ELECTORAL LITIGATION

Injunctions

Mr Ned Kelly's application on late candidate nomination. On 22 October 2001, Mr Ned Kelly, previously known as Mr Terry Sharples, filed an application in the High Court, seeking a constitutional writ of mandamus to compel the AEC to accept and declare his nomination. He also sought a constitutional writ of prohibition to postpone the half-Senate election for NSW until such time as the AEC accepted and declared his nomination as a candidate for the NSW half-Senate election. Finally, Mr Kelly sought a constitutional writ of injunction to restrain the Commonwealth from holding the half-Senate election for NSW until such a time as there was a final determination of his claims.

On 31 October 2001, the High Court remitted the matter to the Federal Court for hearing.

On 5 November 2001, Mr Kelly applied to Justice Emmett of the Sydney Registry of the Federal Court for the matter to be heard before polling day on 10 November 2001. At that hearing, Mr Kelly abandoned his claims for constitutional writs of mandamus and prohibition, but retained his request for an injunction to postpone the half-Senate election for NSW. Further, Mr Kelly amended his application to include a request that the Court declare that his nomination complied with the legislative requirements of the Electoral Act and declare that the writ for the half-Senate election for NSW was issued unconstitutionally. Finally, Mr Kelly requested that the Court strike out subsections 169(4) and 169A(3) of the Electoral Act as unconstitutional, and award exemplary damages against the AEC.

Justice Emmett of the Federal Court refused to grant an expedited hearing, and noted that Mr Kelly's application appeared to be an attempt to challenge the validity of the half-Senate election for NSW. Justice Emmett noted that the proper way to challenge the validity of an election was through the Court of Disputed Returns process under Part XXII of the Electoral Act, which could not be done until after the election had been held. Justice Emmett adjourned the injunction hearing until after the 2001 federal election.

A series of hearings have been held in the Federal Court since then, and on 14 May 2002, Justice Gyles of the Sydney Registry of the Federal Court adjourned the matter for further hearing in the Brisbane Registry of the Federal Court. The AEC has filed a Notice of Motion to have the matter dismissed. This Notice of Motion is listed for hearing on 26 August 2002 in Brisbane.

The Ponnuswarmy Nadar application on incomplete candidate nomination. On 23 October 2001, Mr Ponnuswarmy Nadar applied to the Federal Court under the AD(JR) Act for an order of review of the decision by the DRO Grayndler to reject his nomination as a candidate for the Division of

Grayndler. Mr Nadar also requested an injunction to stop the 2001 federal election until such time as he had been accepted as a candidate.

At an interim hearing on 5 November 2001, the Federal Court held that it did not have the power, under the AD(JR) Act, to issue an injunction to postpone an election.

On 23 November 2001, the Federal Court transferred the matter to the Federal Magistrates Court for a further hearing on the outstanding matters (review of decision and costs).

On 13 March 2002, the matter was dismissed by the Federal Magistrates Court due to the non-appearance of the applicant on successive hearing dates. That same day, Mr Ponnuswarmy applied to the Court to have the dismissal set aside.

On 7 May 2002, the Federal Magistrates Court declined to set aside the dismissal. Immediately following this decision, Mr Ponnuswarmy filed an application for leave to appeal to the Federal Court. As at 27 June 2002, no hearing date for the application for leave to appeal had been set down.

The AEC application in relation to One Nation How to Vote cards. Prior to the 2001 federal election the AEC received a complaint that the One Nation candidate in the Division of Indi (VIC) was circulating a How-To-Vote (HTV) card that contained material errors and inaccuracies. The AEC referred the HTV card to the Director of Public Prosecutions (DPP) for advice as to whether the HTV card was potentially in breach of the Electoral Act. The DPP advised that the HTV card appeared to be in breach of section 329 of the Electoral Act as it appeared to have the capacity to mislead an elector in the casting of his or her vote.

On 9 November 2001, the day before polling, the AEC informed the One Nation candidate that the HTV card should be withdrawn from circulation. The candidate did not withdraw the HTV cards as requested. On polling day, 10 November 2001, the AEC again requested that One Nation withdraw the HTV cards from circulation. Again, the cards were not withdrawn as requested.

At 2.30pm on polling day the AEC applied to the Federal Court for an interim injunction against the One Nation candidate and the Victorian branch of One Nation. The Federal Court granted the interim injunction. After being advised of the decision of the Federal Court, the One Nation candidate ceased distributing the cards. The matter is now finalised.

