

# *Electoral Challenges: Judicial Review of Parliamentary Elections in Australia*

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## 1. Introduction

Electoral law engages judges in the resolution of disputes about political legitimacy and the freeness and fairness of representative, democratic elections. A judge must balance the pragmatic goals of stable governance and the need for finality over more abstract questions of rights and the purity of the electoral contest. By their very nature, such questions are of practical relevance to basic constitutional concerns. They delimit the scope that the (judicial) rule of law is permitted to play in what is inevitably the predominantly political arena of elections.

Judicial involvement in the law of parliamentary elections is sporadic, although not uncommon. Such cases are produced out of the three to four year cycle of elections at the federal level and in each state and territory. Recent High Court decisions have thrown into relief the principles and law concerning challenges to the parliamentary electoral process. These decisions include the disqualification of Senator Heather Hill in *Sue v Hill*,<sup>1</sup> and the dismissal of a late petition against Senator Ross Lightfoot in *Rudolph v Lightfoot*.<sup>2</sup>

This article surveys and critiques the scope for judicial review of electoral matters. An historical and constitutional context is necessary to understand the law of electoral challenges. Some of that history is fascinating for the way it reveals the shifting power balances between parliaments, Crown, judiciary and citizen, themes that continue to be relevant to constitutional and electoral debates today. The historical canvas reveals that electoral jurisdiction has been contested and shared; but the historical trajectory, as well as contemporary constitutional policy, shows that electoral jurisdiction has developed over the last 130 years into essentially a judicial, and not parliamentary, concern. However, as we will argue, it has tended to be an ad hoc jurisdiction, with a consequent under-development of the underlying legal principles.

This article examines jurisdictional issues. It does not deal with the substantive grounds for electoral challenges, such as what constitutes a fraudulently deceptive how-to-vote card, nor broader questions relating to the constitutional validity of electoral regulation, such as the right to vote or 'one vote, one value'.<sup>3</sup> Instead, we analyse three types of cases: contested electoral results before courts of disputed returns; cases questioning the qualifications of parliamentary members; and judicial review of electoral administration. Each raises fundamental questions of judicial review and the scope for the involvement of judges in the quest for free and fair elections.

Following this introduction, section two contains a discussion of the historical roots of the electoral jurisdiction. The third section then examines the general nature of the jurisdiction over both disputed returns and member qualifications

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1 (1999) 163 ALR 648. The second author of this article acted on behalf of the first petitioner in this case.

2 (1999) 197 CLR 500.

3 See generally George Williams, *Human Rights under the Australian Constitution* (1999) at 158–165.

questions in contemporary Australian law (including the overlap between the two). It also describes the nature of the courts of disputed returns, the exclusivity of their jurisdiction, and the factors that motivate (and skew) the petitioning process. Section four considers the issues of expedition and restrictions on amendment in disputed returns petitions. Section five is a detailed discussion of the place of appeals (and stated cases) in electoral matters. Both the third and fifth sections contain discussion of the vexed constitutional question of the status of the electoral jurisdiction as judicial power. Section six then surveys the role of judicial review outside of courts of disputed returns, prior to a concluding section summarising the lessons and suggestions for reform.

## 2. *The Struggle for Power over Disputed Elections*

### A. *An Evolving Power: the Historical Legacy*

The propriety of the return of members to sit in any parliament has always been a live issue, particularly in the period immediately following an election. Since Australian law and practice in this area owes a great debt to British tradition, it is necessary to first examine the history of the issue at Westminster. Although initially subjugated to other concerns, as the House of Commons' power increased, questions about the propriety of returns came to be hotly contested and debated. The reason is obvious: as Parliament's power increased, so the right to sit as a representative for a county, borough or city became less of an expensive and sometimes dangerous burden,<sup>4</sup> and more of a privilege that sounded in influence, and hence value, to the member — or, more typically, the patron or interest to which he was beholden.

In the early centuries of the 2<sup>nd</sup> millennium, disputes over returns were settled by the Crown using a mixture of custom, force and what we would now call administrative action. By 1405, however, we find positive, textual law intervening in such disputes in the form of the statute of 7 Henry IV ch 15 on 'The Manner of the Election of Knights of Shires for a Parliament'. That Act began by reciting the existence of a:

grievous Complaint of [the] Commons in this present Parliament, of the undue Election of the Knights of Counties for the Parliament, which be sometime made of Affection of Sheriffs, and otherwise against the Form of the Writs directed to the Sheriff, to the great Slander of the Counties, and Hindrance of the Business of the Commonalty in the said County.

The Act then laid down certain regulations, in particular to bind the sheriffs in whose hands were placed the conduct of individual polls and the all important return of the writ. So, for example, an indenture was thereafter to be attached to the writ, naming the persons<sup>5</sup> elected to represent the county, under the seal of all the

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<sup>4</sup> As to the burdensome nature of parliamentary service from the middle ages to the 16<sup>th</sup> century, see Sir William Holdsworth, *A History of English Law* (1938) Vol 4 at 93–94, especially at 93 n5.

‘choosers’ (that is electors — polling was taken openly in these times, usually at a public meeting). As Coke wrote, in further declaring that elections should be ‘freely and indifferently’ made ‘notwithstanding any Request or Commandment to the contrary’, the Parliament of 1405 was simply declaring old custom and principle.<sup>6</sup> The key notion of ‘free elections’ had been in currency for some centuries, having been laid down most famously in 1275 by the Statute of 3 Edward I ch 5, which declared that elections be ‘free’ and decreed it a great offence for anyone by force, malice or menace to ‘disturb any to make free Election’.<sup>7</sup>

The direct motivation for the statute of 1405 was confusion generated in the previous election. King’s Letters had been circulated, purporting to disqualify lawyers from election to the Commons. Such disqualification was not part of the writs, nor validated by statute. In fact, the Letters were partly sourced in an ordinance of the House of Lords. Some sheriffs connived in, or were confused into, preventing lawyers from standing or being returned — hence the complaint of ‘undue Election’. As this imbroglio, and subsequent history to this day reveals, threats to the free and fairness of elections were typically not to be found in crude physical attempts to impede polling, but more subtle forms of manipulation by those with power (including the Monarch, his or her Council and later the landed, wealthy and possessors of institutional power).

The intervention of positive law regulating the validity of electoral procedure, and in particular imposing ‘due election’ requirements on electoral officials and consequences for their breach, proceeded from this point. A statute of 1429 complained in its recital of ‘outrageous and excessive numbers of people voting who were not qualified because they possessed insufficient income generating property’.<sup>8</sup> It then codified the 40 shilling property franchise for the shires or counties and empowered sheriffs to examine potential electors under oath. This power came with a sting in the tail. Any sheriff making an undue return by permitting unqualified persons to vote was to be subject to an inquiry by the Justices of the Assize. The justices were empowered to attain and fine such sheriffs 100 pounds and sentence them to one years gaol. Further, any knight so returned would lose his seat and ‘wages’. All future electoral writs were to refer to that Act as a means of promulgating the law (it being a long-standing requirement that the sheriff in setting a time and place for the election was to read the writ and precept publicly). In effect, the Act was self-publicising.

The statute of 1429 represents early, public and general legislation about disputed electoral returns. Moreover, it vested review power in the judiciary. This is not to say that the Commons did not occasionally purport to deal with the right of members to sit, in particular by deliberating on qualifications questions.<sup>9</sup> Rather, the lessons for us are what we might call ‘electoral jurisdiction’ was in these early times vested in several places, and exercised in key respects by the

5 Double member constituencies were the norm in Britain until comparatively recently.

6 Coke, 4 Inst 10.

7 The terms were re-enacted in the *Bill of Rights* 1688 1 Will & Mar Sess 2, c2, s1(8). The preamble of that Act alleged breaches of the freedom of elections by King James I.

8 8 Henry VI c7.

courts. Two noteworthy procedural aspects of these early statutes on undue elections are that: (a) the primary target of the penalties was the chief electoral administrator or officer — that is, the sheriff; and (b) the chief political penalty or consequence was that the returned candidate risked losing his seat.

Parliament and the Assizes were not the only possible sites of electoral jurisdiction. Indeed, by the 16<sup>th</sup> century, the orthodox view was that the Chancery, then an evolving amalgam of royal government department and court exercising extraordinary, equitable jurisdiction, was the proper place to seek review. The role of issuing the Crown's writs summoning a Parliament had lain for some centuries with Chancery,<sup>10</sup> which also received and compiled the returns from the sheriffs who oversaw the conduct of each poll. Naturally then, Chancery for a long time exercised the central role in determining if a return were, in general terms, bad (for form or otherwise). Neale, the great historian of Elizabethan politics, went so far as to say that '[t]here can be no doubt as to where, by constitutional theory, jurisdiction lay. It was with the Crown in Chancery.'<sup>11</sup> Lovell observed that '[t]he right to decide disputed elections was also claimed by the House of Commons, *though only infrequently*, and [jurisdictional struggles] never became a serious matter under the Tudors'.<sup>12</sup> But matters were bound to come to a head when a particularly controversial case arose, not least because of Chancery's links to the Crown, and Parliament's growing resentment of Crown control.

In 1586, late in the Tudor reign, the election for Norfolk was disputed as irregular and Chancery investigated and decided to issue writs for a new election. The House of Commons, however, set up its own committee in effective defiance of Chancery and in the face of a request by Elizabeth I to desist. That committee upheld the election. Elizabeth cannily intervened, agreeing to uphold the poll and admit the members who had been originally returned. On its face this was a conciliatory gesture to the Commons, but as Lovell observes, its underlying effect was (albeit temporarily) to deny that House a clear cut precedent that it alone judged elections to it.<sup>13</sup>

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9 There are well documented instances of the Commons excluding *unqualified* members in the mid-16<sup>th</sup> century: Geoffrey Elton (ed), *The Tudor Constitution: Documents and Commentary* (2<sup>nd</sup> ed, 1982); Albert Pollard, *The Evolution of Parliament* (1920) at 325. Further, there was an instance of the judges declining to hear a dispute between two Lords over a seat in 7 Henry VI (1428–1429): RC of the Middle Temple, Esq, *Arcana Parliamentaria: Or Precedents Concerning Elections, Proceedings, Privileges and Punishments in Parliament* (1685) at 50–51.

10 Since 1405, the year of the statute of 7 Henry IV, c15. It should be noted that in 1580 the Commons asserted the right of its Speaker to order a writ for a casual vacancy, which it extended in 1672 to vacancies during periods of Parliamentary recess. See, for example, 10 Geo III, c36 s1.

11 Sir John Neale, *Elizabeth I and Her Parliaments: 1584–1601* (1958) at 184.

12 CR Lovell, *English Constitutional and Legal History: A Survey* (1962) at 241 (emphasis added). A famous example of an egregious case of bribery to gain a seat — resolved by the Tudor Commons — was that of Thomas Long: Sir John Neale, *The Elizabethan House of Commons* (1949) at 157–158.

13 Lovell, *ibid*.

In the early Stuarts' battle with Parliament, the question of electoral jurisdiction became an important site of struggle. In the Buckinghamshire case of 1604, the returned candidate, Sir Francis Goodwin, was an outlaw: but he was an outlaw on a civil debt rather than a criminal charge. By proclamation of James I, no bankrupt or outlaw could be returned. Chancery declared his election undue and issued a writ for a new election, at which Sir John Fortescue, a Privy Councillor who had been rejected by the electorate in favour of Goodwin, was returned. The Commons, as in 1586, objected. It established its own committee, which determined that Goodwin was not disqualified. The House resolved not only that Goodwin should sit, but that *it alone* should judge elections to it. James I declared to the contrary that Chancery was the sole arbiter: '[t]his House ought not to meddle with Returns, being all made into the Chancery, and are to be corrected or reformed by that Court only.'<sup>14</sup> The House accepted a compromise of another fresh election, but members objected to Chancery's jurisdiction: 'the free Election of the country [will be] taken away, and none shall be chosen but such as shall please the King and Council.'<sup>15</sup>

The dispute was apparently settled with a compromise allowing concurrent jurisdiction. But such an impractical solution could not last as electoral disputes were becoming more common as seats in Parliament became more precious. Instead, it came to be accepted that the House had sole jurisdiction over disputed returns, and the Crown desisted from having Chancery go behind returns.<sup>16</sup> It was also accepted that the House could (as it already had) cede part of this jurisdiction to the common law courts.

There was thus an important shift in constitutional orthodoxy in the early 17<sup>th</sup> century as the natural site of electoral jurisdiction shifted from Chancery to Parliament. For most of the ensuing three centuries, the jurisdiction was treated as one of the privileges of Parliament.<sup>17</sup> It was a fallacy, however, to assume that the electoral jurisdiction was an ancient privilege of Parliament. Quite the contrary: as Sir George Bowyer told the Commons in 1868, it represented a 'usurpation of the common law order'.<sup>18</sup>

By excluding Chancery, and hence the executive influence of the Crown, this resolution of the site of electoral jurisdiction represented a significant step in democratic evolution. It helped shape forms which are central to modern practice. The ultimate electoral administrator (Chancery) could thenceforth evolve as a relatively independent public body to administer returns, minus the power to review them. Consider the contemporary analogy: one would not expect the

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14 2 State Trials 98. See also Joseph Tanner, *Constitutional Documents of the Reign of James I: AD 1603–1625 with an Historical Commentary* (1930) at 201–230.

15 2 State Trials 98 at 98.

16 Lovell, above n12 at 289; Joseph Tanner, *English Constitutional Conflicts of the Seventeenth Century, 1603–1689* (1966).

17 For example, Holdsworth, above n4, Vol 6 at 95.

18 United Kingdom, House of Commons, *Parliamentary Debates (Hansard)*, 26 March 1868, 3<sup>rd</sup> series, Vol 191, col 301–302.

Australian Electoral Commission (hereinafter the AEC), however independent it is of the executive government, to determine electoral challenges today. After all, its administration may be implicated in any challenge.

