



**WESTERN
AUSTRALIAN
GOVERNMENT**
Gazette

ISSN 1448-949X

PRINT POST APPROVED PP665002/00041

6341



PERTH, FRIDAY, 20 DECEMBER 2013 No. 235 SPECIAL

PUBLISHED BY AUTHORITY JOHN A. STRIJK, GOVERNMENT PRINTER AT 12.45 PM

© STATE OF WESTERN AUSTRALIA

COMMONWEALTH ELECTORAL ACT 1918

PETITION

(No. P56 of 2013)

**Election of Senators for
Western Australia**

COMMONWEALTH ELECTORAL ACT 1918**PETITION****Election of Senators for Western Australia**

In The High Court of Australia Perth Registry

No. P 56 of 2013

BETWEEN:

Simon Mead, Petitioner.

AND:

David Johnston, First Respondent.

Joe Bullock, Second Respondent.

Michaelia Cash, Third Respondent.

Linda Reynolds, Fourth Respondent.

Wayne Dropulich, Fifth Respondent.

Scott Ludlam, Sixth Respondent.

Zhenya Wang, Seventh Respondent.

Louise Pratt, Eighth Respondent.

The Australian Electoral Commission, Ninth Respondent.

AMENDED ELECTION PETITION

(Amended on 16 December 2013 pursuant to order of Hayne J made on 13 December 2013)

This petition concerns the election of 6 senators for the State of Western Australia to serve in the Senate of the Parliament of the Commonwealth held on 7 September 2013.

RETURN OF WRIT

The writ for the election was returned on 6 November 2013

ENTITLEMENT TO FILE THIS PETITION

The petitioner is entitled to file this petition because he was qualified to vote at the election.

STATEMENT OF FACTS

1. On 5 August 2013, Her Excellency the Governor-General in Council, pursuant to the *Commonwealth Constitution* and the *Commonwealth Electoral Act 1918* (Cth) (the **Act**), issued writs for the election of members of the House of Representatives for the States and Territories and for the election of senators for the Australian Capital Territory and the Northern Territory.

The Election

2. On 5 August 2013, His Excellency the Governor of Western Australia, pursuant to the *Election of Senators Act 1903* (WA) (the **WA Act**), issued a writ for the election of 6 senators for Western Australia (the **Election**).

3. Pursuant to s 2 of the WA Act, His Excellency fixed the following dates for the purpose of the Election—

- (a) for the close of the rolls, 12 August 2013;
- (b) for the nomination of candidates, 15 August 2013;
- (c) for the polling, 7 September 2013; and
- (d) for the return of the writ, on or before 13 November 2013.

4. On 5 August 2013, the Governors of the other States also issued writs for the election of senators for those States.

5. The general election conducted on 7 September 2013 included the Election, being a Senate election where 6 places of senators were to become vacant on 1 July 2014, and were required to be filled.

6. Candidates at the Election included the First to Eighth Respondents, and Jamie van Burgel and Murray Bow.

7. Western Australia is divided into Divisions for the purposes of a general election for the Parliament as follows—

- (a) there are 15 Divisions for the House of Representatives;
- (b) each Division has a Divisional Returning Officer (**DRO**);

- (c) the DRO for each of the 15 Divisions has responsibilities in relation to the conduct of a general election within and for the Division, including the scrutiny of votes cast for candidates for the House of Representatives seat for that Division and votes cast in that Division for the election of senators for Western Australia; and
- (d) two of the Divisions are Forrest and Pearce.

Scrutiny of the Election

8. Pursuant to ss 273, 273A and 273B of the Act, the scrutiny of Senate votes includes—

- (a) a first count of the ballot papers conducted by the Assistant Returning Officer at the polling place at which the vote is cast (the **original scrutiny**);
- (b) a second count of the ballot papers conducted by the DRO for each Division (the **fresh scrutiny**); and
- (c) the distribution of preferences by the Australian Electoral Officer for each State.

9. Following the conduct of the scrutiny processes referred to at paragraph 8 above, on or about 2 October 2013 the Australian Electoral Officer for Western Australia (**AEO**) ascertained that for the Election—

- (a) the total number of ballot papers, informal and unrejected, was 1,349,635;
- (b) the number of unrejected ballot papers was 1,311,440;
- (c) the number of informal ballot papers was 38,195;
- (d) the quota for the purposes of s 273(7) of the Act was 187,349;
- (e) the appropriate transfer values as described in s 273(7) of the Act; and
- (f) the order of standing of continuing candidates as described in s 273(7) of the Act.

10. On 2 October 2013, 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 the First, Second, Third, Fourth, Seventh, and Eighth Respondents.

