IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY No C17 of 2013
PERTH REGISTRY No P55 of 2013
PERTH REGISTRY No P56 of 2013

BETWEEN: **THE AUSTRALIAN ELECTORAL COMMISSION**
Petitioner in C17 of 2013
Eighth Respondent in P55 of 2013
Ninth Respondent in P56 of 2013

SIMON MEAD
Petitioner in P56 of 2013

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 in C17 of 2013 and P56 of 2013
Petitioner in P55 of 2013

LOUISE PRATT
Eighth Respondent in C17 of 2013 and P56 of 2013
Seventh Respondent in P55 of 2013

SIMON MEAD'S OUTLINE OF SUBMISSIONS

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

Introduction

2. Mr Simon Mead's petition in P56 of 2013 seeks, in the first instance, a declaration that at the election of 6 senators for the State of Western Australia to serve in the Senate of the Parliament of the Commonwealth held on 7 September 2013 (the **Election**), Mr Dropulich and Senator Ludlam were not duly elected and Mr Wang and Senator Pratt were duly elected to the fifth and sixth vacancies respectively. In the alternative, Mr Mead seeks a declaration that the Election is absolutely void.

3. Mr Mead's primary argument in P56 of 2013 is that:

   (a) the Australian Electoral Commission's (**AEC**) records of the 1,370 ballot papers lost between the fresh scrutiny and the re-count (the **missing ballot papers**) are likely to be substantially accurate;

   (b) if the AEO had correctly admitted or rejected the reserved ballot papers, at least 87 votes should have been added to Mr Bow's count in the re-count and at least 90 votes should be deducted from Mr van Burgel's count in the re-count, so that the margin at the 50th exclusion point should have been at least 165 votes in favour of Mr Bow;

   (c) given the likely substantial accuracy of the missing ballot papers and the magnitude of the margin which should have been counted in Mr Bow's favour at the 50th exclusion point of the re-count, the loss of the missing ballot papers is unlikely to have affected the result of the Election; and

   (d) the Court of Disputed Returns should declare that Mr Wang and Senator Pratt were, and that Mr Dropulich and Senator Ludlam were not, duly elected to the fifth and sixth vacancies.

4. Mr Mead's alternative argument is that, if the uncertainty concerning the AEC's records of the missing ballot papers is so great as to overcome the margin between Mr Bow and Mr van Burgel at the 50th exclusion point, then the Election should be declared absolutely void.

5. Mr Mead contends that the 3 questions reserved for preliminary determination in respect of the petitions should be answered as follows:

   (a) the electors whose votes were taken by means of the missing ballot papers were not "prevented from voting" by their loss for the purposes of s 365 of the *Commonwealth Electoral Act 1918* (Cth) (the ***Act***);

   (b) the proviso to s 365 does not prevent the Court of Disputed Returns from having regard to secondary evidence of the missing ballot papers for the purposes of Mr Mead's petition; and

   (c) further factual inquiries into the validity of the AEO's determinations of the formality of the reserved ballot papers are permitted by a combination of

ss 281(3), 353, and 360, and are relevant and necessary to the disposition of Mr Mead's petition.

Facts

6. The facts as agreed for the purposes of the determination of the preliminary questions reserved for the opinion of the Court are set out in an Amended Statement of Agreed and Assumed Facts (the **SOAF**). The SOAF also includes statements of facts which are asserted by various parties in their respective petitions and which are relevant to the determination of the reserved questions, but which are not agreed by all parties. The statements of particular relevance to Mr Mead's contentions may be summarised as follows:

(a) The results of the first scrutiny were entered by the respective AROs at the polling places where the votes were cast into the AEC's election management system (**ELMS**).

(b) The AROs at the polling places at Bunbury East (in the Division of Forrest), and at Henley Brook, Mt Helena, and Wundowie (in the Division of Pearce) entered data into ELMS recording the results of the first scrutiny of the boxes containing the missing ballot papers. Those records are reproduced as Annexure A to the SOAF.