### **B. *The Coming of the Judges: Constitutional Lessons***

The same concerns that applied to Chancery came equally to apply to Parliament. Since the conduct of politicians is often, and the interests of parliamentarians are generally, implicated in any challenge, why should Parliament have any say in the resolution of disputed elections? This was exacerbated by the fact that as the royal Crown lost its executive power, it came to reside in a political Cabinet consisting of those party members who controlled the votes on the floor of Parliament. Perniciously, by the 18<sup>th</sup> century, party-line voting had rendered the resolution of disputed returns by the whole Commons a matter of mere numerical party strength.<sup>19</sup> Even when, following Grenville's Act of 1770, an elaborate 'jury-style' selection of a panel of members to sit on a specialist Select Committee was instituted, the problem was merely diluted, not eradicated.<sup>20</sup> Yet the equally obvious development — in terms of safeguarding democracy and separating power — whereby Parliament ceded to the courts the electoral jurisdiction it had wrested from Chancery, had to await the Victorian era.

In 1868, the Commons handed its hard won disputed returns jurisdiction to the courts of common law,<sup>21</sup> albeit not without some judicial reluctance at what some judges saw as a 'hot potato'.<sup>22</sup> The debates over this reform reveal a general acceptance, even by the Select Committee which had been hearing electoral petitions, that the jurisdiction was unsatisfactorily reposed in Parliament and that it should be transferred to a judicial tribunal of the highest order. The reasons were many, including that the Select Committee could not sit locally, nor whilst Parliament was not convened. However impartial it sought to be, its members typically lacked qualifications to decide increasingly intricate questions — and lawyers appearing before it treated them accordingly. Most damningly, as J Stuart Mill put it to the Commons, it had become unacceptable that a particular class of men (the parliamentary and political elite) should effectively sit in judgment on itself.<sup>23</sup> Despite the transfer of power in 1868, as late as 1930 the Privy Council

19 Holdsworth, above n4, Vol 10 at 548–549.

20 Id at 549. Grenville's Act is 10 Geo III, c16.

21 *The Parliamentary Elections Act 1868* (UK) s11.

22 For example, a memo from Prime Minister Disraeli cites the Lord Chief Justice protesting on behalf of all the Judges that the Bill conferring jurisdiction was an 'impossibility': quoted in Maurice Gwyer, *Anson's Law and Custom of the Constitution* (5<sup>th</sup> ed, 1922) Vol 1 'Parliament', at 181 n3. The nature of the tribunal (for example, whether to employ a jury and how to select the judges) underwent considerable amendment before and after this protest. By the *Parliamentary Elections and Corrupt Practices Act 1879* (UK), two judges were employed. Today a bench of two judges from a pool or rota forms the 'Election Court': *Representation of the People Act 1983* (UK) s123(1).

23 'Nobody out of this House, and I ... may almost add in it, believes that so long as the jurisdiction remains in this House the penalties against the giver of the bribe will ever be seriously enforced.' United Kingdom, House of Commons, *Parliamentary Debates (Hansard)*, 26 March 1868, 3<sup>rd</sup> series, Vol 191, col 309.

was characterising electoral jurisdiction as ‘extremely special’ for it ‘concerns what, according to British ideas, are normally the rights and privileges of the Assembly itself, always jealously maintained and guarded in complete independence of the Crown’.<sup>24</sup>

Reforms such as those of 1868 were part of a much wider battle against corrupt practices that had plagued elections for several centuries. The battle, at least over the forms of corruption then prevalent, was soon won (although ‘money politics’ and campaign finance scandals, albeit in different forms, have remained a feature of electoral politics). This is not to say that on its own the widespread exercise of judicial power to unseat candidates for illegal practices slayed the dragon of corruption: socio-economic and cultural factors affecting the nature of campaigning, and reforms in more general election law (for example, the extension of the franchise) played a great role.<sup>25</sup> But as the central study of the era has argued, judicial machinery was one of three factors which interacted to render the reforms effective.<sup>26</sup> Certainly, the resolution of electoral challenges in previous centuries by parliamentary committee had had little impact on corruption. One reason is that politicians of all complexions were inevitably compromised by being the product of an electoral process in which to compete successfully meant adopting at least some of the less savoury aspects of contemporary canvassing culture.

Today, the freeness and fairness of elections is under less direct threat, at least as far as electoral procedure and campaign tactics are concerned. Nonetheless, there is — and always will be in a questioning society — disquiet over the electoral process. Further, cynicism about parliaments as deliberative bodies has grown with the increasing dominance of executive and party control in the 20<sup>th</sup> century. Conversely, the judicial realm has flourished in both independence and specialisation in the last 100 years. Electoral jurisdiction, despite its special discretions and subject matter, is in essence no different to other fields, such as industrial law, commonly exercised by judges of general jurisdiction.

It is thus arguable today, particularly at the federal level where a separation of powers is embedded,<sup>27</sup> that if an Australian parliament were to exercise electoral jurisdiction it would breach the principle of the separation of powers. History shows that parliamentary ‘privilege’ to decide elections and qualifications questions was contested and evolving. As the recent decision of the High Court in *Egan v Willis*<sup>28</sup> demonstrates, the courts determine, ultimately, what privileges

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24 *Strickland v Grima* [1930] AC 285 at 296.

25 The sociological factors are championed in an empirical study of petitions: JP King, ‘Socioeconomic Development and Corrupt Campaign Practices in England’ in Arnold Heidenheimer, Michael Johnston & Victor Levine (eds), *Political Corruption: A Handbook* (1989) at 233.

26 Cornelius O’Leary, *The Elimination of Corrupt Practices in British Elections, 1868–1911* (1962) at 2.

27 See, for example, *R v Kirby; Ex parte Boilermakers’ Society of Australia* (hereinafter *Boilermakers’ case*) (1956) 94 CLR 254.

28 (1998) 195 CLR 424.

parliaments possess,<sup>29</sup> and this is one privilege which has no place in a modern democracy. If not over, the ancient struggle for power in this field has matured into an acceptance that the power to determine disputes touching elections properly resides in the judicial realm.

### 3. *Australian Disputed Returns Jurisdiction*

#### A. *The Constitution and Power over Electoral Returns and Members' Qualifications*

Australia does not have a long history of struggle between the Crown and the various parliaments over electoral issues. Freed of this tug-of-war, the question of where the jurisdiction to resolve electoral challenges should lie is largely one of policy.<sup>30</sup> In England by 1868, it had become unacceptable that parliamentarians should sit in judgment on themselves. The Australian colonies and states accepted this and enacted similar legislation.<sup>31</sup>

At the federal level, s47 of the Constitution states:

Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

It is noteworthy that, whilst treating them together, this section acknowledges the historical distinction between qualifications questions and disputed returns questions.

While recognising the historical assumption that Parliament could resolve electoral disputes, the history of s47 reveals that the framers of the Constitution envisaged that this role would be entrusted to the courts. This was recognised at the constitutional conventions of the 1890s, at which s47 was drafted. Several speakers suggested that, although the final decision ought to be left to the new Parliament, the Parliament should vest disputed returns jurisdiction in the High

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29 *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162 (Dixon CJ) ('it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise').

30 For a discussion of the transition to Courts of Disputed Returns in Australia (by an author critical of the impediments of cost and evidentiary strictures in court proceedings for private petitioners seeking to uncover electoral fraud), see Amy McGrath, 'One Vote, One Value: Electoral Fraud in Australia' in The Samuel Griffith Society, *Upholding the Australian Constitution: Volume Eight* (1997).

31 Although with varying degrees of delay, and with similar debates over the form of the tribunal, and even some antipodean innovation. For instance the *Elections Tribunal Act 1886* (Qld) employed an Elections Judge with a panel of Parliamentary assessors acting as a jury (until 1915). See generally Paul Schoff, 'The Electoral Jurisdiction of the High Court as the Court of Disputed Returns: Non-judicial Power and Incompatible Function?' (1997) 25 *Fed LR* 317 at 326–328.

Court or another judicial body.<sup>32</sup> For example, one delegate stated: ‘I think the federal parliament will undoubtedly enact, as soon as possible, that disputed elections relating to either house of that parliament shall be decided by the federal supreme court.’<sup>33</sup> In fact, an earlier draft version of s47 had provided: ‘Until the Parliament otherwise provides, all questions of disputed elections arising in the Senate or the House of Representatives shall be determined by a Federal Court or a Court exercising Federal jurisdiction.’<sup>34</sup>

Unsurprisingly, the new Federal Parliament quickly passed legislation to transfer disputed returns power to the High Court. In the *Commonwealth Electoral Act* 1902 (Cth) the Federal Parliament legislated pursuant to s47 to confer power upon the High Court as the Court of Disputed Returns.<sup>35</sup> The scope of this referral, now enacted under the *Commonwealth Electoral Act* 1918 (Cth) (hereinafter the *CEA* (Cth)), arose in the decision of the High Court in *Sue v Hill*.

At the October 1998 federal election, Heather Hill, standing on behalf of Pauline Hanson’s One Nation Party, was elected as a senator for Queensland. Hill was born in the United Kingdom in 1960, and thereby gained British citizenship. In January 1998, she was also granted Australian citizenship. Two petitioners challenged Hill’s election on the basis that, at the time of her nomination, she was a dual citizen who did not satisfy the requirements of s44(i) of the Constitution, which states: ‘Any person who... is a subject or a citizen... of a foreign power... shall be incapable of being chosen or of sitting as a senator’.

The matter came before the Full Court of the High Court by way of a case stated from the Court of Disputed Returns. The central issue was whether the United Kingdom was ‘a foreign power’ under s44(i). A majority consisting of Gleeson CJ, Gaudron, Gummow and Hayne JJ held that it was, and that Hill had not been duly elected. The minority, McHugh, Kirby and Callinan JJ, reached no conclusion on the operation of s44(i), holding instead that the *CEA* (Cth) did not confer jurisdiction upon the Court of Disputed Returns to determine the issue. According to McHugh J, the question could only be raised ‘on a referral by one of the Houses of Parliament’ or ‘incidentally in determining whether an election should be set aside on the ground that the elected person has committed an “illegal practice” by falsely declaring that he or she was’ qualified to be elected.<sup>36</sup>

The minority finding depended upon a construction of ss353 and 354 of the *CEA* (Cth). Section 353 provided: ‘The validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise’. Section 354 constituted the High Court as ‘the Court of Disputed

32 *Official Record of the Debates of the Australasian Federal Convention* (reprinted 1986) Vol 3, Adelaide 1897, at 680–682. See, on the drafting history of s47, Sir John Quick & Sir Robert Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at 495–496.

33 *Official Record of the Debates of the Australasian Federal Convention*, id, Vol 2, Sydney 1897, at 464 (NE Lewis). See id at 465 (Mr Wise).

34 Id, Vol 3, Adelaide 1897, at 1229. See id, Vol 2 at 1150. Compare clauses 21 and 43 in id at 1225, 1228.

35 Schoff, above n31 at 329–331.

36 Above n1 at 698.

Returns'; conferred upon it jurisdiction to try the petitions referred to in s353; and endowed it ('in respect of the petition') with 'all the powers and functions of the Court of Disputed Returns'. The question was whether these provisions could be read as including a grant of power to receive and determine petitions raising issues of disqualification under s44 of the Constitution. In respect of 'any question of a disputed election' under s47 of the Constitution, the Parliament had 'otherwise provided' by ss353 and 354 of the *CEA* (Cth). In respect of 'any question respecting... qualification', it had 'otherwise provided' by s376:

Any question respecting the qualifications of a Senator or of a Member of the House of Representatives or respecting a vacancy in either House of the Parliament may be referred by resolution to the Court of Disputed Returns by the House in which the question arises and the Court of Disputed Returns shall thereupon have jurisdiction to hear and determine the question.

The immediate question was whether s376 was intended to provide the only way in which issues of disqualification can be raised before the High Court, or whether the words of ss353 and 354 were wide enough to permit such a question to be raised by petition. Both mechanisms (that of ss353–354 and that of s376) are contained in Part XXII of the *CEA* (Cth), but the former mechanism is contained in Division 1 and the latter in Division 2. The argument accepted by McHugh, Kirby and Callinan JJ was that the two provisions were mutually exclusive.

The majority rejected this and adopted the reasoning of Dawson J in *Sykes v Cleary (No 1)* that 'disputed election' encompasses a challenge to a return based on the successful candidate's qualifications at the time of nomination and election, since such a petition is literally a disputing of the election.<sup>37</sup> Thus, Gaudron J reasoned that disqualification is a matter that affects a candidate's capacity to be elected and not only his or her capacity to sit in the Parliament. The majority view should be preferred: in permitting electors the right to petition over qualifications, it better fits the historical trend to judicialise such issues rather than leaving them in parliamentary hands. Far from being an undemocratic arrogation of parliamentary power to an unelected judiciary, it enhances democracy since it allows electors to instigate petitions.

Behind this issue was another question which the conflicting judgments did not resolve. As to 'question[s] of a disputed election' it is clear that the mechanism now provided by ss353 and 354 has excluded any continuing possibility of the Houses of Parliament resolving such an issue for themselves under s47 of the Constitution: s353 provides that such issues may be dealt with by petition 'and not otherwise'. But as to 'question[s] respecting... qualification' the words 'and not otherwise' do not appear in s376. On the contrary, that provision says only that the issue 'may be referred by resolution to the Court of Disputed Returns'. Does that mean that, while s376 gives each House the option of referring such issues to the

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37 *Sykes v Cleary (No 1)* (1992) 107 ALR 577 at 579.

High Court as a Court of Disputed Returns, each House also retains the option of determining such issues for itself, by reason of a continuing operation of s47 of the Constitution?

