

FEDERAL COURT OF AUSTRALIA

Gunter v Hollingworth [2002] FCA 943

PARLIAMENTARY ELECTION (CTH) - Petition deputing election or return - House of Representatives - Court of Disputed returns - summons seeking dismissal of petition - whether petition within jurisdiction of Court of Disputed Returns - where petition not limited to particular Division - where petition challenges entirety of general election - requirement that petition set out facts relied upon - whether satisfied.

Commonwealth Electoral Act 1918 (Cth)
Constitution (Office of Governor) Act 1987 (Qld)

Muldowney v Australian Electoral Commission (1993) 178 CLR 34 App
Pavlekovich-Smith v Australian Electoral Commission (1993) 115 ALR 641 Cited
Sykes v Australian Electoral Commission (1993) 115 ALR 645 Cited
Robertson v Australian Electoral Commission (1993) 116 ALR 407 Cited
Abbotto v Australian Electoral Commission (1997) 144 ALR 352 Cited
McClure v Australian Electoral Commission (1999) 163 ALR 734 Cited
Joosse v Australian Securities and Investment Commission (1998) 159 ALR 260 Cited
Sharples v Arnison & Ors [2001] QCA 518 Appl
Skyring v Crown Solicitor [2001] QSC 350 Appl
Skyring v Electoral Commission of Queensland [2001] QSC 080 Appl
Sharples v Arnison [2001] QCA 274 Appl
Re Skyring's Application [No 2] (1985) 59 ALJR 561; 58 ALR 629 Cited
Skyring v Australia & New Zealand Banking Group Ltd (unreported) Qld CA 12 May 1994 Cited
Skyring v Commissioner of Taxation (unreported) Qld CA 25 March 1993 Cited
Re Skyring [1994] 68 ALJR 618 Cited
Re Attorney General (Cth) Ex parte Skyring (1996) 135 ALR 29 Cited
Re Cusack (1985) 66 ALR 93 Cited
Sue v Hill (1999) 199 CLR 462 Cited

RICHARD STEPHEN GUNTER v DR PETER HOLLINGWORTH, MAJOR GENERAL PETER ARNISON AO, PETER DOUGLAS BEATTIE, AUSTRALIAN ELECTORAL COMMISSION, ALAN GEORGE SKYRING, JAMES EDGAR STEWART, TREVOR ACWORTH, DONALD CAMERON, DONALD GORDON CAMERON
Q55 OF 2002

COOPER J
BRISBANE
30 JULY 2002

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

Q55 OF 2002

**BETWEEN: RICHARD STEPHEN GUNTER
 APPLICANT**

**AND: DR PETER HOLLINGWORTH
 FIRST RESPONDENT**

**MAJ GEN PETER ARNISON
SECOND RESPONDENT**

**PETER DOUGLAS BEATTIE
THIRD RESPONDENT**

**AUSTRALIAN ELECTORAL COMMISSION
FOURTH RESPONDENT**

**ALAN GEORGE SKYRING
FIFTH RESPONDENT**

**JAMES EDGAR STEWART
SIXTH RESPONDENT**

**TREVOR ACWORTH
SEVENTH RESPONDENT**

**DONALD CAMERON
EIGHTH RESPONDENT**

**DONALD GORDON CAMERON
NINTH RESPONDENT**

JUDGE: COOPER J

DATE OF ORDER: 30 JULY 2002

WHERE MADE: BRISBANE

THE COURT ORDERS THAT:

1. The petition be dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

Q55 OF 2002

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SEVENTH RESPONDENT**

**DONALD CAMERON
EIGHTH RESPONDENT**

**DONALD GORDON CAMERON
NINTH RESPONDENT**

JUDGE: COOPER J

DATE: 30 JULY 2002

PLACE: BRISBANE

REASONS FOR JUDGMENT

BACKGROUND

1 On 12 December 2001, Richard Stephen Gunter filed a petition in the High Court of Australia sitting as the Court of Disputed Returns. The petition stated that it "... concerns the

General Election for the entire House of Representatives and half of the Senate, ostensibly held on 10 November 2001”. The petition named as respondents the Governor-General, the Governor of Queensland, the Premier of Queensland and the Australian Electoral Commissioner.

