

## **Submission to the Joint Committee on Electoral Matters** ***Inquiry into the 2016 Federal Election***

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I appreciate the opportunity to make this submission, and the invitation to give evidence on 11 November (on authorisation of material) and 25 November (on general issues). I regret that work and time constraints prevent me making a fuller written submission. This submission is limited to problems and possible reforms relating to the disqualification provisions affecting Commonwealth elections.

### **The Problem with Disqualification Law**

Candidate disqualification law suffers from 4 problems:

1. **Relevance.** Section 44 of the Australian Constitution was written in the values and language of another era.<sup>1</sup> Modern media applies exacting scrutiny to candidates and parliamentary elections. Even more importantly, in a modern democracy, there is no real need to prevent citizens-as-electors from voting for any other citizen-an-elector. So, as a matter of principle, we should have as few disqualifications as possible. We should rely on simple, positive qualifications instead: a candidate needs to be qualified to be an elector, that is be they need to be 18 years, a resident and a citizen.

There is no reason in 2016 why the 'gene pool' of candidates and possible MPs should necessarily exclude or make it hard for millions of Australians to stand for parliament: especially dual citizens, people who take business risks leading to bankruptcy, and people who happen to be in public employment at the time an election is called.

2. **Rigidity.** As Geoffrey Sawer famously wrote, Australia has been a constitutionally 'frozen continent'. Sometimes locking things in from one generation to another makes sense. But the framers of the Constitution mostly, and wisely, avoided locking in specific rules or values. They wanted to leave each generation to shape its own rules through parliamentary government. Compared to that wisdom, section 44 is an aberration. Worse, the High Court has interpreted it in ways that are unfortunate. Eg, in *Cleary's case*, the Court unnecessarily held that the disqualification applied at the date of nomination, rather than the date of 'election', ie the date of the declaration of the result or return of the electoral writ. That created extra rigidity.

3. **Fuzziness.** 'Office of profit under the Crown'. 'Allegiance to a foreign power'. 'pecuniary interest in any agreement with the Public Service of the Commonwealth'. These are fuzzy phrases. Too fuzzy for limits on something as fundamental as the right to stand for parliament. They fall hardest on smaller parties without legal advisors. But they affect many candidates and MPs, from all sides of politics.

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<sup>1</sup> For an overview of section 44 issues and cases see G Orr, *The Law of Politics* (Federation Press 2010) 103-116.

The High Court has sometimes interpreted disqualifications broadly - so in *Cleary's case* a state school teacher elected to the House of Representatives, whilst on leave without pay, was disqualified for holding 'an office of profit'. Even though there was no possible way he was under the influence of the Commonwealth executive. Yet, at other times, the Court has ruled narrowly - so in *Re Webster*, a Senator with a small company supplying timber on demand to the Commonwealth was not caught by the 'pecuniary interest' provisions.

Such inconsistency is understandable given that actual court cases are not common. But it hampers the ability of citizens and parties to participate with certainty in elections.

**4. Impracticality.** It is almost impossible to police disqualifications, let alone fairly. Michael Maley is a great thinker on electoral matters, but I disagree with his suggestion that we need to find new ways to police section 44.<sup>2</sup>

*First*, it is an undue burden on potential candidates. It is a scientific and logical truism that it is very hard to prove a negative. Take this example: 'Show me you are *not* a citizen of a foreign power'. There are close to 200 nations in the world; with varying rules about acquiring and renouncing citizenship. My wife was born in New Zealand to travelling Australian parents, but left as a baby. She has NZ citizenship by birth, and Australian citizenship by parentage. Having a NZ born mother means my children have a claim to NZ citizenship by descent.<sup>3</sup> They do not know that. Even if they did, who could advise them if they are qualified to run for Parliament in a few decades time? And they are the one-in-the-million with access to a nerd like me to help them through the thicket.

*Second*, it would be a problem to have electoral authorities more involved in vetting candidates and any proof of non-disqualification. Take the above example: is New Zealand a 'foreign power' under the Constitution? Is the AEC to stop the election process to get solicitor-general advice? Worse, it may politicise the AEC in the eyes of some. This is likely to happen. For instance, when one official takes closer scrutiny than another in another state, or if – as is likely – smaller parties are differentially impacted by having candidates refused nomination.

