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THE HIGH COURT AND THE AEC*

Tom Rogers (Electoral Commissioner, Australian Electoral Commission)

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Abstract

This paper focuses on the interaction between the AEC and the High Court and its effects on electoral administration.

At the outset, I would like to thank the organisers of this Conference for providing me with the opportunity to speak to you about the High Court and the AEC. I also want to acknowledge that this paper was largely prepared by Mr. Paul Pirani – the AEC’s Chief Legal Officer: the legal pulse, if I may describe him that way, at the centre of the AEC’s complex anatomy. In an irony not lost on me, the reason for his absence from this talk on the AEC and the High Court is partly as a result of some recent matters before the High Court!

There is a well-known aphorism wrongly attributed, I think, to Otto Von Bismarck to the effect that “laws are like sausages – it’s better not to see them being made.” Regardless of who made that statement, the reverse is true with electoral administration. Perhaps two key principles that should underpin the activities of any Electoral Management Body are “transparency in electoral administration”, and “appropriate external scrutiny of electoral processes.” Anything other than transparency can lead to suspicion that electoral administrators are involved in nefarious activities. Even where there is genuine electoral transparency, such as in Australia, suspicions endure. For example, at the last federal election, one survey indicated that almost one in four electors believe fraud does occur during Australian elections.

Transparency is achieved, in part, through external reviews of the AEC by a number of external bodies - including Parliament.

However, this speech focusses on the interaction between the AEC and the High Court. The AEC has always acted in matters before the High Court as though it was subject to the approach as set out by the High Court in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13. The AEC’s role in all legal proceedings is to assist the Court. The AEC has since 1983 clearly been accepted by the High Court as appropriately being involved in matters involving arguments about whether facts as pleaded disclose any “illegal practice” that may have led to the results of the election being likely to have been affected.

High Court jurisdiction

The High Court’s jurisdiction can only be invoked under particular circumstances, as laid out primarily in the Constitution. The requirements for jurisdiction raise a central question for all potential High Court matters: “will the Court hear the case”?

The first requirement is that the High Court may only hear “matters” (see section 76 of the Constitution and section 30 of the *Judiciary Act 1903*). A “matter” requires that there is a real dispute about an immediate legal right, duty or liability that the High Court is capable of determining finally. This requirement means the Court cannot rule on merely hypothetical cases, or a case which it is incapable of resolving.

It is this requirement to have a “matter” that exists together with the requirements that a person must have standing (see for example *Croome v Tasmania* [1991]) and that the “matter” is not hypothetical, which will impact on the timing of legal proceedings involving electoral laws. The issue of timing places stress on the AEC at a time where resources are usually fully

stretched in preparing or actually conducting an election. I will discuss the broad issue of timing, and the impact of decisions, as part of this paper.

The High Court has two distinct roles where it interacts with the AEC. The first role is in dealing with challenges to elections and the qualifications of Members of Parliament where it sits as the Court of Disputed Returns as provided by Part XXII of the Electoral Act. The second role is where the High Court is exercising the original jurisdiction under section 75 of the Constitution in reviewing the laws that deal with elections.

The Court of Disputed Returns

The Court of Disputed Returns provisions as outlined in s353 (1) of the electoral Act provides that:

The validity of any election or return may be disputed by petition to the Court of Disputed Returns and not otherwise.

The longstanding Court of Disputed Returns processes and the related judicial review laws enable the actions and decision of the AEC to be challenged in the Courts. The difficulty that is often faced by potential plaintiffs is which process is the appropriate process to pursue and the timing in which that can take place.

In the NSW Supreme Court decisions in *McDonald v Keats* (1981) 2 NSWLR 268 and *Osborne v Shepherd* (1981) 2 NSWLR 297 appears to have led to a view that any legal challenge to matters relating to the conduct of an election can only be mounted after the return of the writs and only with the Court of Disputed Returns.

In the Federal jurisdiction this is clearly not the case. In the case of *Courtice v AEC* [1990] FCA 57, Mr. Justice Pincus found that the NSW Supreme Court decisions were “irrelevant” to the interpretation of the Electoral Act.

The above position taken by the Federal Court has been mirrored in numerous decisions including:

- *Assaf v Australian Electoral Commission* [2004] FCA 1239 (the dropped ball when selecting the order of names on the ballot paper);

Decisions that have been cited in the various academic publications to support a particular view about the jurisdictional argument has to be carefully examined against the actual facts involved and the timing in which they are brought before a Court.