2 The petitioner pleaded that he was qualified to vote, and did vote, in the election of a member for the Division of Blair in the House of Representatives and also to vote in the election for Senators for Queensland in the Senate.

3 On 17 December 2001, Alan George Skyring (the fifth respondent) filed an entry of appearance in the proceeding initiated by the petition as a person “who voted at the Election in the Division of Ryan”.

4 On 19 December 2001, James Edgar Stewart (the sixth respondent) filed an entry of appearance in the petition proceedings as “an elector enrolled to vote in the Division of Moreton”.

5 On 24 December 2001, Trevor Acworth (the seventh respondent) filed an entry of appearance in the petition proceedings “as a person who had a right to vote, and who did in fact vote, at the election in question for the Division of Oxley”.

6 On 24 December 2001, Donald Cameron (the eighth respondent) filed an entry of appearance in the petition proceedings “as a person who had a right to vote, and who did in fact vote, at the election in question for the Division of Oxley”.

7 On 24 December 2001, Donald Gordon Cameron (the ninth respondent) filed an entry of appearance in the petition proceedings “as a person who had a right to vote, and who did vote, at the election in question for the Division of Oxley”.

8 The entries of appearance filed on 24 December 2001 in terms claimed to be filed pursuant to O 68 r 6(1) of the High Court Rules 1952. All relied upon O 68 r 6(2) to give them the standing as parties to the petition proceedings. None of the appearances in terms purports to relate to the election of Senators for the State of Queensland.

9 On 11 April 2002, the Australian Electoral Commission filed a summons in the High

Court of Australia sitting as the Court of Disputed Returns seeking the following orders :

- “1. *The Australian Electoral Commission have leave to enter an appearance in the proceedings and to be represented and be heard.*
2. *The name of the Fourth Respondent be struck out and that the Australian Electoral Commission be added as the Fourth Respondent.*
3. *The petition be dismissed.*
4. *In the alternative to Order 3, proceedings on the petition be stayed :*
 - (a) *on the ground that there is no reasonable or probable cause of action or suit;*
 - (b) *in the alternative to (a), on the ground that the proceeding is an abuse of the process of the Court.*
5. *Such further or other order as the Court thinks fit.*
6. *The Petitioner pay the costs of the Australian Electoral Commission.”*

10 On 12 April 2002, Justice Gummow of the High Court made the following orders in respect of the proceeding instituted by the filing of the petition :

- “1. *The Fourth Respondent be identified as the Australian Electoral Commission in place of the Australian Electoral Commissioner.*
2. *The petition be referred for trial to the Federal Court of Australia, Queensland District Registry.*
3. *The proceeding be continued in the Federal Court as if steps already taken in this Court, including the filing of the summons on 11 April 2002, had been taken in the Federal Court.*
4. *The Registrar of this Court provide to the proper officer of the Federal Court photocopies of all documents filed in this Court and the deposit which has been lodged pursuant to section 356 of the Commonwealth Electoral Act 1918.*
5. *The costs of the proceedings in this Court to date be costs in the Federal Court.*
6. *The costs referred to in this Court, including the costs of this order be according to the scale applicable to proceedings in this Court and therefore according to the scale applicable in the Federal Court and in the discretion of the Federal Court.”*

THE APPLICATION TO DISMISS THE PETITION

11 The fourth respondent, in terms of paragraph 3 of its summons, seeks that the petition
be dismissed and that, in terms of paragraph 6, the petitioner pay the costs of the fourth
respondent.

12 The grounds relied upon by the fourth respondent are :

1. The Court of Disputed Returns has no jurisdiction to entertain the petition in that it seeks relief on the ground that the entirety of the general election was void; and
2. By force of s 358(1) of the *Commonwealth Electoral Act 1918* (Cth) (“the Act”) no proceeding can be had on the petition in that it does not comply with s 355(1) of the Act because it fails to set out facts which would invalidate any election or return.