11. In ascertaining those successful candidates, and in application of ss 273(8)-(32) of the Act, the AEO took the following material steps and the following matters occurred—

- (a) After the 49th exclusion of a candidate pursuant to s 273(13) (an **exclusion point**) and distribution of ballot papers in accordance with s 273(13AA), Mr van Burgel had more votes than Mr Bow.
- (b) At the 50th exclusion point, Mr van Burgel and Mr Bow had the fewest number of votes of the candidates not already elected or excluded from the count (**continuing candidates**). At this exclusion point, Mr van Burgel had gained (through preference flows) another 2,216 votes, bringing his total to 23,501, and Mr Bow had gained (through preference flows) another 9,965 votes, bringing his total to 23,515. The difference between Mr van Burgel and Mr Bow was 14 votes.
- (c) At the 50th exclusion point, Mr van Burgel was excluded as the candidate who stood lowest in the poll, and his ballot papers were distributed in accordance with s 273(13AA) of the Act.
- (d) The result in the final count was the election of the Seventh and Eighth Respondents to the fifth and sixth vacancies respectively.

12. The question of which of Mr van Burgel or Mr Bow was excluded at the 50th exclusion point was critical in determining who would be elected to fill the fifth and sixth vacancies respectively. That is because the preferences that would be directed upon the exclusion of Mr van Burgel were such as to favour decisively the election of the Seventh and Eighth Respondents, and the preferences that would be directed upon the exclusion of Mr Bow were such as to favour decisively the election of the Fifth and Sixth Respondents.

Request for a re-count

13. On 2 October 2013, the Fifth and Sixth Respondents each made a formal request for a re-count.

14. On 2 October 2013, the AEO announced that the declaration under s 283(1)(a) of the Act of the result of the Election and the names of the candidates elected would be deferred.

15. On 3 October 2013, the AEO refused the respective requests of the Fifth and Sixth Respondents.

16. On 3 October 2013, the Sixth Respondent appealed to the Electoral Commissioner to direct a re-count.

17. On 4 October 2013, the Fifth Respondent appealed to the Electoral Commissioner to direct a re-count.

18. On 4 October 2013, the AEO further deferred the declaration of the results of the election in light of the appeals for a direction for a re-count.

19. On 10 October 2013, the Electoral Commissioner directed the AEO to conduct a recount of ballot papers, in the following terms—

To the Australia Electoral Officer for Western Australia

Pursuant to section 278(2) of the *Commonwealth Electoral Act 1918* (Electoral Act 1918) you are hereby directed to conduct a re-count of the following category of ballot papers cast by voters in the election of the Senators for Western Australia—

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.

To be clear, the above category of Senate ballot papers excludes those ballot papers that proceeded to the Centralised Senate Scrutiny and which were previously considered by you under section 273A(4) of the Electoral Act.

The re-count

20. The AEO commenced the re-count on 17 October 2013.

21. The re-count involved the scrutiny of approximately 96% of the ballot papers in the election.

22. During the course of the re-count, approximately 942 ballot papers were reserved for the decision of the AEO in accordance with s 281 of the Act. From 17 to 31 October 2013, the AEO decided whether each of the ballot papers so reserved (the **reserved ballot papers**) were to be allowed and admitted or disallowed and rejected.

23. In deciding whether to admit or reject the reserved ballot papers, the AEO admitted ballot papers that were informal and rejected ballot papers that were not informal, contrary to ss 268, 273, 273A and 280 of the Act.