This question arose two weeks before the judgments in *Sue v Hill* were delivered, when the Federal Opposition argued that Warren Entsch, Parliamentary Secretary to the Minister for Industry, was disqualified from continuing to sit in the House of Representatives. He held an interest in a private company, Cape York Concrete Pty Ltd, which had won a \$175 000 contract to supply concrete for a RAAF base. It was alleged that this amounted to a 'pecuniary interest in any agreement with the Public Service of the Commonwealth' within the meaning of s44(v) of the Constitution. On 10 June 1999, Opposition Leader Kim Beazley moved in the House of Representatives that the matter be referred to the Court of Disputed Returns under s376, but the motion was lost.<sup>38</sup> The House instead purported to determine the issue itself under s47 of the Constitution by resolving, on the motion of Attorney-General Daryl Williams, that Entsch 'does not have any direct or indirect pecuniary interest with the Public Service of the Commonwealth within the meaning of section 44(v) of the Constitution by reason of any contract entered into by Cape York Concrete Pty Ltd' and was therefore 'not incapable of sitting as a member of this House'.<sup>39</sup> Whether the House had power to pass such a resolution depends on whether s376 of the *CEA* (Cth) has excluded its continuing power to do so, or has merely provided an alternative path which the House may use if it so chooses.

The majority judgments in *Sue v Hill* did not determine this question. They found that the 'referral' mechanism in s376 of the Act is not exclusive of the possibility that such issues may also be raised by elector petition under ss353 and 354. As to the continuing effect of s47 of the Constitution, the joint judgment of Gleeson CJ, Gummow and Hayne JJ offered only a cryptic reference to 'an argument in *terrorem*'.<sup>40</sup>

It was suggested that the situation might arise where, whilst there was pending a petition under Div 1 challenging an election by reason of constitutional ineligibility of the Senator or Member in question, that Senator or Member might take his or her seat and that, despite the pendency of the petition, the relevant chamber could proceed to determine the qualification itself without waiting for the determination of the petition and without making a reference under Div 2. However, questions respecting the exercise by the chambers of the Parliament of their constitutional authority bestowed by s 47 of the Constitution are not to be approached by reference to some distorting possibility.<sup>41</sup>

This seems to suggest that, even if the relevant House of Parliament does still have power to answer such a question for itself under s47 of the Constitution, the

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38 House of Representatives, *Parliamentary Debates (Hansard)*, 10 June 1999 at 6720.

39 *Id* at 6724.

40 Above n1 at 656.

41 *Id* at 656–657.

fact that it has already done so might not deter the High Court from giving a different answer in response to a timely elector petition under ss353 and 354.<sup>42</sup> Indeed, the Court ought to do so if the facts and law relating to qualifications so requires in the particular case. Some might argue that this could lead to a collision between the Court and Parliament, invoking fears of a 16<sup>th</sup> century style stand-off if the Parliamentary majority refused to accept the Court's verdict. Courts are understandably wary of appearing impotent. However, greater embarrassment would likely be suffered by Parliament: the Court's decision on a petition is declared by an Act of Parliament, the *CEA* (Cth), to be 'final and conclusive'.<sup>43</sup>

### **B. Qualification Questions and Parliamentary References and Determinations**

Historically, parliaments took a keen interest in and reserved the right to make determinative rulings on who should sit in them, in particular where questions were raised about a member's qualifications. With the trend to judicial resolution, however, most Australian parliaments augmented the power to make determinations on qualifications with provisions allowing them, at any time, to refer questions concerning the qualifications of members to the courts of disputed returns.<sup>44</sup> Such references are largely resolved by a similar process to ordinary disputed returns petitions, although noticeably a power to allow any interested person to be heard is typically added.<sup>45</sup>

The question of 'qualifications' here is taken in the sense of an eligibility to stand and sit rather than undue nomination. For instance, it would be beyond power to question a person's 'qualifications' years after an election simply because it was discovered that no deposit was paid. Paying a deposit is not a 'qualification' for candidature, merely an administrative element of a due nomination: as opposed to questions such as age, citizenship, enrolment and absence of constitutional disqualifications.<sup>46</sup> On the other hand, the discovery of a breach of a substantial statutory qualification going beyond a merely formal issue relating to the nomination process (for example, not meeting the minimum age requirement) would arguably be impeachable outside an election petition, at least if the 'member' were still under age.

42 As to the strictness of time limits on petitions, see section 4A below.

43 *CEA* (Cth) s368.

44 *CEA* (Cth) Pt XXII Div 2; *Parliamentary Electorates and Elections Act 1912* (NSW) (*PEEA* (NSW)) Pt 6 Div 2; *The Constitution Act Amendment Act 1958* (Vic) (*CAA* (Vic)) Pt 5 Div 22 Sub-div 2 and *Constitution Act 1975* (Vic) s45; *Electoral Act 1992* (Qld) (*EA* (Qld)) Pt 8 Div 3; *Electoral Act 1985* (Tas) (*EA* (Tas)) Pt X; *Electoral Act 1992* (ACT) (*EA* (ACT)) Pt 16 Div 4; *Northern Territory Electoral Act 1995* (*NTEA* (NT)) Pt 12 Div 2. There is no such provision in *Electoral Act 1907* (WA) (*EA* (WA)) where electors have a broad right to challenge. Nor is there such a provision in *Electoral Act 1985* (SA) (*EA* (SA)), rather the South Australian House concerned is required by *Constitution Act 1934* (SA) s43 to resolve the question.

45 *CEA* (Cth) s378; *PEEA* (NSW) s277(a); *CAA* (Vic) s300; *EA* (Qld) s145(1)(a); *EA* (Tas) s234(1); *EA* (ACT) s277(a); *NTEA* (NT) s125.

46 *CEA* (Cth) s163, headed 'Qualifications for nomination', which references *Constitution* ss43, 44.

Thus, the question of ‘qualifications’ is not co-extensive with ‘due nomination’. To validly nominate and be elected, a candidate must satisfy a variety of criteria, from constitutional requirements (which typically include limitations on holding certain offices)<sup>47</sup> to statutory requirements of substance (such as age and entitlement to vote) and of form (for example, payment of a deposit). *Sue v Hill* determined that at the federal level the return of an unqualified candidate may be challenged by a disputed returns petition. Such a petition may be founded on any ground of nomination irregularity that could be classed as an illegal practice (in the sense of one not according to law): an absence of constitutional qualifications is obviously just as much a defect in nomination as say the candidate not being entitled to vote. An undue nomination by a losing candidate, however, is not grounds for petitioning the result.<sup>48</sup>

The broad practical implication of the retention of parliamentary power over qualifications, however, is that a person who is not qualified, although otherwise duly elected, can never be safe in their seat, *unless* they enjoy the support of a majority of their House of Parliament. This in itself is perverse, since it leaves the matter of whether to resolve the question judicially, or indeed politically, to the partisanship of party politics (with predictable consequences).<sup>49</sup> Vincent J, in finding under the *Constitution Act 1975* (Vic) that no private challenge lay (at least outside the petitioning period), declared that it was:

[T]o put it mildly, unfortunate that the entitlement of a member of the Legislature of this State to sit and vote on matters of great public importance cannot be determined through some independent and impartial process, and may ultimately depend upon the balance of political power within the House itself.<sup>50</sup>

More alarmingly, it also permits situations where the fact of disqualification could be covered up but used as a form of political blackmail.

Some may argue that the discretion to make resolutions or references on qualifications questions, for reasons of history and autonomy, should ultimately remain with parliament. We think not. Either the matter should be resolved judicially or not at all. References by parliaments are suspiciously rare<sup>51</sup> and

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47 Although most state constitutions are much more flexible on this than the rigid federal provisions in s44 of the Constitution.

48 *Re Wood* (1988) 167 CLR 145 overruling *Hickey v Tuxworth* (1987) 47 NTR 39. The preferential nature of the Australian voting system explains this conclusion: voters are either required to state a further preference which is then counted, or where preferences are optional, they can be taken to have wanted to vote for the disqualified candidate, or no-one else.

49 This is not to say that some, if not most, petitions have a political motivation: although in challenging an election on what most voters regard as technicalities, rather than constitutional morality, a successful petition can easily backfire at the subsequent re-election. This occurred to the Australian Labor Party (hereinafter ALP) after *Free v Kelly* (1996) 185 CLR 296.

50 *Ellis v Atkinson* [1998] 3 VR 175 at 186.

51 Two exceptions which prove the rule are *Re Webster* (1975) 132 CLR 270 and *Re Walsh* [1971] VR 33. Conversely despite the narrow time frame, private disputed returns petitions are not uncommon, especially at federal level.

authors such as Schoff and Walker have doubted their propriety under separation of powers principles.<sup>52</sup> Even if no mechanism were provided outside the ordinary petitioning period there would be a natural political method of resolution: if the fact were notorious, the member may not be re-elected. In reality a mechanism must be provided, however, since some constitutional disqualifications can occur at any time; most notably the acceptance of an office of profit, or a financial dealing with the public service, incompatible with parliamentary status.

In any event, abolishing the parliamentary reference and resolution powers would not leave the matter entirely unregulated, at least at federal level. A constitutional curiosity, s46, which entitles ordinary citizens to sue a disqualified member for a civil penalty, spawned the *Common Informers (Parliamentary Disqualification) Act 1975* (Cth).<sup>53</sup> That Act allows a suitor to claim \$200 for every day a member invalidly sits after the suit is filed. Ideally, if qualification questions are to be taken seriously, this should be converted into a full right to petition the Court of Disputed Returns at any time to unseat the disqualified member. Western Australia, alone in Australia, appears to permit this.<sup>54</sup> It is certainly the case that with present arrangements in place, some embarrassment and indeed constitutional conflict could arise if a court faced a common informers action in a case, such as that involving Minister Entsch discussed above, where a parliament had already decided not to refer the matter, or had resolved that the member was qualified.<sup>55</sup> Indeed this could happen with any regime permitting concurrent jurisdiction in both courts and parliament. This is another reason for parliaments to cede the remnant of this power to the courts, such as by providing that questions of qualifications of sitting members are referable by elector petition to the court that normally exercises disputed returns jurisdiction for conclusive resolution, subject to any appeal rights.<sup>56</sup>

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52 Schoff, above n31 at 347–348; Kristen Walker, ‘Disputed Returns and Parliamentary Qualifications: Is the High Court’s Jurisdiction Constitutional?’ (1997) 20 *UNSWLJ* 257. We agree: above, text at n27.

53 Two state constitutions contain similar common informer rights: *Constitution Act 1902* (NSW) s14(1); and *Constitution Acts Amendment Act 1899* (WA) s41.

54 *Constitution Acts Amendment Act 1899* (WA) s41 (application to Full Court): the power of Western Australian electors to challenge, whilst not extended to all disqualifications, is not limited in time.

55 The reverse embarrassment of a parliament, unhappy with an actual court ruling and resolving contrary to it, although historically precedented, seems unlikely at least in jurisdictions which provide that a court of disputed returns decision on a parliamentary reference is final and conclusive: for example, *CEA* (Cth) s381, adopting s368.

56 This may require state constitutional reform, but this is not a great hurdle at state level. Key sections requiring attention are those such as *Constitution Act 1902* (NSW) s14(1): ‘If any person by this Act ... disabled ... to sit ... is, nevertheless, elected ... such election ... shall be declared by [the House]... to be void, and thereupon the same shall become void’. *Constitution Act 1867* (Qld) ss6, 7 and *Constitution Act 1934* (SA) s43 are in similar terms. If desired, the courts could assume whatever power particular parliaments have to relieve members of trivial or spent breaches: *Constitution Act 1975* (Vic) s61A; *Constitution Acts Amendment Act 1899* (WA) s39.

### C. *When is a Court not a Court? The Nature of Courts of Disputed Returns*

The question of whether the power to exercise disputed returns jurisdiction is conferred upon a court or a separate tribunal raises important issues, many of which were canvassed in separate articles by Walker and Schoff, which foreshadowed *Sue v Hill*.<sup>57</sup> As a recent Queensland parliamentary committee report noted with some alarm,<sup>58</sup> the answer affects whether appeals can be restricted. (We discuss this at length in section 5B below).

The typical legislative vesting provision current federally and in most of the states and territories does not create a separate Court of Disputed Returns. Rather the relevant superior court is merely given a convenient label identifying it as exercising disputed returns power. Section 354(1) of the *CEA* (Cth) is illustrative: 'The High Court shall be the Court of Disputed Returns'.<sup>59</sup> In *Sue v Hill*, the majority decided that this did not establish a separate tribunal nor appoint the Court's judges as *personae designatae*, that is, in their personal capacity, but simply conferred an additional jurisdiction on the Court itself.<sup>60</sup> Conversely in the ACT (where the label 'Court of Disputed Elections' is used) and Tasmania (where the pretence of a special label is not employed at all) the legislation explicitly states that the Supreme Court is exercising the relevant power.<sup>61</sup>

The position is more obscure in Western Australia, where the legislation states that a 'Judge of the Supreme Court sitting in open Court shall constitute the Court of Disputed Returns'.<sup>62</sup> There is old precedent that such words constitute a separate tribunal,<sup>63</sup> but that precedent is questionable in light of *Sue v Hill*, particularly since there is now no underlying assumption that the power is so special as to be inherently non-judicial (discussed further below).<sup>64</sup> Indeed, since the power is clearly judicial when bestowed on a court, but possibly non-judicial if a parliament were to arrogate it back to itself, no presumption in favour of a separate tribunal can arise based simply on the nature of the power. Instead, it is better to presume that a legislature will not do something as significant as creating a separate tribunal without clear words. An example of that is the Northern Territory legislation, which reads: 'There is hereby established a tribunal to be

57 Walker, above n52; Schoff, above n31.

58 Legal, Constitutional and Administrative Review Committee (LCARC), *Issues of Electoral Reform Raised in the Mansfield Decision: Regulating How-to-Vote Cards and Providing for Appeals from the Court of Disputed Returns* Report No 18 (1999).

59 There is identical wording in *PEEA* (NSW) s156(1) and *CAA* (Vic) s280(1). *EA* (Qld) s127(1) and *EA* (SA) s103(1) use the term 'is' instead of 'shall be'.