13 The fourth respondent’s application is supported by the second and third respondents (the Governor and Premier of Queensland respectively) who also seek an order for costs against the petitioner.

14 The petitioner and the fifth respondent seek to rely upon substantial affidavit and other material to make out the proposition that there was a systemic failure in the process of calling the general election which occurred on 10 November 2001, which thereby invalidated the entire election. Those failures, they claim, flowed from an absence of power in the Governor-General to validly issue writs for the Commonwealth House of Representatives Elections and from a failure to properly and effectively prorogue the Commonwealth Parliament before the issue of writs for elections on 10 November 2001. So far as the Governor of Queensland was concerned, it is alleged that he had no power to validly issue a writ for the election of Senators for Queensland in the half senate election held on 10 November 2001.

15 The sixth respondent seeks to rely upon systemic and legal defects outlined in an affidavit sworn by him on 13 February 2002 and wherein he claims, in addition to the relief claimed in the petition, the following relief :

- “1. *require the AEC to update and validate the Moreton electoral roll, removing from it anyone not entitled to elect its representative (this should have begun already);*
2. *inform all duly enrolled Moreton electors of the evidence of this*

petition, plus the law's provisions, and court judgements, protecting free, fair and democratic elections, and for real justice to be observed in hearing disputes such as this;

3. *proceed with this case as a class action, joining all Moreton willing and lawfully enrolled electors at the close of the roll last October;*
4. *make, in accordance with s 375 of the Act, and the intentions of its architects, Rules of Court for a duly chosen jury of electors to try this case;*
5. *require parties such as those mentioned in this petition to appear as witnesses to substantiate or to refute its substantial truth and merits;*
6. *request ABC TV, to broadcast, as a matter of urgent public importance, the origins and progress of this petition, to start reversing what Justice Kirby last year called: 'the shocking ignorance about civics in Australia'.*
7. *issue a press release alerting all major Australian publishers and broadcasters to key facts of the petition, **and** that the resultant uncertainty surrounding our parliaments and government reflects decades of media omissions, misrepresentations, deceptions and failures to faithfully investigate and report matters fundamental to government according to law;*
8. *recount Moreton ballots and votes, including only votes that can be seen as not unduly influenced to choose all 6 candidates;*
9. *declare Gary Hardgrave was not duly elected;*
10. *void the Moreton election of 10 November;*
11. *recount of ballots and votes in other electorates where a minority of the 'formal' plus 'informal' voters marked first choices for the returned candidate."*

16 He also seeks to rely on e-mails sent to Ms Harris in the High Court Registry on 15 and 29 April 2002.

17 The seventh and eighth respondents claim to appear as citizens of the Independent Sovereign State of Australia. The eighth respondent claims to be the Chief Justice of the Supreme Court of the Independent Sovereign State of Australia and seeks to appear in that capacity. The seventh and eighth respondents support the petition and in addition seek the following additional orders :

“1. *Citizens of God’s State (ISSA) or Principality of Acworth or any other Principality ceded land mass are not Citizens of the Commonwealth of Australia and as citizens exempt from the following :*

- (a) Voting in any State or Federal Elections*
- (b) Payment of State Registration & insurance fees or charges*
- (c) Payment of Local Government rates fees or charges*
- (d) Payment of Commonwealth Government taxation*
- (e) God’s State (ISSA) Citizenship Certificate-Driver License-Passport-Vehicle Registration & Insurance are lawful and binding on all State & Commonwealth Authorities.”*

18 The ninth respondent did not appear on the fourth respondent’s application.

GROUND 1

19 The petitioner in written submissions filed on 11 June 2002 submits that his challenge “at first instance” was brought as to the validity of the return of the member for the Division of Blair in the House of Representatives and that the other parties who had “joined” his petition brought challenges likewise for the return of members for the divisions of Ryan, Moreton and Oxley. Further, he submits that he and each of the respondents who joined his petition challenged the election of the Queensland Senators. Thus, he submits the jurisdiction of the High Court as the Court of Disputed Returns was properly invoked by the filing of the petition because it was limited to the election for the member for Blair and to the election of Senators for Queensland, if such a limitation is necessary. However, the petitioner and the fifth, sixth, seventh and eighth respondents dispute the contention that a petition must be limited to one electorate only, and submit that s 353(1) of the Act permits the entirety of a general election to be challenged as invalid in a single petition to the Court of Disputed Returns.

