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Election Litigation

Injunctions

During an election period, injunction applications are normally made under section 383 of the *Commonwealth Electoral Act 1918* (CEA). This section allows either the Electoral Commissioner or a candidate at the federal election to apply to the Federal Court for an injunction to stop potential breaches of the CEA being commissioned.

During the election period, and up to the close of polling, four applications were filed for injunctions. However, of the four applications, only two applications for injunctions were made to the Federal Court under section 383 of the CEA. One was made to the High Court under section 75 of the Constitution, and one was made to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act). In one case, the AEC sought an injunction against a candidate. In the three other cases, candidates or people who had intended to nominate as candidates sought injunctions against the AEC.

Mr Ned Kelly's application on late candidate nomination

On 22 October 2001, Mr Ned Kelly, previously known as Mr Terry Sharples, filed an application in the High Court, seeking a constitutional writ of mandamus to compel the AEC to accept and declare his nomination as a candidate for the NSW half-Senate election. His nomination had been rejected due to non-compliance with statutory requirements.

In his application to the Court, Mr Kelly also sought a constitutional writ of injunction to postpone the half-Senate election for NSW until such time as the AEC accepted and declared his nomination.

On 31 October 2001, the High Court remitted the matter to the Federal Court for hearing.

On 5 November 2001, Mr Kelly applied to the Federal Court for the matter to be heard before polling day on 10 November 2001. At that hearing, Mr Kelly amended his application to request an injunction to postpone the half-Senate election for NSW, a declaration that his nomination complied with the legislative

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Mr Ned Kelly's application on late candidate nomination (continued)

requirements of the CEA, a declaration that the writ for the half-Senate election for NSW was issued unconstitutionally, and an order to strike out subsections 169(4) and 169A(3) of the CEA as unconstitutional. In addition, Mr Kelly claimed exemplary damages against the AEC.

Justice Emmett of the Federal Court refused to grant an expedited hearing, and noted that Mr Kelly's application appeared to be an attempt to challenge the validity of the half-Senate election for NSW. Justice Emmett noted that the proper way to challenge the validity of an election is through the Court of Disputed returns process under Part XXII of the CEA. Therefore, he set the matter down for further hearing after the election.

As at 28 March 2002, the matter had been adjourned for further hearing on 29 April 2002.

The Ponnuswarmy Nadar application on incomplete candidate nomination

On 23 October 2001, Mr Ponnuswarmy Nadar applied to the Federal Court under the AD(JR) Act for judicial review of the decision by the Divisional Returning Officer for Grayndler to reject his nomination as a candidate for the Division of Grayndler. Mr Nadar also requested an injunction to stop the 2001 Federal Election until such time as his nomination had been accepted and declared.

At an interim hearing on 5 November 2001, the Federal Court held that it did not have the power, under the AD(JR) Act, to issue an injunction to postpone an election.

The Federal Court transferred the matter to the Federal Magistrates Court for a further hearing on the outstanding matters (review of decision and costs). The matter was eventually dismissed by the Federal Magistrates Court due to the non-appearance of the applicant on successive hearing dates.

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The AEC application in relation to One Nation How to Vote cards

Prior to the 2001 Federal Election the AEC received a complaint that the One Nation candidate in the Division of Indi was circulating a How-To-Vote (HTV) card that contained material errors and inaccuracies. The AEC referred the HTV card to the Director of Public Prosecutions (DPP) for advice as to whether the HTV card was potentially in breach of the CEA. The DPP advised that the HTV card appeared to be in breach of section 329 of the CEA as it appeared to have the capacity to mislead an elector in the casting of his or her vote.

On 9 November 2001, the day before polling, the AEC informed the One Nation candidate that the HTV card should be withdrawn from circulation. The candidate did not withdraw the HTV cards as requested. On polling day, 10 November 2001, the AEC again requested that One Nation withdraw the HTV cards from circulation. Again, the cards were not withdrawn as requested.