As far as judicial review is concerned, the starting off point is that the AEC is a body which makes a range of decisions under the Electoral Act. As such all of its decisions are capable of judicial review under the *Administrative Decisions (Judicial Review) Act 1977* and under section 39B of the *Judiciary Act 1903*. As to whether or not a particular AEC decision is capable of judicial review in any particular circumstance is dependent upon a number of factors which include (but are not limited to):

- (a) The scope of the exclusion contained in subsection 353(1) of the Electoral Act that “the validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise”; and
- (b) The particular timing of the proceedings in relation to the conduct of an election and the performance of the various duties required to be performed under the Electoral Act.

There have been numerous challenges to various provisions in the Electoral Act which are argued as being an infringement of various rights arising from the Constitution. Some are stated to flow directly from such provisions as sections 7 and 24 of the Constitution (“directly chosen by the people”) while others are argued to impliedly exist (e.g. the implied freedom of political communications). The Constitution contains a distinction between certain matters that are expressly dealt with by the Constitution itself (for example the disqualification of candidates under section 44), while other matters are left to be determined by the Parliament (for example the qualification of electors in sections 8 and 30 and the voting system in sections 7, 9, 24, 29 and 31).

This distinction has resulted in a fertile ground for legal challenges particularly where various amendments made to the Electoral Act may be regarded by some as being partisan and political in their nature. I take particular note of the comments made by Justice Dawson in the case of *McGinty v Western Australia* [1996] HCA 48 at paragraph 10 where he refers to the various provisions of the Constitution which he describes as “provide for the minimum requirements of representative government but do not purport to go significantly further.” He goes on in the same paragraph to conclude that:

Thus, it may be seen that the form of representative government, including the type of electoral system, the adoption and size of electoral divisions, and the franchise are all left to Parliament by the Constitution.

So we are left with a conundrum. Given the political nature of the Parliament, how are the democratic rights of Australians to representative government to be safeguarded?

It has been stated by Professor Orr that one of the cornerstones of voting rights was the 1975 High Court decision in *Ex rel McKinley v Commonwealth* [1975] HCA 53. Although the High Court in this case rejected the argument mandating one-vote one-value that applies in the United States, the joint judgment of Justices McTiernan and Jacobs at paragraph 6 stated that:

At some point choice by electors could cease to be able to be described as a choice by the people of the Commonwealth. It is a question of degree. It cannot be determined in the abstract. It depends in part upon the common understanding of the time on those who must be eligible to vote before a member can be described as chosen by the people of the Commonwealth.

The majority of the High Court in the prisoner voting case of *Roach v Electoral Commissioner* [2007] HCA 43 adopted and applied the above statement although it appears to be limited to adult Australian citizens and is subject to exception that Parliament can enact legislation that limits universal adult suffrage in circumstances that are proportionate to and reasonably consistent with representative government.

Both the Roach case and the earlier Australian Capital Television case (see *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45) were notable as the High Court had generally deferred to the Commonwealth in such cases involving the measures in the Electoral Act thereby displaying the traditional reluctance of all courts to interfere with the parliamentary process.

What remedy?

However, the broad issue of timing is one that isn't frequently canvassed. Let me explain by way of an example.

The matter of *Rowe v Electoral Commissioner* [2010] HCA 46 there was no doubt that the proceedings attracted the original jurisdiction of the High Court under section 75 of the Constitution. However, when the matter first came on before Justice Hayne on 29 July 2010 concerns were raised that because the writs for the 2010 general election had already been issued, whether the relief being sought was able to be accommodated by the AEC without risking the whole election.

The affidavit of Mr. Paul Dacey, the Deputy Electoral Commissioner, indicated that the relief sought could be achieved by the AEC if the Court's decision was handed down by 6 August 2010. Mr. Dacey's evidence was specifically referred to in the judgment of the Chief Justice and reflected in all of the other judgements.

