

IN THE HIGH COURT OF AUSTRALIA
CANBERRA AND PERTH REGISTRIES

NO C17, P55, P 56 AND P 59 OF 2013

BETWEEN:

THE AUSTRALIAN ELECTORAL COMMISSION
Petitioner (C 17 of 2013) / Eighth Respondent (P 55 and P 59
of 2013) / Ninth Respondent (P 56 of 2013)

SIMON MEAD

Petitioner (P.56 of 2013)

AND:

DAVID JOHNSTON

First Respondent (All Petitions)

JOE BULLOCK

Second Respondent (All Petitions)

MICHAELIA CASH

Third Respondent (All Petitions)

LINDA REYNOLDS

Fourth Respondent (All Petitions)

WAYNE DROPULICH

Fifth Respondent (All Petitions)

SCOTT LUDLAM

Sixth Respondent (C17, P55 and P 56 of 2013) / Petitioner
(P 59 of 2013)

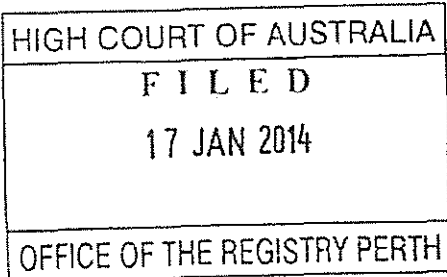
ZHENYA WANG

Seventh Respondent (C 17 of 2013, P 56 and P 59 of 2013)
/ Petitioner (P 55 of 2013)

LOUISE PRATT

Eighth Respondent (C17 and P 56 of 2013) / Seventh
Respondent (P 55 and P 59 of 2013)

SUBMISSIONS OF FIFTH RESPONDENT (ALL PETITIONS)



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

INTRODUCTION

2. In substance, the three questions of law set down for hearing raise whether the loss of 1,370 ballot papers in the WA Senate election held on 7 September 2013 is, in itself, a sufficient ground for the Court of Disputed Returns to declare the election absolutely void, without further inquiry being necessary.
3. The fifth respondent contends as follows in relation to the three questions of law:

- 10 (a) the loss of the 1,370 ballot papers did not mean that the electors who cast the votes recorded in those ballot papers were prevented from voting in the election for the purposes of s.365 of the *Commonwealth Electoral Act*. The stated question should be answered “No”;
- (b) the Court of Disputed Returns would be entitled to admit the records of the votes cast in the missing ballot papers, if any petitioner had made two necessary factual allegations: that these records were reliable; and that the declared result of the election was likely to have been affected, taking into account the votes recorded for the missing ballot papers. However, as no petitioner has made such factual
20 allegations, there is no basis to admit the records of the votes cast in the missing ballot papers. The stated question should be answered “Yes”; and
- (c) a further inquiry is permitted and required in relation to the correctness of each decision made by the Australian Electoral Officer in respect of a ballot paper reserved for his decision pursuant to s.281 of the *Commonwealth Electoral Act*, to the extent that any petitioner maintains a challenge to such a decision. Each of the sub-parts to this stated question should be answered “Yes”, with the additional elaboration mentioned below.

BACKGROUND

- 30 4. On 4 November 2013, the Australian Electoral Officer for Western Australia (the “Electoral Officer”) declared the result of the WA Senate election held on 7 September 2013. The Electoral Officer declared that Senator Johnston, Mr Bullock, Senator Cash, Ms Reynolds, Mr Dropulich and Senator Ludlam were elected in that order.

5. In declaring the result of the election, the Electoral Officer was performing his statutory function pursuant to s.283(1)(a) of the *Commonwealth Electoral Act*. That provision requires the Electoral Officer to declare the result of a Senate election.
6. The Electoral Officer declared the result of the election without reference to 1,370 votes which had been cast, but which had gone missing. Records of the way in which these votes had been cast were available from the original scrutiny and fresh scrutiny of the votes conducted under ss.273, 273A and 273B of the *Commonwealth Electoral Act*.
- 10 7. Had the Electoral Officer declared the result of the election by reference to the records of the original and fresh scrutines, Mr Dropulich and Senator Ludlam would not have been returned as WA's fifth and sixth senators. Instead, Mr Wang and Senator Pratt would have been returned in their places.
8. The Australian Electoral Commission has not alleged that the records of the original and fresh scrutines of the missing ballots are accurate and reliable. Instead, the Commission has alleged that it is not possible to conclude with certainty, or on the balance of probabilities, whether Mr Dropulich and Senator Ludlam ought to have been returned, or whether Mr Wang or Senator Pratt should have been returned.¹
- 20 9. Likewise, Mr Wang has not alleged that the records of the original and fresh scrutines are accurate and reliable. He has simply alleged that the result of a recount based upon the records of the fresh scrutiny would return him and Senator Pratt "on the assumption that the records of the fresh scrutiny ... were correct".² There is no allegation that the assumption is correct, and it is difficult to see how such an allegation could be made where the Australian Electoral Commission says to the contrary, and where there are significant discrepancies between the initial and subsequent counts, including as to the total number of votes cast.³
- 30 10. Similarly, all that Mr Mead has alleged in his petition is that the records of the missing ballot papers are "substantially accurate",⁴ not that they are precisely accurate. An allegation of substantial accuracy is insufficient to establish that the records of the missing ballot papers, if counted, would lead to a different