*Third*, are cost and timeliness. Maybe it is feasible for current bankruptcy status, or current conviction status data to be fed – subject to privacy law – from the Federal Court or the many comptroller-general off prisons and/or police databases. Or perhaps not. But at what cost in administrative resources, and above all time? Commonwealth elections have short campaigns and unfixed dates. What if the AEC refuses a nomination, and the matter is taken to judicial review in the election campaign? All this presents a hornet's nest, with risks of delaying the finalisation of nominations and hence issuing of early ballots.

In short, there are many reasons to liberalise the law about *disqualifications*. These arguments are also made in pages 1-2 of the Election Law Journal article which follows.

### **Recommendation 1 - Replace section 44 of the Constitution with clear legislation**

The States, with their flexible constitutional systems, suffer few of the problems just described. As Professor Carney's book explains,<sup>4</sup> the States may legislate, and easily amend, a clear list of sensitive public offices. Holders of such offices (like judges, integrity officials, etc) can automatically forfeit their commissions if they nominate for election. Separate

<sup>2</sup> M Maley, Submission to this inquiry.

<sup>3</sup> [https://www.dia.govt.nz/diawebsite.nsf/wpg\\_URL/Services-Citizenship-Citizenship-by-Descent-born-on-or-after-1-January-1978?OpenDocument](https://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Citizenship-Citizenship-by-Descent-born-on-or-after-1-January-1978?OpenDocument)

<sup>4</sup> G Carney, *Members of Parliament: Law and Ethics* (Prospect 2000).



provisions can then allow ordinary public servants who nominate to trigger leave without pay, to avoid the perception of taxpayers subsidising their campaigning.

The ‘pecuniary interest’ issue, highlighted in the current discussion around Senator Day, can be handled through ethics and contracting rules. For example, by legislating for: tighter rules around disclosure of dealings with government by new MPs in particular; a role for the Auditor-General to review such contracts if they are already in place; and/or a monetary limit on the size of any such contracts.

The problems with section 44 were recognised long ago, by a bipartisan parliamentary inquiry amongst others.<sup>5</sup> But no referendum has been offered. Why is not clear. Is it feared that electors will balk at a referendum ‘about politicians’ or about process issues? They did not balk in 1977, when judges’ terms and Senate casual vacancies passed easily with bipartisan support. A section 44 referendum could be held alongside the next referendum or general election, to avoid costs.

Above all, it should not be hard to convince electors to remove an outdated and undemocratic provision like section 44. See how electors react badly, when sent back to the polls after a disqualification case. They tend to see such arguments as technicalities. Thus Phil Cleary and Jackie Kelly were both re-elected shortly after being disqualified, Kelly with a swing to her. ‘You as electors should be able to vote for any other elector to represent you’ is a slogan to capture the sentiment. If it is felt that there needs to be a barrier to candidates currently in prison under sentence,<sup>6</sup> that could be the one disqualification put in a new section 44, or it could be legislated for.

### **Recommendation 2 – Immediate legislative reforms**

Pending a clean-out by referendum, some immediate, simple tweaks are warranted:

1. **Make it clear that a losing disqualified candidate *cannot* affect an election outcome.** This question arose in Queensland after the tight 2015 State election. A minor party candidate in the close seat of Ferny Grove had allegedly nominated whilst a bankrupt. The ECQ and LNP both threatened to litigate the issue against the totally innocent ALP winner. There is no reason, especially in a system of preferential voting for this to be even an arguable issue. The paper at the end of this submission explains the reasons and relevant case law in detail.
2. **Legislate so that Parliament can only deal with *current* disqualification issues.**

Today the Senate, following government advice, appears likely to refer Senators Day and Culleton’s elections to the High Court. This is odd. Imagine a Senate whose party make-

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<sup>5</sup> Eg Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament* (AGPS, 1981) and House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution* (AGPS, 1977).

<sup>6</sup> I don’t think there should be – consider the IRA prisoners elected to Westminster for understandable political reasons. And then consider how unlikely it is a major party would nominate a person in prison, or that under media scrutiny such a candidate would be elected. But if there were such a disqualification it would be easy, for once, to administer. And including it might counter one populist objection to constitutional reform of section 44.

up changes after a half Senate election – 4 or 5 years after her election, a continuing Senator might find her election referred to the Court by the Senate!

