes.

iii. **Question 3:** On a proper construction of the Act, including the re-count provisions, is any further inquiry regarding the manner in which the AEO dealt with the ballot papers reserved for decision pursuant to s 281:

(a) permitted under any, and if so which, provision of the Act;

Yes, by a combination of ss 281(3), 353(1) and 360.

(b) relevant to the disposition of any, and if so which, petitions before the Court of Disputed Returns;

No, because the number of missing ballot papers (1,370) significantly exceeds the number of reserved ballot papers (949) and even more significantly exceeds the numerical impact of successful challenges to rulings in respect of the reserved ballots.

(c) necessary to the disposition of any, and if so which, petitions before the Court of Disputed Returns?

No, for the reasons given in answer to iii(b) above.

7. Those answers are, it is submitted, compelled by the following propositions, to be elucidated further below, concerning the operation of the Act and the facts raised by the petitions. They are also supported by authority.

8. First, once a re-count was ordered by the Commissioner of the above-the-line votes in the Election pursuant to s 278(2) of the Act, the result of the Election was to be declared on the basis of the re-count together with the formal below-the-line votes that were not the subject of the re-count process. The re-count was to be conducted according to the deliberate and *de novo* process laid down in s 279B of the Act which necessarily required results of the original scrutiny (pursuant to s 273(2)) and the fresh scrutiny (pursuant to s 273(5)) to be disregarded.

9. Secondly, given that, as s 263 of the Act proclaims, "*[t]he result of the polling shall be by scrutiny*", the loss of 1,370 ballot papers between the fresh scrutiny stage and the re-count had the consequence that the 1,370 voters who had cast those ballot papers were "*prevented from voting*" in the Election within the meaning of s 365 of the Act, because their "votes" were necessarily not considered in the further scrutiny constituted by the re-count which contemplated the scrutiny of the relevant ballot papers for the purpose of ascertaining the result of the polling.

10. Thirdly, the proviso to s 365 expressly precludes the admission of "*any evidence*" of the way in which electors who were "prevented from voting" intended to vote.

11. Fourthly, because of the effect of the above propositions, the Court of Disputed Returns is precluded from admitting evidence from the original scrutiny or the fresh scrutiny for the purposes of establishing how the 1,370 electors intended to vote or voted in the Election. In this context, no relevant distinction is to be drawn between how such electors intended to vote and how they in fact "voted". Accepting secondary evidence from the fresh scrutiny of the 1,370 missing

ballot papers is inconsistent with the Act's central premise that election be by scrutiny of the ballot papers.

12. Fifthly, where, as here, the lost or compromised votes exceed the margin of any victory, and any margin that could be established with any examination of the reserved ballot papers, there is no utility in embarking upon an inquiry into individual ballots reserved for decision.

13. These submissions now develop the answers to the reserved questions and propositions set forth above in further detail. As ever, it is necessary to begin with a consideration of salient features of the Act including to note certain aspects of its drafting history.

Legislative history and key statutory provisions

14. Four main periods in the evolution of the legislation may be noted.

    i. From 1902 to 1905, when the *Commonwealth Electoral Act 1902* (Cth) (**1902 Act**) by its terms did not provide for elections to be avoided on the basis of illegal practices, including bribery and corruption, but did, by virtue of s 200 of the 1902 Act as made (the predecessor to s 365 of the Act), allow an election to be avoided on the basis of irregularities such as an error of an officer. However, s 200 required the petitioner to "prove" that the error "...affected the result of the election".

    ii. From 1905 to 1922, when both the 1902 Act (in s 198A) and, from 1918, the Act (in s 191) permitted the Court to void an election on the basis of an illegal practice, including bribery or corruption, when the illegal practice was "likely to affect the result of the election", thereby entrenching that statutory formula for illegal practices to the present day, as found in s 362. The phrase "illegal practice" was undefined.

    iii. From 1922 to 1983, when s 191 (the present s 362) remained materially unchanged, but what had been s 200 of the 1902 Act and s 191 of the Act (the present s 365) no longer contained the requirement of proof that an error affected the result of the election. It was amended to provide that no election could be avoided on account of an error "which did not affect the election". The 1922 amendment also introduced the proviso now contained in s 365. Further, at the same time, the equivalent of s 360(1)(iii) of the Act was inserted which gave the Court a broad power to allow parties access to certain documents[2], but notably ballot papers were specifically exempted, thereby buttressing the effect of the amendment to the present s 365.

    iv. From 1983 to the present day, when a definition of "illegal practices" was inserted into the Act (the present s 352), so that an illegal practice

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2 Overcoming the decision in *Hedges v Burchell* (1913) 17 CLR 327.

included any contravention of the Act, whether it involved conduct involving moral turpitude or otherwise.[3]

15. Turning to the Act in its current form, Part XVIII of the Act is entitled "The Scrutiny". Section 263 provides that *"[t]he result of the polling shall be by scrutiny"* and the balance of that Part sets out, in a very deliberate manner, the method by which the scrutiny is to be undertaken.

