SUBMISSION to
JOINT STANDING COMMITTEE on ELECTORAL MATTERS (JSCEM)
2004 ELECTION INQUIRY

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Scope of this Submission – Courts of Disputed Returns

This submission is a response to issues raised in Justice Dowsett's recent decision in *Hudson v Entsch* [2005] Federal Court of Australia 460 (26 April 2005).

The case raises important concerns about the powers of Courts of Disputed Returns.

Its outcome also raises questions about campaign practices and the intention of section 327 of the Commonwealth Electoral Act 1918, which is meant to cover interferences with political liberty.

Background: *Hudson v Entsch*

Members of the JSCEM may likely be aware that Warren Entsch MHR was petitioned over a campaign dispute involving his televised threat/admission that he was encouraging supporters to 'knock down' the campaign signs of an independent candidate, Mr Hudson.

The facts generate a degree of sympathy for Mr Entsch. The judgment began with a 5 page detailing how Mr Hudson's constitutent-parliamentarian relationship with Mr Entsch deteriorated so badly that Mr Hudson ran as a candidate with highly personalised attacks on Mr Entsch, out of all proportion to the policy issue that was the source of their original disagreement. In Mr Hudson's favour, his upset was that his signs had both been removed, and later knocked down.

Mr Hudson alleged a breach of sub-section 327(1):

> **Interference with political liberty, etc**
>
> A person shall not hinder or interfere with the free exercise or performance, by another person, of any political right or duty that is relevant to an election under this Act.
> Penalty: $1000 or imprisonment for 6 months, or both.

Justice Dowsett however had to perform some interpretive gymnastics to find Mr Entsch's election valid.

In part this was because of problems in section 362, which provides for automatic unseating in cases of 'bribery or undue influence'. Section 352 defines 'undue influence' as a contravention of section 327, or *Crimes Act 1914* section 28 (the more serious offence of interfering with political liberty by 'violence or by threats or intimidation of any kind'.

Justice Dowsett, in the end, interpreted sub-section 327(1) in the shadow of historical assumptions about the old offence of 'undue influence', which required 'violence or detriment, or the threat of violence or detriment'.

Analysis

1. Justice Dowsett would not have needed to make interpretive contortions, if the interplay of the sections were clearer. Section 362's instruction to automatically unseat should only apply in cases of traditional 'undue influence', ie violence or intimidation in relation to a defined set of electoral rights (eg to enroll or vote, who to vote for or support). That is, in breaches of the *Crimes Act* – whose maximum penalty of 3 years is 5 times that of section 327 (This *Crimes Act* penalty would, if proven beyond reasonable doubt, lead to an MP's temporary disqualification anyway, under s 44 of the *Constitution*. Section 327's maximum penalty is well under that disqualification rule).

2. Section 327 should remain. If section 362 were clarified as I just recommended, a breach of section 327 alone would only matter to an election if it 'was likely' to have affected the outcome (see section 362(3)). If this had been the law in this case, Justice Dowsett could have come to the much more natural conclusion that Mr Entsch, on the balance of probabilities, had quite possibly infringed section 327, but 'so what?' Even if there had been evidence that a hundred signs had been knocked down, there was no evidence that the result was likely to have been affected.

3. I appreciate that long-time politicians may feel that a certain degree of 'argy-bargy' is inevitable in our campaign culture, and that electoral administrators are afraid of being asked to intervene every time there is an arguable case that rights in electoral politics are hindered/interfered with. Parliament may wish to clarify the types of conduct that section 327 would cover. But the section should not be gutted: there *is* a need for a broad provision to discourage unethical actions against rival campaigns.

4. Whatever one's sympathies in this case, it is a very odd conclusion that a high profile candidate – an MP no less – was found to be at liberty to publicly (and privately) encourage supporters to knock down opponent's signs. Justice Dowsett talked a lot about whether Mr Entsch was a 'party' to any offence, in particular whether he had 'incited' any offence. He concluded with the statement that knocking down signs was fine, since Mr Hudson was free to erect more, but that removing or stealing signs might be different (para 22 of judgment). Students of tort law learn that interferences with property short of destroying or stealing it still amounts to the tort of trespass.

Criminal law fineries seem odd in the field of electoral law, which must have its own ethic. It is unrealistic to imagine that an influential party figure's encouragement would *not* cause party activists to engage in such behaviour.

Do parties and politicians of any hue truly want candidates to be free to encourage supporters to act this way? It is not merely that such hi-jinks (or low-jinks) are 'not cricket', but that such conduct is anti-competitive since better resourced campaigns are in a much better position to replace campaign material than small campaigns. Justice Dowsett's decision could be read as an incitement to unfair and anti-competitive conduct!

Also, note that the precedent of this case goes much wider than knocking down signs. It would appear to declare legal, for electoral law purposes, a variety of interferences with electoral rights and freedoms in relation to property and communication, such as taking leaflets out of letterboxes, pulling posters down, spam or other attacks on websites, bussing in activists to impose on a campaign rally etc.