20 The statutory provisions relating to the Court of Disputed Returns are contained in Part XXII of the Act. Division 1 of that Part deals with disputed elections and returns. The validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise: s 353(1). The High Court of Australia is the Court of Disputed Returns and may itself try the petition or refer it for trial to the Federal Court of Australia: s 354(1). Where a petition has been referred for trial to the Federal Court, this Court has jurisdiction to try the petition and has in respect of the petition all the powers and functions of the Court of Disputed Returns: s 354(2).

21 The requisites for a valid petition are contained in s 355 of the Act. No proceedings can be brought on a petition unless the provisions of s 355 are complied with: s 358(1).

22 An elector in the case of a Senate election is only admitted to vote for the election of Senators for the State or Territory for which he or she is enrolled: s 221(1). Similarly, in the case of a House of Representatives election an elector is only admitted to vote for the election of a member for the Division for which he or she is enrolled: s 221(2). This limitation on the right to vote in an election limits the right of a person to present a petition disputing the validity of any election or return to the Court of Disputed Return. So much was recognised by Brennan ACJ in *Muldowney v Australian Electoral Commission* (1993) 178 CLR 34 at 42 where his Honour said :

“The framework of the Act as well as the language of s 355(c) indicates that the jurisdiction of the Court of Disputed Returns does not extend to the making of a declaration that the entirety of a general election is void. The jurisdiction to declare an election void on the petition of a person ‘who was qualified to vote thereat’ is limited to those elections in which the petitioner was an elector entitled to vote. If a challenge on justiciable grounds can be mounted to the validity of a general election - a question that I need not consider - such a challenge cannot be entertained by the Court of Disputed Returns: Re Surfers Paradise Election Petition [1975] QdR 114, at p117, suggests that a similar conclusion was reached under the Elections Act 1915 (Q) by Dunn J sitting as an Election Tribunal. It may be that the High Court has such a jurisdiction but that has not been decided: see the dicta of Gibbs CJ in McKenzie v The Commonwealth (1984) 59 ALJR 190, at p191; 57 ALR 747, at pp 749 - 750.”

23 The consequence is that the Court of Disputed Returns only has jurisdiction to hear and determine a petition from the petitioner limited to disputing the validity of the election or return for the member for the Division of Blair in the House of Representatives election and for the Senators in the election of Senators for the State of Queensland.

24 The limited nature of the jurisdiction of the Court of Disputed Returns, and of the right of an elector to petition, taken by Brennan ACJ in *Muldowney* has been consistently agreed in and applied by subsequent determinations of the Court of Disputed Returns: see for example, *Pavlekovich-Smith v Australian Electoral Commission* (1993) 115 ALR 641 at 642 - 643; *Sykes v Australian Electoral Commission* (1993) 115 ALR 645 at 646 - 647; *Robertson v Australian Electoral Commission* (1993) 116 ALR 407 at 408, 410; *Abbotto v Australian Electoral Commission* (1997) 144 ALR 352 at 353 - 354; *McClure v Australian*

Electoral Commission (1999) 163 ALR 734 at 738.