(c) The AROs then bundled ballot papers into 'parcels' and transmitted them to the relevant DRO.

(d) The DROs then conducted the fresh scrutiny. They entered the results of the count of first preference votes and the count of votes rejected as informal into ELMS.

(e) The DROs for Forrest and Pearce entered data into ELMS recording the results of the fresh scrutiny of the boxes containing the missing ballot papers. Those records are reproduced as Annexure B to the SOAF.

(f) At some unknown time between the conclusion of the fresh scrutiny of the missing ballot papers and the re-count, the AEC lost the missing ballot papers.

(g) The AEC did not include any record of the missing ballot papers in the conduct of the re-count.

(h) In the circumstances which have arisen, only votes for Groups G, K, V, C and O are capable of affecting the tallies of Mr Bow (G, K, and V) and Mr van Burgel (C and O).

(i) At the 50th exclusion point of the re-count, Mr van Burgel had 12 votes more than Mr Bow, so Mr Bow was excluded with the result that Mr Dropulich and Senator Ludlam were elected to the fifth and sixth vacancies respectively.

7. From the above, and from the AEC's records of the missing ballot papers, the following further facts emerge:

(a) 1,139 electors marked their vote on ballot papers and deposited them in ballot-boxes at Bunbury East, Henley Brook, Mt Helena, and Wundowie, which ballot papers were allowed as formal votes at both the original scrutiny and the fresh scrutiny.

(b) There is no difference in the tallies of votes cast for Groups G, K, V, C, and O between the ELMS records of the original and fresh scrutinies of the missing ballot papers.

(c) The AROs and DROs recorded the following tallies for Groups G, K, V, C, and O in ELMS at the original and fresh scrutinies of the missing ballot papers:

(i) Group C: 3 votes;
(ii) Group G 14 votes;
(iii) Group K: 4 votes;
(iv) Group O: 2 votes.

(d) The ELMS records of the missing ballot papers therefore record a net margin of 13 votes in favour of Mr Bow over Mr van Burgel.

(e) The number of votes recorded by the AROs and DROs in favour of Groups G, K, V, C, and O at both the original and fresh scrutinies of the missing ballot papers therefore constitute approximately 2% of the missing ballot papers which were allowed as formal votes.

The statutory text of the *Commonwealth Electoral Act*

8. The meaning of the phrase "prevented from voting" in the proviso to s 365 requires determination of what it means to have "voted" under the *Act*. Plainly, an elector cannot have been "prevented from voting" if he or she has actually "voted".

9. As the Court observed in *Re Lack; ex parte McManus* (1965) 112 CLR 1, at 10.4, the *Act* sets out "a series of steps in a fixed temporal sequence" for the conduct of an election. Relevantly, the *Act* separates those steps which form part of "the polling" (dealt with in Part XVI) from those which comprise "the scrutiny" (dealt with in Part XVIII). In summary, the polling is the phase of an election during which votes are taken (s 220) (i.e. during which voting occurs), and the scrutiny is the phase which follows when the votes are counted and the result is ascertained (s 263).

10. That the polling necessarily precedes the scrutiny, and must be completed before the scrutiny commences, manifests in s 265(1)(a), which provides that the scrutiny "shall commence as soon as practicable *after the closing of the poll*" (emphasis added).[1]

11. The central premise of the AEC's submissions is that an elector has not "voted" until his or her ballot paper has been considered in the final scrutiny. Thus, the AEC contends

[1] See also the provisions of s 238B dealing with the premature opening of a ballot box containing ballot papers before the close of the poll.

that electors may be "prevented from voting" if their votes were not considered in the re-count.

12. However, the structure of the *Act* described above renders it nonsensical to describe the voters whose ballot papers were lost after the polling as having been "prevented from voting". The missing ballot papers were lost during the scrutiny phase of the election, after polling had closed and all the votes had been taken from the electors who voted. The ballot papers had been counted and recorded at least twice before they were lost.