60 Above n1 at 657 (Gleeson CJ, Gummow & Hayne JJ), 688 (Gaudron J).

61 *EA* (ACT) s252(1), (2) states 'The Supreme Court has jurisdiction ... [and] shall be known as the Court of Disputed Elections'. *EA* (Tas) s215(1) merely states 'The Supreme Court has jurisdiction...'. In these jurisdictions, the ordinary procedural language of 'applications' is used instead of 'petitions'.

62 *EA* (WA) s157(2).

63 *Hamersley v McCabe* (1916) 18 WAR 130 at 131–133 (WA Full Court).

64 In Section 5B of this article (in the context of the existence of appeal rights).

known as the Election Tribunal', albeit one constituted from time to time by a Supreme Court judge.<sup>65</sup> Clearly in that Territory, there is a tribunal with a separate existence from the Court.

In all jurisdictions, it is normal for disputed returns power to be exercised by a single judge, sitting alone. The most obvious practical exception lies where provision is made for the reference or stating of cases to a full bench. Further, albeit occasionally, several judges may sit at first instance on a petition, as has happened several times at federal level in cases involving the dismissal of petitions.<sup>66</sup> There is probably no room for multi-judge benches, however, in Western Australia, Tasmania and the Northern Territory, where the use of a single judge is mandated.<sup>67</sup>

The image of a Supreme Court judge sitting as if in an ordinary civil trial is tempered in three procedural respects. First, procedure on an electoral petition is somewhat loosened, judges in all jurisdictions being enjoined to avoid technical interpretations and applications of their power on matters of evidence and procedure. Two provisions are typical: one that power should be exercised 'on such grounds as the Court in its discretion thinks just and sufficient',<sup>68</sup> the other (often entitled 'Real Justice to be Observed') that the court 'shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities or whether the evidence ... [accords] with the law of evidence'.<sup>69</sup> Neither are warrants for a non-judicial approach.<sup>70</sup> Second, in most jurisdictions specialist rules of court may be enacted,<sup>71</sup> although not all have done so and those that have tend not to be detailed and explicitly adopt general Supreme Court practice as default rules.<sup>72</sup> Third, vital public interests are present in electoral challenges. This is illustrated not only by the court's usual obligation to notify the relevant parliamentary clerk or Governor and to report any findings of illegal practices to the relevant minister,<sup>73</sup> but by restrictions on the ability of the parties

65 *NTEA* (NT) s107(1), (2).

66 See, for example, *In re Berrill's Petition* (1978) 52 ALJR 359 (five justices) and *Nile v Wood* (1988) 62 ALJR 42 (three justices).

67 'Shall' is used in *EA* (WA) s157(2); *EA* (Tas) s215(2); *NTEA* s107(2). Compare the permissive language in *CEA* (Cth) s354(6); *PEEA* (NSW) s280(2); *CAA* (Vic) s280(2); *EA* (Qld) s127(2).

68 *CEA* (Cth) s360; *PEEA* (NSW) s161; *CAA* (Vic) s285; *EA* (Qld) s136 ('just and equitable'); *EA* (WA) s162; *NTEA* (NT) s112 ('any grounds it thinks fit'). There is no corresponding provision in South Australia, Tasmania or the ACT.

69 *CEA* (Cth) s364; *PEEA* (NSW) s166; *CAA* (Vic) s289; *EA* (Qld) s134(2); *EA* (SA) s106; *EA* (Tas) s219(9); *EA* (ACT) s281. There is no corresponding provision in Western Australia or the Northern Territory.

70 *Sue v Hill*, above n1 at 661 (Gleeson CJ, Gummow & Hayne JJ), 689 (Gaudron J).

71 *CEA* (Cth) s375; *PEEA* (NSW) s175A; *EA* (Qld) s134(6); *EA* (WA) s173; *EA* (Tas) s229; *EA* (ACT) s254; *NTEA* (NT) ss112(1)(e), 129. There is no explicit power in Victoria or South Australia, but the Supreme Court's general rule-making power would suffice.

72 *High Court Rules* (Cth) o68, especially o68 r2; *Supreme Court Rules* (NSW) Pt 79, especially s79.4; *Supreme Court (Miscellaneous Civil Proceedings) Rules* 1998 (Vic), especially ss20.05, 20.09; *Electoral Rules* 1908 (WA), especially r16; *Electoral Rules* 1985/232 (Tas); *Supreme Court Rules* (ACT) Pt 10, especially o79 r1.

to ‘settle’ petitions. Reflecting an historical suspicion of politicians doing deals to save face or to hand over a seat, disputed returns regimes traditionally prevented withdrawal or abatement of a petition unless the court was satisfied that the parties had *not* come to an agreement.<sup>74</sup> Short of an inquisitorial process, a stronger inversion of the ordinary civil procedures designed to *encourage* settlement is hard to imagine.

#### **D. Exclusivity and Jurisdiction to Petition Electoral Returns**

##### *(i) Challenging the ‘Return’*

Typically, legislation declares that the court of disputed returns route (however labelled) is the *only* route for challenging the validity of any election result. The *CEA* (Cth) s353(1) embodies a time-honoured provision: ‘The validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise.’<sup>75</sup> The term ‘election or return’ captures the fact that the election itself is not complete without the ‘return’ of a member by official indorsement on the writ.<sup>76</sup> The same petitioning process is used whether one is complaining of events in the election or the return. The return is now largely a formality, but as shown above, in earlier centuries before the electoral process itself was highly regulated and professional electoral authorities developed, the original source of disputes was over the propriety of the sheriff’s return: that is, whether it was a ‘due return’ or not.

The election/return distinction is more than an historical footnote, however. It remains important in one practical respect: a single petition can only challenge the return in a single electorate. It is not permissible to challenge the whole or even a large proportion of a general ‘election’ understood as a statewide or national

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73 For example, *CEA* (Cth) ss369, 380 (notifying clerk); s363 (report to Minister). These provisions do not impact on the Court’s independence or mode of adjudication: *Sue v Hill*, above n1 at 690.

74 These provisions are less common today (for example, having just been repealed in the UK by the *Political Parties, Elections and Referendums Act 2000* (UK) Sch 16 cl 3), but survive in *EA* (Tas) s221; *EA* (ACT) s263. A weaker form of the leave requirement exists federally: *High Court Rules* o68 r11. Such provisions are difficult to enforce unless the Court is seized of sufficient evidence of the alleged collusion, at least in cases where the petitioner simply drops any attempt to prosecute it. They reflect the fact that in the 18<sup>th</sup> to 19<sup>th</sup> centuries it was not uncommon for candidates to counter-petition, alleging mutual corrupt practices, then to treat the matter as a private dispute. The public interest in the proper investigation of electoral challenges is also reflected in provisions mandating that the electoral commission concerned be a party, and in the power often present to award costs against the state.

75 Identically phrased are *PEEA* (NSW) s155; *CAA* (Vic) s279; *EA* (WA) s157(1); *EA* (SA) s102; *EA* 1985 (Tas) s214(1). The other jurisdictions are functionally equivalent but omit the reference to ‘a return’: *EA* (Qld) ss128(1),(2); *EA* (ACT) s256(1); *NTEA* (NT) s108(1).

76 United Kingdom legislation preserves the distinction by also referring to a complaint of ‘an undue election or undue return’: *Representation of the People Act* 1983 (UK) s120(1). Note that in the ACT writs are dispensed with in favour of a simple notification requirement: *EA* (ACT) s189(1).

event.<sup>77</sup> The only qualification to this is that Senate polling creates a single electorate for each state or territory.<sup>78</sup>

The distinction also remains in a more indirect form, in a contrast between the ‘result’ of polling understood simply as the filling of a vacancy in parliament, and the ‘result’ of an election more broadly understood as a statement of the numbers of votes, preferences and so on. To the machinery of parliament and government, only the question of who fills which seats matters: that is, the ‘outcome’ of the poll. But to the machinery of politics, the question of percentages and swings measuring electoral attitudes also matter. They matter to perceptions of political legitimacy and to the accuracy of information on which assessments of trends in voter support (and hence both party and electoral strategies in response) will depend. The rule in electoral challenges is that only the outcome, that is, the return of particular candidates, not the number of their majority or the overall result in terms of statistical returns, can be challenged.<sup>79</sup>

It is a rare case in which an electoral petition will be valid despite the allegations raised being insufficient to cast probable doubt on the outcome. An example would be a grave infringement such as bribery by the successful candidate or his or her agents.<sup>80</sup> The statutory tests require a finding that the result was likely to have been affected. There is also generally a rider that the judge be satisfied that it is ‘just to do so’ before unseating a candidate.<sup>81</sup> In cases where the successful candidate was not qualified to nominate, the answer is a simple yes. By definition the result was affected, since the candidate should not have been on the ballot. But the more contentious cases involve complex allegations of electoral malpractice or error.

At common law, under the English decision of *Woodward v Sarsons*,<sup>82</sup> it was sufficient to allege matters which, taken together, meant that there was no free election in accordance with law. That is, it was sufficient to allege such a widespread and significant failure to follow procedure that it could be said that an election occurred, but not substantially under the existing law. An example might be the holding of polls on different days in different areas without legitimate cause

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77 Litigants in person, perhaps with inflated aims, have often fallen foul of this, see: *Muldowney v AEC* (1993) 67 ALJR 700; *Pavlovich-Smith v AEC* (1993) 67 ALJR 711; *Sykes v AEC* (1993) 67 ALJR 714; *Robertson v AEC* (1993) 67 ALJR 818.

78 The Sharples petition heard with *Sue v Hill*, above n1, represented an (unsuccessful) attempt to seek a new Senate election for a whole state.

79 *Kean v Kerby* (1920) 27 CLR 449 at 458 (Isaacs J).

80 For example, *CEA* (Cth) s362(1).

81 *CEA* (Cth) s362(3); *PEEA* (NSW) s164(3); *CAA* (Vic) s287(3); *EA* (WA) s164(3); *EA* (SA) s107(3) (rider omitted); *EA* (Tas) ss222(3),(4); *EA* (ACT) s266(2); *NTEA* s114(1). The rule extends to most illegal practices (that is, contraventions of the electoral provisions) whether attributable to officials or participants. Queensland does not enact the rule, but such a crucial judicial discretion cannot be left unguided and the ‘likely to have been affected’ test is implied from the common law and common sense. One leading practitioner lists this rule as one of the fundamental principles in the field: John McCarthy QC, ‘General Principles of Australian Electoral Law’ (2000) 19 *Aust Bar Rev* 109 at 110.

82 *Woodward v Sarsons* (1875) LR 10 CP 733 at 743–744.

or statutory authority.<sup>83</sup> This would be a clear breach of a basic element of what it means to have *an* election day uniting *an* electorate, but one about which it may be hard to find evidence as to whether the outcome was likely to have been affected.

It was accepted early on that *Woodward's case* was applicable in Australia.<sup>84</sup> But there is also a respectable view that the common law, which evolved particularly in the 19<sup>th</sup> century to regulate British parliamentary elections, is largely irrelevant to Australian jurisdictions regulated by individual statutes that give the appearance of being electoral 'codes'.<sup>85</sup> It would be unfortunate if the *Woodward* rule were to be rejected and an example like balloting on multiple days rendered unchallengeable by petition after the event, leaving the improper election as a *fait accompli*. The answer to this, for those who espouse the 'code' approach, might be to find discretionary latitude in the 'likely to have been affected' test, especially as there is conflicting dicta about where the onus of proof lies.<sup>86</sup>

The example of balloting on multiple days is an extreme case. A more likely infringement would be the closing of some polling booths a few minutes early. In such a case it would be easy to show that a small but not insignificant number of people were disenfranchised and that the purity of the electoral process has been compromised. However, except in a very close result, a small number of votes which might have gone either way will not matter to the outcome and hence no petition, or indeed other judicial process, will lie to vindicate the disenfranchised. This applies under both the statutory requirement of 'likely to have been affected' and the common law's alternative test of whether the election, in substance, was conducted under the prevailing law. The closing of a few booths early does not, after all, mean that the authorities in substance substituted a different set of rules to run the election.

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83 Such adjournments or delays may be authorised by the presiding officer for cause, notably foul weather: see, for example, *CEA* (Cth) ss241, 242.

84 *Bridge v Bowen* (1916) 21 CLR 582 at 616 (Isaacs J) (hereinafter *Bridge*).

85 *Chanter v Blackwood (No 1)* (1984) 1 CLR 39 at 55 (Griffith CJ); *Sue v Hill*, above n1 at 712–716 (McHugh J). This also seems to be the implication of Gaudron J's decision in *Hudson v Lee* (1993) 177 CLR 627 at 631 that the *CEA* (Cth) provides 'exhaustively as to the general grounds on which an election may be invalidated or declared void'.

86 The conflict lies between the views that, on the one hand, unseating a member is a grave thing, versus the view that if any reasonable doubt is raised about the fairness of an election, then the matter should be thrown back to the electorate. *Molloy v Brown* (1904) 7 WAR 146 illustrates the differing policies: compare Parker ACJ at 157 (strong prima facie case should be made out by petitioner) with Burnside J at 163 (onus lies on elected candidate to show result not likely to have been affected). Compare above n84 (respondent friendly decision setting high bar to overturning election) to *Scarcella v Morgan* [1962] VR 201 at 203 (onus shifts once contraventions capable of upsetting poll are raised) and cases following it. In earlier times when the test was stronger ('no election shall be avoided'), but also passively worded, the burden was obviously stronger on the petitioner: see *Cole v Lacey* (1965) 112 CLR 45.

(ii) *The 'First Law of Electoral Law': or Why only Close Results Attract Challenges*

Since the law only countenances challenges after the return where the outcome could have been affected (except in extreme cases of misapplication of the law or corruption), only close contests give rise to petitions. We dub the corollary of this the 'first law of electoral law'. It holds that *all* close contests give rise to serious legal consideration of a petition, however speculative, simply because it is worth the losing candidate's party investing time and money into querying the few votes needed to raise doubt over the outcome. The reality is, with enough resources and a little inventive legal thought, a number of votes could be questioned in most seats, marginal or safe.