25 The limited nature of the jurisdiction raised by a valid petition which satisfies s 355 of the Act limits the category of persons who may enter an appearance: O 68 r 6 of the High Court Rules. That rule provides :

- “6(1) A person returned as a member whose election or return is disputed by a petition shall, within fourteen days after service of the petition, and a person who voted or had a right to vote at the election to which the petition relates may, within fourteen days after the publication of the petition in the official Gazette of the State in which the election was held, enter an appearance to the petition.*
- (2) A person so entering an appearance shall be deemed to be a party to the proceedings upon the petition.”*

26 A person who was not entitled to vote at the election the subject of the petition has no right to appear on the petition and be made a party to it. Importantly, O 68 r 6 does not permit a petition to be expanded to challenge the validity of the election or return in Divisions or in a Senate Election, in respect of which the original petitioner was not entitled to vote. Thus the fifth, sixth, seventh, eighth and ninth respondents could not, by entering an appearance, individually challenge the elections in the Divisions of Ryan, Moreton or Oxley. Nor were they qualified to enter an appearance in so far as the petition related, if it did, solely to the election in the Division of Blair.

27 Section 355 of the Act, so far as presently relevant, provides :

“Subject to section 357, every petition disputing an election or return in this Part called the petition shall:

- (a) set out the facts relied on to invalidate the election or return;*
- (aa) subject to subsection 358(2), set out those facts with sufficient particularity to identify the specific matter or matters on which the petitioner relies as justifying the grant of relief;*
- (b) contain a prayer asking for the relief the petitioner claims to be entitled to.”*

28 It follows that what a petitioner seeks to dispute by the petition, and the relief sought, are to be ascertained from the terms of the petition itself as a matter of construction. The

affidavits and other material sought to be relied upon by the petitioner and those respondents supporting the petition are irrelevant to the issue of what the petition seeks to dispute and whether there is or is not a jurisdiction in the Court of Disputed Returns to hear the dispute and make the orders sought.

29 I turn now to a consideration of the petition filed in the present proceeding. The petition is not in Form 70 of the High Court forms as required by O 68 r 2A of the High Court Rules. However, no objection was taken to the petition on this ground.

30 The subject matter of the petition is stated in the opening paragraph in the following terms :

“The humble petition of Richard Stephen Gunter of Lot 1 Blackwall Road Chuwar, Q. 4306 showeth that it concerns the General Election for the entire House of Representatives and half of the Senate, ostensibly held on 10 November 2001. The various writs which initiated this process were returned progressively over the period 3-6 December 2001, those relating to Queensland in particular being returned on 6 December 2001.”

31 The petition then particularises the subject matter by a series of numbered paragraphs.

32 Paragraph 1 of the particulars pleads that the petitioner was qualified to vote and did vote in the Division of Blair to elect a member for that Division to the House of Representatives and in the election for Senators for the State of Queensland. Paragraph 1 goes to the entitlement of the petitioner to file the petition; it does not seek to limit the issues raised to the election in the Division of Blair or to the election of Senators for Queensland nor to limit the relief claimed in that way.

33 Paragraph 2 pleads that on 8 October 2001, the Governor-General signed the writ which commenced the electoral process for the members of the House of Representatives. It is alleged that the Governor-General was ostensibly acting pursuant to s 32 of the Commonwealth Constitution. It also pleads that the Governor of Queensland and the Premier of Queensland signed the writ which was issued by the Governor of Queensland to start the electoral process for the Senators for Queensland. It is alleged that the Governor of Queensland was ostensibly acting pursuant to s 12 of the Commonwealth Constitution.

34 Finally, it is alleged that the Australian Electoral Commissioner, upon receipt of writs

from the first and second respondents "... and the counterpart of the latter in other States, took the requisite steps pursuant to the *Commonwealth Electoral Act 1918* (Cth) to complete the process thereby initiated."

35 Paragraph 3 of the particulars states :

"3. While this process appears to have been correctly discharged, close scrutiny of it reveals that, because of changes which have been made to the powers of the Commonwealth Governor-General and the State Governor of Queensland - effected by the issue of the revised Letters Patent on 21st August 1984 and 14th February 1986 respectively and their subsequent proclamation via the Commonwealth and State Government Gazettes on 24th August 1984 and 8th March 1986 respectively, the upshot of which changes, in the view of those well informed on such matters, was that legal powers were no longer conferred on those Vice-Regal Representatives - neither had the requisite legal power any longer to participate directly in the administration of the affairs of the Commonwealth and this State of Queensland respectively, and therefore to take the action each did to initiate the whole electoral process, as it applied to Queensland."