¹ Amended Election Petition (C17 of 2013), [50]

² Amended Election Petition (P55 of 2013), [40](b)

³ Amended Statement of Agreed and Assumed Facts, [40]

⁴ Amended Election Petition (P56 of 2013), [32]

result to the declared result. That is because the circumstances are that there was only a difference of one vote at exclusion point 50, which would lead to a different allocation of preferences between Mr Dropulich and Senator Ludlam on the one hand, and Mr Wang and Senator Pratt on the other hand.⁵ Presumably this is why Mr Mead has not alleged that the result of the election was likely to have been affected if the votes recorded for the missing ballot papers had been counted. This is only alleged in relation to the votes which were reserved for the decision of the Electoral Officer pursuant to s.281 of the *Commonwealth Electoral Act*.⁶

10 OVERVIEW OF FIFTH RESPONDENT'S POSITION

11. The fifth respondent's position first requires an explanation of what occurs when the Electoral Officer declares the result of an election. This may be summarised in the following propositions:

- (a) the Electoral Officer has a statutory duty to declare the election on the basis of all valid votes cast, by virtue of s.283(1)(a) of the *Commonwealth Electoral Act*;
- (b) if a recount has been ordered, but valid votes are lost or misplaced before the recount is concluded, the overriding statutory duty of the Electoral Officer to declare the result of the election on the basis of all valid votes cast must be satisfied by the declared result being based upon the recount plus reliable records of the first count in relation to the missing ballots;
- (c) consequently, where a voter casts a valid vote which is not counted for the purposes of the declared result, the Electoral Officer commits a breach of the statutory duty contained in s.283(1)(a) by reason of his error or omission in failing to count a valid vote which has been cast for the purposes of declaring the election result;
- (d) any such breach of statutory duty by the Electoral Officer will also be a contravention of the *Commonwealth Electoral Act* and will constitute an "illegal practice" within the meaning of s.352(1) of that Act;
- (e) in order to declare an election, or the return of a candidate, void on the basis of an illegal practice (which is unknown to the candidate and

⁵ Amended Statement of Agreed and Assumed Facts, [42](f).

⁶ Amended Election Petition (P56 of 2013), [36]

which is not bribery, corruption or attempted bribery or corruption), it is necessary for the Court to be satisfied that the result of the election was likely to be affected by the illegal practice: s.362(3). For these purposes, the result of an election relates to the identity of the successful candidates, not the numerical margin by which any candidate was successful;

- (f) whether declaring an election without counting all valid votes is likely to have affected the result of the election will depend upon which way the uncounted valid votes were cast. In order to determine this issue, it is necessary for the Court of Disputed Returns to receive reliable secondary evidence of those votes, if available. If, however, there is no secondary evidence of the actual way in which the uncounted votes were cast, then a petitioner will not be able to positively establish that the breach of statutory duty in declaring an election without counting all votes was likely to have affected the declared result of the election.

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12. Having regard to these initial propositions, the fifth respondent's position in relation to section 365 of the *Commonwealth Electoral Act* may be summarised in the following further propositions:

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- (a) section 365 does not extend or provide power to the Court to declare an election, or the return of a candidate, void if an error or omission of an electoral officer prevents an elector from voting. Section 365 is a limit upon the power contained in s.360 to declare an election, or the return of a candidate, void. The power contained in s.360 can only be exercised if the requirements of s.362(3) are satisfied. This construction of s.365 is supported by the wording of s.365 and also by the fact that in Australia, unlike in England, the legislature has expressly chosen to positively state the circumstances in which the Court of Disputed Returns may declare a Commonwealth election void. These circumstances exist where the result of the election is likely to have been affected by an illegal practice, and do not include the situation where the Court is uncertain whether the result of the election may have been affected;

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- (b) further, a voter who casts a valid vote which is not counted has not been "prevented from voting" for the purposes of s.365. That is because, properly construed, a voter is only prevented from voting for the purposes of s.365 if that voter has not been able to cast a valid vote. This is supported by the wording of s.365 which only bars

evidence of the intention of how a voter would have cast a vote, not evidence of votes which have been cast, and the legislative history of the provision;

- 10 (c) there is only one discernible policy reason for construing s.365 as meaning that an elector who casts a valid vote which is not counted is "prevented from voting". That would be to avoid a situation where there is no contravention of the *Commonwealth Electoral Act* if the election result is declared without counting all valid votes. However, as explained, there is a separate statutory duty arising by virtue of s.283 which requires the Electoral Officer to declare an election upon the basis of all votes which have been validly cast.