A consequence of the statutory and common law rule is that serious violations may go unlitigated where the result of the election is not very close — although hopefully not unnoticed if the media and review bodies, such as the federal parliamentary Joint Standing Committee on Electoral Matters, are fulfilling their roles. Further, some important legal questions are never asked, simply because they may not have arisen in a close contest. Conversely, some minor violations will be litigated in ultra close elections. This tendency is reinforced by the fact that the process is largely civil and driven by a private adversarialism; examples of electoral commissions petitioning results are rare.<sup>87</sup> Due to the costs and interests involved, serious challenges are only ever mounted by the major political parties. Many examples of petitioners-in-person can be found in recent decades; however their success rate is virtually nil. The process of gathering evidence, interpreting the legal categories and pleading a petition is complex enough for the practitioners who find occasional work in the field. For litigants in person it is overwhelmingly difficult and their petitions are usually dismissed before any hearing of the merits of their claim.

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<sup>87</sup> Indeed in the UK, a *laissez-faire* approach has been tacitly accepted by both sides of politics, so that electoral petitions were rare in the UK in the 20<sup>th</sup> century. The major parties and candidates' agents inherited a weariness of litigation after the flurry of activity from 1868 to 1918, and seem to feel that it is better not to wash their linen in public on the assumption that all sides of politics are equally dirty.

#### 4. *Expedition in Disputed Returns: Petition Quickly and Petition Particularly*

##### A. *A Narrow Window of Opportunity: Short and Unextendable Time Limitations*

Time limitations for the filing of disputed returns petitions vary between jurisdictions as follows:<sup>88</sup>

Jurisdiction	Time Limitation
Commonwealth	40 days from return of writ
New South Wales	40 days from return of writ
Victoria	40 days from return of writ
Queensland	7 days from return of writ
Western Australia	40 days from due date for writ
South Australia	40 days from return of writ
Tasmania	90 days from return of writ
Australian Capital Territory	40 days after declaration of poll
Northern Territory	21 days from due date for writ

The periods range from the relatively leisurely (Tasmania) to the extremely truncated (Queensland), with 40 days from the actual return of the writ being common. The narrow time frame in Queensland is slightly mitigated by some allowance for its extension. However the general rule, and strict rule across other jurisdictions, is that the time limitation is mandatory. The rule against extension can be inferred from provisions in most jurisdictions providing that no proceedings shall be had on a petition *unless* certain procedural requirements, including the time limitation on filing, are complied with.<sup>89</sup> These provisions have been taken to their extreme: in one case, a judge declared that a petition that omitted to state the petitioner's occupation, contrary to the technical requirements of the legislation, would not be proceeded with.<sup>90</sup>

88 *CEA* (Cth) s355(e); *PEEA* (NSW) s157(e); *CAA* (Vic) s281(1)(f); *EA* (Qld) s130; *EA* (WA) ss158(5), 159; *EA* (SA) s104(1)(e); *EA* (Tas) s214(5); *EA* (ACT) s259; *NTEA* (NT) s108(1)(f).

89 *CEA* (Cth) s358(1); *PEEA* (NSW) s159; *CAA* (Vic) s283; *EA* (Qld) s130(1); *EA* (WA) s161; *EA* (Tas) s214(7); *NTEA* (NT) s110.

90 *Yates v Unsworth* (NSW Supreme Court sitting as the Court of Disputed Returns, Needham J, 8 July 1988) at 8. Such technical literalism seemed unremarkable to Dawson J in *Re Barry Ceminchuk* (High Court sitting as the Court of Disputed Returns, 28 October 1993) at 4.

Even in South Australia and the Australian Capital Territory, where no rule against proceeding exists explicitly, reasoning from policy would arrive at the same conclusion. The policy, as recently reiterated by the High Court in *Rudolph v Lightfoot*, is that the time limitation 'plainly is designed to produce criteria which are objective and certain and reflect the public interest in resolving expeditiously and with finality questions respecting disputed elections and returns'.<sup>91</sup> Petitioner Rudolph had sought to argue for a slip rule, claiming that the facts underlying the petition were not known to him until outside the petitioning period. In a sense equity was on his side: certain forms of fraud may be well hidden, and their consequences for an election result not knowable without forensic work, sophisticated legal advice and good fortune.<sup>92</sup> However, the interest in finality prevailed.

In two jurisdictions, the limitation period is measured from the date set in the writ for its final return, rather than its actual return. This is sensible, since it sets a date known well in advance and one which will be common for all constituencies.<sup>93</sup> Sometimes, especially as counting methods improve, the writ can be returned in advance of that date, and such early returns are not well publicised. Indeed, in most jurisdictions, returning officers are under a duty to declare the poll as soon as practicable if the outcome is clear, without waiting for all postal or absentee votes.<sup>94</sup> In those cases the return of the writ is then an expedited formality: indeed in Queensland, where expedition suffuses the legislation, the commissioner *must* return each writ as soon as practicable.<sup>95</sup> Further, it is generally possible for writs to be returned on different days for different seats.<sup>96</sup> None of this lends predictability to the process of petitioning. Nor does it lend fairness since the actual return of the writ can be on an arbitrary date. Indeed, in a worst case scenario, an electoral authority aware that it had made mistakes in administering the poll could be tempted to expedite the returns to

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91 Above n2 at 508.

92 The deregistration of the One Nation Party in Queensland may be a case in point — it was not deregistered for fraud until well over a year after the election concerned: *Sharples v O'Shea* [1999] QSC 190. (Note, however, that most jurisdictions exclude the mere presence of a false party label on ballot papers from the sorts of irregularities capable of invalidating a return.)

93 The final date for returning writs will vary from jurisdiction to jurisdiction and election to election, but at maximum can be up to 100 days from issue (Cth), down to 60 days from issue (Vic) or 21 days from election day (NSW). Issue date is generally shortly after the election is called.

94 *CEA* (Cth) ss284(1),(2)(c); *PEEA* (NSW) ss126(2),(2A); *CAAA* (Vic) ss210(1),(2); *EA* (Qld) ss122(1),(2); *EA* (WA) s144(4); *EA* (SA) ss98(1),(2), 99(1),(2). Contrast *EA* (Tas) s189. Admittedly, early returns are more common in safe seats — that is those where late votes are not relevant to the outcome — and in such seats the converse of the 'first law of electoral law' suggests that a petition will be unlikely.

95 *EA* (Qld) s123. See also *EA* (WA) s147(1). Other electoral commissions may in any event feel under a professional duty to return the writs as soon as practicable.

96 But contrast *CEA* (Cth) s284(3), which mandates that for federal elections the writs for seats in each state and territory should be returned in bulk. Similarly, see *EA* (SA) s99(3) (Legislative Assembly); *EA* (ACT) s189(4).

reduce the time period and hence the likelihood of a potentially embarrassing petition. It would be a small, but sensible amendment if all jurisdictions set a common and reasonable fixed time limitation, in each case dated from the last day set for the return of writs for the election concerned.

### **B. The Rule Against Amendment**

A petitioner must not only be quick, but also very particular. The general rule is that no petition can be amended, at least in a matter of substance, after the limitation period has expired. This has been stated in the High Court in a string of cases, from the earliest days of federation to the present. It originated in *Cameron v Fysh*,<sup>97</sup> with a ruling by Griffith CJ that no amendment that would introduce a new ground would be allowed, at least out of time, for that would undermine the time limitation on filing. Petitions must not only simply state a valid legal ground for challenge, but state particular *facts* capable of supporting the unseating of the elected candidate. Consequentially, no new facts can ordinarily be adduced after the short time limitation has expired, although court rules invariably provide that the petitioner can be required to give further and better particulars of the facts already pleaded. This conclusion was reinforced by full benches of the federal Court of Disputed Returns in *Re Berrill's Petition*,<sup>98</sup> and *Nile v Wood*.<sup>99</sup> As a corollary, the bare statement of a legal conclusion (for example, that a section of the Constitution or electoral legislation was broken) is not merely bad pleading, but will also suffer from the fact that no amendment outside the time period to allow particularisation will be permitted.<sup>100</sup>

To respondents, the strict rule against amendment will seem eminently fair: they wish to know, as soon as possible, the case they must meet. A further rationale was given in a Northern Territory case, *Hickey v Tuxworth (No 2)*: '[otherwise] a petition could be filed on any ground, however unmeritorious, while the petitioner excogitated an effective ground which could be included by amendment.'<sup>101</sup> For petitioners, however, particularly those who have pleaded grounds and facts capable of invalidating an election, it is harsh to be forced to present in a single unamendable pleading given that further evidence may only come to light during pre-trial investigations. Such amendment, at the trial judge's discretion, is a typical feature of almost all civil litigation, and is seen as a necessary aspect of streamlining modern litigation to ensure that justice can efficiently be pursued at trial.

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97 (1904) 1 CLR 314 at 316.

98 Above n66.

99 Above n66.

100 *Berrill's Petition*, above n66. Examples of the application of this strict rule are: *Yates v Unsworth*, above n90; and *Sue v Hill*, above n1. There is doubtful dicta suggesting greater openness in *Crittenden v Anderson* (High Court sitting as the Court of Disputed Returns, Fullagar J, 23 August 1950) at 4. Taylor J in *Cole v Lacey*, above n86 at 51, in talking of facts 'indirectly alleged', suggested an interpretive approach that might be used to save a petition.

101 (1987) 47 NTR 44 at 46.

The rule against amendment cannot be strictly applied in all cases. First, the original rationale for the rule is to prevent any substantive amendment effectively raising a *new* ground. It is not a rule against amendment of facts already relied on.<sup>102</sup> Second, recognising that some latitude for clarificatory amendment is apt, several jurisdictions have enacted limited slip rules. The Commonwealth provisions since 1990 have allowed relief from failure to give sufficient particulars, provided the original petition identifies the specific matters which are relied upon. This sets up a distinction — not always an easily drawn one — between essential and merely particular facts.<sup>103</sup> It is certainly the case that a petition should not be dismissed as defective simply because it contains some unparticularised allegations, although it is proper that no reliance be placed on them.<sup>104</sup>

The Western Australian legislation appears to go a step further by explicitly providing that amendment is permissible at any time.<sup>105</sup> Caution needs to be exercised here. An explicit power of amendment was formerly provided in South Australia, but the Full Court of the Supreme Court in *Crafter v Webster*<sup>106</sup> held that such power did not in itself extend to overturning the strict rule against the out-of-time pleading of fresh facts amounting to a new ground of challenge. However, that Court was willing to find power in an atypically liberal provision in the *Limitations of Actions Act 1936* (SA) which provided a slip rule for the institution of *any* actions in the interest of justice. Presumably the same leniency, at least in exceptional circumstances, might be granted in South Australia today.

The only jurisdiction where a liberal approach to amendment out of time has consistently been taken is Queensland. Contrary to the run of High Court reasoning, Queensland courts have twice held that power exists to amend matters of substance out of time. The legal bases for this can be criticised. In the first case, *The Flinders Election Petition; Forde v Lonergan*,<sup>107</sup> the petitioner was allowed to rely on allegations of official default not pleaded in the original petition. The blunt justification was that an election tribunal had to apply the ‘real justice’ principle.<sup>108</sup> Besides not addressing the rationale for the strict rule against amendment, it was not made clear what, if any, principles should guide such discretion. The ‘real justice’ principle, as we have noted, is not an invitation to judicial licence or electoral law exceptionalism.<sup>109</sup> In particular, it does not dispense with formal requirements of the legislation, such as time periods and the

102 Dawson J’s apparently contrary statement of the rule in *Pavlovich-Smith v AEC*, above n77 at 712 (‘no amendment of the facts ... will be allowed if ... more than 40 days have elapsed’) should not be read as broadly as it literally appears. Besides being obiter, it did not take into account the 1990 liberalisations, below n103.

103 *CEA* (Cth) ss355(aa), 348(2),(3). See *Sykes v AEC*, above n77.

104 As was ruled in respect of part of the petition in *Sue v Hill*, above n1.

105 *EA* (WA) s162(1)(cb).

106 (1979) 23 SASR 61 at 62–63.

107 [1958] Qd R 324.

108 *Id* at 335.

109 Above n70.

need for a petition to be witnessed.<sup>110</sup> The second case, *Tanti v Davies (No 2)*,<sup>111</sup> was more circumspect, but still rejected the prevailing *Cameron v Fysh* approach. *Tanti* featured two sets of amendments made out of time, including one involving new facts and a section of the Act not previously pleaded (although the amendments were substantially the same as critical facts already pleaded).<sup>112</sup> The judge was willing to hold that the Queensland Court of Disputed Returns had substantially the same procedural powers as the Supreme Court in its ordinary civil jurisdiction, a view which had been rejected in the South Australian case of *Crafter v Webster*.

The licence for this less strict position in Queensland is now said to rest on a negative provision in the Act that the seemingly mandatory procedural requirements 'do not, by implication, prevent the amendment of [a] petition'.<sup>113</sup> In the petition by *Tanti*, a second judge, whilst striking out one bad part of a pleading, declared in dicta that 'if further facts come to light when Commission documents are inspected, the petitioner may ... seek to amend the petition [by relying on the Act]'.<sup>114</sup> While the position in Queensland seems inconsistent with long-standing policy and statutory interpretation elsewhere, it may have an unexpressed local rationale. The time limitation for filing in Queensland is unreasonably short. Used judiciously, the power to amend can overcome this, although there are obvious dangers in applying one dubious rule to undo the effects of another.