At 2.30 p.m. on polling day the AEC applied to the Federal Court for an interim injunction against the One Nation candidate and the Victorian branch of One Nation. The Federal Court granted the interim injunction. After being advised of the decision of the Federal Court, the One Nation candidate ceased distributing the cards. The matter is now finalised.

The Schorel-Hlavka application on the calculation of the election timetable

On 2 November 2001, Mr Gerrit Schorel-Hlavka applied to the Federal Court for an injunction under section 383 of the CEA to stop the election on the grounds that the date for the close of nominations was calculated incorrectly. Mr Schorel-Hlavka contended that the term "not less than 10 days" in subsection 156(1) of the CEA should be interpreted as meaning "not less than 10 full periods of 24 hours". Mr Schorel-Hlavka argued that, on this interpretation, the date set for nomination would have been a day later than the one that was relied upon for the election.

At a hearing on 7 November 2001, Justice Marshall of the Federal Court noted that Mr Schorel-Hlavka was attempting to challenge the validity of the election through section 383 of the CEA. Justice Marshall held that the Federal Court did not have

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The Schorel-Hlavka application on the calculation of the election timetable (continued)

the jurisdiction to hear a challenge to the validity of an election through this section of the CEA.

Further, Justice Marshall held that the Federal Court could only hear challenges to the validity of elections where the Court of Disputed Returns (CDR) remitted a petition to the Federal Court under section 354 of the CEA. Justice Marshall also held that section 383 of the CEA does not authorise challenges to the validity of steps taken by the Governor-General or the State Governors, or attempts to restrain the AEC from conducting an election.

On 22 November 2001, Mr Schorel-Hlavka filed an appeal in the High Court under subsection 383(9) of the CEA, which allows an appeal to the High Court from a decision made by the Federal Court exercising jurisdiction under subsection 383(1) of the CEA.

On 12 February 2002, the AEC filed a Summons and supporting affidavit to strike the matter out on the grounds that the Federal Court was not exercising jurisdiction under section 383 of the CEA when it determined that it could not hear a challenge to the validity of an election through that section, but was exercising inherent jurisdiction.

As at 28 March 2002, no date had been set for the initial directions hearing.

Petitions to the Court of Disputed Returns

Four petitions to the Court of Disputed Returns (CDR) under Part XXII of the CEA were filed in the High Court registry before the end of the relevant 40-day periods.

Mr Richard S Gunter's petition on gold currency and issue of writs

On 12 December 2001, Mr Gunter filed a petition in the Brisbane registry of the High Court, challenging the entire 2001 Federal Election.

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Mr Richard S Gunter's petition on gold currency and issue of writs (continued)

In the petition, Mr Gunter argued that the payment of nomination deposits in anything other than gold coin was unconstitutional as the Commonwealth lacked the power to issue paper money as legal tender. Therefore, Mr Gunter maintained that all nomination deposits paid to the AEC were invalid, making all nominations received by the AEC invalid. Secondly, Mr Gunter argued that, due to amendments to the Letters Patent and associated legislation in the 1980s, the Governor-General and the State Governors lacked valid power to issue the writs for the Federal Election 2001.

The gold coin or "legal tender" ground has previously been litigated by Mr Alan Skyring in several legal forums, and was dismissed each time as having no merit. In particular, the High Court, in *Re Skyring's Application [No 2]* (1985) 50 ALJR 561, held that "there is no substance in the argument that there is a constitutional bar against the issue by the Commonwealth of paper money as legal tender." per Justice Deane at 561 to 562.

Further, an argument very similar to the second ground was the subject of consideration in the Queensland Supreme Court in *Sharples v Arnison & Ors* [2001] QSC 56. In this case, an application to the Court by Mr Terry Sharples for review of the Governor of Queensland's action in issuing writs for the Queensland State election was dismissed as having no merit. Mr Sharples appealed this decision to the Full Bench, who affirmed the original decision of the Supreme Court.