13. Applying these propositions, the fifth respondent's position in relation to the present case and the reserved questions of law, is as follows:

- (a) there is no express allegation in any petition that there was a breach of the Electoral Officer's statutory duty contained in s.283(1) of the *Commonwealth Electoral Act* to declare the election on the basis of all valid votes which had been cast. Hence, there has been no allegation of any illegal practice which could potentially affect the result of the election;

- 20 (b) the illegal practices which have been alleged, concerning the failure to conduct a proper recount and the loss of the missing ballots, would not be likely to affect the outcome of the election if the first count had been conducted reliably and properly by the Electoral Commission. Secondary evidence of the first count would have been admissible, and could have been used as a basis for declaring the result of the election by reference to all valid votes which had been cast. However, again there is no allegation by any petitioner that there was any illegal practice by the officers of the Electoral Commission in failing to conduct the first count reliably and accurately;

- 30 (c) even if there had been proper allegations of illegal practices as mentioned in subparagraphs (a) or (b), such allegations would only be capable of leading to the result of the WA Senate election being set aside if any of the petitioners had alleged that there was available reliable secondary evidence of the uncounted valid votes, and that if those votes had been counted the declared result was likely to have been affected. As explained, there are no such allegations contained in the petitions;

- (d) for the purposes of the first question of law - no voter was prevented from voting in the WA Senate election for the purposes of s.365, as each voter whose ballot has been lost in fact cast a valid vote and was not prevented from doing so;
- (e) for the purposes of the second question of law - there is no need to examine the secondary evidence of the lost ballots, as there is no allegation that the secondary evidence is reliable (in the case of the petitions of Electoral Commission and Mr Wang) and no allegation that if the votes from the lost ballots votes were counted this would have likely altered the outcome of the declared result of the election (in the case of Mr Mead's petition);
- (f) for the purposes of the third question of law - the reserved ballots should be examined. If they have been wrongly admitted or rejected as alleged, this is likely to have an effect upon the outcome of the declared result of the WA Senate election.

THE STATUTORY DUTY TO DECLARE AN ELECTION ON THE BASIS OF ALL VALID VOTES CAST

14. The provisions of the *Commonwealth Electoral Act* are elaborate. They prescribe a detailed set of rules for enrolment of voters, casting of votes and counting of votes. These rules are for one end only. That is to ensure that the election of members of Parliament occurs on the basis of every valid vote cast in an election, and only on that basis. The rules and procedures are the means of protecting each elector's franchise.⁷
15. The result of a senate election is to be declared by the Electoral Officer. See s.283(1)(a) of the *Commonwealth Electoral Act*. For these purposes, the election result means the return of a particular candidate, and not the number of that candidate's majority.⁸
16. Given that the whole purpose of the *Commonwealth Electoral Act* is to ensure that a voter may exercise his or her franchise, the notion of declaring an election result must mean declaring the result upon the basis of every valid vote which has been cast.
17. That is inherent within the notion of making a "declaration". A person who makes a declaration is expressly and publicly stating a result which that person

⁷ *Kean v Kerby* (1920) 27 CLR 449 at 459-461 (Isaacs J).

⁸ *Kean v Kerby* (1920) 27 CLR 449 at 458 (Isaacs J).

has ascertained.⁹ In the context of an election, that must mean ascertainment of the result of counting all valid votes which have been cast.

18. In these circumstances, the Electoral Officer had a duty in this case to declare the result of the WA Senate election by reference to all valid votes which had been cast. He did not perform that duty, and that contravention of the *Commonwealth Electoral Act* was an "illegal practice" within the meaning of s.352. It was also an "error or omission" by the Electoral Officer, within the meaning of s.365. However, for reasons mentioned below, the fifth respondent contends that it was not an error or omission which meant that any elector was "prevented from voting" in the WA Senate election.
19. There is a question whether the Electoral Officer could still have performed his duty under s.283(1)(a) after some of the ballot papers went missing between the first count and the recount. In effect, the Electoral Commission contends that once the missing ballot papers could not be included in the partial recount, the Electoral Officer could no longer perform his duty to declare the election result upon the basis of all valid votes cast, and could not declare the election on the basis of all valid votes cast. That is because the results shown on the electoral "scoreboard" had been "reset".¹⁰
20. The only Australian case which deals with the effect of lost ballots, and whether a recount can occur after the loss, is *Blundell v Vardon*.¹¹ That case concerned whether the Court of Disputed Returns could order a recount under the similar predecessor to s.360(1) of the *Commonwealth Electoral Act*¹² when approximately one-eighth of the ballot papers (from the division of Angas) in a South Australian senate election had been lost, having thought to have been burnt.¹³ It was argued that there could be no valid recount because of the loss of ballot papers, and that no recount should be ordered. Barton J rejected that argument and held that the lost Angas votes would be counted as they stood on the return. Barton J ordered a recount.