36 Paragraphs 4 and 5 of the particulars allege that the Governor-General proceeded with the appointment and swearing in of the "Queen's Ministers of State" for the Commonwealth, notwithstanding that it was beyond the power of the Governor-General to do so, for the reason stated in paragraph 3 of the petition, and before the final return was made of all candidates from all Divisions and States.

37 In consequence of the matters pleaded in the preceding paragraphs, the petition in paragraph 6 of the particulars states :

"6. The petitioner, therefore, disputes the legal validity of the entire election and also of the subsequent 'appointment' of the 'Ministry' on the grounds detailed below:

(a) *The action taken by the Governor-General, ostensibly correctly pursuant to s.32 of the Commonwealth Constitution, is predicated on the assumption that he still had the requisite powers to so act, embodied in s.61 of the Commonwealth Constitution. The changes cited above, however, mean that he no longer has those powers envisioned when the Commonwealth Constitution Act was enacted and came into effect on the 1st January 1901. The net effect is then that by signing and issuing the writ as he did, the Governor-General was acting beyond the warrant which he now holds under the law and accordingly the action he took was unlawful. It necessarily follows, therefore, that the entire electoral process, commenced by the issue of*

that writ, has no proper basis in law, and accordingly any returns ostensibly to be made from that Election for the House of Representatives are null and void at law and of no effect whatsoever.

- (b) *Similarly, the counterpart action taken by the Queensland State Governor ostensibly pursuant to s.12 of the Commonwealth Constitution in respect of the electoral process for the Senators for Queensland, is predicated on the assumption that he too still has the requisite powers envisioned at the time of Federation of the States in 1901. The changes cited above, however - taken further in this instance by the Queensland Constitution (Office of Governor) Act 1987 - mean that he too no longer has those powers envisioned when the Commonwealth Constitution Act was enacted and came into effect on the 1st January 1901. The net effect again is then that by signing and issuing the writ as he did, the Queensland State Governor also acted beyond the warrant which he holds under the law and accordingly the action he took is also unlawful. It necessarily follows, therefore, that the entire electoral process, commenced by the issue of that writ has no proper basis in law either, and accordingly any returns ostensibly made from that Election for the Senators for Queensland also are null and void at law and of no effect whatsoever.*
- (c) *There are other dimensions to these changes, however, which are not insignificant. The first relates to the basis upon which these changes to the powers of the Queen's Representatives were effected. **In both instances, referenda of all electors were required to be held before any such changes were made - at Commonwealth level by s.128 of the Commonwealth Constitution, and at State level by the then new s.53 added to the Queensland Constitution (Amendment) Act 1977. At Commonwealth level no referendum was held before the changes were made in August 1984 and when one was held on this matter on 6 November 1999, the outcome was that, by the criteria set out in s.128 of the Commonwealth Constitution, it was 'lost'. In Queensland the changes were effected as the sequel to the ostensible enactment of the Australia Acts 1986. Again, however, no referendum was held as required by the State Constitution Acts in force at the time when the initiating Australia Acts (Request) Act 1985 was enacted by the Queensland Parliament, so all that follows from that enactment is also null and void for want of constitutionality.***

38 Subparagraphs 6(d), (e) and (f) allege a failure of the incumbents of the office of Governor-General since federation to properly discharge the functions of the office in terms of ss 61, 62, 63 and 64 of the Commonwealth Constitution with the consequent effect that "... the intent of the Constitution has never really been met." This failure, it is alleged, is to be found for example in the failures in the monetary system and the failure of the legal system to correct the "system defects" alleged by the petitioner.

