HIGH COURT OF AUSTRALIA

HAYNE J

Matter No C17/2013

THE AUSTRALIAN ELECTORAL COMMISSION PETITIONER

AND

DAVID JOHNSTON & ORS RESPONDENTS

Matter No P55/2013

ZHENYA WANG PETITIONER

AND

DAVID JOHNSTON & ORS RESPONDENTS

Matter No P56/2013

SIMON MEAD PETITIONER

AND

DAVID JOHNSTON & ORS RESPONDENTS

Australian Electoral Commission v Johnston
Wang v Johnston
Mead v Johnston
[2014] HCA 5
18 February 2014
C17/2013, P55/2013 & P56/2013

ORDER

1. *The questions of law which, on 13 December 2013, were ordered to be tried separately be answered as follows:*

1. *Did the loss of the 1,370 ballot papers between the fresh scrutiny and the re-count mean that the 1,370 electors who submitted those ballot papers in the poll were "prevented from voting" in the Election for the purposes of s 365 of the* Commonwealth Electoral Act *1918 (Cth) ("Act")?*

   Answer: *Yes.*

2. *Is the Court of Disputed Returns precluded by s 365 or otherwise from admitting the records of the fresh scrutiny, or original scrutiny, that bear on the 1,370 missing ballot papers as evidence of the way in which each of those voters intended to vote, or voted, in the Election for the purposes of each of the petitions filed in the matter, including in so far as those petitions seek relief under ss 360 and 362?*

   Answer: *The Court of Disputed Returns is precluded by s 365 from admitting the records of the fresh scrutiny and the original scrutiny that bear on the 1,370 missing ballot papers for the purpose identified in the proviso to s 365, namely, determining whether the loss of the ballot papers did or did not affect the result of the election. Further, the records of the original scrutiny and the fresh scrutiny that bear on those missing ballot papers are not admissible for the purpose of the Court determining that it should declare any candidate duly elected who was not returned as elected.*

3. *On a proper construction of the Act, including the re-count provisions, is any further inquiry regarding the manner in which the Australian Electoral Officer for Western Australia dealt with the ballot papers reserved for decision pursuant to s 281:*

   (a) *permitted under any, and if so which, provision of the Act;*

   (b) *relevant to the disposition of any, and if so which, petitions before the Court of Disputed Returns;*

   (c) *necessary to the disposition of any, and if so which, petitions before the Court of Disputed Returns?*

Answer: *(a)* *Yes, s 281(3).*

(b) *No.*

(c) *No.*

2. *Costs of the trial of separate questions reserved.*

3. *Stand over further hearing of petitions to Thursday, 20 February 2014 at 12 noon in Melbourne.*

Representation

J T Gleeson SC, Solicitor-General of the Commonwealth and A S Bell SC with P Kulevski for the petitioner in C17/2013, for the eighth respondent in P55/2013 and for the ninth respondent in P56/2013 (instructed by Australian Government Solicitor)

S P Donaghue SC with D W Bennett for the first, third and fourth respondents in each matter (instructed by Colquhoun Murphy)

A D Lang with E M Heenan for the second and eighth respondents in C17/2013, for the second and seventh respondents in P55/2013 and for the petitioner and the second and eighth respondents in P56/2013 (instructed by Slater & Gordon Lawyers)

J A Thomson SC with D B Shaw for the fifth respondent in each matter (instructed by DLA Piper)

R Merkel QC with F I Gordon for the sixth respondent in each matter (instructed by MDC Legal)

K A Barlow QC with T O Prince for the petitioner in P55/2013 and for the seventh respondent in C17/2013 and P56/2013 (instructed by Hopgood Ganim Lawyers)

CATCHWORDS

Australian Electoral Commission v Johnston
Wang v Johnston
Mead v Johnston

Parliamentary elections (Cth) – Senate – Court of Disputed Returns – Petitions disputing election – Election of six senators for State of Western Australia – Election for fifth and sixth Senate places very close – Re-count of ballot papers directed – 1,370 ballot papers lost before re-count – Re-count of available ballot papers led to different candidates being elected to fifth and sixth Senate places from those determined upon "fresh scrutiny" under s 273 of *Commonwealth Electoral Act* 1918 (Cth) ("Act") – Whether result of election likely affected by loss of ballot papers – Whether electors who cast lost ballot papers "prevented from voting" in election – Whether Court precluded by s 365 of Act from admitting evidence of records made at earlier counts about lost ballot papers in determining whether result of election affected – Whether Court could declare candidate duly elected by combining records made in earlier counts about lost ballot papers with results of re-count.

Words and phrases – "duly elected", "prevented from voting", "result of the election was likely to be affected".

Commonwealth Electoral Act 1918 (Cth), ss 263, 273, 281(3), 360(1)(v)-(vii), 362(3), 365.

HAYNE J.

The issues

1 An election of six senators for the State of Western Australia to serve in the Senate of the Parliament of the Commonwealth was held on 7 September 2013. The election for the fifth and sixth places was very close. A re-count was directed, but not all of the ballot papers to be re-counted could be found: 1,370 of them had been lost. On the re-count, the candidates who won the fifth and sixth places differed from those ascertained by earlier counts.

2 Was the result of the election likely to be affected by the loss of the ballot papers? Can this Court now decide who should have been elected? Can it do so by looking at records of earlier counts of the lost ballot papers? And need it now examine ballot papers whose formality is disputed? Or must it instead declare the election absolutely void?

3 The resolution of these questions depends on the proper construction of the Act under which the election was held and under which the result of the election is now challenged: the *Commonwealth Electoral Act* 1918 (Cth) ("the Act"). This decision resolves three questions of law about the construction of that Act. It is the answers to these questions that determine the answers to the questions above.

Outline

4 Section 7 of the Constitution requires that "[t]he Senate shall be composed of senators for each State, directly chosen by the people of the State". The Act provides the mechanisms and procedures by which senators are chosen by the people. In particular, the Act provides for the issue of writs for elections (Pt XIII), the nomination of candidates (Pt XIV), postal voting (Pt XV), pre-poll voting (Pt XVA) and the polling (Pt XVI).

5 Section 263 of the Act provides that the result of the polling shall be ascertained by scrutiny. Section 283(1)(a) of the Act requires the Australian Electoral Officer for the relevant State or Territory to declare the result of the election and the names of the candidates elected as soon as is convenient after the result of the election has been ascertained.

6 Three election petitions have been issued disputing[1] the election of six senators for Western Australia that was held on 7 September 2013. Following the conduct of an original scrutiny and a fresh scrutiny of the ballot papers cast at the election, the Electoral Commissioner directed a re-count of a category of

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1 s 353(1).

ballot papers. That category related to about 96 per cent of the votes that had been cast at the election. During the course of the re-count, it emerged that 1,370 ballot papers considered in both the original and fresh scrutinies had been lost and could not be included in the re-count.

7 By its petition, the Australian Electoral Commission ("the AEC") alleges that the result of the election was affected by the loss of the ballot papers and seeks an order declaring the election absolutely void. Mr Zhenya Wang (a candidate at the election) petitions for orders declaring that the fifth and sixth persons returned as elected (Mr Wayne Dropulich and Senator Scott Ludlam) were not duly elected and declaring that Mr Wang and Senator Louise Pratt were. In the alternative, Mr Wang petitions for an order declaring the election absolutely void. Mr Simon Mead (a person qualified to vote at the election) petitions for the same orders as those sought by Mr Wang.

8 Mr Wang and Mr Mead both rely on the loss of the 1,370 ballot papers but allege further contraventions of the Act constituted by what they allege were wrong decisions about ballot papers reserved during the course of the re-count for the decision of the Australian Electoral Officer for Western Australia.