13. Several key provisions of the *Act* establish that voting is a physical process which occurs at an identifiable time and place, which an elector has either done or not done by the close of the poll. Whether an elector has voted does not depend upon whether his or her ballot paper is considered in the scrutiny.

14. The text of ss 220 and 222(1) makes clear that the ordinary method of voting is an activity undertaken by an elector during the poll at a polling booth. In particular:

    (a) section 220(b) provides that polling at each polling booth shall open at 8 am and not close until all electors present in the polling booth at 6 pm desiring to vote *have voted* (past tense);

    (b) the final paragraph of s 220 speaks in the past tense of votes having been "taken" at a polling booth before the close of the poll;

    (c) section 222(1) uses a locative "at" to provide that an elector "is entitled to vote *at* any polling place … at which a polling booth is open" (emphasis added).

15. The above provisions are in conformity with the definition of "polling booth" in s 4(1) as a place provided "for the purpose of *taking votes during polling*".

16. So too, it is evident from the provisions allowing for the taking of votes at hospitals (s 224) and in mobile booths (s 227) that voting by these methods is an activity completed before the close of the poll.

17. The third question which a presiding officer of a polling place is required by s 229(1)(c) to ask of a person attending at a polling place claiming to vote in an election presupposes that an elector has either voted or not before the close of the poll. The AEC's construction of "prevented from voting" would render this question incapable of certain answer until the declaration of the poll and the return of the writ.

18. The precise physical steps which s 233(1) requires a voter to undertake upon receiving a ballot paper further establish that voting is complete before the close of the poll. Relevantly, a voter must:

    (a) retire to an unoccupied compartment of the polling booth and, in private, mark his or her vote on the ballot paper;

    (b) fold the ballot paper so as to conceal his or her vote;

(c) deposit the ballot paper in the ballot-box (or, in the case of an absent voter, return it to the presiding officer); and

(d) quit the booth.

19. The *Act* clearly contemplates that once a voter has completed the above steps then he or she should answer the question in s 229(1)(c) affirmatively. That is, after an elector has attended a polling place, marked his or her vote on a ballot paper, and deposited the ballot paper in a ballot-box, the elector has voted.

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20. Sections 234(1) and 234A(1) also support the conclusion that voting is a physical act undertaken by a voter at a place on polling day. The first allows vision impaired, physically incapacitated, and illiterate voters to obtain assistance in the act of voting in a polling booth. The second allows someone unable to physically enter a polling place to vote outside it.

21. Therefore, on a plain reading of the text of the proviso to s 365 in its statutory context, the electors who submitted the missing ballot papers were not "prevented from voting" by the loss of those ballot papers.

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Legislative history of the proviso

22. The legislative history of the enactment of s 365 also supports the above construction. As identified at paragraph [54(vi)] of the AEC's submissions, the precursor to what is now the proviso to s 365 was introduced as an amendment to the then s 194 of the *Act* by s 25(c) of the *Commonwealth Electoral Act 1922* (Cth). The second reading speeches in both the Senate[2] and the House of Representatives[3] identified that the purpose of the amendments made by s 25 of the 1922 Act was to bring Australian law into conformity with Isaacs J's description of English law in *Kean v Kerby* (1920) 27 CLR 449, at 458.

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23. *Kean v Kerby* concerned a petition relating to a House of Representatives election for the Division of Ballarat in December 1919. The final margin between the two candidates was 1 vote. Relevantly, the petitioner argued, and his Honour held, that 1 absentee voter for the Division of Ballarat had been given the wrong ballot paper at a polling place in Redan (outside the Division), and 2 other absentee voters had been unable to vote at Duverney (outside the Division) because insufficient absentee ballot-papers had been made available. Others who attended polling places within the Division were wrongfully denied ballot papers. In all, 7 persons had been wrongly prevented from voting by official error.