39 In sub-paragraphs 6(g), (h) and (i), it is alleged that “insofar as the validation of nominations of all candidates for election in all Divisions and States is concerned” and in the Divisions of Blair and Ryan, in particular, no candidate satisfied the requirements of s 170(3) of the Act concerning the payment of the nomination deposit necessary to support a valid nomination. The allegation made is that :

“... the instruments used to purportedly satisfy the requirements of that section did not in fact and/or in law do so, in that they were not ‘legal tender’ as statutorily defined and/or they otherwise failed to provide the requisite ‘quantum of monetary value’ set out in that provision for a valid nomination”.

The consequence was, it is pleaded, that there was no proper basis for an election to proceed at all, as no candidate had been properly nominated. Further, it is pleaded that as no candidate was validly nominated, s 181 of the Act deemed the election to have failed, and the names of candidates placed on the returns have not been placed there legally or validly.

40 Paragraph 7 of the particulars seeks to challenge the returns made in the general elections held on 24 March 1990, 13 March 1993, 2 March 1996 and 3 October 1998 on the grounds alleged in subparagraphs 7(a), (b) and (c), which in substance repeat the allegation that the candidate in the Division of Ryan in particular, and the candidates in all Divisions in general, failed to pay the nomination deposit in a way which satisfied the monetary value requirements of s 170(3) of the Act.

41 The prayer for relief seeks a primary declaration or alternatively four other declarations. The prayer states :

“The petitioner therefore humbly prays as follows :

(a) *FOR A DECLARATION that the writs issued on 8 October 2001 by the Commonwealth Governor-General to commence the Electoral process for the House of Representatives Election and by the State Governor of Queensland for the Senators for Queensland respectively were null and void at law for want of constitutionality, and accordingly any return made against these writs from the election ostensibly held on 10 November 2001 is also null and valid [sic] at law as a consequence.*

Or in the alternative, if it is deemed on balance that the writs were validly issued;

(b) *FOR A DECLARATION that a nomination deposit made by any candidate for this general election in ‘paper money’ in any form to a*

face value of only \$350.00 for a House of Representatives candidacy or \$700.00 for a Senate candidacy, did not constitute a deposit of the requisite monetary value of \$350.00 or \$700.00 respectively, when due regard is had for the requirements of s.8, s.14, s.16 and s.22 of the Currency Act 1965, as required under s.170(3) of the Electoral Act 1918 to make a valid nomination for any Division of the House of Representatives or the Senate respectively, and therefore the nomination of any candidate who has made his/her deposit in this form is invalid;

- (c) *FOR A DECLARATION that, as no candidate has satisfied the abovementioned requirements for a valid nomination, the general election for all Divisions of the House of Representatives and for the Senate for all States has failed under s.181 of the Electoral Act 1918 for want of any candidates being validly nominated.*
- (d) *FOR A DECLARATION that the invocation of the order made by Toohey J against the challenger which effectively prevented the hearing of his earlier petitions challenging the return of the Member for Ryan from the previous general elections held in 1990, 1993, 1996 and 1998 and also the by-election for that Division held on 17 March 2001 was invalid at law, and that matters which were centrally in issue in all of those petition [sic] but never properly adjudicated then be now brought on for hearing forthwith in connection with the General Election ostensibly held on 10 November 2001,*
- (e) *FOR A DECLARATION that the Governor-General, as the Constitutional 'Chief Executive' of the Commonwealth, in any event, is not bound to appoint as the Queen's Ministers of State all, or indeed even any, of the persons nominated by the 'Parliamentary leader' of the partisan political group which happens to have 'gained a majority' of members of the House of Representatives in particular, as none has the legal standing to command such appointment, and that it is at His Excellency's discretion, therefore, how long such persons who were so appointed on 26 November 2001 hold such office."*

42 On any fair reading of the prayer for relief, it is apparent that in paragraph (a) the petitioner seeks to challenge and have declared invalid the election of all members of the House of Representatives and all Queensland Senators elected at the general election held on 10 November 2001. Similarly, paragraph (b) seeks to challenge the election of all candidates at the general election, whether candidates for the House of Representatives or for the Senate (without restriction as to Queensland), who paid a nomination deposit in "paper money" by having declared as invalid all such nominations. Paragraph (c) specifically seeks a declaration that "the general election for all Divisions of the House of Representatives and for the Senate for all States has failed under s 181 of the *Commonwealth Electoral Act 1918*

(Cth) for want of any candidates being validly nominated.”