⁹ The Shorter Oxford English Dictionary relevantly defines "declare" as "make known or state publicly, formally or explicitly; affirm, assert; proclaim; (in weakened sense) say, announce" (definition 2). A "declaration" is "The action of setting forth, stating, or announcing publicly, formally or explicitly; a positive statement, an emphatic or solemn assertion" (definition 3).

¹⁰ AEC's Submissions, [21]

¹¹ (1907) 4 CLR 1463

¹² Commonwealth Electoral Act 1902, s.197

¹³ An interesting historical footnote is that after the decision of the Court of Disputed Returns, the missing ballot papers appear to have been located again: *The Advertiser* (Saturday 14 September 1907), p 9

21. The Electoral Commission relies upon *Re Lack; ex Parte McManus*¹⁴ in support of the proposition that the electoral scoreboard is reset once a recount is ordered. However, that case involved a very different situation, where there was no question of any lost votes. In that case, the question was whether a recount could be ordered before a first count had been concluded. All of the votes to be re-counted were available for the purposes of the re-count. In such circumstances, the Court held that the result of the re-count should be preferred to the result of the first count. That does not constitute a finding that the results of the first count of any ballots which have gone missing should be entirely disregarded.
22. The fifth respondent submits that the duty contained in section 283(1)(a) to declare the result of an election on the basis of all valid votes cast, is a duty which still must be performed where a recount is directed, but ballots go missing prior to the recount being undertaken.
23. The duty to declare an election result is the whole purpose of the *Commonwealth Electoral Act*. The Act has particularly prescribed the circumstances in which a breach of duty may mean that an election, or the return of a candidate may be declared void. It does not in any case prescribe circumstances which would relieve the Electoral Officer from carrying out his or her primary duty under the legislation. In particular, the Act does not provide that the Electoral Officer shall not be required to declare the result of an election where all votes counted on an initial count are not available upon a recount. Obviously that is because such a provision would cause great inconvenience where only a small number of votes were missing, and the outcome was clear in any event. Consequently, it is not possible to infer any statutory intention that the Electoral Officer is relieved from the duty to declare the result of an election on the basis of all valid votes cast, simply because some votes have been lost between the first count and a re-count.
24. If the Electoral Officer remains under a duty to declare the result of the election on the basis of all valid votes cast, the Electoral Officer must perform that duty as best as he or she is able, subject to any statutory prescriptions as to how that duty is to be performed.
25. For these reasons, in the present case the statutory duty of the Electoral Officer under s.283(1)(a) required him to declare the result of the WA Senate election by reference to all valid votes cast. He breached that duty by not declaring the

¹⁴ (1965) 112 CLR 1

result of the election by reference to 1,250 formal votes which were cast and then went missing.

26. However, by reason of s.362(3), this breach of duty can only lead to the declared result being set aside if the Court is satisfied that the declared result was likely to have been affected by the breach of statutory duty.

27. In circumstances where no petitioner has alleged that the secondary evidence concerning the votes recorded for the 1,250 missing ballots votes is accurate and reliable, the Court cannot know whether, if these 1,250 votes had been counted, the result would have been affected. The position is materially the same as in *Bridge v Bowen*.¹⁵

28. In that case, a majority of the Court held that the return of candidates could not be declared void where certain votes were cast by unqualified voters; the number of unqualified voters exceeded the margin by which the petitioner missed out on election; but it could not be shown that the result of the election would have been any different had the unqualified votes not been cast, because it was not known for whom the unqualified electors voted.

29. While the election in *Bridge* was a municipal election, the Court accepted that the principle would apply equally to federal elections.¹⁶ Isaacs J (with whom Gavan Duffy and Rich JJ agreed), expressly rejected the view that a Senate election could be set aside just because the effect of including unqualified votes was unknown.¹⁷ If the unknown effect of counting unqualified votes does not justify setting aside the declared result of an election, equally the unknown effect of not counting qualified votes ought not to justify declaring an election void.

FIRST QUESTION OF LAW

30. The first question of law arises out of the allegations by the Electoral Commission that the loss of the 1,370 missing ballot papers constitutes an error or omission for the purposes of s.365 of the *Commonwealth Electoral Act*, and that the nature and circumstances of that error or omission mean that it cannot be concluded that the error or omission did not affect the result of the election, with the consequence that the election should be declared void.¹⁸

¹⁵ (1916) 21 CLR 582

¹⁶ (1916) 21 CLR 582 at 623, 635

¹⁷ (1916) 21 CLR 582 at 622-623

¹⁸ Amended Election Petition (C17 of 2013), [46], [52]

31. The allegations in the Electoral Commission's petition and submissions, in effect, proceed upon the basis that, upon a proper construction of s.365, if there is doubt about whether an error or omission affected the result of an election, the Court has power to declare the election void, whether or not that error or omission was also an "illegal practice" and even where the Court cannot be satisfied that the result of the election was likely to have been affected by the error or omission.

10 32. The only way in which s.365 can have such an effect is either by removing the limit contained in s.362(3) upon the Court's power to declare an election, or the return of a candidate, void; or by conferring a separate power to declare an election void.