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24. Significantly for the present case, none of these voters had voted in the election, in that none of them had marked their vote for the election in the Division on a ballot paper. The issue was whether the Court could admit sworn oral evidence from these electors of their intention to vote for one or the other candidate. The respondent objected that such evidence would tend to invade the secrecy of the ballot.

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[2] Commonwealth, Senate, *Parliamentary Debates (Hansard)*, 26 July 1922, p 752.

[3] Commonwealth, House of Representatives, *Parliamentary Debates (Hansard)*, 14 September 1922, pp 2268-9. See, also, 20 September 1922, p 2467.

25. His Honour held that, under the *Act* as it was then in force, the petitioner was required to affirmatively prove that the official errors had actually affected the return of the candidate, whereas under English law it was sufficient to prove that a mistake *may* have affected the result. Isaacs J concluded that the secrecy of the ballot was a means to achieving the end of the free election of a representative by a majority of those entitled to vote (at 459). Where an elector had been prevented from recording their vote in writing on a ballot paper, "the only means of establishing [his or her] intention is the evidence of the elector himself. That is the only mode of protecting the right which an elector has endeavoured to exercise and has been prevented by official error from exercising" (at 460).

26. Section 25(b) of the 1922 Act adopted the English test for when an election may be avoided for official error. Rather than being required to prove that the error *had* affected the result, the petitioner has only to show that it *may* have affected the result.[4] In that context, the proviso introduced by s 25(c) prevents a respondent from adducing evidence from voters who were "prevented from voting" of how they would have voted so as to establish that the result was not affected. It protects the secrecy of the ballot.

27. The present case is not analogous to the situation in *Kean v Kerby* or the mischief to which s 25 of the 1922 Act was directed. As set out above, the electors in this matter whose ballot papers were lost were not "prevented from voting" as the electors in *Kean v Kerby* were. The records of the missing ballot papers do not detract from the secrecy of the ballot.

Authorities considering the proviso

28. In *Campbell v Easter* (unreported, 12 June 1959), Sugerman J concluded that electors whose ballot papers were rendered informal by official failure to initial or sign the ballot papers had been "prevented from voting" for the purposes of the proviso to the NSW equivalent of s 365 of the *Act*. His Honour held that a Court of Disputed Returns could not examine such ballot papers so as to ascertain whether the error affected the result of the election. However, while considering the legislative history of the proviso, Sugerman J did not identify the purpose for which it had been enacted, namely the protection of the secrecy of the ballot.

29. In *Dunbier v Mallam* [1971] 2 NSWLR 169, Hardie J declined to follow *Campbell v Easter*. His Honour examined ballot papers which had been rejected as informal by the returning officer because they had been incorrectly initialled by the presiding officer in order to ascertain whether the error had affected the result. Both counsel in the proceeding had concurred that the NSW equivalent of the proviso did not preclude the court looking at the ballot papers to identify in whose favour they were cast.

30. As Starke J identified in *Varty v Ives* [1986] VR 1, at 12, the Parliament's obvious intention in enacting the proviso to s 365 was to maintain the secrecy of the ballot. His Honour agreed, at 16, with Sugerman J's conclusion that "prevented from voting" meant "casting a vote which is included in the count", but favoured a construction of the proviso barring only admission of evidence which would infringe the secrecy of the ballot by revealing how an identifiable individual elector intended to vote.

[4] Section 365 is subject to s 362, under which the petitioner must show that the result of the election "was likely to be affected": *Sykes v Australian Electoral Commission* (1993) 115 ALR 645, at 652.3.

31. Significantly, Starke J did not consider that *Dunbier v Mallam* was incorrect. His Honour noted, at 15, that the ballot papers in *Dunbier v Mallam* were not in envelopes and the identification of the voter was impossible – "The secrecy of the ballot box did not arise *for the evidence did not disclose the intention of 'the elector'*" (emphasis added). His Honour similarly observed, at 15-6, that in *Fell v Vale (No 2)* [1974] VR 134, where Gowans J did examine ballot papers, the anonymity of the elector was not threatened because the ballot papers were not taken from envelopes.