This power only arises because of the High Court's decision in *Re Wood*. The *Commonwealth Electoral Act* has long said there is a strict time limit of 40 days to petition an election. It has also long said that an election can only be impeached by petition. These old rules, common in Westminster democracies, reflect the need for an end to litigation so the make up of parliament to be known and certain. They even save a candidate who has committed serious electoral misconduct, of a type that might be hidden well beyond the 40 day period.<sup>7</sup>

Yet the High Court read the Act's rule, that either house of Parliament can refer a 'qualification or vacancy' provision to the Court, as an exception. Why? What is so special about qualifications at the time of an election? Especially since, with a dual citizen, pecuniary interest of public service role, the MP may have removed the problem before or shortly after the election was decided. What point is there allowing a house of Parliament, possibly for political reasons, to help unseat such an MP when there is no ongoing conflict of interest or duty?

Instead, the *Commonwealth Electoral Act* should be amended to make clear that: (i) the power of referral only applies to *current* disqualification concerns; and (ii) that the Parliament no longer has any power to make its own rulings that an MP is qualified.<sup>8</sup> This would help depoliticise the area and create greater certainty.

### 3. Legislate to make clear that votes cannot be treated as 'having been thrown away'.

Under the common law, if an electorate is made aware of allegations that a candidate is disqualified, and that candidate is still elected, a second-placed loser can argue that the supporters of the winner 'threw away' their votes and then claim the seat. This old rule only made sense when elections occurred at the end of face-to-face meetings or hustings, after opportunity for discussion. It is radically undemocratic, especially in a party system. It is also bizarre when disqualification law is so fuzzy. Yet it has been applied in the 20<sup>th</sup> century in the UK, and recently in other Commonwealth countries. (It also arose in the Wentworth 2007 campaign, with very public claims about Mr Newhouse's alleged disqualification).

The High Court has doubted its democratic relevance but wondered if it might apply in a 'two-horse race'.<sup>9</sup> For clarity and fairness a simple legislative statement should say the rule is no part of Australian election law.

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<sup>7</sup> Unlike other civil litigation there is no rule permitting an extension of time in the interests of justice: *Rudolph v Lightfoot* (1997) 199 CLR 500.

<sup>8</sup> Compare Constitution section 47. The power of Parliament to rule on its own membership was not a truly ancient 'privilege': the power originally lay with 'Chancery', that part of the Crown/executive that received election writs. The British Parliament took it over around the time of its great battles with the Crown. But by 1868 it was seen as unseemly, for obvious partisan reasons, for Parliament to be ruling on election disputes. There is no reason for the power over qualifications not to be ceded to the Courts. As it is, any Parliamentary ruling that an MP is 'qualified' (cf Mr Entsch's matter) cannot be final – it can be effectively challenged by a 'common informer' under section 46 of the Constitution.

<sup>9</sup> See discussion and cases noted in Orr, *Law of Politics*, above n 1, 228-9.

## Does an Unqualified but Losing Candidacy Upset an Election?

Graeme Orr

### ABSTRACT

All electoral systems erect qualifications and disqualifications for would-be candidates. An unqualified candidate cannot be duly elected. But what is—or should be—the effect on an elective race of an unqualified *losing* candidate appearing on the ballot? This commentary examines the law and policy on point, to conclude that only in limited circumstances could an election be argued to be void because of a losing candidate being found to be unqualified. Those circumstances would be where first-past-the-post voting is used and the loser's vote tally well exceeded the winning margin. In any event, it is a point that legislators everywhere would do well to clarify.

### THE QUESTION STATED— AND THE NATURE OF QUALIFICATIONS AND DISQUALIFICATIONS

**A**LL ELECTORAL SYSTEMS erect qualifications and disqualifications to people standing as candidates. It is trite law that an unqualified candidate cannot be duly elected. But what is—or should be—the effect on an elective race of the presence of a losing, unqualified candidate on the ballot? The point recently arose in Australia, in a close constituency that was pivotal to the overall outcome of a general election.