Textual Analysis

33. In construing section 365, it is necessary to start with the words of the provision itself: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)*.¹⁹

20 34. Those words show the nature of s.365. It is a provision which contains a prohibition upon the circumstances in which a Court may declare an election void. Section 365 relevantly provides that no election may be avoided on account of the absence of an error or omission by any officer which did not affect the result of the election. This provision does not, by its wording, purport to be a facilitative provision which extends the limits of a power, or which confers a separate power, to declare an election, or the return of a candidate, void.

35. The second paragraph of s.365 concerns the operation and application of the prohibition in the first paragraph in the particular case where a voter has been prevented from voting. It does not purport, on its plain wording, to be a provision which alters the limits upon power elsewhere contained in s.362(3), and it does not purport to confer any new power to declare an election void.

30 36. In understanding the operation of s.365 as a prohibition upon power, it is also important to consider the concept of an "error or omission" in that provision.

37. What constitutes an "error or omission" must be assessed in the context of the elaborate set of legislative rules which govern elections. An error or omission must generally (if not always) mean an error or omission in the application of

¹⁹ [2009] HCA 41; (2009) 239 CLR 27 at [47].

those legislative rules. It follows that such errors or omissions will typically (if not always) involve a contravention of the *Commonwealth Electoral Act* or regulations made under this legislation, and that there will also be "illegal practice" within s.352.

38. Consequently, it is evident that where there is an error or omission by an electoral officer, the circumstances attracting s.365 will also be circumstances which will generally attract the operation of s.362(3), so that an election result cannot be set aside unless the Court is satisfied that the result of the election is likely to have been affected by the error or omission.

10 39. Having regard to the nature of s.365 as a prohibition, a harmonious reading of s.362(3) and s.365 *in relation to errors or omissions made by electoral officers* means that:

(a) the Court shall not declare an election, or the return of a candidate, void on the basis of an error or omission by an electoral officer, which is also an illegal practice, if the error or omission / illegal practice did not (objectively) affect the result of the election;

20 (b) the Court shall not declare an election, or the return of a candidate, void on the basis of an error or omission / illegal practice by an electoral officer which prevented an elector from voting, if the error or omission / illegal practice did not (objectively) affect the result of the election by the elector being prevented from voting. In determining if the declared result was affected by the elector being prevented from voting, the Court shall not take into account the way in which the elector intended to vote;

(c) the Court shall not declare an election, or the return of a candidate, void on the basis of an error or omission / illegal practice by an electoral officer, unless the Court is satisfied that the declared result was likely to be affected by the error or omission / illegal practice;

30 (d) the Court shall declare an election, or the return of a candidate, void on the basis of an error or omission / illegal practice by an electoral officer, if the Court is satisfied that the declared result was likely to be affected by the error or omission / illegal practice and it is just to do so.

40. In substance, the second paragraph of s.365 means that the Court can conclude that an error or omission which prevents electors from voting will not

objectively have affected the result of the election, if the majority is clear by a number which exceeds the number of voters who were prevented from voting. In such circumstances, there is no need to inquire into the way in which the voters would have voted or to declare the election void.

41. This approach was explained by Martin B in *The Warrington Case*.²⁰

10 *"Supposing it happened that the votes of half-a-dozen out of 2000 or 3000 voters are omitted to be taken, are all the other votes to be set aside, and the election declared void? It would be in my opinion ridiculous to say that because at one booth there was an irregularity, the whole of the rest of the borough should be put to the trouble of a new election, and all that has taken place declared null and void. ... a Judge to upset an election ought to be satisfied beyond all doubt that the election was void, and that the return of a member is a serious matter, and not to be lightly set aside."*

20 42. There is a degree of overlap between the circumstances in which section 362(3) and 365 may apply, where there is an illegal practice by reason of a contravention of the *Commonwealth Electoral Act* or regulations made under that legislation, which occurs by reason of an error or omission of an electoral officer. However, s.365 is not confined in its operation to such circumstances. Section 365 also applies where there is a delay in the declaration of nominations, in the provision of certified lists of voters to candidates, in the polling or in the return of the writ, or where there is an absence of any officer. Consequently, there will be times when s.365 will operate independently of s.362(3).

30 43. In addition to the above construction, the fifth respondent particularly submits that, on the plain meaning of the words in the provision, the second paragraph of s.365 has no relevance to the present case because the electors in this case who cast votes which were then lost were not "prevented from voting" in the sense contemplated by this paragraph. These words ought to be construed to refer to the voter being prevented from doing the act of casting a valid vote in an election, not whether a vote which an elector cast was in fact counted. If votes are not counted, then that may mean that the Electoral Officer has not properly performed his statutory duty contained in s.283(1)(a) of the *Commonwealth Electoral Act*.