32. Starke J's concluding remarks, at 16, countenanced the possibility of inspection of the ballot papers in *Varty v Ives* if the anonymity, and the appearance of anonymity, of the electors could be preserved so that no evidence of an individual elector's voting intention might be revealed.

33. Such a course had earlier been adopted by Nagle J in *Cleary v Freeman* (unreported, 31 October 1974, NSW Court of Disputed Returns). In that case, his Honour also identified that the intention of the proviso to s 365 was to protect the secrecy of the ballot. Nagle J remarked:

> "it would seem obvious that in introducing this proviso the legislature took a different view from the views so forcibly expressed by Isaacs, J. and wished to prohibit by the introduction of the proviso what it regarded as an improper intrusion on the secrecy of the ballot by other judges adopting the course which had been adopted by Isaacs, J. in calling electors into the witness box and asking them how they might have voted at an election. It seems to me evident that the mischief at which the legislature aimed to eliminate was the identification of an elector with his vote and particularly with the procedure adopted by Isaacs, J. long after an election calling an elector, who had been debarred from physically registering his vote into the witness-box to speak of the intentions he had at the time of the election."

34. Nagle J observed that two interpretations of "prevented from voting" were possible – Sugerman J's construction that it meant "prevented from casting an effective vote" and the alternative that it meant prevented from "the marking of the ballot paper to indicate the preferences of the elector." His Honour preferred the latter, and stated:

> "In my view it is essential to differentiate, as the [NSW] Act does, between the act of voting, which is the designation on a ballot paper of a candidate or candidates for whom the elector wishes to cast his vote, and a vote actually cast which may or may not be an effective vote. It is in the former of these cases, namely the case where an elector has been prevented from voting by some error or omission of an official and when the elector's intention never having been indicated in this ballot paper, it is proper to say he has been prevented from voting. Looked at in another way, once a voter has recorded a vote, whether it be a valid or an invalid vote, then he has voted, and I think the section, when it speaks of 'the way in which the elector intended to vote' and prevents evidence being admitted as to that it is not referring to an intention which is culminated in an act."

35. In *Fenlon v Radke* [1996] 2 Qd R 157, at 171-2, Ambrose J also concluded, albeit in obiter, that the purpose of the proviso is to preserve the secrecy of the ballot, so that evidence which does not reveal how individual electors had intended to vote was admissible. His Honour said, at 172.2:

> "While there are clearly reasons based upon convenience, reliability and indeed the principle of preservation of the secrecy of voting to explain the exclusion of evidence of voting intention of voters who have never cast a valid vote by reason of a failure of officers of the Commission to observe constraints imposed upon them by Division 5 of the Act, no such reasons were advanced which would justify the rejection of the voting return in a dispute which upon the petitioner's material does not disclose the individual voting intentions of any of the declaration voters but discloses only the return of the counting of declaration votes valid at the time they were cast and which remained valid until on the petitioner's contention they were rendered invalid by the manner in which they were counted."

36. With the exception of *Campbell v Easter*, all of the above cases considering the proviso support the admission of evidence which does not infringe the secrecy of the ballot. Examination of the ballot papers in *Dunbier v Mallam* was permissible because there was nothing about them which would identify how any individual voter had intended to vote. Inspection was not allowable in *Varty v Ives* because the ballot papers were contained in envelopes identifying the individual electors. In *Cleary v Freeman*, Nagle J devised a method of shuffling absent voter envelopes so that inspection of the ballot papers inside them did not reveal how individual electors had voted. Each of these cases concerned circumstances where ballot papers had been rendered informal by official error or omission, but the ballot papers were still in existence.

Answers to Questions 1 and 2

37. In the full legislative context discussed above, it is not sensible to speak of the electors whose ballot papers were lost in the present case as having been "prevented from voting" because their ballots were not counted in the re-count. They attended polling booths, received ballot papers, marked their votes, and deposited them in ballot boxes. Their ballot papers were assessed as formal at the original scrutiny and the fresh scrutiny. Had no re-count been ordered, the Election would have been declared on the results of the fresh scrutiny.