This commentary elucidates the relevant issues from both black-letter law and policy perspectives. It draws particularly on common law rulings from the UK, Australia, and Canada. But the principles apply equally to elections anywhere. The question has been the subject of surprisingly little litigation. This suggests that parties and their lawyers assume

that losing candidacies should not upset an election. For a variety of reasons, as will be argued here, this assumption is entirely desirable.

The qualification rules governing standing for, or serving in, legislative or executive office are typically numerous and complex. Caroline Morris gives a good account of their evolution in the Westminster parliamentary tradition.<sup>1</sup> Thorny qualification questions can arise in relation to residency or citizenship. Disqualifications can cover groups as diverse and numerous as public servants, dual citizens, bankrupts, and current or former felons. Justifications for these inclusionary and exclusionary rules vary from perceived conflicts of interest, loyalty or duty, to concerns about a candidate's practical or moral capacity to serve in elective office.

It is worth noting that *disqualifications* are often distinguishable from those positive qualifications which are built into the requirement that all candidates be part of the pool of electors whom they aspire to represent. Disqualifications may be distinguishable

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<sup>1</sup>Caroline Morris, *Parliamentary Elections, Representation and the Law* (Hart Publishing, 2012) ch. 3. See also Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect, 2000) ch. 2 4.

conceptually and, often, pragmatically. The most obvious positive qualification is adulthood. Electoral authorities can easily screen nominations for simple positive requirements, like age and being enrolled—or, in the distant past, being male.<sup>2</sup> Admittedly, in some cases actual residency or citizenship may be a positive requirement that is harder to screen for: witness the “birther” allegations against President Obama or for that matter Senator McCain, as to their parentage and birthplace.

But proving a *negative* is notoriously difficult. This is especially so with categories of disqualification involving fuzzy tests. Such as: “does this would-be candidate hold a disqualifying ‘office of profit under the Crown’?”<sup>3</sup> Or: “did this candidate inherit a dual citizenship and, if so, has she done all she reasonably can to renounce her dual citizenship?”<sup>4</sup>

Arguably, most disqualifications are unnecessary. After all, aside from a few sensitive offices such as serving judges or electoral officials, why should any group be prohibited from standing for election? Democratic and pragmatic reasoning implies that electors should be allowed to choose from amongst themselves. If rules are needed to prevent elected officials holding multiple or inconsistent positions, they should be required to resign the inconsistent position once they are elected, rather than being disqualified from running.<sup>5</sup> But as long as the law—constitutional, statute, or judge-made—erects complex qualification requirements, a question arises about the impact of unqualified candidacies on election outcomes.

## THE ELECTORAL RAMIFICATIONS OF UNQUALIFIED CANDIDATES

Where an unqualified candidate “wins” an election, the situation is relatively simple. The candidate is not duly elected. A court, on an election contest or petition, will disqualify the winner and declare the seat or office vacant. (Alternatively, in some parliamentary systems, the legislature itself may declare the seat vacant if the qualification impediment is an ongoing one.<sup>6</sup>) The voiding of the election follows from old legal *dicta*. “Where the majority of electors vote for a disqualified person ... the election may be void or voidable.”<sup>7</sup> “If a [candidate] is incapacitated, though at the election neither he nor any elector is guilty of fault, the election is void.”<sup>8</sup>

A void election generates a vacancy to be filled.<sup>9</sup> In a single member constituency or race, a new election is then required.<sup>10</sup> Assuming a partisan political system, any other result would be unfair. Awarding the race to the second-place getter punishes the electors and perversely awards the position to a losing party. Exceptionally, there is an old UK rule that if the qualification problem is notorious during the campaign, a runner-up may argue that the votes of supporters of the disqualified winner were “thrown away.”<sup>11</sup> This rule only made sense when candidates were not representing parties. It originated when electors met to consider and cast their votes, so that any allegation of disqualification could be discussed between the electors and candidates, face to face, prior to voting. The fairness of the “votes thrown away” idea has thus been doubted in modern times,<sup>12</sup> although it continues to be sporadically cited and even applied.<sup>13</sup>

In a proportional electoral system, with parties nominating lists of candidates, the consequence of a winning candidate being unqualified is also

<sup>2</sup>Allowing screening of gender at the time of nomination, see *Hobbs v. Morey* [1904] 1 KB 74.