9 In deciding whether to declare that persons returned as elected were not duly elected, or to declare the election void, the Court must be satisfied[2] that the loss of the ballot papers was likely to have affected the result of the election that was declared. To make either form of declaration, the Court must also be satisfied[3] that it is just to do so. And if any elector was *prevented from voting* in the election on account of an error of, or omission by, an officer, the Court may not admit[4], for the purpose of determining whether the error or omission did or did not affect the result of the election, any evidence of the way in which the elector intended to vote in the election.

10 These reasons will show that the electors who submitted the lost ballot papers were prevented from voting. The Court may not admit evidence of records about the lost ballot papers made following the original scrutiny or the fresh scrutiny in deciding whether the result of the election was affected by the loss of the ballot papers.

11 The number of ballot papers lost far exceeded the margin between relevant candidates at a point in the count determinative of who were the

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2 s 362(3).

3 s 362(3).

4 s 365.

successful candidates for the fifth and sixth Senate places[5]. That margin was assessed on the fresh scrutiny to be 14 votes in favour of one candidate and, on the re-count of available ballot papers, 12 votes in favour of the other. Without evidence of the voting intentions recorded in the lost ballot papers, the conclusion that the result which was declared was likely affected by the loss of the ballot papers is inevitable.

12 It may be noted, however, that, if the Court could admit such records, three of the respondents to the petitions assert (and no other party denies) that the records would demonstrate that the result of the election was likely affected. Combining what was recorded about the lost ballot papers with what was ascertained in the re-count would have led to a different result.

13 The result of the election being likely affected by the loss of ballot papers, what orders should the Court make?

14 Mr Wang and Mr Mead (with the support of several other parties) submitted that the Court should use the records which were made about the lost ballot papers in the original and fresh scrutinies to decide that Mr Wang and Senator Pratt should now be declared to have been duly elected. These claims depend upon the petitioners demonstrating not only that Mr Dropulich and Senator Ludlam were *not* duly elected but also that the Court can and should decide who would have been elected if the re-count had been conducted in accordance with the Act.

15 The choice of senators must be made and ascertained in accordance with law[6]. For present purposes, that means in accordance with the Act. The Act requires that the result of the election be ascertained by scrutiny of the ballot papers. Once a re-count was directed, the process of scrutinising the ballot papers which were to be re-counted had to begin afresh[7]. There was not in the re-count, and there cannot now be, scrutiny of all of the relevant ballot papers to ascertain the result of the election. There was not then, and cannot now be, any opportunity for any of the lost ballot papers to be reserved for decision (in accordance with s 281) or for this Court to consider (in accordance with s 281(3)) any of the ballot papers which were reserved.

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5 *Chanter v Blackwood (No 2)* (1904) 1 CLR 121 at 131 per Griffith CJ; [1904] HCA 48; cf *Kean v Kerby* (1920) 27 CLR 449 at 457-458 per Isaacs J; [1920] HCA 35.

6 *Chanter v Blackwood* (1904) 1 CLR 39 at 75 per O'Connor J; [1904] HCA 2.

7 *Re Lack; Ex parte McManus* (1965) 112 CLR 1 at 10; [1965] HCA 7.

16 Mr Wang and Mr Mead (and those who supported this aspect of their arguments) ask the Court to construct a result of the polling from a combination of scrutiny of votes on the re-count, consideration of some of the votes reserved in the course of that re-count and consideration of records made in the course of the original and fresh scrutinies about the lost ballot papers which should have been, but were not, included in the re-count.

17 The Act does not permit[8] the construction of a result in that way. It is not now possible for the Court to combine the result of so much of the re-count as was undertaken (whether revised to correct what are said to be errors made with respect to some ballot papers, or not) with records made in the original and fresh scrutinies about the lost ballot papers. The results of the original and fresh scrutinies must be disregarded[9] and the result of the election ascertained in accordance with a re-count conducted according to law. Ballot papers having been lost through official error, it is not possible to ascertain "the valid choice of the electors"[10] by a re-count. The loss of the ballot papers (which constituted and occasioned contraventions of the Act) cannot be dismissed as immaterial.

18 The fifth and sixth candidates returned as elected (Mr Dropulich and Senator Ludlam) were not duly elected. It is not possible to determine who was duly elected because ballot papers have been lost. All parties rightly[11] accepted that, if the Court declares that Mr Dropulich and Senator Ludlam were not duly elected, and cannot declare who was duly elected, the only relief appropriate is for the election to be declared void.

Directions for trial together and trial of separate questions

19 On 13 December 2013, I ordered that the three petitions were to be heard and determined together, with the evidence, findings of fact and decisions in one petition also being evidence, findings of fact and decisions in the others.

20 On the same day, I ordered that three questions of law be set down for trial separately from other issues raised by the petitions. Those questions are:

> "1. Did the loss of the 1,370 ballot papers between the fresh scrutiny and the re-count mean that the 1,370 electors who submitted those ballot papers in the poll were 'prevented from voting' in the

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8 *In re Wood* (1988) 167 CLR 145 at 166; [1988] HCA 22.

9 *Re Lack* (1965) 112 CLR 1 at 10.

10 *In re Wood* (1988) 167 CLR 145 at 166.

11 *In re Wood* (1988) 167 CLR 145 at 166.

Election for the purposes of s 365 of the *Commonwealth Electoral Act* 1918 (Cth) ('Act')?

2. Is the Court of Disputed Returns precluded by s 365 or otherwise from admitting the records of the fresh scrutiny, or original scrutiny, that bear on the 1,370 missing ballot papers as evidence of the way in which each of those voters intended to vote, or voted, in the Election for the purposes of each of the petitions filed in the matter, including in so far as those petitions seek relief under ss 360 and 362?

3. On a proper construction of the Act, including the re-count provisions, is any further inquiry regarding the manner in which the [Australian Electoral Officer for Western Australia] dealt with the ballot papers reserved for decision pursuant to s 281:

   (a) permitted under any, and if so which, provision of the Act;

   (b) relevant to the disposition of any, and if so which, petitions before the Court of Disputed Returns;

   (c) necessary to the disposition of any, and if so which, petitions before the Court of Disputed Returns?"

21 Those questions should be answered as follows:

1. Yes.

2. The Court of Disputed Returns is precluded by s 365 from admitting the records of the fresh scrutiny and the original scrutiny that bear on the 1,370 missing ballot papers for the purpose identified in the proviso to s 365, namely, determining whether the loss of the ballot papers did or did not affect the result of the election. Further, the records of the original scrutiny and the fresh scrutiny that bear on those missing ballot papers are not admissible for the purpose of the Court determining that it should declare any candidate duly elected who was not returned as elected.

3. (a) Yes, s 281(3).

   (b) No.

   (c) No.

22 In order to understand the questions and the answers which are given, it is necessary to say something further about the relevant provisions of the Act and

about the facts and circumstances which have been agreed or assumed for the purposes of the determination of the questions.

Writs for elections

23 Part XIII of the Act (ss 151-161) provides for the issue of writs for the election of senators[12] and members of the House of Representatives[13]. The writ fixes[14] the dates for the close of the rolls, the nomination of candidates, the polling and the return of the writ. The dates which may be fixed for those steps are prescribed by ss 155-159.

The polling

24 Part XVI of the Act (ss 202A-245) provides for the conduct of the polling. Provision is made for the form[15] and printing[16] of Senate ballot papers and for group voting tickets[17] and individual voting tickets[18], which are steps necessary to permit electors to vote "above the line" in a Senate election.

25 An elector claiming to vote in an election (and who does not take advantage of the provisions for postal or pre-poll voting) must attend a polling place and, upon answering certain questions[19], has the right to receive a ballot paper[20]. Subject to some exceptions which are not material, the voter, upon receipt of the ballot paper, marks "his or her vote on the ballot paper"[21], folds the

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12 ss 151 and 153.

13 s 154.

14 s 152(1).

15 s 209.

16 s 210.

17 s 211.

18 s 211A.

19 s 229(1).

20 s 231(1).