38. Further and alternatively, even if the electors in this case were "prevented from voting", s 365 does not prevent admission of evidence which does not identify how an identifiable individual elector intended to vote. Admission of the records of the missing ballot papers in the present case is incapable of violating the secrecy of the ballot, and will not identify how any individual elector intended to vote.

Further inquiry into how the AEO dealt with the reserved ballot papers is permitted, relevant, and necessary

39. Section 281 of the *Act* empowers the Court of Disputed Returns to consider ballot papers reserved for the decision of the AEO. As submitted by the AEC, the language of s 281(3) mimics s 353(1), which in turn looks to s 360, so as to grant the Court of

Disputed Returns the power on a petition to inquire into the manner in which the AEO dealt with the reserved ballot papers. No other provision in the *Act* precludes the inquiry.

40. Consistently with the limitation in s 281(3) on the class of ballot papers which the Court may consider, Mr Mead's petition invites the Court to look only at the reserved ballot papers.

41. The authorities cited by the AEC which pre-date the amendments in 1922 are not relevant to whether further inquiry should be made into the reserved ballot papers as alleged in Mr Mead's petition. The authorities cited are entwined with the meaning of "prevented from voting" dealt with above and do not advance the AEC's argument any further. They reflect the historical position when it was necessary for a petitioner to affirmatively establish that an official error affected the result of an election.

42. In addition, *Hirsch v Phillips* (1904) 1 CLR 1432 and *Chanter v Blackwood (No 2)* (1904) 1 CLR 121 concerned circumstances where it was not possible to say what the result would have been had the official error not occurred. In *Blundell v Vardon* (1907) 4 CLR 1463, where the ballot papers invalidated by incorrect initialling were available, Barton J did examine them to determine whether the errors had affected the result. For the reasons set out above, examination of ballot papers in those circumstances was not foreclosed by the 1922 amendments.

43. For the reasons set out above, the present is not a case where some electors have been "prevented from voting", and it is possible to know whether the error affected the result without violating the secrecy of the ballot. Secondary evidence of the missing ballot papers is available in the form of the AEC's records. The proviso to s 365 does not prevent admission of that evidence. It is fictitious to contend, as the AEC does at paragraph [51] of its submissions, that nothing can be known about how those electors voted. Nor is it sensible to say, as the AEC does at paragraph [52], that the Court is bound to assume all the missing ballot papers could have been cast in one direction, when there is clear evidence to the contrary.

44. It is clear that the re-count was a scrutiny *de novo*: *Re Lack; ex parte McManus* (1965) 112 CLR 1, at 10. The avenue adopted by Barton J in *Blundell v Vardon* of including the results of the count of the destroyed ballots in the re-count is not open. Accordingly, Mr Mead's petition does not contend that the AEC's records of the missing ballot papers can or should be included in the results of the re-count. However, for the reasons set out above, secondary evidence of those missing ballot papers is admissible for the purpose of establishing whether their loss affected the result of the Election.

45. Mr Mead's primary argument is that, if the reserved ballot papers are admitted or rejected correctly, Mr van Burgel not Mr Bow should be excluded at the 50th exclusion point of the re-count. In order for that argument to succeed, Mr Mead must establish that, in those circumstances, the loss of the missing ballot papers did not affect the result. If rulings on the reserved ballot papers produce a final margin in favour of Mr Bow, then the secondary evidence of the missing ballot papers (which favoured Mr Bow) would establish that their loss did not affect the result.

46. However, if no evidence can be admitted of the records of the missing ballot papers then it is clear that the number of reserved ballot papers in dispute is insufficient to overcome the "uncertainty" which would arise from assuming that nothing can be known about the missing ballot papers. In that scenario, there would be no point in examining the reserved ballot papers, and the Election should be declared absolutely void.

Dated: 17 January 2014

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