<sup>3</sup>Compare Australian *Constitution* § 44(iv). Contrast the compendious list of disqualifying public sector positions in the House of Commons Disqualification Act 1975 (UK).

<sup>4</sup>Compare Australian *Constitution* § 44(i) as interpreted in *Sykes v. Cleary* (1992) 176 CLR 77.

<sup>5</sup>Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2010) 116.

<sup>6</sup>See Morris, above n. 1, 130–131, on the traditional powers of the Westminster parliament to govern its membership.

<sup>7</sup>*Gosling v. Veley* (1847) 16 LJ(R) 201 at 210.

<sup>8</sup>*Drinkwater v. Deakin* (1874) LR 9 CP 626 at 644.

<sup>9</sup>See *R v. Mayor of Tewkesbury* (1868) LR3QB 629, 634 and 638.

<sup>10</sup>E.g., *Boyd v. Nebraska ex rel Thayer*, 143 U.S. 135 (1892) (U.S. Supreme Court overturning voiding of gubernatorial election on qualification grounds, but only on facts); *Sykes v. Cleary*, above n. 4 and *Free v. Kelly* (No. 2) (1996) 138 ALR 649 (Australian High Court); and *Re Parliamentary Election for Bristol South East* [1964] 2 QB 257 (UK, below n. 11).

<sup>11</sup>*Gosling’s case*, above n. 7. The most famous modern instance was *Re Parliamentary Election for Bristol South East*, above n. 10. On the disqualification of Tony Benn MP, elected to the UK House of Commons for the Labour Party after inheriting an unrenounceable peerage, the seat was awarded to the petitioner, the Conservative Party candidate, despite his losing to Benn by a 2–1 margin.

<sup>12</sup>See Australian cases such as *Free v. Kelly* (1996) 185 CLR 296 at 304, *Povah v. Coverley* (1933) 35 WALR 73 at 79, and *Bero v. Electoral Commission Queensland* [2012] QSC 222.

<sup>13</sup>E.g., it was seen as good law in a Caribbean parliamentary election in *Dabdoub v. Vaz* (Court of Appeal, Jamaica, March 13, 2009), and was applied in a local election in Australia in *Re Doerr* (1981) 56 LGRA 116.

fairly straightforward. In a strict party-list system, the seat in question falls to the next qualified candidate on the party list. After all, the party “earns” a proportion of seats by attracting a certain share of the vote. Where a single transferable vote is used, as in Australia’s Senate, a recount can be conducted as if the losing candidate had died during the campaign.<sup>14</sup> The preferences of the electors are thereby respected, even if the unqualified candidate was an independent without a party endorsement. The alternative, of staging a by-election for only one vacancy, has been employed.<sup>15</sup> But that option undermines the ideal of proportionality.<sup>16</sup>

### THE CONSEQUENCES OF AN UNQUALIFIED, LOSING CANDIDATE— LEGAL AND POLICY ARGUMENTS

What, if anything, follows if the unqualified candidate was not a winner? To concretize the question, consider this recent example from Australia. In the 2015 parliamentary election for the state of Queensland, the opposition Labor Party secured 44 out of 89 seats. One of three cross-benchers announced he would support the Labor Party forming a minority government. During the finalizing of the count, the media discovered that, in a very close seat otherwise won by the Labor Party, a minor party candidate had been an undischarged bankrupt. Because of that, he should not have been on the ballot.

The electoral commission, and the caretaker conservative government, each announced it would litigate the impact of the bankrupt’s candidacy in the Court of Disputed Returns. After a delay of almost two weeks, caused by laws allowing postal votes 10 days to arrive and by the need for recounts, it turned out that the relevant number of votes for the unqualified candidate were not quite enough to have affected the outcome.<sup>17</sup> The mooted litigation was not proceeded with, leaving the underlying question and principles unresolved.