21 s 233(1)(a).

ballot paper and either deposits[22] the paper in the ballot-box or, if voting as an absent voter, returns[23] it to the presiding officer.

Senate voting

26 The effect of the detailed provisions made by s 273 is to provide for a single transferable vote system of proportional representation by which a candidate, at a half-Senate election, must obtain a quota of one-seventh of the available formal votes cast in the State, plus one, in order to be elected. If all available vacancies are not filled on a count of the first preferences, or on the transfer of the surplus votes of elected candidates beyond their quotas to the candidates next in the preferences indicated by the ballot paper, there is progressive exclusion[24] of candidates with the fewest votes and the distribution of those candidates' preferences until six candidates have the required quota of votes.

27 Electors may express[25] their preferences, "below the line", by writing the number "1" in the square opposite the name of the candidate for whom the person votes as his or her first preference and successive numbers in the squares opposite the names of all remaining candidates so as to indicate the order of the person's preferences.

28 Electors may express[26] their preferences by voting "above the line", thus adopting a group or individual voting ticket lodged with the Australian Electoral Officer for the relevant State or Territory in accordance with s 211 or s 211A. The order of the electors' preferences is then determined in accordance with the relevant ticket.

The scrutiny

29 Section 263 of the Act provides that "[t]he result of the polling shall be ascertained by scrutiny".

30 Section 273 provides for the manual scrutiny of votes in Senate elections and s 273A provides for the computerised scrutiny of votes in Senate elections.

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22 s 233(1)(b)(i).

23 s 233(1)(b)(ii).

24 s 273(9)-(17).

25 s 239(1).

26 s 239(2).

Section 273B permits a scrutiny of votes for a Senate election to be conducted partly under s 273 and partly under s 273A.

31 Section 273(2) requires Assistant Returning Officers to conduct an original scrutiny of votes. Each Assistant Returning Officer, in the presence of a polling official and of such authorised scrutineers as may attend, must reject[27] all informal ballot papers "and arrange the unrejected ballot papers under the names of the respective candidates by placing in a separate parcel all those on which a first preference is indicated for the same candidate". Each Assistant Returning Officer must seal up[28] the parcels of ballot papers and transmit[29] the parcels to the Divisional Returning Officer with the least possible delay.

32 Upon receiving the sealed parcels of ballot papers from Assistant Returning Officers, the Divisional Returning Officer is required[30] to make a fresh scrutiny of the ballot papers contained in the parcels, "and for this purpose the officer shall have the same powers as if the fresh scrutiny were the original scrutiny, and may reverse any decision given by an Assistant Returning Officer in relation to the original scrutiny". The procedures which must then be followed are similar to those for the original scrutiny. The Divisional Returning Officer, having completed the fresh scrutiny, must place[31] all informal ballot papers in a separate parcel and bundle[32] the unrejected ballot papers under the names of the respective candidates. The officer must place in separate parcels all the ballot papers on which a first preference is indicated above the line for a candidate and all the ballot papers on which a first preference is marked below the line for that candidate. The Divisional Returning Officer must count[33] the first preference votes given for each candidate and transmit information, this time to the Australian Electoral Officer for the relevant State or Territory, about the number of first preference votes given for each candidate (distinguishing between those votes cast above the line and those cast below the line) and the total number of ballot papers rejected as informal.

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27 s 273(2)(b).

28 s 273(2)(g).

29 s 273(2)(h).

30 s 273(5)(a).

31 s 273(5)(b).

32 s 273(5)(c).

33 s 273(5)(d).

Re-count

33 At any time before the declaration of the result of a Senate election the Australian Electoral Officer for the relevant State or Territory may, on the written request of any candidate "setting forth the reasons for the request", or of the officer's own motion, direct or conduct[34] a re-count of the ballot papers contained in any parcel or in any other category determined by the Australian Electoral Officer. If the Australian Electoral Officer refuses the request of a candidate for a re-count, the candidate may, in writing, appeal[35] to the Electoral Commissioner to direct a re-count. The Electoral Commissioner has a discretion either to direct a re-count of the ballot papers or to refuse to direct a re-count.

34 Section 279B regulates the conduct of a re-count. It requires[36] the opening of the sealed parcels of ballot papers which are to be re-counted and the counting of the votes in the parcels. Section 280 provides that:

> "The officer conducting a re-count shall have the same powers as if the re-count were the scrutiny, and may reverse any decision in relation to the scrutiny as to the allowance and admission or disallowance and rejection of any ballot paper."

Section 281 provides, in part, that:

> "(1) The officer conducting a re-count may, and at the request of any scrutineer shall, reserve any ballot paper for the decision of the Australian Electoral Officer.
>
> (2) The Australian Electoral Officer shall decide whether any ballot paper so reserved is to be allowed and admitted or disallowed and rejected."

Section 279B(7) requires the Australian Electoral Officer to scrutinise the ballot papers which are reserved for decision and mark each as "admitted" or "rejected" according to his or her decision.

The 7 September 2013 election and original scrutiny

35 On 5 August 2013, the Governor-General in Council issued writs for the election of members of the House of Representatives for the States and

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34 s 278(1).

35 s 278(2).

36 s 279B(1).

Territories and for the election of senators for the Australian Capital Territory and the Northern Territory. On the same day, pursuant to the *Election of Senators Act* 1903 (WA), the Governor of Western Australia issued a writ for the election of six senators for Western Australia. The writ fixed dates for the close of the rolls, nominations, polling and return of the writ. The date fixed for the return of the writ was on or before 13 November 2013.

36 There were 62 candidates for election as a senator for Western Australia. The candidates were divided into 27 groups or political parties, with one "ungrouped" candidate. Each group or political party registered a group voting ticket pursuant to s 211 of the Act. Under their respective registered group voting tickets, preferences from Group G (Shooters and Fishers), Group K (Australian Independents) and Group V (Australian Fishing and Lifestyle Party) flowed to Mr Murray Bow of the Shooters and Fishers. Under their respective registered group voting tickets, preferences from Group C (Australian Christians) and Group O (No Carbon Tax Climate Sceptics) flowed to Mr Jamie van Burgel of the Australian Christians.

37 On 7 September 2013, after the close of the poll, Assistant Returning Officers at each of the appointed polling places conducted, in accordance with s 273(2) of the Act, an original scrutiny of the ballot papers cast at the election except for declaration votes.

The fresh scrutiny

38 The fresh scrutiny required by s 273(5) of the Act began on about 9 September 2013.

39 On 2 October 2013, the Australian Electoral Officer for Western Australia ("the AEO") announced that, for the purposes of s 273A(5) of the Act, he had ascertained that the successful candidates at the election, in order of their election, were Senator David Johnston, Mr Joe Bullock, Senator Michaelia Cash, Ms Linda Reynolds, Mr Wang and Senator Pratt.

The 50th exclusion point

40 All parties accept that the 50th exclusion point in the process required by s 273 of the Act was critical to the determination of who were the last two successful candidates at the election. At the 50th exclusion point, either Mr van Burgel (representing the Australian Christians) or Mr Bow (representing the Shooters and Fishers) was to be excluded according to who then had the lower number of votes.

41 The Wang petition and the Mead petition allege that who had the lower number of votes was affected, in the case of Mr Bow, by votes validly cast for Mr Daryl Higgins (Australian Independents) and Mr Jay Edwards (Australian

Fishing and Lifestyle Party) and, in the case of Mr van Burgel, by votes wrongly accepted as cast for Mr Adrian Byass (No Carbon Tax Climate Sceptics).

42 According to the fresh scrutiny, at the 50th exclusion point Mr Bow had 23,515 votes and Mr van Burgel had 23,501 (a difference of 14 votes in favour of Mr Bow). All parties accept that if, at the 50th exclusion point, Mr van Burgel had more votes than Mr Bow (with the consequence that Mr Bow was excluded and his votes transferred in accordance with s 273), Mr Dropulich and Senator Ludlam (not Mr Wang and Senator Pratt) would have been the fifth and sixth candidates elected as senators for Western Australia.