44. If the duty to declare an election result contained in s.283(1)(a) requires all valid votes to be counted, there is no reason to construe s.365 to mean that a voter

²⁰ (1868) 1 O'M & H 42 at 44

has been prevented from voting where the voter has cast a vote, but it has not been properly counted. The focus of s.365 concerns the act of the voter in casting a vote, whereas the obligation of the Electoral Officer to count votes which have been validly cast derives from s.283(1)(a). The construction of s.365 advanced by the Electoral Commission confuses the requirement that a voter be allowed to cast a vote, with the Electoral Officer's obligation to count a vote which has been validly cast.

- 10 45. The consequence of eliding these two concepts in the manner advanced by the Electoral Commission is that such a construction would avoid the requirement contained in s.362(3) that a Court must be satisfied that any contravention of a statutory duty imposed by the *Commonwealth Electoral Act* must be likely to have affected the declared result of the election before the election may be declared void, or a person may be declared not to have been returned. The Commission says that if the proviso to s.365 applies, the Court has power to declare an election void if there is doubt whether an error or omission affected the result of the election. That submission ought to be rejected for reasons referred to earlier. If rejected, there is no reason to adopt the Commission's construction of what it means for a voter to have been prevented from voting in an election for the purposes of the proviso to s.365.
- 20 46. Further, the construction and interaction of s.283(1)(a) and s.365 outlined above is supported by the natural meaning of the concluding words of s.365. These words preclude evidence "of the way in which the elector intended to vote in the election". They do not preclude evidence of the way in which the elector did in fact vote. This supports a construction of the proviso in s.365 which applies where an elector is prevented from casting a vote, rather than a situation where the elector has in fact cast a vote which has not been counted. A good example of a situation where electors are prevented from voting is where a polling station does not open.²¹
- 30 47. For these reasons, decisions which determine that an elector is prevented from voting if that elector has cast a valid vote, but it is not counted, ought not to be followed or applied.²² In particular, these decisions do not give any consideration to the duty to count valid votes which applies to an electoral

²¹ *In re Hackney Election Petition; Gill v Reed* (1874) 2 O'M & H 77

²² *Varty v Ives* [1986] VR 1 at 10-16; *Campbell v Easter* (unreported, 12 June 1959, NSW Court of Disputed Returns). It is not insignificant that the contrary view, in line with the fifth respondent's position, was asserted by counsel (including Sir Maurice Byers QC and M D Kirby), and accepted by Hardie J, in *Dunbier v Mallam* [1971] 2 NSWLR 169 at 175.

officer declaring the result of an election. If that point had been recognised, there is no reason to construe s.365 or its equivalent in the manner advanced by the Electoral Commission.

Historical Analysis

48. The history of s.365 also confirms that the construction of s.365 set out above, based upon the text of the provision. However, there is an argument that the history of the provision ought to lead to a different construction, inconsistent with the plain meaning of the text. For reasons mentioned below, that argument should be rejected.
- 10 49. The English position at the time when the *Commonwealth Electoral Act* was first passed was that an election could be declared void if it was conducted so badly that it did not qualify as a true election. Otherwise, if there was an election conducted substantially in accordance with the election law, the result of an election could only be declared void if the Court concluded that a breach of the election law or rules had affected the result.²³
50. In Australia, the *Commonwealth Electoral Act 1902*, s 200, only allowed an election, or the return of a candidate, to be declared void if it was proved that an error had affected the result of an election. This was continued by s.194 of the *Commonwealth Electoral Act 1918*, which later became s.365.
- 20 51. As well, from 1905, s.198A(3) of the *Commonwealth Electoral Act 1902* introduced the restriction that a Court should not declare an election, or the return of a candidate, void, unless it was satisfied that the result of the election was likely to have been affected by an illegal practice (leaving aside bribery, corruption or attempted bribery or corruption). This provision became s.191(3) in the *Commonwealth Electoral Act 1918*, and was later renumbered to become s.362(3) of that Act.
52. At least until the amendments introduced in 1922, these provisions represented a deliberate legislative choice not to provide a power to declare an election, or return of a candidate, void on the first basis, just because the result of an
30 election may have been affected.²⁴

²³ See the historical summary contained in *Morgan v Simpson* [1975] 1 QB 151 at 161-164 (Lord Denning MR).

²⁴ *Kean v Kerby* (1920) 27 CLR 449 at 458

53. In 1922, the words of the first paragraph to s.194 of the *Commonwealth Electoral Act 1918* (which later became s.365) were amended.²⁵ The amendments concerned the particular words of what is now the first paragraph of s.365 and introduced the second paragraph to s.365. These amendments were introduced in response to the decision of Isaacs J in *Kean v Kerby*.²⁶

54. In *Kean v Kirby*, certain voters were prevented from voting in relation to their electorates. Isaacs J held that evidence of how those electors would have voted was admissible and relevant to prove that the fact that these electors were prevented from voting affected the declared result of the election.

