IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY **NO C17 OF 2013**

BETWEEN: **THE AUSTRALIAN ELECTORAL COMMISSION**
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

NO P55 OF 2013

BETWEEN: **ZHENYA WANG**
Petitioner

AND: **DAVID JOHNSTON**
First Respondent

JOE BULLOCK
Second Respondent

MICHAELIA CASH
Third Respondent

LINDA REYNOLDS
Fourth Respondent

Filed on behalf of the Australian Electoral Commission by:

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WAYNE DROPULICH
Fifth Respondent

SCOTT LUDLAM
Sixth Respondent

LOUISE PRATT
Seventh Respondent

AUSTRALIAN ELECTORAL COMMISSION
Eighth Respondent

NO P56 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

AEC'S REPLY

1. These reply submissions are in a form suitable for publication on the Internet.

2. Due to the volume of submissions put and the disparate nature of the arguments, in the space available the AEC deals with the main arguments below.

Prevented from voting

3. It is correct, as a number of the respondents point out,[1] that various sections of the Act use the word "vote" and its cognates in the sense of an elector presenting at a polling booth and marking a ballot paper. From this, they contend that the expression "*prevented from voting*" in s 365 of the Act can only apply to those electors who did not actually cast a vote.[2]

4. What the submissions of the first, third, and fourth respondents ("**the Liberal Candidates**"), and Messrs Dropulich, Wang, and Mead all overlook, however, is that, at the time s 365 was introduced by the 1922 amendments to the Act, the established meaning of "*prevented from voting*", as it applied to official error, *included* that the vote was not recorded in the relevant count. The phrase may be directly tracked to *Woodward v Sarsons* (1875) LR 10 CP at 743 where Lord Coleridge CJ, delivering the judgment of the Court, spoke of a circumstance where there was "no real *electing* at all" (emphasis in original). He proceeded to give examples of electors being "*prevented from voting*" by official error which critically included prevention "by fraudulent counting of votes or false declarations of numbers by a Returning Officer or by such other acts or mishaps", examples which necessarily involved the relevant elector(s) having cast a ballot.

5. The seminal passage from *Woodward v Sarsons* was cited *in extenso* by Griffith CJ in *Chanter v Blackwood* (1904) 1 CLR 39 at 58-59 as well as by Barton J and Isaacs J (with whom Gavan Duffy and Rich JJ agreed) in their separate judgments in *Bridge v Bowen* (1916) 21 CLR 582 at 605-606 and 616-618 respectively. At 618, Isaacs J said in his "exhaustive" examination of the two heads of avoiding an election under *Woodward v Sarsons* which his Honour thought (at 616) "appl[ied] to all classes of elections all over Australia", that:

> The Court [in *Woodward v Sarsons*] next proceeds to apply those rules to the facts of the case, and in doing so indicated what they meant by the words "may have been prevented" under the first head. At p 745 they show that it included prevention from recording votes with effect and say:-"There is no evidence, as it seems to us, that any elector was prevented from recording his vote, or induced not to record it, by what occurred...The result is, that all the electors who desired to vote did vote." *So much for actual voting.* Then, at p 746, the Court inquires into the validity or invalidity of the votes given, to see whether the voters were *prevented from voting with effect* by reason of the official errors. If the error was a departure, however small, from a rigid mandatory enactment, *so that the vote could not be counted, there would have been a prevention as to the votes affected*; but if the departure is from a rule which requires only substantial and not strict compliance, and there is substantial compliance, there is no prevention.

[1] Eg Liberal Candidates [8]-[30], Mr Wang at [27]ff.
[2] Such an argument was put and rejected in *Varty v Ives* [1986] VR 1 at 11.

They held that there was no prevention as the ballot papers were in order. (emphasis added)[3]

6. In 2002, the Full Court of the Supreme Court of South Australia in *Featherston v Tully* (2002) 83 SASR 302 determined that the common law as expressed in *Bridge v Bowen* continued to apply in South Australia as that State's electoral legislation had been amended so as to make the legislation non-exhaustive. At 339 [147], Bleby J, with whom Mullighan J and Williams J agreed, said that "[i]n determining whether electors may have been prevented from voting by official errors under the first limb, if the error was a departure from a rigid mandatory enactment so that the vote could not be counted, there is a prevention".

7. There is no basis for supposing (and there is nothing in the *travaux* to support the view) that, when the Legislature used the phrase "*prevented from voting*" in 1922 as it applied to official error, it was doing it in a manner inconsistent with the clear understanding of the High Court (expressed to apply to elections generally) of that same phrase in the exact context of its relevance to official error. As the quotation from Isaacs J in *Bridge v Bowen* at 618 shows, the established understanding of the expression "prevented from voting" was far broader than the narrow construction urged by the Liberal Candidates, Messrs Dropulich, Mead and Wang, namely that "prevented from voting" solely means that a voter is prevented from casting his or her ballot. The view of Isaacs J, who was in the majority in *Bridge v Bowen* and who also decided *Kean v Kerby*, was that it meant "*prevention from recording votes with effect*". This was precisely the meaning accorded to the expression by Sugerman J. in *Campbell v Easter* who also made reference to *Woodward v Sarsons* in the course of his judgment. Significantly, *Woodward* was *not* referred to by Hardie J. in *Dunbier v Mallam* nor by Nagle J in *Cleary v Freeman* upon which some of the other parties place considerable reliance.