Requests for a re-count

43 Mr Dropulich and Senator Ludlam each requested a re-count. The AEO refused those requests. Senator Ludlam – and, later, Mr Dropulich – appealed to the Electoral Commissioner against the decision to refuse the requests for a re-count. On 10 October 2013, the Electoral Commissioner directed the AEO to conduct a re-count of a category of ballot papers submitted by voters in the election of senators for Western Australia. The category of ballot papers which was to be re-counted was described as:

> "All the Senate ballot papers marked above the line together with those informal ballot papers that have been determined as obviously informal by Divisional Returning Officers in accordance with section 273A(3) of the Electoral Act."

44 The re-count related to about 96 per cent of the votes that had been cast at the election. The Electoral Commissioner gave as his reasons for ordering a re-count that "the criticality of the particular Senate candidate exclusion together with the small margin leads me to conclude that it is prudent to confirm the result in the interests of the electorate's confidence in the outcome".

Ballot papers reserved for the decision of the AEO

45 During the re-count, 949 ballot papers were reserved for the decision of the AEO in accordance with s 281(1). Both Mr Wang and Mr Mead seek, by their petitions, to dispute some of the decisions which were made by the AEO in respect of reserved ballot papers.

46 In his petition, Mr Mead alleges that the AEO wrongly rejected at least 87 ballot papers and wrongly accepted at least 90 ballot papers, which affected whether Mr Bow or Mr van Burgel was excluded at the 50th exclusion point. In his petition, Mr Wang alleges that the AEO wrongly rejected at least 56 ballot papers and wrongly accepted at least 18 ballot papers, which affected the 50th exclusion point.

47 It is likely that there is at least some, perhaps very substantial, overlap between the allegations made in the Wang and Mead petitions about wrongful rejection and wrongful acceptance of votes. It is not necessary, however, to decide whether or to what extent this is so. Argument proceeded on the assumption that, together, Mr Wang and Mr Mead seek to demonstrate error in the treatment of at least 250 ballot papers reserved for the decision of the AEO.

Lost ballot papers

48 During the course of the re-count, it emerged that 1,370 ballot papers for votes which had been cast in either the Division of Forrest or the Division of Pearce (said, in the records of the fresh scrutiny, to be 120 informal votes and 1,250 unrejected above the line votes) could not be located and brought within the re-count. Those ballot papers have not since been found and it is accepted that it is unlikely that they will be found. Because these ballot papers were lost, the re-count directed by the Electoral Commissioner could not, and did not, take place in accordance with the Act. But those of the ballot papers which were to be re-counted and were available were scrutinised.

The result of the scrutiny of ballot papers available for re-count

49 Before the re-count, the AEO ascertained that a total of 1,349,635 ballot papers were submitted at the election of senators for Western Australia, of which 1,311,440 were unrejected votes and 38,195 were informal votes.

50 Re-counting those votes which were the subject of the Electoral Commissioner's direction and were available for re-count revealed that, at the 50th exclusion point, Mr van Burgel had 23,526 votes and Mr Bow had 23,514 (a difference of 12 votes in favour of Mr van Burgel). (As noted earlier, the fresh scrutiny had found Mr van Burgel to have 23,501 votes and Mr Bow 23,515.)

51 The fresh scrutiny and the re-count arrived at different tallies of votes. The parties accept that 532 ballot papers were counted on the re-count which had not been counted in the fresh scrutiny. The parties further accept that the numbers of ballot papers (both in parcels of above the line votes and in parcels of informal votes) counted at the re-count differed from the numbers counted at the fresh scrutiny. Some of these differences in counting were due to miscounts of the number of ballot papers in some parcels at the fresh scrutiny; some were due to counting about 80 blank ballot papers as informal votes on the re-count. And some were due to movement of ballot papers between parcels at the re-count (for example, from one registered group voting ticket to another). Each transfer of ballot papers between parcels was counted as two movements (one addition and one subtraction). There were 7,826 movements of ballot papers. That is, on the re-count, 3,913 ballot papers were assigned to parcels different from the parcels to which they had been assigned at the fresh scrutiny.

52 If it were proper to take account of the information about the number of first preference votes given for each candidate and the total number of ballot papers rejected as informal which, following the fresh scrutiny, the relevant Divisional Returning Officers transmitted to the AEO in accordance with s 273(5)(d), and treat that information as accurately recording the effect properly to be given to those ballot papers which should have been, but were not, scrutinised in the re-count, the AEC calculates that Mr Bow would have been one vote ahead of Mr van Burgel at the 50th exclusion point. (Mr van Burgel would have had 23,531 votes and Mr Bow 23,532.)

Declaration and return of the writ

53 On 4 November 2013, the AEO declared, under s 283(1)(a) of the Act, that the first to sixth respondents to the AEC petition were elected in that order. The declaration reflected the results revealed by the re-count, which had been conducted without the 1,370 lost ballot papers. That is, the result which was declared depended upon excluding Mr Bow at the 50th exclusion point.

54 On 6 November 2013, the AEO returned the writ for the election of senators for Western Australia to the Governor of Western Australia.

Powers of the Court of Disputed Returns

55 Section 360 of the Act gives the Court of Disputed Returns power to declare[37] that any person who was returned as elected was not duly elected and to declare[38] any election absolutely void. These powers may be exercised[39] "on the ground that illegal practices were committed in connexion with the election". "Illegal practice" is defined[40] to include "a contravention of [the] Act". That expression means[41] a failure to comply with a provision of the Act. The Court also has the power to declare[42] any candidate duly elected who was not returned as elected. But it could not exercise that power in this case without first declaring that someone returned as elected was *not* duly elected.

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37 s 360(1)(v).

38 s 360(1)(vii).

39 s 360(3).

40 s 352(1).

41 *Sue v Hill* (1999) 199 CLR 462 at 512 [124] per Gaudron J; [1999] HCA 30.

42 s 360(1)(vi).

56 Section 362(3) of the Act places two conditions on the exercise of the Court's power to declare an election void, and the Court's power to declare that a person returned as elected was not duly elected, on the ground of certain illegal practices. The Court must be satisfied[43], first, "that the result of the election was likely to be affected" (scil by one or more of the illegal practices alleged) and, second, "that it is just that the candidate should be declared not to be duly elected or that the election should be declared void". The "result of the election" means the result as it was declared. And "result" in the Act means[44] the return of a particular candidate, not the number of the candidate's majority.

57 Section 365 of the Act places limits on the evidence the Court may admit to determine whether the result of an election was affected by certain illegal practices. If any elector was prevented from voting in an election on account of an error of, or omission by, an officer, the section prohibits the Court from admitting, for the purpose of determining whether the error or omission affected the result of the election, any evidence of the way in which the elector intended to vote in that election.

Illegal practices and ss 362(3) and 365

58 All three petitioners seek relief under s 360(1) and (3) on the ground that illegal practices were committed in connection with the election. All three petitioners allege that the loss of the ballot papers and the consequent failure to conduct the re-count in accordance with the Act were illegal practices.

59 It is not necessary to identify more precisely which provisions of the Act were contravened. It is sufficient to proceed on the footing adopted in argument that the loss of the ballot papers both constituted and occasioned one or more contraventions of the Act. It is to be noted, however, that because ballot papers were lost, there was not the scrutiny required by ss 279B and 280 of all the ballot papers which were to be re-counted. There was not the opportunity for the officer conducting the re-count to allow and admit, or disallow and reject, any of the lost ballot papers. There was not the opportunity for a scrutineer to require[45] reservation for the decision of the AEO of any of the lost ballot papers which were disputed.