5. The judgment contains contorted arguments in interpreting section 327. I say this because on ordinary literal and purposive interpretation methods, section 327 should *not* have been read in the shadow of old ideas of 'undue influence'. First, the section heading to 327 is not 'undue influence': it is 'Interference with Political Liberty'. Second, the more serious *Crimes Act* provision explicitly covers 'violence and intimidation'. The absence of such words in the modernized section 327 requires a finding that Parliament intended the old law of 'undue influence' to have little relevance to section 327. Thirdly, the idea that 'original intent' methods of interpretation apply – rather than say literal interpretation –was trashed in the famous High Court Engineers case (1920).

6. Justice Dowsett's arguments for a narrow reading of section 327 would have been better off drawing on 20th century Australian law, rather than delving into 19th century English law, but.

The judgment fails to mention *Re Cusack* (1986) 60 ALJR 302, which contains High Court dicta directly relevant to *Hudson v Entsch*. In *Re Cusack*, Justice Wilson rejected a bizarre claim that the charging of nomination fees hindered or interfered with an electoral right. Justice Wilson said:

> Section 327 is not addressed to fiscal considerations [like nomination costs]. It is concerned with intimidatory or other practices which tend to overbear the freedom of will of the person exercising the right or duty.

The first sentence is patently good law. However Justice Wilson gave no reasons for the narrow reading down of the literal terms of section 327. (Indeed the second sentence in his pure *obiter*, since the case was dismissed on the basis of the first sentence - an explicit and particular law charging a nomination fee could hardly be invalidated by section 327).

The assumption made by Justice Wilson that section 327 only covers suborning someone's will is not valid, for the reasons I give in paragraph 4 above, namely that section 327 literally does, and should, cover blatant breaches of another's freedom of property and communication in an election.

I do not raise the absence of any mention of *Re Cusack* in the judgment in *Hudson v Entsch* to reflect on Justice Dowsett, let alone the lawyers for the AEC or Mr Entsch.

Rather, I mention it to draw attention to a serious problem in Australia in the development of electoral law. *There is no textbook on the topic*. Without support, publishers are unwilling to take up such a project. Publishers of legal material today assume there is no profit in a book that will not sell to undergraduate students, no matter how important or fascinating the topic is. Electoral law is both. The fate of

governments can rest on its interpretation (witness Queensland in 1995 in the Mundingburra petition, and South Australia in 2002 in the Hammond petition).

The interpretation of Australian electoral law – which depends on litigation and on parties having access to well researched advice - will continue to develop in a sometimes contorted fashion as long as there is no basic reference on the topic. As Professor Williams has said (and Professor Colin Hughes has repeated) the absence of a text and the diffuseness of the cases create 'very high barriers to entry' to electoral law. These barriers do not just affect new researchers, ordinary citizens or lay people in party administration. Judges and barristers who only see the field very sporadically are put in a difficult position; and litigants-in-person (who represent a majority of litigants in the field these days) continue to advance poorly argued positions.

When litigants advance poorly argued positions, it is difficult for the law to develop in a balanced way, as the adversarial nature of the common law relies on the judge receiving competing counter-arguments.

Problems can arise if the litigant-in-person's case has no underlying merit but, as in *Re Cusack*, an exasperated judge lays down dicta that is wider than is needed. This can include judges simply plumping for the position of the AEC, without reflecting on the policy consequences. For example in a series of decisions, the ability to challenge mistakes in the pre-polling day process is being narrowed, in an over-reaction to baseless attempts by litigants-in-person to delay polling day. This is based on a misreading of the rule that an 'election' can only be challenged after the event, by petition. The better rule is that there should be a wide power for the Federal Court to grant an injunction to correct errors in electoral process provided the orders would not delay polling day. A stitch in time…

The same process can occur even if the litigant-in-person's case has some underlying cause, as in *Hudson v Entsch*. The judgment in that case is overwhelmingly a dialogue between judge and AEC submission, neglecting consideration of the true legal merits of the petitioner's case. Again, this is not a direct criticism of judge or AEC, but a product of a failure in the adversarial system.

Recommendations

That:

1. section 352 and 362 to amended to make apply automatic unseating only to true undue influence by a candidate or agent. That is 'violence or intimidation' within say Crimes Act 1914 s 28.
2. section 327 be clarified, but so as to make clear that it is an offence to improperly interfere with freedom of communication or property in an electoral campaign.
3. that thought be given to supporting the publication of a text covering the law of politics (ie the law covering elections and political parties) in Australia, as a resource for judges, administrators, parties and litigants, to help inform the interpretation, application and development of the law.

I thank the Committee for the opportunity to make this submission.

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My qualifications to make this submission.

For the last 8 years, I have been researching electoral law. My PhD was on the regulation of electoral bribery, and I have written the titles on parliamentary electoral law and local government electoral law for *Halsbury's Laws of Australia* (the new parliamentary title is just published and does describe Re Cusack's relevance to section 327!)

More particularly, with Professor George Williams I wrote the first detailed analysis of Court of Disputed Returns processes: 'Electoral Challenges: Judicial Review of Parliamentary Elections in Australia' (2001) 23 *Sydney Law Review* 53-93. With assistance from the Electoral Council of Australia, we also developed and edited the first specific book on electoral law in Australia, *Realising Democracy* (2003, Federation Press).