8. Of course, when the Act imposes a duty on an elector to vote, it imposes nothing further than the elector doing everything in his or her power to record that vote (as the reference by the Liberal Candidates ([9]) to *Faderson v Bridger* shows)[4], but those "votes" are then placed in the care and custody of electoral officers, and a voter is prevented from voting in the relevant sense if the electoral officer, through error or omission, prevents that vote from counting in the count that matters. That is the established rule, probably because, with respect, it accords with common sense. In setting up a false duality between the "polling" and the "scrutiny" under the Act, those parties opposed to the submissions of the AEC, elide the fact that the point of the polling is that the votes will be subjected to scrutiny. The job of the voter might be done at the point at which he or she casts a vote, but that is not the end of the story. There are, indeed, detailed provisions with respect to how someone is to cast a vote, but that vote is worthless if it is not subjected to scrutiny, and that part of the process is entirely in the hands of officials and outside the hands of electors.

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[3] As explained in the AEC's submissions in chief, the dispute in *Bridge v Bowen*, was as to the nature of proof necessary to void an election (the majority in that case finding that an election which had been compromised by the votes of personators would not be avoided as, under the municipal legislation in effect, the risk of personation had been addressed and that if the election was run again, the officials would be obliged to let in the same votes meaning there had been no error under the statute cf Mr Dropulich at [28]-[30]). However, the Court operated on the assumption of the expanded definition of "prevented from voting" that had been applied in *Woodward v Sarsons*.

[4] Mr Wang's reliance ([35]) on s 367 of the Act is unavailing. That section which speaks of an elector "not permitted to vote", in fact supports the AEC position; it suggests that being "prevented from voting" is a different and broader concept than simply not being permitted to vote.

9. The position taken by the common law recognises that errors by officials are just as important before the ballot paper is marked as after. That is why "voting" in the expression "prevented from voting" has a wider meaning than "*actual* voting" although it of course includes "actual voting". Errors by officials that prevent votes from being counted are just as significant as errors that allow ballot boxes to be stuffed illegally with extra votes. One may ask rhetorically why s 365 would distinguish between an error whereby an official accidentally burns down the polling place before voters vote and where he or she does it after and before the scrutiny. Most of the decided cases do indeed deal with circumstances that arise before the votes are cast, but that is because at that point there is a greater range of things that may go wrong.

10. Further, there is no basis for supposing that the amendments in 1984 to "illegal practices" in some way altered the operation of the s 365 proviso. Putting to one side that Baron Pollock must have been right that "illegal practices" always meant any contravention of the Act[5], nothing about the 1984 amendments suggests that they were thought to alter radically the nature of evidence that would be admitted in respect of an election petition so that evidence of voter intention would now be admissible.

11. For the above reasons, the 1,370 electors whose votes were not able to be counted in the re-count were "*prevented from voting*" within the meaning of s 365.[6] It is also important to note that, because those ballots had been lost, not only was the officer who conducted the re-count unable to count those ballots but also the scrutineers who participated in the re-count were not able to request the "reservation" of any of those ballots, including the 120 ballots recorded as informal at the fresh scrutiny, pursuant to s 281 of the Act, for potential consideration by the Court of Disputed Returns.

Use of the records of the 1,370 missing ballot papers

12. A number of the other parties' submissions place an unwarranted gloss on the proviso to s 365. Thus, it is suggested that evidence of voter intention is only precluded where the admission of such evidence would reveal the identity of the elector. But the proviso is not so limited. It also precludes the receipt of evidence which may be unreliable or compromised for any number of reasons. It is absolute in its terms and is engaged where an elector has been prevented from voting by an official error. It does not give the Court a discretion to admit some evidence but not other evidence. It does not separate the franchise between those whose secrecy is threatened and others. Those who are to maintain their secrecy but have been prevented by official error from voting are not to be penalised for that as against other prevented electors.

13. A related argument advanced by Mr Wang ([43]ff) and the Liberal Candidates ([50-51]) places much emphasis on the use of the definite article "the" prior to the word "elector" in the proviso. But that is simply correct grammar following the use of the

[5] Fn 3 on p 6 of AEC submissions in chief.

[6] The various "*reductios*" advanced on behalf of the Liberal Candidates at [23]-[30] of their submissions should be rejected. It is not suggested that the meaning of the expression "prevented from voting" in s 365 should translate to other sections of the Act using the term "vote" or its cognates to produce absurd results. Further, as [38] of the AEC submissions in chief makes clear, the present case does not require the Court to determine whether or not an elector whose vote has been rejected as informal has been "prevented from voting" within the meaning of s 365.

expression "any elector" earlier in the proviso. The singular will include the plural and no particular significance should be attributed to its use.