60 So much was accepted by all parties to the petitions. Each petitioner and each respondent accepted, correctly, that the loss of ballot papers and the failure to have available at the re-count all of the parcels of ballot papers which were to

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43 s 362(3).

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

45 s 281(1).

be the subject of the re-count constituted contraventions of the Act and thus illegal practices in connection with the election.

61 Those illegal practices are of the kind to which s 362(3) applies. That is, they were (as all parties accepted) "committed by [a] person other than the candidate and without the knowledge or authority of the candidate"[46] and were not "bribery or corruption or attempted bribery or corruption"[47].

62 It follows that, although s 362(3) applies only to the Court's powers to declare an election void and to declare that a person returned as elected was not duly elected, *none* of the orders sought by any petitioner can be made unless the Court is satisfied, first, that the result of the election was likely to be affected by one or more of the illegal practices and, second, that it is just that the candidates who were returned as elected should be declared not to be duly elected or that the election should be declared void. That is because no order could be made declaring that Mr Wang and Senator Pratt *were* duly elected (being an order outside the scope of s 362(3)) without first declaring that Mr Dropulich and Senator Ludlam were *not* duly elected.

63 Those illegal practices are also of the kind dealt with by s 365, thus engaging the proviso to that section. That is, the illegal practices constituted and occasioned by the loss of ballot papers were (as all parties implicitly or explicitly accepted) occasioned by the "omission [of an] officer". What evidence the Court can admit to determine whether the result of the election was affected by those illegal practices (at least in respect of claims for the avoidance of the election) therefore depends on whether the electors whose ballot papers were lost were "prevented from voting" within the meaning of s 365.

64 Three particular questions must then be considered.

65 First, must the Court deal first with the allegations made by Mr Wang and Mr Mead that there were wrong decisions made about reserved votes? Or, without dealing with those allegations, can the Court decide whether the loss of ballot papers was likely to have affected the result of the election?

66 Second, were electors whose ballot papers were lost on account of the error of, or omission by, an officer "prevented from voting" in the election? If those electors were prevented from voting, the Court cannot admit evidence of the way in which they "intended to vote" in determining whether the illegal practices affected the result of the election. And if the Court is prohibited from

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46 s 362(3)(a).

47 s 362(3)(b).

admitting such evidence, it must determine whether records about earlier scrutinies of the lost ballot papers amount to such evidence.

67 Third, if the likely effect on the result of the election must be determined without regard to those records, the Court must decide whether the records could and should be considered for some other purpose and, if they can be so considered, whether it is necessary to do so for the purposes of determining any of these petitions.

Deal first with allegations of wrong decisions?

68 Mr Wang and Mr Mead both submitted that the Court must first deal with their allegations of wrong decisions about reserved votes. They submitted that once it was shown that wrong decisions were made, the difference between the relevant candidates at the 50th exclusion point would be so large (in favour of Mr Bow) that it would be obvious that the result of the election would have been different and that the lost ballot papers could not or would not have altered the result that the candidates who should have been declared elected were Mr Wang and Senator Pratt. Necessarily implicit in the submission was the proposition that altering the decisions which the petitioners challenged in respect of about 250 ballot papers would swamp the effect of losing 1,370 ballot papers. That implicit proposition could be established only by making some assumption about what voting intentions were validly recorded on the lost ballot papers (or by relying on records of those intentions).

69 Both Mr Wang and Mr Mead went so far as to submit that, if the Court first determined the challenges to decisions about reserved ballot papers, the illegal practices constituted and occasioned by the loss of ballot papers would be shown not to have affected the result of the election. The "result" of the election referred to in these submissions appears to have been the result which Mr Wang and Mr Mead submitted *should* have been reached rather than the result which was declared. As already explained, s 362(3) requires that no order be made declaring a person who was returned as elected not to have been duly elected, or declaring an election void, unless the Court is satisfied that the result which was declared was likely to be affected. And the whole point of both Mr Wang's petition and Mr Mead's petition was to challenge the result which was declared, and obtain either a declaration that Mr Dropulich and Senator Ludlam were not duly elected (coupled with a further declaration that Mr Wang and Senator Pratt were) or a declaration that the election was absolutely void.

70 To the extent to which Mr Wang and Mr Mead allege that the loss of ballot papers constituted and occasioned illegal practices entitling them to any of the relief they claim, they must demonstrate that those illegal practices were likely to have affected the result of the election. Neither Mr Wang nor Mr Mead abandoned reliance upon the loss of ballot papers as constituting and occasioning illegal practices.

71 If, as the AEC submitted, the loss of ballot papers was likely to have affected the result of the election, it is not necessary to decide whether other illegal practices were committed which were likely to affect that result. The only relevant significance which other illegal practices could have would be in relation to what orders the Court should make.

72 Was the result of the election which was declared likely to have been affected by the loss of the ballot papers? In deciding whether the loss of ballot papers did or did not affect the result of the election, may the Court admit evidence of the records made about the lost ballot papers in the original and fresh scrutinies? That is, is the proviso to s 365 engaged?

Prevented from voting

73 The ballot papers which were lost were omitted from processes which the Act required to be followed to determine the result of the election. Although included in both the original and the fresh scrutinies, those lost ballot papers were not available at the re-count. The lost ballot papers were, therefore, excluded from the processes which, in the events that had happened, the Act required be undertaken to determine who should be returned as duly elected. As is apparent from the description which has been given of the Act's provisions about Senate elections, the Act provides for several distinct steps being taken before the result of the poll is ascertained and declared. In this case, after the original and fresh scrutinies, a re-count was directed. As the AEC rightly emphasised, when a re-count is directed, the result of that re-count is to be determined by scrutiny and it is *this* scrutiny (not any of the earlier scrutinies) which determines[48] the result of the poll.

74 Were the electors who had submitted the lost ballot papers prevented from voting in the election?

75 Although it is the proviso to s 365 which is directly relevant to this question, it is necessary to set out the whole of the provision:

> "No election shall be avoided on account of any delay in the declaration of nominations, the provision of certified lists of voters to candidates, the polling, or the return of the writ, or on account of the absence or error of or omission by any officer which did not affect the result of the election:
>
> Provided that where any elector was, on account of the absence or error of, or omission by, any officer, prevented from voting in any election, the Court shall not, for the purpose of determining whether the absence or error of, or omission by, the officer did or did not affect the result of the

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48 *Re Lack* (1965) 112 CLR 1 at 10.

election, admit any evidence of the way in which the elector intended to vote in the election."

76 Mr Wang and Mr Mead, and the respondents to the AEC petition other than Senator Ludlam, all submitted that the electors who had submitted the lost ballot papers were not prevented from voting; the AEC and Senator Ludlam submitted that they were. The central difference upon which the submissions hinged was whether "voting" should be understood as complete at the point an elector put his or her ballot paper into the ballot-box or should instead be understood as extending to the point where the ballot paper was considered in the scrutiny conducted to ascertain the result of the polling.

77 It may readily be accepted that an elector would, "on account of the ... error of, or omission by, any officer", be "prevented from voting in [the] election" if an officer prevented the elector receiving[49] a ballot paper to which the elector was entitled, or prevented the elector depositing[50] the ballot paper in the ballot-box. But does the notion of "prevented from voting" stop at the point where an elector has done all that he or she can do to submit a ballot paper for consideration in the poll?

78 The preferable construction of the Act is that the reference in the proviso to s 365 to an elector being prevented by error or omission of an officer from voting in any election includes a case such as this where 1,370 electors were prevented, through official error, from having their ballot papers be the subject of the determinative scrutiny (in this case the re-count). There are several reasons to prefer this construction.