Particulars

- (a) The AEO rejected at least 23 ballot papers on the basis that he was not satisfied that the mark above the line was a clear enough figure 1 to indicate the voter's first preference. In each case it was clear from the ballot paper as a whole that the voter intended the mark in question to be the figure 1, and each ballot paper was not informal and should not have been rejected.
 - (b) The AEO rejected at least 21 ballot papers on the basis that he was not satisfied that the mark above the line was a clear enough cross to indicate the voter's first preference. In each case it was clear from the ballot paper as a whole that the voter intended the mark in question to be a cross, and each ballot paper was not informal and should not have been rejected.
 - (c) The AEO rejected at least 19 ballot papers on the basis that he was not satisfied that the mark above the line was a clear enough tick to indicate the voter's first preference. In each case it was clear from the ballot paper as a whole that the voter intended the mark in question to be a tick, and each ballot paper was not informal and should not have been rejected.
 - (d) The AEO rejected at least 24 ballot papers where the voter had indicated a first preference by a figure 1, cross, or tick above the line but where there was another marking on the ballot paper or a rip in the ballot paper. In each case it was clear from each ballot paper as a whole that the voter intended the mark above the line to indicate his or her first preference, and each ballot paper was not informal and should not have been rejected.
 - (e) The AEO accepted at least 29 ballot papers where the voter had marked a figure above the line on the basis that the mark was a clear enough figure 1 to indicate the voter's first preference. In each case, the mark was not sufficiently clear to indicate that the voter intended the mark in question to express his or her first preference, and each ballot paper was informal and should not have been accepted.
 - (f) The AEO accepted at least 16 ballot papers where the voter had marked a figure above the line on the basis that the mark was a clear enough cross to indicate the voter's first preference. In each case, the mark was not sufficiently clear to indicate that the voter intended the mark in question to express his or her first preference, and each ballot paper was informal and should not have been accepted.
 - (g) The AEO accepted at least 20 ballot papers where the voter had marked a figure above the line on the basis that the mark was a clear enough tick to indicate the voter's first preference. In each case, the mark was not sufficiently clear to indicate that the voter intended the mark in question to express his or her first preference, and each ballot paper was informal and should not have been accepted.
 - (h) The AEO accepted at least 25 ballot papers where the voter had marked a figure above the line but where there was another marking on the ballot paper. This decision was made even though the other markings indicated that the voter did not intend the figure above the line to indicate the voter's first preference. In each case, each ballot paper was informal and should not have been accepted.
24. Each of the ballot papers referred to at paragraphs 23(a)-(d) above that was incorrectly rejected by the AEO indicated a first preference for Mr Bow, Mr Daryl Higgins or Mr Jay Edwards. Mr Higgins and Mr Edwards were excluded before the 50th exclusion point. Had the reserved ballot papers indicating a first preference for Mr Higgins and Mr Edwards been accepted by the AEO, they would have been distributed to Mr Bow and added to his total at the 50th exclusion point.
25. Each of the ballot papers referred to at paragraphs 23(e)-(h) above that was incorrectly accepted by the AEO indicated a first preference for Mr van Burgel or Mr Adrian Byass. Mr Byass was excluded before the 50th exclusion point. The reserved ballot papers indicating a first preference for Mr Byass which were incorrectly accepted by the AEO were distributed to Mr van Burgel and were part of his total at the 50th exclusion point.
26. Further, during the course of the re-count, the following matters emerged—
- (a) A total of 1,370 ballot papers for votes which had been cast in either the Division of Forrest or the Division of Pearce could not be located and brought within the re-count (the **missing ballot papers**).

- (b) The re-count proceeded with respect to the balance of ballot papers falling within the scope of the Electoral Commissioner's direction. To those results were added the existing record of the votes that fell outside the Electoral Commissioner's direction, namely the below the line votes, in order to determine the result.
- (c) The balance of ballot papers, together with the existing results of the below the line votes, comprised 38,519 ballot papers for informal votes (which included the unused blank ballot papers referred to in paragraph 26(e) below) and 1,310,278 ballot papers for unrejected votes. That was a total of 1,348,797 ballot papers.
- (d) Conducting the re-count solely on the balance of ballot papers, the AEO ascertained that the total number of informal votes, when informal votes outside the scope of the re-count direction were added, was 38,519, which was 324 votes more than the AEO had ascertained during the scrutiny up to 2 October 2013.
- ~~(e) The re-count also ascertained that the number of ballot papers pleaded in paragraph 9(a) had been miscounted because there had been arithmetical errors in the counting of the number of ballot papers in some parcels. The miscounting resulted in the number of ballot papers after the re-count being only 838 fewer than the number of ballot papers pleaded in paragraph 9(a) despite 1,370 ballot papers being missing. The correct figure for the number pleaded in paragraph 9(a) should have been 1,350,167, namely, the 1,348,797 ballot papers pleaded in paragraph 26(c) plus the 1,370 missing ballot papers.~~
- (e) The number of ballot papers counted in the re-count was only 838 fewer than the number of ballot papers pleaded in paragraph 9(a) despite 1,370 ballot papers being missing. This was due to undercounting of the total number of ballot papers in some parcels in the scrutiny up to 2 October 2013 and the inclusion of some unused blank ballot papers in the re-count.
- (f) At the 50th exclusion point of the re-count, Mr van Burgel and Mr Bow were again the two continuing candidates with the fewest number of votes. At this exclusion point, Mr van Burgel had gained (through preference flows) another 2,216 votes, bringing his total to 23,526 and Mr Bow had gained (through preference flows) another 9,971 votes, bringing his total to 23,514. The difference between Mr Bow and Mr van Burgel was 12 votes.
- (g) At the 50th exclusion point, Mr Bow was excluded as the candidate who stood lowest in the poll, and his ballot papers were distributed in accordance with s 273(13AA).
- (h) The result in the final count was the election of the Fifth and Sixth Respondents to the fifth and sixth vacancies respectively.