### C. *Expedition and its Limits*

The push for finality in election outcomes, evident in the strictness of the rules on filing and amendment, is mirrored in several jurisdictions by injunctions to the courts to exercise expedition. These may be reinforced by shortened interlocutory process in special disputed returns rules of court. For instance, *CEA (Cth)* s363A states: 'The Court of Disputed Returns must make its decision on a petition as quickly as is reasonable in the circumstances.'<sup>115</sup> Even where not explicitly legislated, some sense of urgency ought to possess the judicial mind, since as the Privy Council said in 1870: 'the [electoral] jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the [Parliament] to be distinctly and speedily known.'<sup>116</sup>

The rationale for expedition is clear. However, expedition is not a goal in itself. *Finality* is the goal, and finality is not simply a product of a rapid opening and shutting of a case. Finality rests upon justice being seen to be done, because without that there may be no acceptance of the ultimate fairness of the process or

110 *Re Barry Ceminchuk*, above n90 at 3.

111 [1996] 2 Qd R 591 at 600 (hereinafter *Tanti*).

112 *Ibid*.

113 *EA (Qld)* s130(4).

114 *Tanti v Davies (No 1)* [1996] 2 Qd R 102 at 108 (Williams J).

115 See similarly *EA (Qld)* ss134(3),(4).

116 *Théberge v Laudry* (1870) 2 App Cas 102 at 106.

outcome. As a consequence, overly strict rules on matters such as filing times and amendability may bring the ideal of justice and the electoral system into disrepute if in a particular case it is perceived, especially by the community and specific electorate involved, that serious and substantiable allegations are not given their 'day in court'. The argument in *Rudolph v Lightfoot* may have been worthy of more substantial judicial rebuttal, and certainly raises questions of legislative reconsideration of the shortness of time limits and the desirability of a slip rule for cases where evidence of electoral irregularities could not, by their nature, have been known at the time of the poll.

## 5. *Appellate Review*

### A. *Current Provisions and Policy*

All jurisdictions, except Tasmania, currently purport to deny any appeal from a decision on a disputed return (or indeed a disputed qualification reference). The typical provision is akin to *CEA* (Cth) s368: 'All decisions of the Court shall be final and conclusive and without appeal, and shall not be questioned in any way.'<sup>117</sup> Since disputed returns power is now recognised as judicial in nature, no 'back-door' appeal is possible through a prerogative writ.<sup>118</sup> Tasmania alone, where disputed returns power is directly vested in the Supreme Court, allows a 10 day period before the initial order takes effect within which leave may be sought from the Full Court.<sup>119</sup> In reality, Tasmania may not be alone because, as discussed below, appeals in general are constitutionally guaranteed from state supreme courts to the High Court.

Aside from this constitutional aspect, appeals are essentially creatures of statute. This is doubly so when the jurisdiction appealed from itself has a statutory basis. But the deeper question is this: what are the policy reasons for and against allowing an appeal from disputed returns and qualifications decisions?

The chief argument against appeals is expedition: questions relating to the membership of the legislature should be resolved, with finality, as soon as possible. When disputed returns power was exercised by parliamentary committees, there was no right of appeal (although current United Kingdom law permits one level of appeal to the Court of Appeal).<sup>120</sup> The general approach of the common law was averse to finding avenues of appeal from electoral decisions, for instance by denying any prerogative right to petition the Privy Council. It was reasoned that the electoral jurisdiction was 'extremely special: it is of a character that ought, as

117 See also *PEEA* (NSW) s169; *CAAA* (Vic) s292; *EA* (Qld) s141; *EA* (WA) s167; *EA* (SA) s108; *EA* (ACT) s255; *NTEA* (NT) s119. The Queensland position appears set to change, below n126.

118 This follows from Mason CJ's opinion in *Re Brennan*; *Ex parte Muldowney* (1993) 67 ALJR 838 at 839.

119 *EA* (Tas) ss227, 228; *Electoral Rules* 1985 (Tas) rr26–27.

120 With leave of the High Court and on questions of law only: *Representation of the People Act* (UK) s157(1).

soon as possible, to become conclusive, in order that the constitution of the assembly may be distinctly and speedily known', and which because of its history, was not suitable for determination by an entity as close to the Crown as the Crown in Council.<sup>121</sup>

However, expedition alone is insufficient as a policy rationale. Finality is the goal served by expedition, and finality may not necessarily be achieved if a decision on a disputed returns or qualifications matter is perceived to be inadequately reached. Appeal mechanisms can help reinforce a sense of satisfaction with the judicial process, even when they are *not* used (as then the losing party is perceived to have accepted the result).

A broader benefit of allowing appeals is to co-ordinate the development of electoral law. Appeals are likely to provide a more authoritative source of rulings in terms of the hierarchy of precedent and, focused as they are on contested issues of law rather than fact, are likely to generate a deeper level of jurisprudential analysis and coherence. It has been over a century since there has been any sustained building of a corpus of electoral case law. That came about without an appeals system because petitions were common in the heyday of the election courts in late Victorian times. Important principles were generated afresh, including, for example, the development of the principle of agency as a means of combating undesirable campaign practices by the supporters of candidates.<sup>122</sup> Parliamentary elections are more numerous now, especially in Australia's federal system, and few would argue that they are altogether clean of dubious finance and advertising practices, to name just two areas. Yet petitions are not so common that trial judges alone can develop a coherent framework of principle. On the contrary, uncertainty remains over some basic questions, such as the onus of proof and the interaction of statute, discretion and the common law and an appeals jurisdiction may be the only way the development of principled interpretation and application of the law can be achieved.

After reviewing such arguments, a Queensland parliamentary committee recently recommended reinstating an explicit appeals mechanism, by right on questions of law, by creating an Appeals Division of the Court of Disputed Returns.<sup>123</sup> Lying behind this recommendation is the fact that the two previous Queensland elections resulted in knife-edge parliaments, followed by electoral petitions in which the fate of government apparently rested in the hands of a single judge. The first, *Tanti v Davies (No 3)*,<sup>124</sup> resulted in a petitioner-friendly decision which led to the downfall of the ALP government at the subsequent Mundingburra

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121 *Strickland v Grima*, above n24 at 296 (application from Malta) re-affirming *Théberge v Laudry*, above n116 (application from Québec).

122 O'Leary, above n26 at 231.

123 LCARC, above n58 at 50–51. Under the superseded legislation such an appeal lay from the Elections Tribunal to the Full Court of the Queensland Supreme Court: *Elections Act* 1983 (Qld) s154.

124 [1996] 2 Qd R 602: contrast the result with *Bridge*, above n84, where a similarly small majority was not impugned although a similarly small number of ballots were not cast.

re-election. The second, *Carroll v Electoral Commission of Queensland*,<sup>125</sup> saw the retention of the seat by the ALP member in the face of adverse judicial findings against some of the canvassing practices of his supporters, a result which ensured the survival of a minority ALP government. Both cases preceded *Sue v Hill* and it is probable that the disappointed litigants did not appreciate the possibility that a High Court appeal was constitutionally preserved. Whilst rejecting the idea of a separate electoral Appeals Division, the Queensland Government has accepted the desirability of an appeal, as of right on questions of law, to the Court of Appeal.<sup>126</sup>

### **B. *The Electoral Jurisdiction as Judicial Power and the Constitutional Validity of Ousting Appeals***

Section 73 of the Constitution provides that the High Court ‘shall have jurisdiction... to hear and determine appeals from all judgments, decrees, orders, and sentences... of the Supreme Court of any state’. It is clear that if disputed returns jurisdiction is conferred upon a state supreme court, then a right to appeal to the High Court is constitutionally guaranteed. Section 73 provides an absolute right to appeal that will override any contrary state legislation. The right is not to an appeal de novo, but to correct errors of law.<sup>127</sup>

This issue arose in 1906 in *Holmes v Angwin*.<sup>128</sup> Disputed returns under the *Electoral Act* 1904 (WA) were determined by a single judge of the Supreme Court of Western Australia sitting as the Court of Disputed Returns. Section 167 of the Act declared decisions of this body to be ‘final and conclusive’. An appeal was purportedly lodged in the High Court from the Court of Disputed Returns, leaving the High Court to determine whether it possessed the jurisdiction to hear the matter under s73. Griffith CJ found that s73 was directed at bodies created to exercise judicial power, that is, ‘created to administer justice between suitors in respect to all kinds of civil rights... and also to administer the criminal law’.<sup>129</sup> In this case, the High Court held that s73 did not apply and that the appeal to the High Court was accordingly incompetent. Although comprising a member of the Supreme Court, that person was held to have been appointed to the Court of Disputed Returns as a *persona designata*. The powers exercisable by the Court of Disputed Returns were also characterised as legislative, and hence non-judicial, given that the right to determine electoral issues had formerly resided with Parliament at

125 [1998] QSC 190.

126 Electoral and Other Acts Amendment Bill 2000 (Qld) cl8. As to the constitutional reasons for this decision, see text at n155.

127 *Eastman v R* (2000) 172 ALR 39, especially at 59–66 (McHugh J).

128 (1906) 4 CLR 297. See also *Hammersley v McCabe*, above n63.

129 *Holmes v Angwin*, id at 303. Compare the definition of judicial power developed by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357: ‘the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action’.

Westminster. In the words of Barton J: 'The character of the jurisdiction which has been exercised by Parliaments as to election petitions is purely incidental to the legislative power; it has nothing to do with the ordinary determination of the rights of parties who are litigants.'<sup>130</sup>

This approach to s73 was upheld by the High Court in 1939 in *Webb v Hanlon*.<sup>131</sup> That case concerned the Queensland Elections Tribunal established under the *Elections Act* 1915 (Qld). The Tribunal was constituted by a single judge of the Queensland Supreme Court. The Act allowed an appeal from the Tribunal to the Full Court of the Queensland Supreme Court. A dispute was determined by the Elections Tribunal and the result appealed to the Full Court. One of the parties then sought to lodge an appeal in the High Court from the decision of the Full Court, arguing that an appeal lay as of constitutional right. The High Court applied *Holmes v Angwin* to hold that the Elections Tribunal was not a 'Supreme Court' under s73 of the Constitution, and thus that there was no right of appeal from that body to the High Court. However, the High Court did not finally determine whether, once the matter had reached the Full Court of the Supreme Court, an appeal then lay to the High Court. While a majority indicated that an appeal might lie, leave to appeal was in any event refused in part because of the nature of the jurisdiction.

*Holmes v Angwin* and *Webb v Hanlon* are clear authority for the proposition that an appeal as of right under s73 of the Constitution does not lie from a decision of a state Court of Disputed Returns. This meant that a state parliament could legislate to prevent an appeal from such a body. Both decisions, and the effectiveness of the state legislation, rest upon the notion that the power exercised by such tribunals is legislative rather than judicial. However, since these decisions, the approach of the High Court to judicial power has undergone a revolution. The Court has strictly applied two limitations arising from the separation of judicial power at the federal level:<sup>132</sup>

1. only Chapter III courts (that is, courts created under s71 of the Constitution) can be conferred with federal judicial power; and
2. Chapter III courts cannot be conferred with power other than federal judicial power, except where such other power is ancillary or incidental to the exercise of federal judicial power.

These limitations have implications for the decisions in *Holmes v Angwin* and *Webb v Hanlon* and whether disputed returns power can be vested in the High

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130 *Holmes v Angwin*, above n128 at 309. Compare *R v Richards*, above n29 at 167 (Dixon CJ: 'This is not the occasion to discuss the historical grounds upon which these powers and privileges attached to the House of Commons. It is sufficient to say that they were regarded by many authorities as proper incidents of the legislative function, notwithstanding the fact that considered more theoretically — perhaps one might even say, scientifically — they belong to the judicial sphere.')

131 (1939) 61 CLR 313.

132 See, for example, above n27.

Court.<sup>133</sup> It has been argued by Schoff and Walker that if the two decisions are correct in asserting that disputed returns power is legislative, then such power could not be vested in the High Court because this would breach the second limitation.<sup>134</sup> Alternatively, if such jurisdiction can be vested in the High Court, it suggests that disputed returns power as exercised by that Court must be judicial<sup>135</sup> and not legislative, and hence that *Holmes v Angwin* and *Webb v Hanlon* were wrongly decided.

In *Sue v Hill*, Gleeson CJ, Gaudron, Gummow and Hayne JJ held as a matter of construction that the petitions disputing Senator-elect Hill's qualifications fell within the High Court's jurisdiction under the *CEA* (Cth). This meant that they also had to confront a further submission, as to which the three dissenting judges expressed no opinion, that such a conferral of jurisdiction was itself unconstitutional. This involved the argument that the functions of Courts of Disputed Returns were not 'judicial' in nature and could not validly be conferred upon a Chapter III court such as the High Court. Relying upon *Holmes v Angwin*, it was submitted that since all such functions are incidental or ancillary to the working of legislative institutions, they must be regarded as incidents of legislative power.

Gleeson CJ, Gummow and Hayne JJ noted that the decision in *Holmes v Angwin* had been delivered before that of Isaacs J in 1926 in *Federal Commissioner of Taxation v Munro*,<sup>136</sup> in which he had developed a 'functional analysis' under which 'some powers when entrusted to a repository other than a court may be characterised as legislative or administrative and non-judicial, when they are entrusted in an appropriate context to a court they may involve the exercise of judicial power'.<sup>137</sup> Hence, when a disputed returns power is exercised by a parliament, it may be said to be an incident of legislative power, but when vested in a court it can take on a judicial aspect. They stated:

the Court of Disputed Returns is not applying the amalgam of centuries of practice and piecemeal statutory provision which constituted 'the Common Law of Parliament' .... Rather ... what is involved in Australia ... is contravention of the particular legislative provisions identified in s 352(1) of the Act .... There is nothing in the nature of the resolution of disputed elections which places such controversies necessarily outside the exercise of the judicial power of the Commonwealth.<sup>138</sup>

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133 See generally, LCARC, above n58 at 29–55.

134 Schoff, above n31; Walker, above n52.

135 This is the conclusion reached by Walker, *id* at 269, who argues that *Holmes v Angwin* and *Webb v Hanlon* should be overruled to the extent that they hold that disputed returns power is non-judicial. On the other hand, Schoff, *id* at 350 does not reach a definite conclusion.

