



HIGH COURT OF AUSTRALIA

18 February 2014

THE AUSTRALIAN ELECTORAL COMMISSION v JOHNSTON & ORS

WANG v JOHNSTON & ORS

MEAD v JOHNSTON & ORS

[2014] HCA 5

Today the High Court, sitting as the Court of Disputed Returns, answered questions of law arising in three petitions which dispute the election of six senators for the State of Western Australia to serve in the Senate of the Parliament of the Commonwealth.

The election for the fifth and sixth Senate places for Western Australia was very close. Who was to be elected to those places depended on which of two candidates was excluded at a determinative point in the count. When the ballot papers were scrutinised, one of those candidates was 14 votes ahead of the other at the determinative point. On that basis, Mr Zhenya Wang and Senator Louise Pratt would have been elected to the fifth and sixth places. Mr Wayne Dropulich and Senator Scott Ludlam, who would have been elected to those places had the other of those candidates been excluded, successfully sought a re-count.

During the conduct of the re-count, it emerged that 1,370 ballot papers had been lost between the earlier counts and the re-count. When the available ballot papers were re-counted, the candidate who had been excluded in the earlier counts was instead 12 votes ahead at the determinative point. This meant that Mr Dropulich and Senator Ludlam were to be elected to the fifth and sixth Senate places. The Australian Electoral Officer for Western Australia ("the AEO") declared the result of the election on that basis.

The Australian Electoral Commission, Mr Wang and a person qualified to vote at the election, Mr Simon Mead, filed petitions in the Court of Disputed Returns disputing the result of the election. Each petitioner asserted that the loss of the ballot papers contravened the *Commonwealth Electoral Act 1918* (Cth) ("the Act"). Mr Wang and Mr Mead also asserted that certain decisions made by the AEO in relation to ballot papers reserved during the re-count for his consideration were wrong. The Court tried three questions of law. Those questions required the Court to consider whether it could decide who should have been elected and whether it could come to that conclusion by looking at records made in earlier counts about the lost ballot papers.

The Court held that it was precluded under the Act from looking at records of earlier counts of the lost ballot papers. It found that, without regard to the voting intentions recorded in those ballot papers, the conclusion that the loss probably affected the result of the election was inevitable. The number of ballot papers lost far exceeded the margin between the candidates at the determinative point in the count. And the re-count yielded different tallies of votes and different decisions about rejection or acceptance of ballot papers from those reached in the earlier counts, in numbers which could not be dismissed as irrelevant or trivial.

The Court rejected the argument of Mr Wang, Mr Mead and some other parties that it could determine who should have been elected by combining the results of the re-count with the records

made in earlier counts about the lost ballot papers. That method of ascertaining the result of the polling is one for which the Act does not provide. The Court concluded that it is therefore unnecessary for it to consider whether certain ballot papers had been wrongly accepted or rejected by the AEO in the re-count.

The Court will hold a further hearing on Thursday, 20 February 2014 to determine the final disposition of the petitions.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*