Key times are set out in election writs that are issued by the Governor-General (House of Representative and ACT and NT Senators) and the State Governors (for Senators in each State). The election writs include the dates for the Close of Rolls, the nomination of candidates, polling day and the returns of the writs. The Electoral Act contains a whole raft of requirements and deadlines that flow from each of the above dates. Any failure by the AEC to comply with those requirements and deadlines invariably results in the electoral process being at risk of resulting in an "illegal practice" (see subsection 352(1) and 362(3) of the Electoral Act) which attracts the jurisdiction of the Court of Disputed Returns.

Given all of this, the time that can be taken in bringing a matter before the High Court can place overwhelming pressure on the ability of the AEC to conduct the election.

The injunction power

Section 383 of the Electoral Act gives to the AEC the power to commence action for an injunction where any person has engaged in conduct that would constitute a contravention of the Electoral Act. The power and duty contained in section 383 is for the AEC to institute proceedings where it is aware of a contravention of the Electoral Act. This is an extraordinarily wide duty that is imposed on the AEC including that the AEC should be taking action against itself where it is aware of some contravention. Indeed, the AEC continues to operate on the basis that it also has a duty to lodge a petition in the Court of Disputed Returns if it becomes aware of any actions by its own staff that have affected the results of an election.

Murphy and Day

In March 2016 the Parliament enacted one of the most significant changes to voting in the Senate since 1983. It was shortly after this that the Prime Minister announced the holding of a double dissolution election with polling day to be on 2 July 2016. The AEC has already entered into a large range of contracts with the passage of the Bill on 18 March 2016 and the Royal Assent on 21 March 2016.

While it was possible to technically terminate most contracts (the contracts have a termination for convenience clause) there would still be costs that the AEC would be liable for and risks to the delivery of a successful election. It is this risk to the actual conduct of an election that is impacted on with the requirement that there must be a "matter" before the Court to enable the Court to have jurisdiction and to hear a legal challenge.

Many elements of the AEC's preparation for the possible election were administratively and legislatively time critical.

The AEC had a workforce of approximately 75,000 people for the election. The vast majority of these were temporary employees who had to be trained (to different levels and in different matters) in relation to the many voting processes that may result from a successful legal challenge. Permanent employees also had to be trained.

The AEC also commences a major public awareness and education campaign shortly after the announcement of any election: including preparing media material, testing it for effectiveness in focus groups, finalising production of television, radio, print (including newspaper, mail outs to homes, information brochures etc.) and internet advertisements and information materials. The AEC has to book space in various media and the public education campaign has to be ready to proceed at the time that writs are issued.

If these arrangements have to be altered after they are put in place then that will inevitably cause considerable administrative disruption and expense to the AEC. The later the changes occur the greater the disruption and expense to the AEC. Additionally, any late changes to the legal requirements for the delivery of an election will create significant, and in some cases critical, risks to the ability of the AEC to deliver a successful election.

It is against this background that the AEC faced not one but two High Court challenges that had the potential to totally change the processes for the conduct of an election.

The first challenge was the case of *Murphy v the Electoral Commissioner* [2016 HCA 36]. These proceedings sought to challenge the prohibition contained in several provisions of the Electoral Act which prevent the AEC from adding electors to the Roll and changing electors' addresses during the period after the Close of Rolls and the close of the poll for the election. The Plaintiff sought orders to have these provisions declared as being invalid and of no effect. This would have had the effect of allowing electors to enrol and change their enrolment up until the close of polls on polling day. This had the potential to raise electoral integrity issues and to delay the return of the writs for an election.

The matter finally came on for a hearing on 11 and 12 May 2016 which was only four days before the Governor-General issued the writs for the 2 July 2016 election. The Court unanimously held that the challenged provisions did not breach the requirements of sections 7 and 24 of the Constitution.

At the same time that the above matter was proceeding, Senator Bob Day had commenced proceedings in the High Court to challenge the validity of the Senate voting changes - *Day v Australian Electoral Officer* [2016] HCA 20. In a decision dated 13 May 2016 the High Court unanimously rejected the Plaintiffs' arguments to the validity of the amendments made to the Electoral Act.

Conclusion

The challenges faced by the AEC in conducting an election are well documented. The Court of Disputed Returns processes are also well documented and have been of a longstanding nature. The AEC is acutely aware of its role as the independent electoral body charged with the conduct of elections and its role as a model litigant in legal proceedings. The AEC strives to ensure that its conduct is at all times of the highest standards and that the existing review rights meet the relevant Australian and international standards that apply to electoral bodies and the application of the rule of law.