10 55. The amendment of what is now the first paragraph of s.365 materially changed this provision from:

"No election shall be avoided ... on account of the ... error of any officer which shall not be proved to have affected the result of the election"

to:

"No election shall be avoided ... on account of the ... error or omission by of any officer which ~~shall not be proved to have affected~~ did not affect the result of the election".

56. The second paragraph to what is now s.365 was introduced to read:

20 *"Provided that where any elector was, on account of the absence or error of, or omission by, any officer, prevented from voting in any election, the Court shall not, for the purpose of determining whether the absence or error of, or omission by, the officer did or did not affect the result of the election, admit any evidence of the way in which the elector intended to vote in the election."*

57. The change to the first paragraph of what is now s.365 adopted the concluding words of s.13 of the *Ballot Act 1872* (Imp). That legislation was quoted by Isaacs J in *Kean v Kerby*, and provided:

30 *"No election shall be declared invalid by reason of a non-compliance with the rules contained in Schedule 1 to this Act, or any mistake in the use of the forms in Schedule 2 to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the*

²⁵ Section 25 of Act No 14 of 1922.

²⁶ (1920) 27 CLR 449 at 457-461

principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election." (underlining added)

58. Despite being expressed negatively, section 13 of the *Ballot Act 1872* was understood to operate positively. However, the precise way in which it was understood to operate positively is a matter on which it is possible to have different views.

59. Immediately after the introduction of the *Ballot Act 1872*, *Leigh & Le Marchant's Election Law* (1874) stated that:

10 "A non-compliance with the provisions of the *Ballot Act, 1872*, and schedules 1 and 2, or a mistake at the poll, will vitiate the election, if it should appear that the result of the election was affected thereby, but not otherwise, provided the election was conducted in accordance with the principles laid down in the body of the act".²⁷

60. This passage was quoted with approval by Lord Denning MR in *Morgan v Simpson*.²⁸ It also appears that Isaacs J may have assumed the correctness of the passage in *Leigh & Le Marchant*, because in *Kean* he said that the effect of the English Act was that: "... if the matter is left so that the mistake may have affected the result, the election may be declared invalid."²⁹

20 61. However, that view of s.13 is not precisely supported by the major case decided upon s.13. This was *Woodward v Sarsons*.³⁰ There Lord Coleridge CJ said that s.13 only really re-enacted the common law:

30 "It is said that s.13, though it is in a negative form, assumes as an affirmative proposition that a non-compliance with the rules, or any mistake in the use of the forms, would render an election invalid, unless it appeared that the election was conducted in accordance with the principles laid down in the body of the Act and that such non-compliance or mistake did not affect the result of the election. If this proposition be closely examined, it will be found to be equivalent to this, that the non-observance of the rules or forms which is to render the election invalid, must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have

²⁷ *Leigh & Le Marchant's Election Law*, 2nd ed (1874) p 97.

²⁸ *Morgan v Simpson* [1975] 1 QB 151 at 162

²⁹ *Kean v Kerby* (1920) 27 CLR 449 at 458

³⁰ (1875) LR 10 CP 733.

affected the majority of the voters, or, in other words, the result of the election. It therefore is, as has been said, an enactment ex abundantia cautela, declaring that to be the law applicable to elections under Ballot Act which would have been the law to be applied if this section had not existed."

62. This passage does not clearly give effect to the view that s.13 should be regarded as a positive source of power to declare an election invalid. Instead, it regards s.13 as ensuring the continuation of the common law power to declare an election, or return of a candidate, void. It also says that the relevant failure to follow election procedure must relate to the "majority of voters".

10 63. Another, slightly different, view of the operation of s.13, consistent with the fifth respondent's construction of s.365 above, was later expressed by Waller and Donaldson JJ in *Levers v Morris*, who commented upon its successor provision as follows:

20 *"In our opinion this section is not to be construed as the enabling section affirmatively setting out circumstances in which a new election should be held. It is wider in its terms than the equivalent section in the Ballot Act 1872 (section 13), but is similar in effect in that it is negatively stated to limit occasions when an election must be declared invalid. In other words it is an enabling section setting out circumstances in which, despite irregularity, a new election need not be held."*³¹

64. The second reading speech for the 1922 amendments to the *Commonwealth Electoral Act* expressly stated that the purpose of the amendment was "to apply the wording of the English law, and do away with the necessity for admitting evidence as to how a voter intended to vote".³²

65. In considering this, it is necessary to have regard to the cautionary principle that statements of legislative intention do not overcome the need to consider the text of a statute to ascertain its meaning.³³

30 66. That is particularly so where, as the different views of s.13 of the *Ballot Act* set out above demonstrate, it is not manifestly clear what was intended by the Commonwealth Parliament in applying the wording of s.13.