16. The Act provides for what is referred to as the "original scrutiny" and then the "fresh scrutiny" which are conducted by Assistant Returning Officers and the Divisional Returning Officer respectively: s 273. That lengthy section sets out the processes to be followed including the identification and rejection of informal ballot papers. The scrutiny is followed by the transmission of the results of the scrutiny to the Australian Electoral Officer who is then tasked, *inter alia*, with the responsibility of determining a quota, transfer values or the order of standing of continuing candidates in a poll and the process of excluding candidates and assigning preferential votes for the purposes of counting. The tasks undertaken by the Australian Electoral Officer are also described as "the scrutiny": see s 273(19). Ultimately, the Australian Electoral Officer must ascertain the successful candidates and the order of their election: s 273A(5).

17. A feature of the scrutiny process is that it is to be conducted in the presence of scrutineers appointed by the candidates: see s 273(2). The Act also contemplates that such scrutineers may be present at the fresh scrutiny: see s 273(5)(e). Scrutineers also participate in any re-count that may be directed (as described further below): see s 279B(1) and (7) and s 281(1).

18. Separate provisions are made for the re-count of ballot papers at both Senate and House of Representative elections: ss 278 and 279. A re-count occurred in the present case and it is important to note that it is the results of that re-count (of about 96% of the votes), which, when coupled with the below-the-line votes, became in substance the results of the election of the Senators for Western Australia, that are the subject of challenge in the various petitions before the Court.

19. Section 279B sets out the procedure for the conduct of the re-count. It, too, involves the scrutiny of the ballot papers: s 279B(1) and s 279B(7)(a) and (8). The re-count involves the Australian Electoral Officer ruling on any ballot papers reserved for decision (s 279B(5) and (7)), it being noted that the Officer's role

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3 There is a possibility on existing authority that the better view of the phrase "illegal practices" is that it meant that in any event. In the *Borough of Wasall Case; Hately, Moss and Mason v James* [1892] 4 O'M & H 123 at 127, Baron Pollock said:

> An illegal practice is not a charge of a corrupt practice, and therefore it is not a question in which the motive of the person who has, as is alleged, broken the Act of Parliament is under discussion at all. It is a question whether and to what extent that person has been guilty of a breach of the Act.

In *Mitchell v Bailey (No 2)* (2008) 169 FCR 529 at 534 [9] Tracey J, without referring to the relevant words of Baron Pollock said that the phrase "...is apt to suggest conduct which involves moral turpitude and conduct which is criminal in nature".

under ss 273 and 273A (the original and fresh scrutiny stages) does not involve him or her so ruling, that task being reserved for the Assistant Returning Officers and the Divisional Returning Officers.

20. Section 280 is important. It provides that *"[t]he officer conducting a re-count shall have the same powers as if the re-count were the scrutiny, and may reverse any decision in relation to the scrutiny as to the allowance and admission or disallowance and rejection of any ballot paper."* This mirrors the language of s 273(5)(a) in relation to the DRO's powers on a "fresh" scrutiny.

21. All of the foregoing provisions are important for consideration of the question whether or not the 1,370 electors whose ballot papers were lost were "prevented from voting" within the meaning of s 365 of the Act. It is evident that the "scoreboard is reset" as it were each time a scrutiny occurs and when there is a re-count (to the extent of the votes ordered to be re-counted) such that the process is *de novo*. This analysis is confirmed by the High Court's decision in *Re Lack; Ex parte McManus* (1965) 112 CLR 1 considered further below.

22. Section 281(3) of the Act operates as something of a control mechanism. Whereas, on a s 279B re-count, the Australian Electoral Officer is required, by s 281(2), to assess and rule on all reserved ballot papers, s 281(3) provides that the Court of Disputed Returns is under no such obligation: it *may* consider those ballot papers but is not to order a re-count of the whole or any part of the ballot papers in connexion with the election unless it is satisfied that the re-count is "justified". As will be seen in the answer to Question 3 below, a further re-count, which is what two of the petitioners (Messrs Wang and Mead) in fact urge for the purposes of the ultimate relief they seek, would not be "justified" in circumstances where that re-count could not involve the scrutiny of the missing ballot papers, and where the number of those papers significantly exceeds the number of ballot papers reserved.

23. Section 360(1)(vii) of the Act confers on the Court the power to declare an election absolutely void.[4] Section 362(3) identifies certain grounds upon which an election may be declared void and conditions the exercise of the power on the Court being satisfied that the *"result of the election was likely to be affected"* and that *"it is just that the election should be declared void"*. Section 365 qualifies the power to void an election by making it clear that immaterial errors will not provide a basis for avoiding the election and emphasising that, in the context of determining whether the absence or error of or omission by the officer did or did not affect the result of the election, no evidence of voting intention was to be admitted of those who had been prevented from voting in the election.