79 First, this construction of the provision follows as a matter of ordinary language. As the first, third and fourth respondents to each of the petitions rightly pointed out, to "vote" means to express or signify a choice. But contrary to the submissions of those parties (and others who adopted their submissions), "voting", when used in the collocation "prevented from voting", extends to taking account of the expression or signification of choice. That is, ask whether an elector *has* voted and the answer will direct attention to whether that person has done those acts which, as far as the elector can, express or signify the elector's choice to those who will decide the outcome of the poll. Hence, as the first, third and fourth respondents rightly pointed out, many of the provisions of the Act use the word "voting" or cognate expressions in a way which directs attention only to the conduct of an elector. So, for example, when s 220(c) forbids admission of persons to a polling booth after six o'clock "for the purpose of voting", the provision is directed only to what the elector would do, if admitted. But ask

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49 s 231(1).

50 s 233(1)(b)(i).

whether an elector has been *prevented* by the error or omission of an officer from voting and the answer must look not only to what the elector has or has not done but also to what the officer has done. And what the officer has done is to be judged according to whether the expression or signification of choice has become available for consideration in determining the outcome of the poll.

80 Second, the preferred construction of the provision better reflects the constitutional purposes pursued by the Act than the competing construction would. As noted earlier, s 7 of the Constitution provides that "[t]he Senate shall be composed of senators for each State, directly chosen by the people of the State". Direct choice by the people is effected only by taking account of the choices expressed by "the people". If some of the choices expressed by the people are not taken into account in the determinative scrutiny, there is at least the possibility that the result determined does not give effect to the choice which the people sought to make.

81 "Choice" bears[51] two faces. It refers to an elector's *act* of choosing. (And it is here that those parties who denied that electors had been prevented from voting would end the analysis.) But it also refers to those who are chosen. Direct choice by the people requires that the lawful expression of *every* voter's choice is taken into account in determining who has been chosen.

82 Reading the expression "prevented from voting" in the proviso to s 365 as encompassing cases such as the present reflects this understanding of the constitutional notion of direct choice. It does so by requiring the Court to determine whether official error affected the result of the election without regard to evidence of the voting intentions of relevant electors. More particularly, it requires the Court to decide whether the errors or omissions of an officer preventing consideration of the choices made by certain electors (regardless of what those choices were) were sufficiently numerous in the poll as a whole to have affected the outcome. By contrast, reading the proviso to s 365 as speaking only to cases where electors were prevented from depositing a ballot paper in the ballot-box would confine attention to only *some* of the cases in which, on account of official error, choices expressed by the people are not considered. And once the step has been taken (as it is in s 365) to require determination of the effect of official error on the result of an election without evidence about how electors intended to vote, its operation should not be confined to *some* cases where persons are denied the effective expression of their choice.

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51 cf *The Oxford English Dictionary*, 2nd ed (1989), vol III at 151-152, "choice", meanings 1a and 5a.

83 Third, the preferred construction of the provision is consistent with its legislative history and what was, at the time of its enactment, its established meaning.

84 The provisions which now appear as s 365 of the Act were brought into their present form by amendments made by s 25 of the *Commonwealth Electoral Act* 1922 (Cth). Section 26 of the 1922 Act inserted what is now s 367, precluding admission of evidence of a witness that he or she was not permitted to vote unless the witness satisfies the Court (in effect) that he or she had claimed to vote and had complied with the requirements of the Act and the regulations relating to voting as far as permitted to do so.

85 These amendments to the Act were made after (and in consequence of) the decision of Isaacs J in *Kean v Kerby*[52]. In that case, Isaacs J had admitted evidence from electors who through official error had not been permitted to submit a ballot paper that each had intended to vote for a particular candidate. But Isaacs J had admitted this evidence because the Act then provided[53] that no election should be avoided on account of the error of any officer "which shall not be proved to have affected the result of the election". Isaacs J observed[54] that in this respect the Act (as it then stood) differed from equivalent English electoral legislation which had been held[55] to provide, in effect, that an election could be declared invalid if official error *may* have affected the result. Isaacs J concluded[56] that, in order to prove that official error *had* affected the result, "[t]he error of refusing a vote to a qualified elector, if it is to have any weight at all, must be accompanied with proof as to how the elector intended to vote".

86 The 1922 Act amended the Act in the respects which have been described for the stated purpose[57] of bringing the law into line with English law. The

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52 (1920) 27 CLR 449.

53 s 194 of the Act as it then stood. Section 194, as amended, was later renumbered s 365.

54 (1920) 27 CLR 449 at 458.

55 *Woodward v Sarsons* (1875) LR 10 CP 733 at 751; *Eastern Division of Clare Case* (1892) 4 O'M & H 162; cf *Hackney Case* (1874) 2 O'M & H 77. See also *Rogers on Elections*, 19th ed (1918), vol 2 at 68-69.

56 (1920) 27 CLR 449 at 458.

57 Australia, Senate, *Parliamentary Debates* (Hansard), 26 July 1922 at 752; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 September 1922 at 2268-2269, 20 September 1922 at 2467.

amendments which were made to what has now become s 365 hinged about the expression "prevented from voting".

87 In 1875, Lord Coleridge CJ had spoken[58] of circumstances in which "an election is to be declared void by the common law applicable to parliamentary elections" as including cases where there was "no real *electing* at all" (original emphasis). His Lordship gave[59] examples of there being "no real electing at all" where "a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference" by any of several specified causes. Those causes included[60] cases of "fraudulent counting of votes or false declaration of numbers by a returning officer". And, of course, those cases are examples which depended upon the relevant electors having submitted their votes. That is, they are examples of cases in which, despite electors having submitted their votes, "a majority of the electors were proved to have been prevented from recording their votes *effectively*"[61] (emphasis added). They were cases where (a majority of) electors were prevented from voting effectively by official error because the votes they submitted were not considered in determining the result of the election.

88 The first, third and fourth respondents to each of the petitions submitted that the reasons of Lord Coleridge CJ should be understood as distinguishing between "prevented from voting" and "prevented from voting effectively". Those respondents submitted that the former expression was used to refer only to cases in which an elector was not permitted to vote and that this, and this alone, was the meaning of the expression "prevented from voting" established by the decision.

89 There are two answers to these arguments. First, I greatly doubt that the reading of the reasons of Lord Coleridge CJ proffered by the first, third and fourth respondents is the preferable reading of what was written. Second, and more significantly, it is not how those reasons were understood in subsequent decisions of this Court. Those decisions, particularly *Chanter v Blackwood*[62] and *Bridge v Bowen*[63], treated *Woodward v Sarsons* as establishing that an elector is

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58 *Woodward v Sarsons* (1875) LR 10 CP 733 at 743.

59 (1875) LR 10 CP 733 at 743.

60 (1875) LR 10 CP 733 at 744.

61 (1875) LR 10 CP 733 at 743.

62 (1904) 1 CLR 39 at 58-59 per Griffith CJ.

63 (1916) 21 CLR 582 at 605-607 per Barton J, 616-618 per Isaacs J (Gavan Duffy and Rich JJ agreeing); [1916] HCA 38.

prevented from voting if the elector is prevented from voting with effect. In particular, Isaacs J explained[64] in *Bridge v Bowen* that an elector is prevented from voting if, through official error, the vote which an elector submitted could not be counted. (Isaacs J distinguished between errors in performance of provisions of enactments requiring strict performance and other kinds of error but this distinction, if relevant to the Act as it then stood, need not be drawn for the purposes of the provisions at issue in these petitions.)

90 This being the state of the law as determined by this Court at the time of the 1922 amendments, there is no reason to conclude that "prevented from voting" was used in those amendments with some narrower meaning.

91 No party submitted that any later decision of this Court casts any doubt on this understanding of "prevented from voting". The parties did examine a number of decisions of State Courts of Disputed Returns[65] which may be read as permitting, even depending upon, the adoption of a narrower construction of "prevented from voting" which would confine its application to cases where an elector was prevented by official error from submitting a vote.