³¹ [1971] 1 QB 221 at 229-230

³² Hansard, 14/9/1922, p 4

³³ *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* [2011] HCA 33; (2011) 244 CLR 508 at [50]

67. Nevertheless, one thing is clear. Unlike the *Ballot Act*, the Commonwealth Parliament had expressly enacted the predecessor to s.362(3), which was obviously intended to be an “*enabling section affirmatively setting out circumstances in which a new election should be held*”. In these circumstances, the amendments to the first paragraph of the predecessor to s.365 should not be understood as also operating in the same way, but should be understood in the more limited fashion as only operating as “*an enabling section setting out circumstances in which, despite irregularity, a new election need not be held.*” That is consistent with the plain textual meaning (which ought to be the departure point for any construction exercise), instead of implying some positive power to set aside an election, which exceeds the limits expressly stated in s.362(3).
68. As to the introduction of the second paragraph of what is now s.365,³⁴ the second reading speech shows that this was introduced to prevent evidence of the intentions of those voters having to be obtained by oral evidence.³⁵ That is because of the concern about intruding upon the secrecy of the ballot process, by individual voters being identified when having to testify how they would have voted. No such rationale applies to evidence of anonymous votes which have actually been cast, and where the identity of the person casting the vote remains unknown.
69. Further, there was no precise equivalent in the *Ballot Act 1872* to the second paragraph of what is now s.365. The closest provision was the last paragraph of s.9 of the *Ballot Act*. That was clearly a provision related to a voter being prevented from the act of voting.
70. In any event, to the extent that the Commonwealth Parliament intended to align English and Australian law in relation to uncounted votes, it is notable that it was later held under the *Ballot Act*, that votes which had been cast, but inadvertently left uncounted, could be examined by the Court to determine whether an election result would have likely been affected.³⁶ There is no difference in principle between a Court considering and counting a vote which has been wrongly rejected, and a vote which has been validly cast and not counted. Consequently, the Electoral Commission’s construction of s.365 as

³⁴ Originally s.194 of the *Commonwealth Electoral Act*.

³⁵ Hansard, 14/9/1922, p 4

³⁶ See *In re North-Eastern Derbyshire Election Petition – Holmes v Lee and Cleaver* (1923) 39 TLR 423 at 424. Under the present English legislation, see *Fitch v Stephenson* [2008] EWHC 501 (almost half the votes not counted).

preventing validly cast votes from being considered does not accord with English law.

71. In *Cole v Lacey*,³⁷ Taylor J considered that history of s.365 left no room for the suggestion that it is incumbent upon a petitioner to allege, or at a later stage to prove, that alleged irregularities affected the result of the election. However, Taylor J assumed that the intention to align the wording of what is now s.365 with English law meant that s.365 ought to be understood as an “*enabling section affirmatively setting out circumstances in which a new election should be held*”. For reasons set out above, the fifth respondent respectfully submits that this is erroneous. Consequently, cases applying the approach adopted by Taylor J in *Cole v Lacey* should also be regarded as incorrect.³⁸

SECOND QUESTION OF LAW

72. The Court is not precluded from admitting evidence of the records of the missing ballot papers by reason of s.365. For reasons explained above, the proviso to s.365 only prevents evidence of how voters would have voted if they have been prevented from doing the act of casting a vote. It does not prevent evidence of how voters in fact voted when they cast a vote which has been lost.
73. However, as no petitioner has alleged that the records of the missing ballot papers are accurate and reliable (in the case of the Electoral Commission and Mr Wang) or that the declared result of the election was likely to have been affected by counting the votes recorded in relation to the missing ballot papers (in the case of Mr Mead), there is no reason to admit evidence of these records. That is because the proviso contained in s.362(3) will never be satisfied by reference to the records of the missing ballot papers, due to missing allegations of essential facts.

THIRD QUESTION OF LAW

74. Section 281(3) of the *Commonwealth Electoral Act* confers power upon the Court to consider any ballot papers reserved for the decision of the Electoral Officer. Consequently, the answer to question 3(a) is “Yes”, the Court is permitted to consider the reserved ballot papers under s.281(3).
75. If the reserved ballots have been wrongly counted, that is relevant to the disposition of the petitions of Mr Mead, Mr Wang and Senator Ludlam, as it is

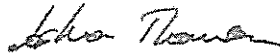
³⁷ (1965) 112 CLR 45

³⁸ Eg *Sykes v AEC* (1993) 115 ALR 645 at 651-652

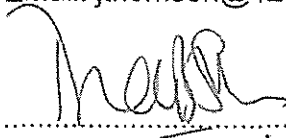
alleged that the declared result of the election would be affected. Consequently, the answer to question 3(b) is "Yes" – in relation to the petitions of Mr Mead, Mr Wang and Senator Ludlam.

76. The Electoral Commission's contrary argument is based upon a new election being required in any event due to the loss of the missing ballots. The fifth respondent does not accept that position for the reasons set out in relation to question 1 above.
77. Given the answers proposed by the fifth respondent to questions 3(a) and (b), it follows that it is necessary for the Court to consider the reserved ballots for the disposition of the petitions of Mr Mead, Mr Wang and Senator Ludlam. Consequently, the answer to question 3(c) is "Yes" - in relation to the petitions of Mr Mead, Mr Wang and Senator Ludlam.

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