27. The petitioner repeats paragraph 12 above for the purposes of the re-count.

Declaration of results of the Election and return of writs

28. On 4 November 2013, the AEO declared under s 283(1)(a) of the Act that the First to Sixth Respondents were elected in that order.

29. On 6 November 2013, the AEO certified in writing the First to Sixth Respondents as the candidates elected to the Senate for Western Australia, attached the certificate to the writ, and returned the writ for the Election to the Governor of Western Australia.

Status of the missing ballot papers

30. By petition in proceeding C17 of 2013, the Australian Electoral Commission (AEC) avers that—

- (a) All the missing ballot papers were the subject of the fresh scrutiny by the DRO for the Division of Forrest or the DRO of the Division of Pearce. The fresh scrutiny commenced on or about 9 September 2013 and continued until on or about 23 September 2013.
- (b) All the missing ballot papers were either for informal votes or votes above the line and the DRO remained responsible for their safe custody in accordance with the directions of the Electoral Commissioner under s 393A(3) of the Act.
- (c) In order for the DRO for the Division of Forrest to discharge the responsibility under s 393A(3), the procedures put in place involved the ballot papers being transferred by a courier company engaged by the AEC (Toll Ipec) to an initial transit point in Bunbury, and then to the courier's depot in the Perth suburb of Hazelmere and subsequently to the AEC's warehouse at the Perth suburb of Welshpool from where they would be available for any subsequent purpose under the Act, such as transfer to a re-count centre for a re-count.
- (d) In order for the DRO for the Division of Pearce to discharge the responsibility under s 393A(3), the procedures put in place involved the ballot papers being transferred direct to the AEC's warehouse at Welshpool from where they would be available for any subsequent purpose under the Act, such as transfer to a re-count centre for a re-count.
- (e) After the re-count commenced on 17 October 2013 and the relevant ballot boxes and parcels of ballot papers were transmitted from the warehouse at Welshpool to the re-count centre, it was ascertained that—
 - (i) ballot papers were missing from the Division of Forrest, which were identified from records of the fresh scrutiny as being 151 above the line votes and 80 informal votes; and
 - (ii) ballot papers were missing from the Division of Pearce, which were identified from records of the fresh scrutiny as being 1,099 above the line votes and 40 informal votes.
- (f) As at 15 November 2013, the missing ballot papers remain lost.
- (g) In the premises above, the missing ballot papers are not in the possession, custody or control of the AEC.

- (h) In the above circumstances, the missing ballot papers are unlikely to be found at all or under conditions in which the integrity of the ballot papers could be established without real doubt as to whether they could be safely counted for the purposes of any power that the Court of Disputed Returns might exercise.

31. As part of the fresh scrutiny referred to at paragraph 30(a) above, the DRO for the Division of Forrest and the DRO for the Division of Pearce recorded information about each of the missing ballot papers (the **AEC records of the missing ballot papers**). Based on the AEC records of the missing ballot papers, on 8 November 2013 the AEC published a media release which includes a table identifying—

- (a) how many votes were formal or informal, and
 (b) in the case of the formal votes (all of which were votes above the line), for which group of candidates the voter had voted.

32. Based on—

- (a) the low number of errors identified in the re-count in respect of ballot papers other than the missing ballot papers, and
 (b) similarly low numbers of errors in other elections conducted by the AEC,

it is likely that the AEC records of the missing ballot papers are substantially accurate.

Effect of reserved ballot papers

33. If the AEO had admitted or rejected the reserved ballot papers referred to at paragraph 23 above correctly in accordance with ss 268, 273, 273A and 280 of the Act, admitting all ballot papers marked in accordance with s 239 and 269 of the Act and rejecting only those ballot papers that were informal as prescribed by s 268 of the Act, the following result would have occurred—

- (a) At the 50th exclusion point of the re-count, Mr Bow would have had more votes than Mr van Burgel, so that Mr van Burgel should have been excluded, not Mr Bow;
 (b) The exclusion of Mr van Burgel rather than Mr Bow would have occurred regardless of whether the missing ballot papers as represented in the AEC records of the missing ballot papers were included in the re-count or not;
 (c) After the distribution of the ballot papers of Mr van Burgel and those of the remaining continuing candidates, the AEO should have declared the Seventh and Eighth Respondents elected to the fifth and sixth vacancies at the Election; and
 (d) The AEO should have certified in writing the First, Second, Third, Fourth, Seventh, and Eighth Respondents as the candidates elected to the Senate for Western Australia, and returned that certificate with the writ for the Election to the Governor of Western Australia.