The Queensland voting system involves compulsory turnout as well as an “optional preferential” ballot.<sup>18</sup> Under “optional preferential” voting, a form of instant-runoff balloting, electors can rank as many or as few candidates as they wish. Anyone who voted for the bankrupt minor party candidate may have done so by “plumping” for that candidate only. Or they could have voted “1” for that candidate and expressed as many second and later prefer-

ences between the remaining candidates as they wished, including expressing a preference between the two major party (Labor and conservative party) candidates. Preferential voting thus gives a trail of preferences which are respected in the count. However the underlying question of an unqualified loser’s impact on an election may arise in a variety of voting systems. And the system used affects the analysis of the problem.

In considering the problem from first principles, it is important to remember that a nomination is valid once it is accepted. Electoral authorities have neither the time nor the resources to police the nominations of every would-be candidate. There are only a few days between nominations closing and the need to prepare ballot material. As it is, campaigning begins in earnest even before nominations close. Aside from such practicalities, the electoral authorities would risk politicization if they policed the background of every candidate. This could give rise to election period litigation which might jeopardize the timing of polling day itself.<sup>19</sup>

Understandably, therefore, electoral authorities err on the side of accepting all nominations that appear valid on their face,<sup>20</sup> and old law says it is not the job of a returning officer to go behind the

<sup>14</sup>*Re Wood* (1988) 167 CLR 145 at 165–166.

<sup>15</sup>*Armagh Election Petition (McCusker v. Malon)*, 1982, as discussed in Hugh Rawlings, *Law and the Electoral Process* (Sweet & Maxwell, 1988) at 224–225.

<sup>16</sup>*Re Wood*, above n. 14, 166.

<sup>17</sup>The results are at: <<http://results.ecq.qld.gov.au/elections/state/State2015/results/booth29.html>>. The winning margin was 466. The disqualified candidate, Taverner, attracted 993 votes. But of these only 353 “exhausted,” i.e., expressed no preference between the winning and second placed candidates. 353 is obviously less than 466. For media analysis see Graeme Orr, “The Caretaker’s Number is Up,” *Courier Mail* (Brisbane), Feb. 11, 2015 and psephologist broadcaster Antony Green, “Ferny Grove Preference Distribution Announced,” Feb. 12, 2015, via <<http://blogs.abc.net.au/antonygreen>>.

<sup>18</sup>“Compulsory turnout” is a better phrase than “compulsory voting,” since electors are entitled to spoil their ballots.

<sup>19</sup>Compare *Courtice v. AEC* (1990) 21 FCR 554. Alternatively, courts may declare they lack jurisdiction to hear campaign period challenges about candidate nominations, given the old rule that “an election may not be challenged except by petition.” I discuss this conundrum in detail in Graeme Orr, “Judicial Review of the Administration of Parliamentary Elections,” (2012) 23 *Public Law Review* 110.

<sup>20</sup>If they improperly reject a nomination, the result may have to be declared void as there is no evidence of how that candidate might have fared. Compare *Davies v. Lord Kensington* (1873–1874) LR 9 CP 720, 729.



nomination form.<sup>21</sup> Given the exigencies of organizing elections, it is not surprising that nominations are legally valid or “due” once accepted by the electoral authorities.<sup>22</sup> Thus, the obligation to vet qualifications rests on each candidate.<sup>23</sup> Any challenge to an election based on candidate qualifications must await the result.

Such election challenges (aka “contests” or “petitions”) are governed by a fundamental rule about remedies. No electoral system is perfect, so problems in elections are not treated with a puristic approach. Rather, the test to get a declaration that an election was void is whether the problem amounted to an illegality or official error *and* that this irregularity was likely to have affected the result. After all, it is the outcome of the election, not its administrative perfection, which is legally tested.

The traditional voting system, in the common law world, is plurality voting. Electors are invited—and limited—to vote only for as many candidates as there are vacancies to be filled. In a single-member election, the system is known as “first-past-the-post” voting. Where there are several vacancies, the system is known as “block” or “plurality-at-large” voting.<sup>24</sup>

In a handful cases, it has been held that where first-past-the-post voting is used, the presence of an unqualified candidate *will* upset the outcome, provided that candidate received clearly more votes than the winning margin. These cases, however, come from rather obscure jurisdictions: Canadian Indigenous council elections, and the Turks and Caicos Islands (a British dependency). A Canadian example is *Omoth v. Ghostkeeper*.