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4 Section 360 does not in terms confer power on the Court to order a further re-count of votes but s 360 is not exhaustive (see the use of the word "include") and s 281(3) by implication includes a power to order a further re-count.

The legal effect of a re-count under the Act and *Re Lack; Ex parte McManus* (1965) 112 CLR 1

24. Once the Commissioner directed, pursuant to s 278(2) of the Act, that there be a re-count of the above-the-line votes, it was as if the original scrutiny and fresh scrutiny had not been conducted and all the relevant ballot papers would need to be freshly examined by the relevant officer or officers, who pursuant to s 280 of the Act, had the same powers as if the re-count was the scrutiny.

25. That conclusion is not only clear on the face of the Act, but is supported by the unanimous decision of the High Court of Australia in *Re Lack*. In that case, a candidate for the election of Senators for the State of Victoria applied for writs of mandamus and prohibition directed to Mr Lack, the Commonwealth Electoral Officer for Victoria. Mr Lack had ordered, on his own motion, a re-count of all the ballot papers in the State pursuant to the then s 137 of the Act which is materially identical to the present s 278 of the Act, save for the fact that the present provision allows for an appeal to the Electoral Commissioner. Section 139 of the Act was identical to the present s 280.

26. Mr Lack had ordered a re-count to take place before the original scrutiny was completed, in that he ceased the scrutiny after two vacancies had been filled on first preference votes and the scrutiny was continuing to fill the remaining places on the basis of the allocation of preferences, where an additional two candidates had been elected and all but three of the continuing candidates had been eliminated. Pursuant to the then s 135 of the Act, and before the availability and use of computers able to tabulate the preference distribution, a random sampling method was employed. Since 1984, a transfer value representing the size of the surplus to quota votes is calculated and all votes distributed at a reduced face value calculated using this transfer value. At the time at which the case was decided, aside from there being no "above-the-line" voting, the transfer value was used to calculate the number of ballot papers equal to the surplus which would then be randomly sampled from the ballot papers that put the candidate over the quota. As the distribution of preferences had begun, the sample had already been taken at the time at which Mr Lack ordered the re-count.

27. Therefore, whilst the practical manner in which votes were counted was different under the scrutiny, the nature of a re-count under the legislation was identical to that under the present Act. The applicant proceeded on the writ of mandamus claiming that first, Mr Lack could not order a re-count prior to the completion of the original "count" and must therefore be compelled to complete it, and, secondly, that the original sampling having been randomly taken, the re-count was obliged to use the same sample subject to any "adjustments" that would need to be made because of any change in the quota and surplus votes expected on the re-count.

28. In a joint judgment, the Court dismissed both arguments. First, the Court said that the scrutiny of ballot papers for a Senate election involved a number of successive "counts" and therefore Mr Lack could, pursuant to s 137(1), direct a re-count after any count had been completed. Of present importance is the way

in which the Court dealt with the second argument. The Court determined that upon any re-count the processes for scrutiny provided for in the Act must all be observed anew, so that the random sampling taken upon the original account must be put aside and a fresh random sample taking be made under s 135(5)(e)(v) of the Act. The Court said (at 10):

> ... it is about as clear as it can be that once a recount is directed there is no elected candidate. The whole notion of a recount is that the first count is to be disregarded and that the election of candidates is to depend upon the result of the recount.

29. The Court went on to say that the taking of another random sample was one thing to be done under the Act as "... one of a series of steps in a fixed temporal sequence", and that it required "... commencement of the whole process *de novo*".

30. Absent any notice of any intention to challenge the correctness of *Re Lack,* it must be applied, there being no material difference in the legislation. Whilst the scrutiny provisions were slightly different, the case stands for the proposition that the steps required in a re-count under the Act, whatever they may be, are begun entirely anew and the original count of the votes the subject of the re-count (here, the above-the-line votes) disregarded.

31. It follows both from the structure of the Act and *Re Lack's* unequivocal indication that the re-count process is *de novo* that 1,370 electors were disenfranchised in that their ballots could not be counted (because they were by then lost) nor the outcomes of the original and fresh scrutinies under s 273 be taken into account on the re-count (because the process was *de novo* and involved a further scrutiny). If they could not be taken into account on the re-count, it is difficult to see that they could or should be taken into account by this Court even before one reaches the express proscription of s 365. The Court would not be engaged in a scrutiny of ballot papers. Additionally, the explanation in *Re Lack* of the centrality of a fresh scrutiny on a re-count explains for the purposes of s 365 what it means to be "prevented from voting". If ballots are not available for scrutiny in a re-count as a result of an error of an electoral officer, then that is a circumstance which answers the class of circumstances envisaged by s 365.