Contraventions of the Act

34. The following contraventions of the Act have occurred—

- (a) the petitioner repeats paragraph 23 above;
 (b) by reason of the missing ballot papers, the AEO has failed to conduct the re-count of ballot papers in accordance with the direction of the Electoral Commissioner for the purposes of ss 278(2) and 279B in contravention of those provisions and ss 18(3) and 20 of the Act; and
 (c) the DRO for the Division of Forrest and the DRO for the Division of Pearce have failed to maintain the safe custody of the missing ballot papers in contravention of s 393A(3) of the Act.

35. The contraventions of the Act constitute illegal practices within the definition in s 352(1) of the Act committed by a person other than a candidate and without the knowledge or authority of the candidate.

The result of the Election was likely to be affected

36. If the AEO had admitted or rejected the reserved ballot papers correctly as pleaded at paragraph 33 above, then the Seventh and Eighth Respondents would have been elected to the fifth and sixth vacancies, rather than the Fifth and Sixth Respondents.

37. Alternatively, if the reserved ballot papers are not admitted or rejected correctly as pleaded at paragraph 33 above—

- (a) In order for the declared result of the Election that was certified in the returned writ to stand as the correct result had the missing ballot papers been available for the re-count, it would be necessary for there to have been one or more errors in the fresh scrutiny of the missing ballot papers with the effect that, on the re-count, the relative order of standing of Mr Bow and Mr van Burgel was such that Mr Bow would be excluded before Mr van Burgel.
 (b) It is not possible to conclude either with certainty, or on the balance of probabilities, either that—
 (i) the Fifth and Sixth Respondents have been correctly returned; or
 (ii) an alternative return of the Seventh and Eighth Respondents accurately, or more accurately, reflects the true intention of the voters.

38. In these premises, for the purposes of s 362(3) of the Act, the Court should be satisfied that the result of the Election was likely to be affected and that it is just that—

- (a) the Fifth and Sixth Respondents should be declared not to be duly elected; or
 (b) the Election should be declared void.

RELIEF

The petitioner asks the Court to make the following orders following the Court's consideration under s 281(3) of the Act of the ballot papers that were reserved by the DRO for the decision of the AEO—

1. A declaration pursuant to ss 360(1)(v) & (vi) of the Act that, at the election of 6 senators for the State of Western Australia to serve in the Senate of the Parliament of the Commonwealth held on 7 September 2013—

(a) the Fifth and Sixth Respondents were not duly elected; and

(b) the Seventh and Eighth Respondents were duly elected.

2. Alternatively, a declaration pursuant to s 360(1)(vii) of the Act that the election of 6 senators for the State of Western Australia to serve in the Senate of the Parliament of the Commonwealth held on 7 September 2013 is absolutely void.

3. The Commonwealth pay the petitioner's costs.

Dated: 16 December 2013.

SIMON MEAD

in the presence of—

Signed by witness
CATHERINE SCAIFE
Name of witness

Signed by witness
ROY SCAIFE
Name of witness

SMALL BUSINESS OWNER
Occupation

RESEARCH OFFICER
Occupation

28 Fitzgerald Way, Australind WA 6233
Address

28 Fitzgerald Way, Australind WA 6233
Address

TO:

THE FIRST, THIRD, AND FOURTH RESPONDENTS
David Johnston, Michaelia Cash, and Linda Reynolds
Colquhoun Murphy
31 Torrens Street
BRADDON ACT 2612

AND TO:

THE SECOND AND EIGHTH RESPONDENTS
Joe Bullock and Louise Pratt
Slater and Gordon Lawyers
Level 4, 190 St Georges Terrace
PERTH WA 6000

AND TO:

THE FIFTH RESPONDENT
Wayne Dropulich
DLA Piper Australia
Level 31, Central Park Building
152-158 St Georges Terrace
PERTH WA 6000

AND TO:

THE SIXTH RESPONDENT
Scott Ludlam
MDC Legal
44 Kings Park Road
WEST PERTH WA 6000

AND TO:

THE SEVENTH RESPONDENT
Zhenya Wang
HopgoodGanim
Level 8, Waterfront Place
1 Eagle Street
BRISBANE QLD 4000

AND TO:

THE NINTH RESPONDENT
The Australian Electoral Commission
Australian Government Solicitor
4 National Circuit
BARTON ACT 2600

The petitioner's address for service is—

Slater and Gordon Lawyers
Level 4, 190 St Georges Terrace
PERTH WA 6000