In his petition, Mr Gunter requested, *inter alia*, that the CDR declare that the writs issued for the half-Senate election in Queensland and the House of Representatives election were not valid; declare that election returns made against the writs are null and void; and to declare all nomination deposits invalid.

As at 28 March 2002, no date had been set for the initial directions hearing.

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Election Litigation

Mr Ned Kelly's petition against the half-Senate election for NSW

On 15 January 2002, Mr Ned Kelly (formerly Mr Terry Sharples) filed a petition in the High Court, challenging the half-Senate election for NSW. Mr Kelly argued that the Governor of NSW did not hold valid constitutional power to issue the writ for the Senate election as a result of changes to State legislation enacted in connection with the enactment of the *Australia Act 1986 (Cth)*.

Secondly, Mr Kelly contended that the date of the issue of the writ for the half-Senate election was the date of publication in the *Government Gazette*, that is, 12 October 2001, rather than the date relied on to calculate the election timetable, which was 8 October 2001. Mr Kelly claimed that the AEC acted illegally in relying on an invalid writ to administer the election.

Thirdly, Mr Kelly claimed that the AEC acted illegally in providing Mr Kelly with (what he perceived to be) incorrect advice in relation to his Senate nomination. Mr Kelly claimed that this amounted to a breach of sections 324 and 327 of the CEA.

Fourthly, Mr Kelly claimed that the AEC acted illegally in refusing to accept his nomination deposit after the close of nominations at 12 noon on 18 October 2001. Mr Kelly claimed that this also amounted to a breach of sections 324 and 327 of the CEA.

Fifthly, Mr Kelly claimed that the Premier of NSW was not properly appointed due to the lack of power of the Governor, as noted in the first ground. Mr Kelly claimed that the Premier did not have the power to advise the Governor to issue the writs for the election, nor to appoint the (then current) Governor.

Mr Kelly requested that the CDR declare that the half-Senate election for NSW was void, and that the Senators-elect were not duly elected. Further, Mr Kelly requested an order that the Commonwealth pay his costs on an indemnity basis.

As at 28 March 2002, no date had been set for the initial directions hearing.

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Mr Ditchburn's petition challenging above the line voting for the Senate

On 11 January 2002, Mr Donald Ditchburn filed a petition in the High Court challenging the validity of the above the line voting system for the Senate. Mr Ditchburn claimed that a number of provisions of the CEA were in breach of sections 7 and 8 of the Constitution because they do not allow for Senators to be "directly chosen" by electors.

This petition is virtually identical to the petition filed by Mr Ditchburn after the 1998 Federal Election, which the CDR dismissed in *Ditchburn v AEO Qld* [1999] HCA 40.

In relation to the 2001 Federal Election petition, Mr Ditchburn sought an order voiding the half-Senate election for Queensland, and if granted that, an order voiding all elections of Senators at the 2001 Federal Election. Mr Ditchburn further requested that, if he was successful in the first two requests, the Court then void all elections of Senators at the 1998 Federal Election.

As at 28 March 2002, no date had been set for the initial directions hearing.

Mr Ditchburn's petition challenging preferential voting in House of Representatives elections

On 11 January 2002, Mr Ditchburn filed a petition in the High Court challenging the validity of the preferential voting system used for House of Representative elections. Mr Ditchburn claimed that several provisions of the CEA were in breach of section 24 of the Constitution because they do not allow the Members to be "directly chosen" by the electors.

Again, this petition is virtually identical to the petition filed by Mr Ditchburn after the 1998 Federal Election, which the CDR dismissed in *Ditchburn v DRO Herbert* [1999] HCA 41.

In relation to the 2001 Federal Election petition, Mr Ditchburn sought an order declaring the election for the Division of Herbert void. If granted that, Mr Ditchburn requested that the CDR declare the elections void in all Divisions where no candidate received an absolute majority of first preference votes.

As at 28 March 2002, no date had been set for the initial directions hearing.

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Prosecutions

As at 28 March 2002, no major prosecutions against the offence provisions of the CEA had been initiated, although a small number of investigations remain in progress.