14. Both the Liberal Candidates and Mr Wang submit that the s 365 proviso has no operation by reason of s 362. This submission was anticipated and dealt with in [43] of AEC's submissions in chief – see also [9] above. Indeed, Gaudron J in *Sue v Hill* at [148], when her Honour spoke of the role of s 365, is not to be taken to have given limited meaning to "prevented from voting". Her Honour was indicating that ss 360 and 362 must be read with s 365, because the latter section confines the operation of s 360. Her Honour, in a case far removed from the present, was not attempting to create a limbo zone between the vote being cast and the scrutiny taking place.

15. The submission made by some that draws a distinction between what was intended by the elector and what the elector actually did in casting his vote was anticipated and dealt with in [44] of AEC's submissions in chief, and the AEC's position must be correct in light of the traditional meaning given by Sir Isaac Isaacs to the phrase "prevented from voting" in *Bridge v Bowen*. When his Honour, in *Kean v Kerby*, gave the opinion extracted at [44] of the AEC's submissions in chief, he was doing it in a context where "prevented from voting" extended past actual voting. In relation to the argument advanced by the Liberal Candidates at [42]ff, it is noted, as is conceded at [47], that the argument does not arise in relation to the reserved questions. There are difficulties with those submissions, presently irrelevant and which require separate consideration.

16. Even if s 365 alone does not preclude receipt of the records of the fresh scrutiny of the 1370 lost ballots, both s 263 and also s 281(3) dictate that result. In this context, s 281(3) contemplates that the Court of Disputed Returns may examine certain reserved ballot papers for the purposes of considering whether or not to order a re-count and may not do so unless satisfied that the re-count is justified. That section presupposes that scrutineers at the s 279B re-count have had an opportunity to request the reservation of any ballot paper, for the initial consideration of the Australian Electoral Officer and then the potential consideration of the Court of Disputed Returns.

17. If reserved ballot papers are the only ballot papers which the Court of Disputed Returns may consider for the purposes of ordering a re-count, which s 281(3) implies, it follows that the Court may not have regard, for the purpose of ascertaining the voters' intention, to what is at best secondary evidence of ballot papers which have not been reserved. In addition, Mr Wang's submissions at ([37](b) and (c)) and ([57]-[64]) attribute a far larger operation to s 361 then it will bear. That section sets up a duality between the type of inquiries that are permitted to be made in respect of voting by concentrating on excluding the conclusiveness of the Roll. It is not a general grant of power.

18. If, as the AEC submits, s 365 is engaged, a more general provision such as s 364 and judicial statements in relation to the breadth of courts' powers cannot be used to undermine or circumvent the operation of the proviso cf Mr Wang [22] and [49]. Although it is true to say that the conferral of jurisdiction on a Court should not be impliedly restricted, that does not equate with extending the jurisdiction to the Court taking the place of those prevented from voting and exercising the franchise on their behalf. The point about a re-count under the Act, which is what the petitions of Messrs Wang and Mead effectively seek, is that the ballot papers, in a close election, must be subjected to a new scrutiny to establish certainty of the election result.

Although the Court undoubtedly has broad powers, its power to examine ballot papers for the purposes of a re-count is constrained by s 281(3), being limited to a consideration of reserved ballots (Mr Mead's submissions at [40] support this view). If the Court had a general power to consider all ballot papers or secondary evidence of them, the first three lines of s 281(3) would be otiose. As the 1,370 missing ballots were not reserved and thus could not be considered by the Court in circumstances where the validity of the election was disputed, receipt of secondary evidence of those ballots is also not permitted.

19. It is to be noted that the petitions of Messrs Wang and Mead and the submissions on behalf of the Liberal Candidates[7] seek that the Court declare candidates duly elected who were not "returned as elected": s 360(1)(vi). This involves a re-counting and must require the Court to ascertain the result of the polling, it being fundamental to the argument that the wrong result was declared. This is where s 263 of the Act assumes such significance because it requires the result of the polling to be "ascertained by scrutiny". That is something which, on the facts of this particular case, the Court cannot do as use of the records of the 1,370 missing ballot papers would mean that the result of the polling would not be ascertained by scrutiny.

20. The centrality of scrutiny of the ballot papers applies equally to a judicial re-count. No allegation was made by the AEC that the records of the original or fresh scrutiny were accurate (cf Mr Dropulich at ([8]-[10]), because the re-count was required to, in a *de novo* fashion, test the scrutiny of the ballot papers: *Re Lack*. None of the parties opposed to the position of the AEC can overcome the fact that re-counts, either one conducted by the AEC or the Court, require scrutiny of all the relevant ballot papers, and that process is impossible where the scale of missing ballot papers exceeds the relevant margin. The Court of Disputed Returns operates to review the process, and it is difficult to see how a process so fundamentally different to that provided for in the Act could be permitted.

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[7] Cf Liberal Candidates at [46], the Court is not able, in the absence of the missing votes, 'to determine the result of the election that the AEC would have been required to declare had the ballot papers not been lost'. If the ballot papers were available, each would have been susceptible to a different decision being made as to formality (whether on a challenge by a scrutineer or on an electoral official's own motion). Where the notional re-count gives a margin of a single vote and this is based on an untested assumption that the counting and decisions on formality were accurate, it is not possible to identify the particular result that the AEC would have been bound to declare.