32. From this, it follows that the voters who had marked the 1,370 missing ballot papers were "prevented from voting" in the Election as their votes were not counted in the *de novo* process of scrutiny that was the "re-count", the results of which completely superseded the original and fresh scrutinies and formed the basis for the ultimate declared result of the election. As a matter of substance, any one of the 1,370 votes whose ballot papers were lost could legitimately say that they were prevented from voting in the Election. Their "votes" were not the subject of any relevant scrutiny, the only relevant scrutiny being that undertaken on the re-count.

33. This analysis is supported by a number of persuasive authorities referred to below although, as shall be seen, there is also a number of first instance cases that accord the phrase "prevented from voting" a narrower and more formalistic meaning, *viz.* a person who is prevented from completing a ballot paper.

Authorities in relation to "prevented from voting"

34. In *Campbell v Easter* (unreported, 12 June 1959), Sugerman J, sitting as the Court of Disputed Returns under the New South Wales legislation said, of the mirror provision to s 365 of the Act:

> Prevention from "voting" in the election includes, in my opinion, prevention from casting an effective vote on account of some 'error of, or omission by' an officer, and is not limited to such acts as, for example, excluding an elector from the polling booth or refusing to hand him a ballot paper. *An elector whose vote, although he is given a ballot paper and marks it, is thrown away on account of some error or omission of an officer, is prevented from voting in the relevant sense.* The errors or omissions here in question were in that category and had that effect. The intention of the elector to vote in a particular manner remains evidenced by his markings upon the rejected ballot paper. To admit evidence of those markings would contravene the prohibition in the proviso against admitting 'any evidence of the way in which the elector intended to vote in the election'. (Emphasis added.)

35. On the facts of that particular case, Sugerman J considered that the electors who had completed 51 ballot papers that were rendered informal on account of errors or omissions of officers due to, *inter alia*, failures by the officers to initial or sign a ballot paper according to statutory requirements, were "prevented from voting" in the relevant sense. Even though the rejected ballots survived, so the case is *a fortiori* the present, his Honour regarded the equivalent of the s 365 proviso as precluding those papers being taken into account as evidencing the intention of the disenfranchised electors. He went on to declare the election void in circumstances where "having regard to the number of ballot papers affected by official errors or omissions and to figures earlier given as to maximum possible majorities, one way or the other, on the votes which were unaffected by official error or omission, the result of the election could have been affected."

36. In *Varty v Ives* [1986] VR 1, Starke J said (at 16) that he had "reached a firm conclusion ... that Sugerman J was correct in holding that the words 'prevented from voting' in the section means prevented from casting a vote which is included in the count" and was critical of the decision of Hardie J in *Dunbier v Mallam* [1971] 2 NSWLR 169 for "brushing aside" without any reasons the conclusions of Sugerman J. He also distinguished the decision of Gowans J in *Fell v Vale (No 2)* [1974] VR 134 where wrongly rejected ballot papers were inspected to ascertain the voting intention of the disenfranchised electors without the statutory proviso apparently being referred to. Justice Dawson cited *Varty v Ives* with apparent approval in *Sykes v AEC* (1993) 115 ALR 645, on the limited question of the history of the s 365 proviso.

37. Two other decisions should be noted. In *Cleary v Freeman* (unreported, 31 October 1974, NSW Court of Disputed Returns), Nagle J considered *Campbell v Easter* and *Dunbier v Mallam* and preferred the view that the equivalent of the s 365 proviso was limited only to circumstances in which the person had not voted at all, with the consequence that where an informal vote been cast, the Court was at liberty to review it for the purpose of determining whether an official error had affected the result of the election. In *Fenlon v Radke* [1996] 2 Qd R 157, Ambrose J, in *dicta*, cast doubt on the decisions of Sugerman J, distinguishing it on the facts of the case in hand.

38. There may well be room to argue (although unnecessary to decide for present purposes) that an elector who casts an informal vote is not "prevented from voting" within the meaning of the Act because that elector has had his or her vote scrutinised by the relevant electoral officer and the candidate's own scrutineers have the opportunity to have the ballot reserved pursuant to s 281 for further review. But where, as in the present case, the subject votes have not been the subject of the relevant scrutiny, it is sensible and meaningful to speak of the electors as having been "prevented from voting". Their completed ballot has not relevantly been scrutinised, and the subject electors are in substance and effect excluded from the ballot.

39. There is no difference, given the *de novo* scrutiny mandated by the Act for the purposes of a re-count, as to whether ballot papers are lost or destroyed after they are marked by a voter and before they are subjected to any scrutiny, and where they are lost or destroyed in between the fresh scrutiny and the scrutiny required by the re-count, as in the present case. The re-count was to be conducted according to the deliberate and *de novo* process laid down in s 279B of the Act, which necessarily required the results of the original scrutiny (pursuant to s 273(2)) and the fresh scrutiny (pursuant to s 273(5)) to be disregarded. That is, the re-count was a *de novo* process for that aspect of the count concerning the above-the-line votes.

