Submission to Joint Select Committee on Electoral Matters

2007 Election Inquiry
Court of Disputed Returns

General

This submission is limited to issues arising from the *McEwen Election Petition* (*Mitchell v Bailey*).

The case concerned hundreds of 'reserved' ballot papers, meaning those disputed by scrutineers.

The petition generated three judgments of Justice Tracey of the Federal Court:
Mitchell v Bailey (No 1) [2008] FCA 426 – an interlocutory ruling limiting access to ballot papers.
Mitchell v Bailey (No 2) [2008] FCA 692 – the main ruling dismissing the application and ruling the seat to Ms Bailey.
Mitchell v Bailey (No 3) [2008] FCA 1029 – making the Commonwealth pay most of the parties' costs.

My submission is motivated by media reporting of a proposal to change the composition of the Court of Disputed Returns.[1] The proposal was said to be a response to concern about the time taken for the main ruling, and the Court contradicting the AEC's decisions on the formality of many ballots.

My recommendations are in bold italics.

1. ACCESS to BALLOTS and PRECEDENT VALUE of CASE

With respect to Justice Tracey, His Honour erred in refusing the parties pre-trial access to the disputed ballots.[2] In this, he was not well advised by legal submissions from the AEC. This decision was an unduly literal reading of the relevant provisions of the *Commonwealth Electoral Act* (the Act). Both natural justice, and a purposive reading of the Act and the Court's inherent powers, should have led to the ballots being disclosed for inspection, and copies made for the parties, at the earliest possible opportunity.

Justice Tracey virtually conceded this, by subsequently moving to give the parties' legal advisers – but not the parties themselves – access to the ballots under court supervision.

It may be that this issue added to the delay in the case.

The decision in Mitchell v Bailey (No 1) should be undone, with an explicit provision in the Act requiring the AEC and subsequently the Court to provide

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[1] Rick Wallace, 'Poll-check panel urged', *The Australian*, 4 August 2008, p 4.
[2] *Mitchell v Bailey (No 1).*

access to all reserved ballots, to all parties to a petition. Copies of such ballots should be available to all parties to the petition at a fair cost.

A second criticism of Justice Tracey's decision is that he did not publish images of any of the disputed ballots. At a minimum, he ought to have published examples of common or categories of disputed ballots, particularly in instances where he overruled the AEC decision on formality.

Instead, his reasons for judgment in *Mitchell v Bailey (No 2)*, excellent as far as they go, read as if they were produced prior to the invention of the photocopier. Most of the judgment ends up being a long table at the end: comprehensible only to the AEC and to a lesser extent the parties' legal representatives.

As a result, whilst his decisions on ballot formality are more open to the outside world than those of the AEC in its recount, it will not really serve either as a formal precedent to future judges, or as a guide to those who work in the area, most notably future scrutineers.

It is recommended that:

- ***(a) The AEC use the decision to prepare an updated, user-friendly guide to formality***
- ***(b) The Act require future Courts to publish (either in print or permanent electronic format) copies of ballot papers on which they rule.***

2. COMPOSITION of the COURT of DISPUTED RETURNS

It would be bad policy and possibly unconstitutional to compromise the judicial status of the Court of Disputed Returns.

Giving disputed returns (and qualifications) power to a fully independent Court, which first occurred in 1868, was a major achievement in the war against electoral corruption.[3] Parts of Australia were slow to fully adopt this. In Queensland for instance, well into the 20th century, the 'Court' was a judge (for legal rulings) sitting with a panel of two parliamentarians (as jury of fact). Professor George Williams and I have argued for the importance of the judicial status of the Court of Disputed Returns.[4]

Bad policy: the Court's beauty is its independence.

Our electoral commissions are formally independent of government, and proudly assert that independence. However, they are still the administrators of elections. Whilst they do an excellent job, they work under great pressure and make errors from time to time. The Act ensures they are represented at each petition; and judges by nature give significant respect to their submissions.

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[3] G Orr, 'Suppressing Vote Buying: the 'War' on Electoral Bribery from 1868' (2006) 27 *Journal of Legal History* 289.

[4] G Orr and G Williams, 'Electoral Challenges: Judicial Review of Parliamentary Elections in Australia' (2001) 23 *Sydney Law Review* 53.

But Caesar cannot judge Caesar. It would be a retrograde step, and against natural justice, for electoral officials to sit in judgment on electoral officials in a court setting. Even if the officials were retired, there would be perceptions of bias.