That case involved a settlement in Alberta, where five council representatives were to be elected by block voting. Sixteen candidates stood. One, Philip Ghostkeeper, was ineligible due to his indebtedness to the council. He attracted 38 votes. The five declared winners attracted between 109 and 87 votes. Another six losing candidates had vote shares within 38 votes (Ghostkeeper’s tally) of the lowest winning tally. A Queen’s Bench judge held that the election result was uncertain, and the egg could only be unscrambled by requiring a fresh election for all five positions.<sup>25</sup>

In the Turks and Caicos case, simple first-past-the-post voting was involved in a House of Assembly district of under 1,000 electors. The winning candidate had a 30-vote margin over the second-place getter. The third-placed candidate received 58 votes. That losing candidate had been born in Grand Turk, later

acquired U.S. citizenship as an employee in that country, but subsequently returned to the island and swore allegiance to the British Crown. The second-placed candidate petitioned the election and convinced the court that not only was the third-placed candidate disqualified due to his dual allegiance, but his nomination upset the result.<sup>26</sup> In a detailed judgment, the Supreme Court cited *Omoth v. Ghostkeeper* and reasoned that in first-past-the-post voting systems an unqualified candidate enlarges electoral choice illegitimately. If the votes attracted by that candidate exceed the winning margin, the election is uncertain and liable to be re-run.<sup>27</sup> As an Albertan judge put it in another Indigenous election case: “[t]here is no way of determining what impact on the election results there may have been had [the disqualified candidate’s] name not appeared on the ballot.”<sup>28</sup>

In contrast, the full bench of the Australian High Court has answered the question in the negative. This decision arose in the context not of first-past-the-post voting, but in a system of full preferential voting which is employed in most of Australia. (“Full” here means that, to vote validly, electors must rank all candidates on offer). In *Re Wood*, the Court reasoned that since the second and later preferences of each elector who did not spoil her ballot were known, there was no injustice in ignoring the unqualified candidature. In doing so it rejected an earlier, lower court finding from the Northern Territory that an unqualified candidate could upset an election under full preferential voting.<sup>29</sup>

The Queensland state election case we began with involved optional preferential balloting. This voting system sits in between full preferential and

<sup>21</sup>*Pritchard v. Mayor of Bangor* (1888) 13 AC 241, 252, and 257. See also *R v. Taylor* (1895) 59 JP 393.

<sup>22</sup>*Re Wood*, above n. 14. For similar reasons, rolls or registers of electors are treated as unimpeachable once they are closed prior to voting, at least until after the election result has been declared.

<sup>23</sup>*Harford v. Linskey* [1899] 1 QB 852.

<sup>24</sup>See further International IDEA, *Electoral System Design: The New International IDEA Handbook* (International IDEA, 2005) ch. 2 3.

<sup>25</sup>*Omoth v. Ghostkeeper* [2005] ABQB 671. Similarly, see *Bellerose v. East Prairie Metis Settlement* [2005] ABQB 597.

<sup>26</sup>*Silver v. Smith*, Supreme Court of the Turks and Caicos Islands, Feb. 7, 2009 <[http://www.tcnewsnow.com/documents/election petition ruling cheshire hall.pdf](http://www.tcnewsnow.com/documents/election%20petition%20ruling%20cheshire%20hall.pdf)>.

<sup>27</sup>*Ibid.* [56].

<sup>28</sup>*Bellerose*, above n. 25, [138].

<sup>29</sup>*Re Wood* (1988) 167 CLR 145, 167. The effectively overruled case was *Hickey v. Tuxworth* (1987) 47 NTR 39.



first-past-the-post voting. Electors in this system can plump (like in first-past-the-post). Or they can rank-order the candidates fully or for that matter partially. It would be odd, given such a plethora of choice, to argue that anyone who chose the unqualified losing candidate was somehow robbed of a meaningful choice. Even those who treat an optional preferential ballot as if it were first-past-the-post have their preferences respected.