Answers to Questions 1 and 2

40. From this analysis coupled with the reasoning in *Re Lack* and the central notion of election by scrutiny, it follows that the 1,370 electors were prevented from voting in the election: their ballot papers did not "count" in the only "count" that mattered – the one that led to the declared result.

41. The underlying principle stated in s 263 of the Act – that the result of the polling is to be ascertained *exclusively* by scrutiny (whether judicial or administrative) – itself operates to preclude resort to any evidence other than the ballots themselves. When a party wishes to adduce proof of secondary evidence, whether by Part 2.2 of the *Evidence Act 1995* (Cth) or through the principles established at least as long ago as in *Sugden v Lord St Leonards* (1876) 1 PD 154, it is for the purpose of proving the records of a document which the court considers relevant. The secondary evidence of the records of the fresh scrutiny are irrelevant, because that process, as *Re Lack* demonstrates, had been rendered irrelevant by the direction to re-count, and therefore subject to scrutiny, all of the above-the-line ballot papers.

42. Once the conclusion is reached that the 1,370 electors were prevented from voting within the meaning of s 365, it follows that the Court is precluded from having regard to the results of the original and fresh scrutiny that bear on the 1,370 missing ballot papers as evidence of the way in which each of those voters intended to vote, or voted, in the Election for the purposes of each of the petitions filed in the matter, including insofar as those petitions seek relief under ss 360 and 362.

43. This conclusion is not affected by the fact that certain petitions seek relief under ss 360 and 362. It would be wholly anomalous if the Court were not permitted to receive evidence of voter intention of those prevented from voting for the purposes of ascertaining the effect of the election results of certain acts or omissions of electoral officials for the purposes of an application put on the basis of s 365, but were permitted to have regard to such evidence for the purposes of applications based upon ss 360 and 362. Such an intention should not be attributed to the legislature, especially in circumstances where both ss 362 and 365 involve the Court examining the effect of certain conduct on the results of the election and where the principle enacted in the 1922 amendments was clearly not to be taken to have been affected by the 1984 amendments that introduced the definition of "illegal practices". It is trite that the Act must be read harmoniously and as a whole. That understanding is further exemplified by the history of the 1922 amendments outlined in answer to Question 3.

44. Insofar as it is sought to be argued that the results of the original and fresh scrutiny provide evidence of how electors actually voted as opposed to how they intended to vote, three points are to be made. First, this is a mere semantic difference. As Isaacs J said in *Kean v Kerby* at 459-460, "when the vote is recorded in writing, no doubt the writing itself is proper evidence of the way the elector intended to vote". Such an argument was also rejected in *Campbell v Easter* and *Varty v Ives* at 16. Secondly, unlike a case such as *Campbell v Easter* where the actual ballots were physically available, the scrutiny results are no more than evidence of opinions formed by various officers of the AEC of what those AEC officers understood to be the voting intentions of electors, such opinions formed on the basis of the interpretation of markings on ballot papers and the formation of judgements as to formality and informality. Thus, the scrutiny results are strictly not even secondary evidence of the actual voter intention as recorded on the ballot papers, as copies or digital images of the lost ballot papers would be. Thirdly, insofar as the fresh scrutiny disclosed that 120 of the 1,370 votes were marked "informal", that fact does not say anything as to how those electors voted but simply how the Divisional Returning Officers assessed or characterised those 120 votes. Whether or not they would have been re-assessed in the same way in the re-count is unknowable.

Question 3

45. The AEC accepts that the Court of Disputed Returns would be permitted as a matter of power to engage in a further inquiry regarding the manner in which the AEO dealt with the ballot papers reserved for decision pursuant to s 281 in an appropriate case, but submits that such an inquiry is neither relevant nor necessary to the disposition of any of the petitions before the Court.

Question 3(a)

46. Sub-section 281(3) of the Act itself provides the jurisdiction for the Court to consider the reserved ballot papers. The phrasing of s 281(3) looks to the language in s 353(1) and then, in turn, s 360, to give the Court the power on a petition to conduct the further inquiry envisaged by Question 3. No other provision in the legislation precludes the inquiry. The proviso to s 365 of the Act operates only when an elector has been "prevented from voting". All of the electors who cast a vote that is represented by a reserved ballot paper had their ballot papers scrutinised by the electoral officials in the re-count, and therefore they should be regarded as not having been prevented from voting, subject to the debate about informal votes adverted to at [38] above.

47. Sub-section 281(3) of the Act contains a limitation on the class of ballot papers that the Court may consider, in the first instance, in the event of a petition challenging a close election. The section was introduced in 1911 to prevent the expense and inconvenience of petitioners, in effect forcing the Court to re-count all the available ballot papers[5]. By the 1911 amendment, petitioners were forced to rely on the decisions made by the candidate scrutineers. By the terms of the provision, it is left to the Court to determine, if a significant type or pattern of errors is disclosed, and in the context of the facts of the election, whether it is justified in ordering the re-count of a wider class of ballot papers according to law. By s 360(1)(iii), the parties are not to have access to the wider class of ballot papers (and nor are the parties themselves to have access to the reserved ballot papers), by reason of the fact that, as part of the 1922 amendments, such access was unnecessary.