In any event, it is hard to imagine how this would work. It is rare to have a petition that focuses on ballot papers, because it is rare, with electorates of 100 000, for results to be so close that formality decisions could upset the result. It is much more common for petitions to challenge other aspects of election administration, and more common again for them to concern candidate behaviour or qualifications. It is far from desirable to have electoral officials semi-presiding over such legal challenges.

A fair number of decisions of the Australian Electoral Officer for Victoria were overruled by the Court of Disputed Returns. But that is no embarrassment to the AEC. In the outcome, it was found to have come to the right result, albeit by a slightly different margin. No-one expects 100% perfection or agreement in the interpretation of 12 million hand-written ballots. Within the AEC, there were sufficient differences of interpretation between the original count, and the recount, to change the result. Public confidence is improved, not negated, through a fully independent Court ruling.

Constitutional issues: A move to staff the disputed returns body with any non-judicial figures would upset recent findings that the Court of Disputed Returns, when staffed only by a judge, exercises judicial power.[5] Because of the rigid separation of powers in our national *Constitution*, there would be unforeseeable consequences if the Court was turned into a quasi-administrative body. It may be that such a body could not be staffed by federal judges. Further, its decisions might become subject to a new layer of appeal (judicial review by prerogative writ), which would defeat the purpose of having a single, definitive court ruling, and lead to even longer delays.[6]

Justice Tracey was correct in law in holding that the ballot papers had to be examined afresh and that he was not to start with a presumption that each AEC decision on formality was correct. It is not the role of a reviewing judge to give deference to decisions of the AEC on formality. To do that would impede consistency. The Court works by the parties, via the scrutiny, identifying doubtful ballot papers. Since the parties make ambit claims in this regard, the ballots under review are over-identified: ie many of them are not really in dispute. This may waste a little time, but it ensures the Court:

(a) Rules on the complete set of doubtful ballots (and not just an artificial subset, as was occurring in the piecemeal challenges by Al Gore in Florida 2000).
(b) Is appraised of a significant number of AEC rulings on ballots that are not really in doubt, which sets the context of the AEC's rulings on those.
(c) Applies a single standard – its discretion – to the whole set of relevant ballots.

[5] Orr and Williams, above, pp 81-87.

[6] At present, the High Court of Australia is the Court of Disputed Returns for federal elections although, as in the McEwen Petition, it can refer the matter for trial by the Federal Court. Having the High Court formally as the Court of Disputed Returns means there is no avenue of appeal, which supports the legislative intention of finality in this area.

3. DELAY

Undoubtedly, this Petition dragged on longer than desirable. Given that the petitioner/ALP had to identify ballots relying essentially on scrutineer reports, and reduce it grounds of challenge to legal form, within just 40 days of the writ, and over the Christmas period, the 5+ month delay till a final judgment is regrettable.

Admittedly, this seat was not crucial to any legislative votes or the fate of government. But there was always the possibility that Tracey J, had he found the winning margin to be within the number of 'multiple' votes, would have ordered a fresh election. It is undesirable to have a re-election a year after the general election.

But it is very hard to suggest a way around this. The obvious answer is to legislatively set a margin, below which it is accepted that the result was really a dead-heat, and to automatically have a re-election in such dead-heats.[7] But that would only cause: (a) more re-elections than at present, and (b) shift the interest in litigation to those cases falling very close to the dead-heat margin.

The Act *already* beseeches the Court of Disputed Returns to act expeditiously, and without undue legalism.[8] The parties contributed in part to the delay, eg with the interlocutory application by the respondent/Liberal party; as did the Court with its narrow ruling on ballot access.

It is not clear that much more can be done to force expedition, without sacrificing the benefits of an independent Court, with its attention to due process.

Had the seat been crucial, the parties and the Court would likely have moved faster.

The Act could set maximum time periods for the filing of any interlocutory claims, and for a final hearing, but this sort of micro-management of Court processes, whilst okay in run of the mill cases, is just as likely to backfire and lead to perceptions of injustice, or even error, in difficult cases.

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[7] Compare Michael J Pitts, 'Heads or Tails A Modest Proposal for Deciding Close Elections' (2006) 39 *Connecticut Law Review* 739, accepting that ultra-marginal elections are essentially statistical dead-heats and considering whether a coin toss is any more or less fair than repeated recounts.

[8] See Orr & Williams, above, pp 78-79.