It is interesting that in none of the Australian cases has the court suggested that compulsory turnout enhances any argument that unqualified candidates taint the ballot. It is possible that prodding people to the polls means that they may be more prone to plump for an unqualified minor party candidate as a protest vote, when if that candidate had not been on the ballot they may have plumped for one of the major parties which tend to run first or second. But no-one forces an elector to plump. Compulsion is only really an issue then in any system where voters are both compelled to the polls and limited in their choice by first-past-the-post voting.<sup>30</sup>

## POLICY CONSIDERATIONS

The reasoning in the Canadian and Turks and Caicos cases applies the standard metric used in election contests (was there an error that was likely to have affected the result). The presence of an unqualified candidate is an error or illegality. But the conclusion in these cases is rather puristic. It also involves a vague rule of thumb: not all of the supporters of the unqualified candidate would have opted for the second-place getter. Some would surely have stayed home whilst others would have opted for the winning candidate. The reasoning also invites a small floodgate of future litigation. Litigation which clarifies the law is always welcome, as is litigation that reinforces incentives to avoid wrongdoing. Ousting an elected candidate for an innocent mistake of fact or law by an unrelated candidate achieves neither purpose.

Besides legal principle, there are logical and pragmatic reasons why the presence of unqualified losers ought not upset elections. It is odd to suggest that the presence of an unqualified losing candidate somehow robs those who vote for that candidate of a clean choice, since electors tend to vote for parties not candidates. An unqualified candidate who falls outside of the first two places in the final count is, by definition, likely to be a minor party candidate. Their pres-

ence on the ballot maximizes the choice of parties available to electors, without it being likely that they will be elected and hence necessarily upset the appcart. Further, as we noted at the start, there are a myriad of qualification rules. Many of the categories of disqualification are fuzzy. Electoral authorities cannot, in practice or law, police them. Minor parties tend to lack the legal advice or institutional ability to tightly screen their candidates. Zealousness about qualification rules is not necessarily democratic and is likely to fall heaviest on minor parties.

Finally, there is a moral hazard—as well as potential for chaos—if we invite legal challenges in tight races whenever there is a losing candidate who was arguably unqualified. This would create a perverse incentive for mischief makers, including those within the major parties, to run a notionally independent “dummy candidate” who is known to have a hidden disqualification,<sup>31</sup> in any seat known to be closely fought. The mischief makers could then leak the qualification issue to the media, during the count, if the result proves to be knife-edge. This could be done in the hope of triggering an election petition and fresh election, or just as a ruse to raise a fog around the legitimacy of the winning member of Parliament.

## CONCLUSION: A NEGLECTED QUESTION DESERVING STATUTORY ATTENTION

Elections should not be voided lightly.<sup>32</sup> If there is concern about unqualified candidates running, the answer is either to ease unnecessary qualification rules, or to direct enhanced education and penalties

<sup>30</sup>Compulsory turnout is only enforced in a dozen or so countries. Few of these employ first past the post voting (which tends to be an Anglophonic system in contemporary times). Singapore is an exception, but its elections are more often walk overs than contests and so unqualified losing candidates are hardly an issue for electoral outcomes.

<sup>31</sup>Like holding a dual citizenship.

<sup>32</sup>This is an old principle. One rationale for it is the need for expedition in the formation of a new government or legislature: *Strickland v. Grima* [1930] AC 285. Another is limiting judicial involvement in the political domain. A third is that elections have an essential temporal aspect: Dennis Thompson, “Election Time: Normative Implications of Temporal Properties of the Electoral Process in the United States,” (2004) 98 *American Political Science Review* 51. Fresh elections for one sub set of that community upset the deliberative, if not communal, basis of voting at roughly the same time.

at candidates and parties. As we have seen, there is a little case law and some formal logic suggesting that where electors “plump” amongst candidates, an unqualified loser who attracts clearly more votes than the winning margin can throw an election in doubt.

As a matter of policy, however, there are good reasons to not upset elections over qualification issues which are often fuzzy or unpredictable, unless the winner is unqualified (in which case a vacancy is unavoidable, and a fresh election is then desirable if the void election was a single-member race). Where preferential voting or party-list systems are used, there is no reason in legal or democratic principle to upset an election because of an unqualified

loser appearing on the ballot. Whatever one’s views on the policy and principle, however, all electoral systems would do well to address the problem with an explicit statutory rule either way.

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