48. For what *remedial* purpose the Court would consider the reserved ballot papers, for example whether to seek to determine an election contest itself by changing a close margin by an evaluation of the reserved ballot papers is a different question, and for the reasons given in answer to the further questions, is unnecessary to examine for the present petitions.[6]

Questions 3(b) and (c)

49. It is both irrelevant and unnecessary in the present petitions to invoke the power to consider the reserved ballot papers because a re-count would necessarily not include the lost 1,370 votes, there being neither the power nor the ability on a

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5 Inserted by s 26 of the *Commonwealth Electoral Act 1911* (Cth); see *Hansard*, House of Representatives, 4 December 1911, p 3636.

6 What standard the Court is meant to apply when considering the reserved ballot papers, namely whether it is a *de novo* approach or whether it gives a "margin of appreciation" to the decisions of the AEO, or whether the standard is one of s 75(v) judicial review, is a different question not presently before the Court.

re-count to "count" missing votes, and the missing votes greatly exceed the numerical differences between Messrs Bow and van Burgel, even assuming each of the foreshadowed challenges in relation to reserved votes were to succeed.

50. The established jurisprudence of the High Court of Australia and elsewhere (most notably the decision of Sugerman J in *Campbell v Easter*) is that when there is a sufficient number of voters who have been prevented from voting to change the critical margin in an election, then a new election should be ordered, as the Court cannot inquire as to how those voters intended to vote.

51. In the present proceedings, there are 1,370 voters who have been disenfranchised. As demonstrated in the answers to Question 2, nothing can be known about the manner in which those voters intended to vote through any form of evidence, there being no primary evidence of the ballots.

52. There would be no point in the Court ordering a further re-count, as there is a class of ballot papers that would necessarily be excluded from the re-count, namely the missing ballot papers. Secondly, and more importantly, no decisions that the Court makes on the reserved ballot papers would be sufficient to outweigh the 1,370 missing ballot papers. Upon the re-count, the critical margin at the 50th exclusion point was 12 votes. There are only 949 reserved ballot papers in total. As that number is lower than the 1,370 missing ballot papers about which no evidence may be adduced, that highlights the mootness of any further inquiry. Moreover, of those 949 reserved ballots, the most that any petitioner presently asserts would fall his way is Mr Mead who asserts that at least 177 votes should be added to Mr Bow's margin over Mr van Burgel in the re-count. However, even in the very unlikely event that all 949 reserved ballot papers were to have been erroneously recorded and change direction to favour either Mr Wang or Ms Pratt, the Court is still bound to assume that all 1,370 of the missing ballot papers could have gone in the other direction.

53. The authorities of this Court prior to 1922 are instructive as to the approach that is taken to assumptions about the votes of "prevented" voters. They also reflect some disagreement about the type of proof required to void an election on the account of official error, which was settled by the 1922 amendments. The broader debate, which is complicated and involves the intersection of the legislation with common law principles, is presently beside the point, save for the fact that all the judgments establish that the wording of s 365 that was adopted in 1922 was done so to establish the proposition that when the number of electors prevented from voting exceeded the relevant margin, proof of their voting intention or the manner in which they voted was irrelevant and the Court would not conduct that further inquiry.

54. The course of the authorities may be briefly summarised as follows:

    i. In *Hirsch v Phillips* (1904) 1 CLR 132, in delivering the judgment of the Court, Griffith CJ said at 142 that when an allegation was made against election officials that they improperly refused to accept the votes of voters who were entitled to vote, then the standard of proof to void the election would be "... if this right was denied to a number of persons so entitled *sufficient to turn the scale*, the petitioner would be entitled to have the election set aside" (emphasis added).

ii. In *Chanter v Blackwood (No 2)* 1 CLR 121, the respondent had been declared elected with a majority of five votes. The petitioner proved that through mistakes in the counting by the Returning Officer, that he in fact had a majority of 67. However, 91 votes were counted of persons who had no right to vote, as well as some other errors. As his Honour said at 130-131 his view was that he had no way of inquiring how those people voted, the position would be the same as if 91 people who were entitled to vote were improperly denied their right and the conclusion must be that an election would be void as:

> I cannot see that any other result can follow when a number of persons, sufficient to change the majority into a minority, if they all voted against the candidate having the majority, have wrongly been allowed to vote. I cannot enquire how they actually voted. It is clear that they may have voted for the respondent, in which case the petitioner's majority would be larger, or that they may have all voted for the petitioner, in which case the respondent would have been elected. But the numbers being as they are, it is impossible for me to say that the majority of the electors may not have been prevented from exercising their free choice.