92 The course of decisions in this Court, before the enactment of the 1922 amendments, provides a sounder foundation for construing s 365 than the later decisions of State Courts of Disputed Returns. Apart from the decision of Sugerman J in *Campbell v Easter*[66], it is not clear that all of those later decisions were made in the light of arguments which fully canvassed the relevant decisions of this Court (and the cases upon which those decisions were based) or referred to all of the decisions of other State Courts which had considered the question of construction. Further, in at least some of the State cases, it would appear that the issue agitated in the course of argument focused more upon preservation of the secrecy of the ballot than upon the more fundamental question of statutory construction and what is meant by "prevented from voting".

93 Finally, the preferred construction of the expression "prevented from voting" is consistent with what is now s 367 (also inserted in the Act by the 1922 Act), which regulates when the Court may admit evidence of any witness

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64 (1916) 21 CLR 582 at 618.

65 Including *Dunbier v Mallam* [1971] 2 NSWLR 169; *Fell v Vale (No 2)* [1974] VR 134; *Freeman v Cleary* unreported, Court of Disputed Returns (NSW), 31 October 1974; *Fenlon v Radke* [1996] 2 Qd R 157. See also *Australian Electoral Commission v Towney* (1994) 51 FCR 250.

66 Unreported, Court of Disputed Returns (NSW), 12 June 1959, followed in *Varty v Ives* [1986] VR 1; *McBride v Graham* unreported, Court of Disputed Returns (NSW), 11 December 1991.

that the witness was not permitted to vote. It is notable that s 367 uses the phrase "not permitted to vote" rather than "prevented from voting". It follows, and no party submitted to the contrary, that cases where an elector is not *permitted* to vote must be understood to be a subset of cases where electors are *prevented* from voting. The question then becomes how widely the set (of which s 367 is a subset) should be drawn. Mr Wang allowed cases where an elector is given the wrong ballot paper as a case of prevention from voting but drew no convincing distinction between such a case and other cases where an elector, through official error, submits a ballot paper which is not the subject of the determinative scrutiny.

94 In this case, where a re-count of some ballot papers was ordered, and the lost ballot papers should have been included within that re-count, the electors who submitted those ballot papers did not have their ballot papers included in the determinative scrutiny.

95 For these several reasons, the 1,370 electors who submitted ballot papers which were lost between the fresh scrutiny and the re-count were prevented from voting. The first separate question should be answered accordingly.

96 It follows from the proviso to s 365 that, in these petitions, where all the petitioners allege that the lost ballot papers were not included in the re-count "on account of the ... error of, or omission by", an officer, "the Court shall not, for the purpose of determining whether the ... error of, or omission by, the officer did or did not affect the result of the election, admit any evidence of the way in which the [electors whose ballot papers were lost] intended to vote in the election".

97 Would admission in evidence of the records about the lost ballot papers be evidence of the way in which electors who were prevented from voting "intended to vote in the election"?

Intended to vote

98 Contrary to the submissions of Mr Wang, Mr Mead and a number of the respondents, admitting evidence of the records made at the original and fresh scrutinies about what voting intentions were validly expressed in the lost ballot papers would be evidence of the way in which those electors intended to vote at the election. It would not be evidence which would reveal how any identified or identifiable elector intended to vote and it therefore would not be evidence which broke the secrecy of the ballot. But once it is accepted that the prevention from voting with which s 365 deals extends to cases of the present kind, it follows that "evidence of the way in which the elector intended to vote" includes evidence revealing how electors whose ballot papers were not the subject of the determinative scrutiny intended (by their ballot papers) to vote.

99 The submissions that this reading of s 365 would lead to incongruent (perhaps even absurd) results should not be accepted. In particular, this reading of s 365 does not exclude any evidence in respect of any ballot paper which was the subject of the determinative scrutiny. It is not a reading of the provision which restricts in any way the Court's consideration of ballot papers which were included in the determinative scrutiny, regardless of whether, on that scrutiny, the vote recorded in the ballot paper was rejected or accepted. If ballot papers were rejected in that determinative scrutiny as informal, the electors concerned would not have been prevented, by official error, from having their papers *considered* in the determinative scrutiny. The proviso to s 365 would not be engaged and, because it would not be engaged, there can be no resulting incongruous or absurd application.

100 For these reasons, evidence of the records made at the original and fresh scrutinies about the voting intentions recorded in the lost ballot papers may not be admitted for the purpose referred to in the proviso to s 365. Whether the official errors relied on by the petitioners did or did not affect the result of the election must be decided without regard to that evidence.

Likely to affect the result?

101 Some attention was given in argument to whether anything turns on the use in s 362(3) of the expression "the result of the election was likely to be affected" but the use in s 365 of the expression "did or did not affect the result of the election".

102 Nothing turns on the use of these different expressions in the two provisions. Section 362(3) provides the relevant limitation on the Court's exercise of two of the powers given by s 360(1) and it is the text of s 362(3) which provides the content of that limitation. The Court must be satisfied that the result of the election was *likely* to be affected before making (and also satisfied that it is just to make) either of the specified kinds of declaration. By contrast, the proviso to s 365 regulates the evidence which may be admitted for the purpose of the Court deciding whether it is satisfied that the result was likely to be affected.

103 Some attention was also given to what is meant by "likely" in the expression "likely to be affected". Does it mean "more probable than not"? Does it include "substantial possibility less than probability"? Perhaps other expressions could be used to capture the various meanings referred to in argument but, for present purposes, the two meanings given capture the substance of the debate.

104 As already noted, without regard to the voting intentions recorded in the 1,370 lost ballot papers, the conclusion that the loss of those ballot papers probably affected the result of the election is inevitable. The conclusion follows

from matters which I identified earlier in these reasons. The result declared was based on a scrutiny from which 1,370 ballot papers were excluded. The result depended upon who was excluded at the 50th exclusion point. The margin at that point was determined in the original and fresh scrutinies to be 14 votes one way but then (excluding scrutiny of the lost ballot papers) determined on the re-count to be 12 votes the other way. And the re-count yielded different tallies of votes and different decisions about rejection or acceptance of ballot papers from those reached in the original and fresh scrutinies, in numbers which cannot be dismissed as irrelevant or trivial. Those are reasons enough to conclude that it is more probable than not that the loss of ballot papers affected the result of the election which was declared.

105 If, as Mr Wang and Mr Mead allege, there were wrong decisions made in relation to reserved votes, the particular errors they allege could only reinforce the conclusion otherwise reached that the result declared was likely to be affected by illegal practices.

106 It is not necessary, in this case, to resolve any dispute about the meaning to be given to the word "likely" in the expression "likely to be affected" in s 362(3). It is, however, desirable to deal specifically with one submission made by Mr Dropulich. It was submitted, in effect, that if the Court could not take account of the records made in the original and fresh scrutinies about the lost ballot papers, the Court could not be satisfied that the result of the election was likely to be affected by the loss of the ballot papers. The Court could not be satisfied, the argument ran, because the Court could form no judgment at all. The Court could form no judgment because both outcomes (the result declared and the opposite result) were equally probable[67]. This argument must be rejected. Wrongly, the argument treated the question of effect on the result of the election as requiring a petitioner to prove what the result would have been if the ballot papers had not been lost. The argument did not take account of all of the relevant facts that are known, including the closeness of the outcome, and the differences shown to exist between the original and fresh scrutinies and the re-count as to both tallies and rejection and acceptance of votes. It is more probable than not that the loss of the ballot papers affected the result of the election which was declared.

Using the records about the lost ballot papers for other purposes

107 Subject to one possible caveat, those who submitted that the Court can and should have regard to the records which were made about the lost ballot papers all did so in aid of arguments that the Court should decide who would have been declared elected if the re-count had been conducted according to law. It is

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67 cf *Jones v Dunkel* (1959) 101 CLR 298 at 304-305 per Dixon CJ; [1959] HCA 8.

convenient to deal at once with the possible caveat and notice a strand of argument which might be understood as seeking to support the admission of evidence about the records of the original and fresh scrutinies on a basis other than demonstrating entitlement to a declaration that Mr Wang and Senator Pratt were duly elected.