The Schorel-Hlavka application on the calculation of the election timetable. On 2 November 2001, Mr Gerrit Schorel-Hlavka applied to the Federal Court for an injunction under section 383 of the Electoral Act to stop the election on the grounds that the date for the close of nominations was calculated incorrectly. Mr Schorel-Hlavka contended that the term “not less than 10 days” in subsection 156(1) of the Electoral Act should be interpreted as meaning not less than 10 full periods of 24 hours. On this interpretation of

the meaning of subsection 156(1), the date set for the close of nominations would have been a day later than the one that was relied upon for the election. Mr Schorel-Hlavka argued that the cumulative effect of this alleged error was that polling day could not be on 10 November 2001, as proclaimed by the Governor-General on 8 October 2001. Mr Schorel-Hlavka submitted that polling day should have been on or after 17 November 2001.

On 7 November 2001, Justice Marshall of the Federal Court held that Mr Schorel-Hlavka was, in effect, attempting to challenge the validity of the election through section 383 of the Electoral Act. Justice Marshall held that the Federal Court did not have the jurisdiction to hear a challenge to the validity of an election through this section of the Electoral Act.

Further, Justice Marshall held that the Federal Court could only hear challenges to the validity of elections where the Court of Disputed Returns remitted a petition to the Federal Court under section 354 of the Electoral Act. Justice Marshall also held that section 383 of the Electoral Act does not authorise challenges to the validity of steps taken by the Governor-General or the State Governors, or attempts to restrain the AEC from conducting an election.

On 22 November 2001, Mr Schorel-Hlavka filed an appeal in the High Court under subsection 383(9) of the Electoral Act, which allows an appeal to the High Court from a decision made by the Federal Court exercising jurisdiction under subsection 383(1) of the Electoral Act.

On 12 February 2002, the AEC filed a Summons and supporting affidavit to strike the matter out on the grounds that the Federal Court was not exercising jurisdiction under section 383 of the Electoral Act when it determined that it could not hear a challenge to the validity of an election through that section, but was exercising inherent jurisdiction.

As at 27 June 2002, no date had been set for the initial directions hearing.

Petitions to the Court of Disputed Returns

Mr Richard S Gunter's petition on gold currency and issue of writs. On 12 December 2001, Mr Gunter filed a petition in the Brisbane Registry of the High Court, seeking to challenge the entire 2001 federal election.

In the petition, Mr Gunter argued that the payment of nomination deposits in anything other than gold coin was unconstitutional as the Commonwealth lacked the power to issue paper money as legal tender. Therefore, Mr Gunter maintained that all nomination deposits paid to the AEC were invalid, making all nominations received by the AEC invalid. Secondly, Mr Gunter argued that, due to amendments to the *Letters Patent* and associated legislation in the 1980s, the Governor-General and the State Governors lacked valid power to issue the writs for the 2001 federal election.

The gold coin or "legal tender" ground has previously been litigated by Mr Alan Skyring in several legal forums, and was dismissed each time as having

no merit. In particular, the High Court, in *Re Skyring's Application [No 2]* (1985) 50 ALJR 561, held that "there is no substance in the argument that there is a constitutional bar against the issue by the Commonwealth of paper money as legal tender." per Justice Deane at 561 to 562.

Further, an argument very similar to the second ground was the subject of consideration in the Queensland Supreme Court in *Sharples v Arnison & Ors* [2001] QSC 56. In this case, an application to the Court by Mr Terry Sharples for review of the Governor of Queensland's action in issuing writs for the Queensland State election was dismissed as having no merit. Mr Sharples appealed this decision to the Full Bench, who affirmed the original decision of the Supreme Court.

In his petition, Mr Gunter requested, amongst other things, that the Court of Disputed Returns declare that the writs issued for the half-Senate election in Queensland and the House of Representatives election were not valid; declare that election returns made against the writs are null and void; and to declare all nomination deposits invalid.

On 11 April 2002, the AEC filed a Summons to have the petition dismissed for lack of merit, or permanently stayed pending payment of a deposit against costs.

On 12 April 2002 the High Court sitting as the Court of Disputed Returns, acting in accordance with section 354 of the Electoral Act, remitted the petition to the Federal Court in Brisbane.

The Summons filed by the AEC has been listed for hearing in the Brisbane Registry of the Federal Court on 22 July 2002.

Mr Ned Kelly's petition against the half-Senate election for NSW. On 15 January 2002, Mr Ned Kelly (formerly Mr Terry Sharples) filed a petition in the High Court, challenging the half-Senate election for NSW. Mr Kelly argued that the Governor of NSW did not hold valid constitutional power to issue the writ for the Senate election as a result of changes to State legislation enacted in connection with the enactment of the *Australia Act 1986 (Cth)*.

Secondly, Mr Kelly contended that the date of the issue of the writ for the half-Senate election was the date of publication in the *Government Gazette*, that is, 12 October 2001, rather than the date relied on to calculate the election timetable, which was 8 October 2001. Mr Kelly claimed that the AEC acted illegally in relying on an invalid writ to administer the election.