iii. In *Blundell v Vardon* (1907) 4 CLR 1463, Barton J affirmed the approach taken in *Chanter v Blackwood (No 2)* and said that, as there was a sufficient number of votes that it was impossible to trace that outnumbered the petitioner's majority, "... it could not be said that their intrusion had not affected the result. Clearly it might well have done so". His Honour voided the election of one candidate (on the position that existed prior to proportional representation being introduced for the Senate in 1948). In this case, a Returning Officer in South Australia accidentally destroyed all of the ballot papers for one of the seven Divisions in South Australia, an event Barton J described as "wholly without precedent". The election result had depended on the statutory re-count. His Honour (at 1478) was uncertain on the then provisions of the Act whether the re-count permitted a revision or re-opening of a decision of the officers on a scrutiny, but was not prepared to hold that they could not be re-opened at a re-count. The subsequent decision of the Full Court in *Re Lack* makes it clear that the re-count procedure is *de novo* such that an entirely new scrutiny is required. This also follows from the analysis of the Act earlier in these submissions. Further, *Blundell v Vardon,* which predated the introduction of s 281 and the proviso to s 365, simply determined that the loss of the ballot papers did not shut the petitioner out of the means of proving that the result of the election was affected, and for that purpose his Honour was prepared to accept the records of the votes on the statutory re-count. That is not possible in the present case. In the end, as his Honour found sufficient errors had been made (examining evidence of ballot papers in a type of inquiry that was deliberately foreclosed by the 1922 amendments, and by

the introduction of the reserved ballot paper system) that he voided the election.[7]

iv. In *Bridge v Bowen* (1916) 21 CLR 582 this Court propounded the common law of elections for this country. The Court has not, in the sense of having a matter that raises that issue for determination before it, revisited that issue. For the reasons given in the joint judgment in *Sue v Hill*, that common law does not apply to contradict the statutory norms expressed in the Act and the AEC does not submit otherwise – the Act is exhaustive. However, *Bridge v Bowen* is relevant for present purposes as the dissenting judgments of Griffith CJ and Barton J expressed the view that there was no difference between the common law and the 1902 Act, and their Honours continued to express the view that it was enough if the unknown votes were sufficient to turn the scale. Justice Isaacs, with whom Gavan Duffy J and Rich J agreed, came to a different view on the terms of the NSW municipal election legislation there in question and on the common law. Higgins J and Powers J, while agreeing with Isaacs J as to the conclusion, took the view that the approach in *Chanter v Blackwood (No 2)* continued to apply in cases of official error.

v. The general views taken by Isaacs J in *Bridge v Bowen* were extended to the Act in *Kean v Kerby*. His Honour had to consider whether he would avoid an election on the basis of "...a great number of official errors causing disenfranchisement of electors". His Honour had to apply the then s 194 of the Act which he said required "proof that the error actually affected the return of the candidate", and if a voter had been prevented from voting through error, evidence of that voter's intention as to how they would have voted was not only admissible but necessary if the petitioner was to meet his or her onus. This view of the law involved disagreeing with the opinion of Griffith CJ in *Chanter v Blackwood (No 2)*, as Isaacs J formed the view that a secret ballot was a means to an end, and the paramount consideration was to protect the right which the elector had "endeavoured to exercise and had been prevented by official error from exercising" and there was no other way to comply with the requirement of proof in s 194. His Honour contrasted the position under the Act with the state of the legislation in England and said that the English legislation meant *"...if the matter is left so that the mistake may have affected the result the election may be declared invalid. Under our Act it is different*", and then went on to say that *"[i]n England, the mere refusal to permit qualified electors to vote would – if the numbers were sufficient – raise a possibility enabling the Court to act*".

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7 It is worth noting that *In re Wood* (1988) 167 CLR 145 was resolved by re-counting the ballot papers to see who would have succeeded had the unqualified candidate been excluded, and the re-count was assisted by the fact that Mr Wood had filled the last available vacancy. The Court of Disputed Returns was able to make that order as it was said (at 166) that "... there is no blemish affecting the taking of the poll and the ballot papers are available to be recounted if the valid choice of the electors can lawfully be ascertained by recounting". That is, of course, the very problem in the present case. The 1,370 missing ballot papers are not available to be re-counted to ascertain the valid choice of the electors and to satisfy the fundamental requirement that the 'result of the polling shall be ascertained by scrutiny: s 263.

vi. The significance of the observations made by Isaacs J in *Kean v Kerby* is that, during the course of the debate after the Second Reading Speech for the Electoral Bill 1922 (Cth), the Rt Hon Senator Pearce, Minister for the Home Territories, said that the intention of cl 24 of the Bill was to amend s 194 of the Act, in light of the decision of Isaacs J in *Kean v Kerby*, to "bring it into line with the English law, and to prevent evidence being called as to the way in which an elector intended to vote at an election".[8] Section 194 was amended by s 25 of the *Commonwealth Electoral Act 1922* (Cth) and took the essential form that is seen in s 365 of the Act today by omitting the words "shall not be proved to have affected" and inserting in their stead the words "did not affect" and by including omissions of officers as well as errors, and preventing evidence of the way in which the elector intended to vote in the election. As such, what Isaacs J said in *Kean v Kerby* in relation to the English legislation may be taken to apply to the Australian legislation after the amendments introduced in 1922.