136 (1926) 38 CLR 153 at 178–179.

137 *Sue v Hill*, above n1 at 658.

138 *Id* at 658–660, applying *Hudson v Lee*, above n85 (Gaudron J).

In any event, Gleeson CJ, Gummow and Hayne JJ found that they did not need to rely upon the ‘functional analysis’ of Isaacs J. They held that the *CEA* (Cth) had conferred original jurisdiction upon the High Court to determine the petition against Hill. This involved a matter arising under the Constitution or involving its interpretation, as well as the determination of constitutional facts, ‘a central concern of the exercise of the judicial power of the Commonwealth’.<sup>139</sup> Hence, no resort to ‘functional analysis’ was necessary as it was clear in this case that the High Court was exercising judicial power. Gaudron J reached the same result.<sup>140</sup> It is one that accords with the historical trend and policy arguments adduced earlier.

In so far as *Holmes v Angwin* decided that disputed returns power is *always legislative* in character, it was effectively overruled by *Sue v Hill*. However, the majority in *Sue v Hill* did not hold the converse to be true, that disputed returns power is *always judicial*. They only held that the power exercised by the High Court in that case in dealing with a disqualification provision in s44 of the Constitution was judicial and not legislative. Whether disputed returns power is judicial when exercised at the state level will depend upon the exact scope of the power in each jurisdiction and the nature of the body exercising it. Whatever the decision of the High Court in each case, there are two possible consequences for state bodies that may significantly affect their operation.

First, *Sue v Hill* shows that it is clearly arguable that disputed returns jurisdiction exercised by state bodies is judicial in character. If this is correct (and we would argue it is, in conformity with the historical trends and policy reasons discussed earlier) and the power is held by a non-judicial body constituted by a judge of a Supreme Court in his or her personal capacity, it does not mean that this power has been improperly vested. The limitation derived from the Constitution that only courts be conferred with judicial power applies to federal judicial power and to Chapter III, that is, federal, courts. The High Court has held that there is no equivalent separation of judicial power at the state level.<sup>141</sup> Instead, the problem arising would be that the premise upon which *Holmes v Angwin* was decided would be flawed, and that the holding in that case that no appeal lies from a state disputed returns body to the High Court under s73 of the Constitution is also probably incorrect. Hence, after *Sue v Hill* it is now arguable (as Walker indeed argued prior to that case)<sup>142</sup> that *Holmes v Angwin* was wrongly decided and that an appeal does lie from a state disputed returns body to the High Court, despite the terms of any state statute that declares the decision of the state body to be final and conclusive.

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139 *Sue v Hill*, above n1 at 660.

140 *Sue v Hill*, above at 684–691.

141 *Kable v DPP (NSW)* (1996) 189 CLR 51. See also *Clyne v East* (1967) 68 SR(NSW) 385; *Building Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.

142 Above n52 at 273.

This consequence however is not mandated by *Sue v Hill*. Gleeson CJ, Gummow and Hayne JJ noted in *Sue v Hill* that the Western Australian statute considered in *Holmes v Angwin* created a ‘new and separate tribunal consisting of a judge of the Supreme Court of Western Australia’, whereas the *CEA* (Cth) ‘fixes upon “the High Court”’.<sup>143</sup> This might be a means of distinguishing the two decisions, at least as to those state jurisdictions that vest power in a separate tribunal and not directly in the Supreme Court. Alternatively, the High Court could recast *Holmes v Angwin* as being correctly decided on another ground. The Court might hold that a state disputed returns body is a non-judicial body or simply not a ‘Supreme Court’, and hence not subject to s73 of the Constitution. This holding could be reached despite the state body exercising judicial power because, consistent with *Holmes v Angwin*, the Supreme Court judge staffing the body would be doing so not as a judge but as a *persona designata*. In other contexts, the High Court has been willing to stretch the *persona designata* doctrine to permit the conferral of non-judicial functions upon federal judges, thereby allowing such judges to act as a *persona designata* even where they are carrying out a function bestowed upon them because of their judicial office.<sup>144</sup>

If, on the other hand, disputed returns power as vested in a state jurisdiction is legislative, then *Holmes v Angwin* remains correctly decided and no appeal issue arises. However, this would lead to a further difficulty arising out of the 1996 decision of the High Court in *Kable v DPP (NSW)*.<sup>145</sup> The *Community Protection Act* 1994 (NSW) empowered the New South Wales Supreme Court to make ‘preventive detention orders’, that is, to order the imprisonment of a person (specifically Gregory Wayne Kable), although that person had not been found guilty of a criminal offence. Two arguments were put to the High Court to suggest that this Act was invalid. The first was that it infringed the separation of judicial power achieved by the *Constitution Act* 1902 (NSW). This was rejected.

The second argument was that the Act infringed the separation of judicial power achieved by the Commonwealth Constitution. Specifically, it was submitted that the Act infringed the incompatibility doctrine developed in *Grollo v Palmer*.<sup>146</sup> A majority of the High Court accepted this, finding, in the words of McHugh J, that ‘the Act is invalid because it purports to vest functions in the Supreme Court of New South Wales that are incompatible with the exercise of the judicial power of the Commonwealth by the Supreme Court of that state’.<sup>147</sup> This

143 *Sue v Hill*, above n1 at 657.

144 *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348. Compare *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 and the dissent of Mason & Deane JJ in *Hilton v Wells* at 84: ‘To the intelligent observer ..., it would come as a surprise to learn that a judge, who is appointed to carry out a function by reference to his judicial office and who carries it out in his court with the assistance of its staff, services and facilities, is not acting as a judge at all, but as a private individual. Such an observer might well think, with some degree of justification, that it is all an elaborate charade’.

145 Above n141.

146 Above n144.

147 *Kable v DPP*, above n141 at 109.

implied limitation arose because the Commonwealth Constitution requires 'the continued existence of a system of state courts with a Supreme Court at the head of the state judicial system'.<sup>148</sup> For example, s73, in conferring jurisdiction upon the High Court to hear appeals from state Supreme Courts, implies that the New South Wales Parliament cannot abolish the Supreme Court of New South Wales.

If, despite the finding in *Sue v Hill*, *Holmes v Angwin* is correct and disputed returns power as vested at the state level is legislative and not judicial, then it is arguable that such power cannot be conferred upon a state Supreme Court. *Kable* demonstrates that a non-judicial function cannot be conferred upon a state Supreme Court where this would be incompatible with the judicial role of that body. A conferral of disputed returns power is arguably incompatible because it would compromise the independence of the judges in that it would involve them in what is essentially a political process.<sup>149</sup> The conferral of disputed returns jurisdiction is particularly vulnerable in Tasmania where the power is explicitly vested in the Supreme Court without even establishing a separate Court of Disputed Returns.<sup>150</sup>

An analogy might be drawn with the decision of the High Court in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*.<sup>151</sup> In that case, the High Court held, with Kirby J dissenting, that the appointment of Justice Jane Mathews of the Federal Court to prepare a report for the Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) was invalid. The High Court majority found that the function of the author of a report was not an independent one, but 'a position equivalent to that of a ministerial adviser' which 'places the judge firmly in the echelons of administration, liable to removal by the minister before the report is made and shorn of the usual judicial protections'.<sup>152</sup> This breached the incompatibility doctrine in that it undermined 'public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity'.<sup>153</sup>

It might be thought that there is a formalist path through this quagmire that would avoid both potential problems. Disputed returns power in each state could be conferred upon a separately established non-judicial body. That is, not vested in the Supreme Court of a state acting as a Court of Disputed Returns, but in a tribunal that does not have such an obvious connection with the Supreme Court. That tribunal could then be staffed by judges of the Supreme Court, consenting to act in the position in their personal capacity. This model is in place in the Northern Territory, where legislation establishes the Election Tribunal.<sup>154</sup> However the

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148 *Id* at 110.

149 See generally the arguments outlined in Schoff, above n31 at 345–350.

150 *EA* (Tas) s215(1).

151 Above n144.

152 *Id* at 18–19 (Brennan, CJ, Dawson, Toohey, McHugh & Gummow JJ).

153 *Grollo v Palmer*, above n144 at 365 (Brennan CJ, Deane, Dawson & Toohey JJ).

154 *NTEA* (NT) s107(1), (2).

quagmire may be too deep to permit such a formalist solution. If, as we argue, disputed returns power at the state level is judicial in nature, conferring it on a separate, non-judicial body would raise further questions, post *Kable*, in that this may threaten the constitutional requirement that a system of state courts continue to exist with the Supreme Court at its head.<sup>155</sup>

### C. *Stated and Special Cases*

In trial litigation generally, procedure often exists for questions to be referred to a higher bench during a trial, with certain facts being settled in writing for reference by the full court. The procedure can take the form of a stated case or a special case. A stated case is technically referred and settled by the judge. In a special case, the parties agree to the reference and settle the facts and question. The distinction may be one without a difference where harmony is prevailing amongst the parties and the bench, but there is one practical difference from the point of view of a full court. In the special case, the full court typically may draw inferences of fact or law from the documents, as if they contained evidence that had been proven at trial.

Stating or reserving facts and questions for a full bench is obviously not an appeal procedure, not least because the usual purpose is to feed the superior court's decision or opinion on a question of law into an ongoing trial court procedure, and only certain aspects of the ongoing proceedings may be considered. But, like an appeal, with some cost to the parties and perhaps delay in reaching finality, it exposes legal questions to considered judgment by several, usually senior judges. Aside from deepening the jurisprudence in a field, it may also encourage both the parties and the wider public to believe that the ultimate decision is a just one.

Only Tasmania<sup>156</sup> and the Commonwealth<sup>157</sup> explicitly provide in their electoral legislation for disputed returns questions to be referred to a full court. Both label them 'special cases'. However, the more common procedure in the High Court sitting as the federal Court of Disputed Returns has been the use of the broad *Judiciary Act* 1903 (Cth) mechanism for stating cases and reserving questions.<sup>158</sup> This occurred in two ground-breaking Senate challenges. The first, *Re Wood* concerned the successful petitioning of a Senator-elect on the grounds that he was constitutionally disqualified where a novel question also arose as to how to fill the vacancy.<sup>159</sup> Rather than leave a single Senate vacancy to be filled by a statewide election which would have distorted the proportional representation system, the Full Bench of the High Court determined that a recount would be the proper procedure, and that was conducted under the ambit of the trial judge.

155 We are indebted to one of the anonymous referees for raising this point. The same concerns were identified in the Queensland Solicitor-General's advice following the LCARC report, above n58. This advice is summarised in the Ministerial Response to the report, which was tabled in Queensland Parliament on 29 February 2000.

156 *EA* (Tas) s220 ('special case').

157 *High Court Rules* o68 r2, picking up o35 rr1-8 concerning special cases.

158 *Judiciary Act* 1903 (Cth) s18.

159 *Re Wood*, above n48.

More recently, in *Sue v Hill* difficult questions were raised by the respondent, Senator-elect Hill, challenging the assumptions that Britain is a foreign power and that the High Court should be determining the question of her qualification without a Senate reference. The Full Court resolved both these questions against her. The Senate recount procedure was again used, but not without some disquiet. It was realised that any recount could not completely unscramble the egg, and that Senators declared elected after the disqualified candidate had an interest in making submissions on the recount since, in mathematical theory at least, their seats could be affected. A third important petition involving constitutional disqualifications effectively resolved by a Full Court on a case stated was *Sykes v Cleary*.<sup>160</sup>

The benefits of involving a full court on thorny legal questions are obvious. It may be that courts of disputed returns outside the federal and Tasmanian arenas could find power to reserve questions, because in general terms they *are* the Supreme Court and hence they can invoke Supreme Court procedure, at least where that is not clearly inapplicable.<sup>161</sup> However, expedition is both a common law, and in some places, a statutory requirement in the electoral jurisdiction, and a judge may feel that the need for speed overrides any implication of an unexpressed power to reserve a question. In any event, it would be a worthwhile reform if all jurisdictions made it clear in their electoral legislation that discretionary power exists to reserve questions to a full bench in a suitable case. This has been recommended in Queensland.<sup>162</sup>

It might be objected that a determination on a question reserved will itself be open to a delaying, High Court appeal. In *Webb v Hanlon*, at least two judges said that an appeal to the Queensland Full Court on an election challenge amounted to a judgment of the Supreme Court, which could not be rendered final by a state ouster clause.<sup>163</sup> From the point of view of the High Court, a determination of a reserved question is surely an interlocutory matter, and it would ordinarily be rare for leave to appeal to be granted in such matters. Counter-balancing this is the fact that any electoral question worth reserving to a full bench would be both of public interest (because of the electoral content) and legal importance (or else it should not have been reserved).

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160 *Sykes v Cleary* (1992) 176 CLR 77. Several candidates' qualifications were impugned. Since Phil Cleary had been elected to a single member House of Representatives constituency, rather than the Senate, a re-election was ruled to be suitable.

161 This is most clearly the case in the ACT, since the pretence of establishing a separate court of disputed returns is not followed. The matter may be less clear in the Northern Territory, which has a separate Elections Tribunal.

162 LCARC, above n58 at 55. It does not, however, feature in the Electoral and Other Acts Amendment Bill 2000 (Qld).

163 Above n131 (Latham CJ & Evatt J).

## 6. *Challenging Electoral Procedure outside the Courts of Disputed Returns*

### A. *Equitable Relief and Judicial Review*

In earlier times, the process of petitioning a return was declared to be the exclusive method of challenging an election in all jurisdictions. In New South Wales, this provision was interpreted so broadly as to exclude any other avenue of challenging or enforcing electoral processes.<sup>164</sup> At the 1981 state election, questions arose as to the validity of ticks and crosses (instead of the numeral '1') on ballots in what was an optional preferential voting system. The electoral authority interpreted such ballots as valid votes — where the elector's intention was clear — and included them in the count. Various candidates issued writs to restrain the declaration of the poll until such votes were excluded. In *McDonald v Keats*,<sup>165</sup> Powell J held that he had no power to rule on such questions under the general law of equity or otherwise. He construed the electoral legislation as erecting a 'code' for elections, and interpreted 'the validity of any election or return may be disputed by petition ... and not otherwise' as excluding such legal process. He reasoned that the 'election' extended to each and every step in the process, from the issue of writs to the declaration of the poll.<sup>166</sup> The result was not just that the parties concerned had to be patient and await the petition process in the specialist disputed returns jurisdiction, but that such petitions would be safe from being struck out only in seats in which the number of ballots in dispute could have affected the outcome.