Thirdly, Mr Kelly claimed that the AEC acted illegally in providing Mr Kelly with (what he perceived to be) incorrect advice in relation to his Senate nomination. Mr Kelly claimed that this amounted to a breach of sections 324 and 327 of the Electoral Act.

Fourthly, Mr Kelly claimed that the AEC acted illegally in refusing to accept his nomination deposit after the close of nominations at 12 noon on 18 October

2001. Mr Kelly claimed that this also amounted to a breach of sections 324 and 327 of the Electoral Act.

Fifthly, Mr Kelly claimed that the Premier of NSW was not properly appointed due to the lack of power of the Governor, as noted in the first ground. Mr Kelly claimed that the Premier did not have the power to advise the Governor to issue the writs for the election, nor to appoint the Governor.

Mr Kelly requested that the Court of Disputed Returns declare that the half-Senate election for NSW was void, and that the Senators-elect were not duly elected. Further, Mr Kelly requested an order that the Commonwealth pay his costs on an indemnity basis.

As Mr Kelly had failed to join the AEC as a respondent to the petition, the AEC filed a Notice of Motion seeking leave of the Court that the AEC appear as a respondent to the petition under section 359 of the Electoral Act.

At a hearing on 14 May 2002, the High Court sitting as the Court of Disputed Returns, acting in accordance with section 354 of the Electoral Act, remitted the petition to the Sydney Registry of the Federal Court. The Court also joined the AEC as a respondent to the petition.

The matter has been listed for further hearing on 5 July 2002 in the Federal Court in Sydney.

Mr Ditchburn's petition challenging above the line voting for the Senate.
On 11 January 2002, Mr Donald Ditchburn filed a petition in the High Court challenging the validity of the above the line voting system for the Senate. Mr Ditchburn claimed that a number of provisions of the Electoral Act were in breach of sections 7 and 8 of the Constitution because they do not allow for Senators to be "directly chosen" by electors.

This petition is virtually identical to the petition filed by Mr Ditchburn after the 1998 federal election, which the Court of Disputed Returns dismissed in *Ditchburn v AEO Qld* [1999] HCA 40.

In relation to the 2001 federal election petition, Mr Ditchburn sought an order voiding the half-Senate election for Queensland, and if granted that, an order voiding all elections of Senators at the 2001 federal election. Mr Ditchburn further requested that, if he was successful in the first two requests, the Court then void all elections of Senators at the 1998 federal election.

On 8 May 2002, the AEC filed a Notice of Motion with the High Court Registry in Brisbane to have the petition remitted to the Federal Court, or dismissed for lack of merit.

The Notice of Motion filed by the AEC to have the petition remitted to the Federal Court, or dismissed, was heard on 24 June 2002. The petition was dismissed by Justice Ian Callinan of the High Court, sitting as the Court of Disputed Returns, upon the same grounds that Mr Ditchburn's petitions of 1998 were dismissed. That is, that above the line voting in the Senate is a

constitutionally valid method of voting, and does not infringe the Constitutional requirement that electors must "directly choose" Senators.

The AEC was awarded a costs order despite Mr Ditchburn's submission that his challenge had been in the public interest.

Mr Ditchburn's petition challenging preferential voting in House of Representatives elections. On 11 January 2002, Mr Ditchburn filed a petition in the High Court challenging the validity of the preferential voting system used for House of Representative elections. Mr Ditchburn claimed that several provisions of the Electoral Act were in breach of section 24 of the Constitution because they do not allow the Members to be "directly chosen" by the electors.

Again, this petition is virtually identical to the petition filed by Mr Ditchburn after the 1998 federal election, which the Court of Disputed Returns dismissed in *Ditchburn v DRO Herbert* [1999] HCA 41.

In relation to the 2001 federal election petition, Mr Ditchburn sought an order declaring the election for the Division of Herbert void. If granted that, Mr Ditchburn requested that the Court of Disputed Returns declare the elections void in all Divisions where no candidate received an absolute majority of first preference votes.

On 8 May 2002, the AEC filed a Notice of Motion with the High Court Registry in Brisbane to have the petition remitted to the Federal Court, or dismissed for lack of merit.

The Notice of Motion filed by the AEC to have the petition remitted to the Federal Court, or dismissed, was heard on 24 June 2002. The petition was dismissed by Justice Ian Callinan of the High Court, sitting as the Court of Disputed Returns, upon the same grounds that Mr Ditchburn's petitions of 1998 were dismissed. That is, that preferential voting in the House of Representatives is a constitutionally valid method of voting, and does not infringe the Constitutional requirement that electors must "directly choose" Members.

The AEC was awarded a costs order despite Mr Ditchburn's submission that his challenge had been in the public interest.