vii. No decision of this Court construing either of the analogues of s 362 or 365 was delivered again until the decision of Taylor J in *Cole v Lacey* (1965) 112 CLR 45. That in itself says something about the effect of the 1922 amendments. In opining on the effect of s 194 of the Act, and referring to the decision in *Kean v Kerby*, his Honour said that "[t]he present form of the section, having regard to its history, leaves no room for the suggestion that in a case such as the present it is incumbent upon the petitioner to allege, or, at a later stage, to prove that the alleged irregularities affected the result of the election". That view was supported by the decision of Dawson J in *Sykes v AEC*.

55. In one sense, it may be argued as a matter of policy that admitting evidence of how the 1,370 missing ballots were counted at the original and fresh scrutinies justifies a "close enough is good enough" approach and that it may be that the record of those ballot papers is unlikely to change sufficiently if the ballot papers were available to be scrutinised in the re-count. Further, it may be said that considering the records of ordinary ballot papers does not violate the secrecy of the ballot, the protection of which is a central aim of the s 365 proviso, in order to prevent the spectre of corruption and fraud that might ensue if voters were to testify of their intentions, and therefore no harm is done by that approach and much expense is saved.

56. Those views, however, do not reflect an approach that the Act permits. The ordinary, unnumbered ballot was already in place at the time of the 1922 amendments, and the changes wrought to s 365 – namely the change to proof and the introduction of the proviso – must be considered together to foreclose any such inquiry. It cannot be thought, as some of the judges who have taken a contrary view to the approach in *Campbell v Easter* thought, that evidence of intention can be adduced where the secrecy of the ballot is not compromised.

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8 Commonwealth, Senate, *Parliamentary Debates (Hansard)*, 26 July 1922.

57. Australia has taken neither the English nor the American position in relation to its elections. Voting is not just a right or privilege – it is a duty (s 245(1)). Our polity requires, on pain of financial penalty, that all those given the franchise exercise it. The 1922 amendments and the centrality of scrutiny show that the point of the polling inquiry is that the will of the electors is manifested by their ballots, and that the electors be *all* electors. It is, after all, the "Australian ballot" and the secret ballot has its origins in what Cicero termed the "billets", brought to the voters by the Diribitores, who afterwards took away the chests they had been anonymously placed in, and counted them.[9] Whatever may be thought, at large, about the "necessity" or "desirability" of elections being voided when some secondary evidence is available, the Act requires that everybody who can must vote by ballot and that those ballots must be scrutinised in accordance with the relevant electoral process.

58. The 1922 amendments therefore put in place a state of affairs where the Court was not to inquire into the manner in which those who had been prevented from voting had intended to vote, and if a sufficient number had been prevented from voting to turn the margin, then the election would be avoided. It did not apply only in circumstances where the secrecy of the ballot might be offended, because that may mean that some votes would be admitted and others would not. In an Australian federal election, the votes of all must be scrutinised. It is a general rule – a vital policy approach which our polity has devised about one of, if not the most important rights given to its members – which does not admit of flexibility in its exactness, however inconvenient it may seem in a particular case.

59. In those circumstances, the scale of the 1,370 missing ballot papers far outweighs any result that could be hoped to be achieved by the complicated process of inspecting and ruling on the reserved ballot papers. As discussed in answer to the previous questions, both on the basis of the reasoning in *Re Lack* and the operation of the proviso to s 365, no use can be made of the 1,370 missing ballot papers. That is confirmed by the approach taken by all Justices of this Court to legislation in its current form to the voiding of elections when a number of voters has been prevented from voting due to official error and that number exceeds the relevant margin. Therefore, it is both irrelevant and unnecessary to undertake that inquiry.

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9 Cooley, TM, *A treatise on the Constitutional limitations which rest upon the Legislative power of the states of the American Union*, Boston, Little Brown & Company, 1868, at 604. Ironically, in a polity of restricted franchise, Cicero considered the secret ballot to be productive of fraud or corruption, as the *viva voce* method of voting in public allowed the commoners to be apprised of the intentions of the aristocrats and forced the aristocrats to declare publicly their positions (and in thinking counter to modern ideas probably allowed the commoners to be instructed by their betters) which thereby prevented bribery: see the Walker Keyes translation of *De Legibus*, 1928, Laws III xv-xvi, at 497-503; Jean-Jacques Rousseau, *The Social Contract*, Penguin, 1968, Book IV, Ch 4, *The Roman Comitia*. In a polity of general franchise, the opposite is true.

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