The decision in *McDonald v Keats* is unsound in law and policy. As a matter of law, it is hard to see in this context why 'election' should be read so broadly. An equally fair reading of the term would read it synonymously with the *return* — that is, the actual election of a candidate in the form of a public declaration and return of the writ. After all, technically it is only that outcome which is challengeable by petition. Further, the provisions for the 'exclusivity' of jurisdiction were historically designed to make it clear that parliamentary committees no longer retained the power to rule on disputed results and that courts alone were the proper fora. They were not designed to exclude other forms of judicial review. Finally, there is later Federal Court authority that ordinary judicial review mechanisms are open to those seeking to enforce the proper administration of elections.<sup>167</sup>

More importantly, the decision was not required by policy, and the better policy arguments lie against it. As the 'first law of election law' suggests, the reasons and scope for disputed returns petitions have more to do with the pragmatic outcome of a poll than the purity of the electoral process. Candidates or indeed electors should not be denied the ability to use standard forms of review, whether judge-

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164 *McDonald v Keats* [1981] 2 NSWLR 268; *Osborne v Shepherd* [1981] 2 NSWLR 277.

165 *Ibid.*

166 *Id* at 274. In doing so, Powell J by-passed an historical argument that electoral jurisdiction was inherently parliamentary.

167 *Courtice v AEC* (1990) 21 FCR 554.

made or legislatively provided, to enforce proper electoral processes prior to a return. Certainly, such cases put judges in the 'hot seat' in the sense of requiring an injunctive and hence discretionary ruling, typically at short notice, whilst polling is being organised or the count is being conducted. But similar requests for intervention are not uncommon in administrative review, and in the electoral sphere they are less 'political' and more clearly 'legal' than a disputed returns petition *after* the result is declared. Finally, a timely review action may obviate the possibility of a later petition, as well as the perception that proper electoral process was not followed.

### **B. Campaign and Election Day Injunctions**

Many jurisdictions provide a direct mechanism in their electoral legislation through which both electoral commissions and candidates can seek injunctions to enforce electoral law. The most developed of these is s383 of the *CEA* (Cth). It vests jurisdiction in the Supreme Courts with an appeal right to the Federal Court. In addition, as noted above, the Federal Court has held that it has original power with respect to federal elections to hear similar claims by candidates, and probably by electors, in the form of judicial review.<sup>168</sup>

Claims seeking injunctions and declarations are becoming more common, especially during campaigning and election preparation. The most (in)famous such litigation involved Albert Langer, who promoted a form of optional preferential voting. He was gaoled for contempt of injunction: the severity of the sentence, but not the injunction itself, was overturned on appeal.<sup>169</sup> Election day challenges, literally actions inter-(political) parties, are more common, although judges have been wary of granting them except in clear cases. Given the short time frames of polling day (generally 8am to 6pm), by the time an application is heard it is easy for an equivocal judge to decide that the balance of convenience lies against granting an injunction.<sup>170</sup>

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168 Ibid. No objection on the ground of standing was raised by the AEC against someone who technically was an elector rather than a candidate in *Cusack v AEC* (Federal Court, Spender J, 29 November 1984). Such challenges could be informed by freedom of information applications against the electoral commissions: for example, *Re Murphy and AEC* (1994) 33 ALD 718.

169 *AEC v Langer* [1996] 1 VR 576 (injunction); *AEC v Langer* (Victorian Supreme Court, Beach J, 14 February 1996) (sentencing); *Langer v AEC* (1996) 59 FCR 450 (injunction appeal); *Langer v AEC* (1996) 59 FCR 463 (sentencing appeal). For secondary discussion, see Kate Eastman, 'Langer v Commonwealth: The High Court's Retreat on the Implied Guarantee of Freedom of Communication' (1996) 3 *AJ Human Rights* 152; Graeme Orr, 'The Choice Not to Choose: Commonwealth Electoral Law and the Withholding of Preferences' (1997) 23 *Mon LR* 285.

170 The distribution of allegedly misleading how-to-vote cards has generated a fair amount of election day litigation: for example, *Goss v Swan* [1994] 1 Qd R 40; *Malone v Bird* (Queensland Supreme Court, Williams J, 30 April 1994).

### C. *Review of Voter and Party Registration*

At first glance, nothing in electoral law seems as mundane as the question of proper roll-keeping. Indeed, the work of those quasi-administrative tribunals of the 19<sup>th</sup> century in Britain, the Revision Courts, staffed by barristers, offers little interest today. This view, however, obscures a significant historical moment. One of the greatest politico-legal battles in the Westminster tradition was fought over this jurisdiction in the early 18<sup>th</sup> century.

Perhaps emboldened by its victory over Chancery in securing the electoral jurisdiction in the early Stuart reign, the House of Commons tried to assert, as against the common law courts, the sole right to determine individual claims to the franchise. This led to the most celebrated electoral litigation of all: *Ashby v White*.<sup>171</sup> Ashby, who had been denied a vote because he was allegedly not a settled inhabitant of the borough, brought a common law action against various local officials. He was ultimately successful in an appeal to the House of Lords. Jealously, the Commons resolved that it alone had power over election questions, which it took to extend to franchise claims (except where it ceded its power by statute). It declared Ashby, or any person who acted similarly, to be in contempt for high breach of parliamentary privilege. The Lords responded with its own set of resolutions, declaring that the Commons, in deterring electors from prosecuting franchise claims before the courts, was in breach of its own privileges.<sup>172</sup> In an overheated atmosphere, citizens who filed similar process to Ashby were gaoled by Commons warrant. Queen Anne, and unsurprisingly those judges who heard habeas corpus writs on behalf of those imprisoned, sided with the Lords. The dispute ultimately established the important principle that citizens have the right to seek redress in the courts in such matters, and hence that parliamentary power is limited.

Today, most jurisdictions provide special provisions for the review of both voter and party registration decisions. Enrolment review typically takes the form of administrative review, although the review body may vary from the local or magistrates court, to senior electoral officials or an administrative appeals tribunal.<sup>173</sup> Even in those jurisdictions which do not explicitly make voter registration decisions reviewable, such decisions are probably examinable under ordinary judicial review principles. Reported case law on these decisions, unsurprisingly, is rare: decisions typically turn on individual circumstances.<sup>174</sup> However, with new federal rules planned which will make registration more

171 *Ashby v White* (1704) 14 State Trials 695; (1703) 40 ER 1188 (Queen's Bench); 1 ER 417 (House of Lords). Holt CJ's dissenting judgment in the Queen's Bench is the key. He held the right to vote to be a species of property and hence a valuable right deserving of common law protection.

172 David Oswald Dykes, *Source Book of Constitutional History from 1660* (1930) at 205–207.

173 *CEA* (Cth) Pt X (Australian Electoral Officer, then to AAT); *PEEA* (NSW) ss48, 49 (Local Court); *CAA* (Vic) ss74, 75 (Magistrates Court); *EA* (Qld) s180 (Magistrates Court); *EA* (SA) Pt 12 Div 1 (Electoral Commissioner or Local Court); *EA* (Tas) Pt 3 Div 4 (Court of Petty Sessions). Provision for objection to *another* person's enrolment is also common.

174 For example, *Re Lake and Australian Electoral Officer* [1998] AATA 83.

difficult, especially for new electors,<sup>175</sup> and with evidence of false enrolments being driven by party pre-selection battles,<sup>176</sup> more attention may be paid to registration challenges.

Party registration is a comparatively recent phenomena, and not present in all jurisdictions. Registration decisions are reviewable.<sup>177</sup> Registration entitles the party to significant benefits such as centralised control of nominations and receipt of public funding, ballot labels, and, where group voting exists, to control the flow of their preferences. For that reason, and because parties in any event represent significant clusters of ideology and support, sometimes organised in convoluted ways, party registration decisions will inevitably attract much more attention and probably raise more complex legal questions than voter registration decisions. The most notable of the few cases thus far on party registration has been the deregistration of the Queensland One Nation Party.<sup>178</sup> Indeed, in the wake of that decision, at least one jurisdiction has tightened its registration procedures to require annual reviews.<sup>179</sup>

## 7. Conclusion

One general observation that arises out of this survey of the history and doctrine of electoral jurisdiction is ‘the first law of electoral law’. This holds that it is not the seriousness of the breach of electoral process, but the closeness of the contest that gives rise to litigation. As a result, *all* close contests, but few others, may give rise to litigation — the ultra-marginal returns will inevitably be examined by lawyers for the defeated major party candidate who will search for even speculative reasons to mount a challenge.

This rule is generated by a combination of restrictions on the scope of petitions and the pragmatics of their litigation as a rather hurried, civil and adversarial process. Since close outcomes arise more commonly in small rather than large electorates this gives rise to a counter-intuitive result for electoral law generally: the less important the election (measured in the numbers of voters involved) the greater the chance that litigation will be an option. Although non-parliamentary

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175 *Electoral and Referendum Amendment Act (No 1)* 1999 (Cth) Sch items 10–12 and regulations to be made under it.

176 Most prominently revealed in the ongoing Criminal Justice Commission (Qld) *Inquiry into Allegations of Electoral Fraud* (‘Shepherdon Inquiry’).

177 *CEA* (Cth) s141 (AAT). *CAA* (Vic) s148U (Supreme Court). *EA* (Qld) s180 (Supreme Court). *EA* (SA) Pt 12 Div 1 (Electoral Commissioner or Local Court). *EA* (Tas) ss64, 65 (Registration Objection Board formed by Supreme Court).

178 *Sharples v O’Shea*, above n92, discussed in Graeme Orr, ‘Of Electoral Jurisdiction, Senate Ballot Papers and Fraudulent Party Registrations: New Developments in Electoral Case Law’ (1999) 2 *CLPR* 32. The deregistration was affirmed on appeal: *Sharples v O’Shea and Hanson* [2000] QCA 23 (Queensland Court of Appeal, 10 March 2000). A prior case was *Re Williams and AEC* (1995) 21 AAR 467 (challenge to change to register involving internal dispute in the Western Australian Greens party).

179 *PEEA* (NSW) s66HA (inserted in 1999).

elections are beyond the scope of this article, the history of referenda, where legal challenges are almost unheard of, compared to the much smaller electorates involved in industrial, local government and ATSIC elections, where challenges are fairly common, bears this out.<sup>180</sup> The implications of this 'first law' and the sporadic nature of challenges is that the case law of parliamentary elections — and hence the orderly development of interpretations and principles implementing the statutory provisions and constitutional norms of electoral law — is not grounded in a stream of steady litigation involving questions of legal substance. This is exacerbated by the absence of appeals.

A second and broader theme of this article is that procedural questions in Australian electoral law demonstrate a principle of limited judicial intervention. Time limits for disputing returns are short, and prohibitions against amendment are rigid — rather too short and rigid in many instances given the difficulties petitioners and their advisers face in gathering evidence and particularising pleadings. The principle of limited intervention, however, reflects a more basic norm in our electoral law, one that promotes the pragmatic goal of stable governance over more abstract questions of rights and the purity of elections.

The current state of Australian electoral law suggests that this goal has been taken too far. The narrowness of and severe limitations upon judicial review show that too high a premium has been placed upon the need for finality. This has occurred at the expense of the related and equally important goal that justice be seen to be done. The constraints imposed upon judicial review do not adequately account for the fact that important objectives at the heart of electoral law will be undermined if the final result is not seen as a just and fair determination of the dispute. There is a danger that judicial review of the electoral process will itself be brought into disrepute and public confidence lost if in a particular case serious allegations are not heard or are heard only in part, especially if the case might lead to a change in government.

This demonstrates the need for reform. Electoral law is characterised by its slow evolution over the course of this and preceding centuries. As we enter a stage where disputed returns power is seen as naturally falling within the judicial rather than the legislative sphere, there is a need to construct a judicial framework that provides for expedition within more carefully crafted and balanced limits.

We make two main recommendations. First, the rules relating to matters such as filing times and amendability are in most cases overly strict and ought to be rewritten. For example, parliaments should enact a slip rule for cases where evidence of electoral irregularities could not have been obtained by the time of the filing of

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180 Referenda case-law is examined in Graeme Orr, 'The Conduct of Referenda and Plebiscites in Australia: A Legal Perspective' (2000) 11 *PLR* 112. There is an almost total absence of any secondary material dealing with other forms of electoral law in Australia. However, the prevalence of local government and industrial election disputes can be measured in the digested cases, and the frequency of ATSIC cases revealed by searching Federal Court decisions on the Internet at <[www.austlii.edu.au/au/cases/cth/federal\\_ct/](http://www.austlii.edu.au/au/cases/cth/federal_ct/)>.

the petition challenging the poll. The time for challenging a return should also be determined from the last day permitted for the return of all writs, rather than from the unpredictable day on which a particular writ happens to be returned.

Second, an appeal should be available from the Court of Disputed Returns or its equivalent in each state and territory. Indeed, as we have canvassed, whether an appeal right is explicitly provided for or not, it may well be constitutionally guaranteed from such bodies to the High Court. An appeal mechanism should be supplemented by a procedure whereby difficult questions of law can be referred to the full bench of a Supreme Court. These reforms would bolster the perception that electoral disputes are given a full and fair hearing. It would also allow the development of a deeper understanding of electoral jurisprudence and could promote the harmonisation of electoral law across Australia.