108 Some of the arguments about the admissibility of the records were expressed in terms which appeared to be directed to the application of the last clause of s 362(3), and its requirement that the Court not declare that a person returned as elected was not duly elected and not declare any election void unless the Court is satisfied that "it is just that the candidate should be declared not to be duly elected or that the election should be declared void". To the extent to which parties sought to support the admission of the evidence about the records of the original and fresh scrutinies on this basis, the argument should be rejected.

109 Without regard to the evidence of the records about the lost ballot papers, the Court can and should be satisfied, not only that the result of the election was likely to be affected by the loss of the ballot papers, but also that it is just that one or other of the forms of declaration dealt with by s 362(3) should be made: either that Mr Dropulich and Senator Ludlam were not duly elected or that the election should be declared void. As has already been noted, admission of evidence about the records of the original and fresh scrutinies would only reinforce these conclusions, for the evidence would show (if admissible and accepted) that the wrong result was declared in respect of the fifth and sixth places. That being so, to the extent to which admission of the evidence was sought to be supported by reference to s 362(3), its admission in this case is unnecessary.

110 Though variously expressed, the chief arguments advanced in support of admission of the evidence of the records of the original and fresh scrutinies asserted that, by adding what was recorded about the lost ballot papers in the original and fresh scrutinies to the results of the re-count (revised or unrevised in accordance with the allegations of Mr Wang and Mr Mead), it would be shown that Mr Wang and Senator Pratt should have filled the fifth and sixth places and should now be declared to have been duly elected.

111 No provision of the Act expressly provides for making such a patchwork of results. Rather, the relevant provisions of the Act provide that the result of the poll will be determined by scrutiny of all of the relevant ballot papers accompanied by whatever additional steps (such as reservation of ballot papers on a re-count for the decision of the Australian Electoral Officer for the relevant State or Territory) the Act permits or requires.

112 Scrutiny of the ballot papers is much more than a mechanical task. Judgments must be made about particular ballot papers. Both the Wang and Mead petitions depend, in very large part, upon this being so. And the differences between decisions made in the original and fresh scrutinies and those

made in the re-count about rejection or acceptance of ballot papers emphasise the importance of the scrutiny. Even the apparently mechanical task of tallying yielded different results between the original and fresh scrutinies and the re-count.

113 As already noted, the Act provides the procedures and mechanisms by which senators are to be directly chosen by the people. Those procedures and mechanisms are the means by which senators are "duly elected". More particularly, senators are duly elected following a poll conducted in accordance with the Act and ascertainment of the result of the polling by scrutiny of the ballot papers. Those who now seek to have the Court declare that Mr Wang and Senator Pratt were "duly elected", though not returned as elected, necessarily ask the Court to do so by reference to a "result" of the election constructed in a manner not provided for by the Act. The departures from those requirements which Mr Wang and Mr Mead invite the Court to make cannot be dismissed as immaterial (as might have been the case if at no point in the successive exclusion of candidates had the margin between candidates been less than the number of lost ballot papers).

114 In *In re Wood*[68], the Full Court determined questions respecting a possible vacancy in the Senate referred to the Court pursuant to s 377 of the Act. A senator returned as elected was not, at the time of his election, an Australian citizen and, therefore, was not entitled[69] to be nominated for election as a senator. The whole Court held that the vacancy should be filled by the further counting of the ballot papers cast at the election, treating expressions of preference in favour of the unqualified candidate as ineffective: "a nullity"[70].

115 The central premise for the Court's conclusions was that a valid result of the polling could be ascertained by scrutiny of the ballot papers. By construing Pt XVIII of the Act (the provisions regulating the scrutiny) in this way, the whole Court concluded[71] that "the true result of the polling – that is to say, the true legal intent of the voters *so far as it is consistent with the Constitution and the Act* – can be ascertained" (emphasis added). As the Court said[72], there was, in that

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68 (1988) 167 CLR 145.

69 Constitution, ss 16 and 34 and the Act, s 163(1)(b) and (2). (The Court expressly refrained from deciding whether s 44(i) of the Constitution was engaged. See now *Sue v Hill* (1999) 199 CLR 462.)

70 (1988) 167 CLR 145 at 166.

71 (1988) 167 CLR 145 at 166.

72 (1988) 167 CLR 145 at 166.

case, "no blemish affecting the taking of the poll *and the ballot papers [were] available to be recounted*" (emphasis added). As "the valid choice of the electors [could] lawfully be ascertained by recounting", it was unnecessary to take a further poll. That is, no further poll was necessary because "[t]he full number of qualified senators required [could] be returned *in accordance with the Act* after a recount of the ballot papers"[73] (emphasis added).

116 The Full Court having answered the questions referred for its consideration pursuant to s 377 of the Act, the matter came on for further hearing before Mason CJ. His Honour gave directions for the further counting and re-counting of ballot papers and did so[74] as an incident of and for the purpose of facilitating the exercise of the power given to the Court of Disputed Returns by s 360(1)(vi) to declare any candidate duly elected who was not returned as elected. It must be acknowledged that, as the first, third and fourth respondents to each of the petitions pointed out, the directions given by Mason CJ moulded the procedures required by the Act to the circumstance that one of the candidates named on the ballot paper was ineligible for election. But the directions given did not provide for any departure from, or addition to, the requirements of the Act regulating the scrutiny beyond recognition of the candidate's ineligibility to be chosen as a senator.

117 By contrast, what Mr Wang and Mr Mead invite the Court to do in this case is to adopt a method of ascertaining the result of the polling which is a method for which the Act does not provide. That step cannot be taken. Because that is so, the evidence of the records of the original and fresh scrutinies which bear on the lost ballot papers is not admissible for the purpose of the Court determining that it should declare any candidate duly elected who was not returned as elected.

118 The second separate question should therefore be given an answer in two parts. First, the Court is precluded by s 365 from admitting, for the purpose described in the proviso to that section, evidence of the records made at the original and fresh scrutinies that bear on the missing ballot papers. Second, those records are not admissible for the purpose of the Court determining that it should declare any candidate duly elected who was not returned as elected.

Third separate question

119 The conclusions just expressed make it unnecessary to deal at any length with the third separate question, which asks, in effect, whether an inquiry

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73 (1988) 167 CLR 145 at 166.

74 (1988) 167 CLR 145 at 172.

regarding the manner in which the AEO dealt with reserved ballot papers is permitted, relevant or necessary.

120 No party submitted that inquiry regarding the manner of dealing with reserved ballot papers was not permitted and, in terms, s 281(3) provides that if the validity of an election is disputed the Court may consider any ballot papers which were reserved for the decision of the Australian Electoral Officer for the relevant State or Territory. Whether ss 353(1) and 360(1) are additional sources of power need not be decided.

121 Question 3(a) should be answered "Yes, s 281(3)".

122 Having regard, however, to the rejection of the submissions made by Mr Wang, Mr Mead and others that the Court can determine who should have been elected by constructing a result from a combination of the records made at the original and fresh scrutinies about the lost ballot papers with the results of the re-count of available ballot papers and the results of the scrutiny of those ballot papers which were not within the re-count, it is neither relevant nor necessary to the disposition of any of the three petitions to consider the reserved ballot papers. It is neither relevant nor necessary to undertake that consideration because the Court must find that Mr Dropulich and Senator Ludlam were *not* duly elected, but cannot declare who *was* duly elected. The only relief appropriate is for the election to be declared void.

Conclusion and orders

123 For these reasons, the separate questions should be answered in the manner set out earlier in these reasons.

124 The costs of the trial of separate questions should be reserved. The petitions should be stood over for argument about any remaining issue (including what order, if any, should be made for the costs of the trial of separate questions) on Thursday, 20 February 2014 at 12 noon in Melbourne.