43 These three paragraphs seek to challenge generally the election held on 10 November 2001 and to have the election of all members of the House of Representatives and of the Senate at that general election set aside by a declaration as to invalidity of the electoral process by which the general election was carried out or by a declaration as to the invalidity of their nomination because of an alleged failure to pay nomination deposits in other than “paper money”. On the authorities to which I have referred, the Court of Disputed Returns has no jurisdiction to entertain a petition which seeks to advance such a challenge or to seek such relief.

44 The relief claimed in paragraphs (d) and (e) of the prayer for relief of the petition, the relief claimed in paragraphs 1 - 7 inclusive, and paragraph 11 of the sixth respondent’s prayer for relief, and, in the orders sought by the seventh and eighth respondents, seek relief other than by way of the avoidance of the election held on 10 November 2001. There is no basis in the Act for concluding that the Court of Disputed Returns has power to grant any or all of the relief claimed which does not seek the avoidance of the election: *McClure v Australian Electoral Commission* (1999) 163 ALR 734 at 737 - 738. These claims are beyond power and must fail.

45 Unless the relief claimed in paragraphs (a), (b) and (c) of the prayer for relief in the petition can be read down by confining it to the election of the member of the House of Representatives for the Division of Blair and the election of Senators for Queensland at the election held on 10 November 2001, the petition must be dismissed: *Pavlekovich-Smith v Australian Electoral Commission* (1993) 115 ALR 641 at 643; *Robertson v Australian Electoral Commission* (1993) 116 ALR 407 at 408.

46 It is not possible to read down the relief claimed in paragraphs (a), (b) and (c) of the prayer for relief to the election of the member for the Division of Blair. That is not what the petitioner has sought. It is the entirety of the electoral process and its effect on the election of every member of the House of Representatives which he wishes to have declared invalid.

47 Even if the relief was capable of being read down to the election for Senators in Queensland, there are other reasons why the petition must fail in respect of the election of

Senators for Queensland on 10 November 2001, which reasons I deal with under the second ground of objection taken by the fourth respondent.

GROUND 2

48 Section 355(a) of the Act requires that a petition set out the facts relied on to invalidate the election or return. Those facts, if proved, must be such as would justify an order invalidating the election: *Sykes v Australian Electoral Commission* at 648 - 649; *Robertson v Australian Electoral Commission* at 409; *Abbotto v Australian Electoral Commission* at 354; *McClure v Australian Electoral Commission* at 739 - 740.

49 There is no allegation that the first respondent was other than the Governor-General and acting as such when he purported to exercise the power under s 32 of the Constitution to cause writs to be issued for general elections of members of the House of Representatives. Indeed, it is positively alleged in paragraphs 2, 3 and 6(a) of the particulars in the petition that he was so acting. The power of the Governor-General to so act is to be determined by the provisions of the Constitution itself and any other applicable law made by the legislature under the Constitution. Neither the terms of the Letters Patent Relating to the Office of the Governor-General made by Her Majesty Queen Elizabeth II on 21 August 1984, nor my understanding of some unspecified person or institution on 1 January 1901 as to how the Governor-General would exercise the powers of the office under the Constitution, nor the conduct of prior incumbents of the office of Governor-General, can operate to limit or impede the exercise of the power which is sourced in s 32 of the Constitution. Clause 5 of the covering clauses to the Constitution requires that the Constitution and laws made under it be given effect to by the Courts: *McClure v Australian Electoral Commission* at 736; *Josse v Australian Securities and Investment Commission* (1998) 159 ALR 260.

50 The petition does not disclose any facts on its face which would lead to a finding that the Governor-General lacked the power pursuant to s 32 of the Constitution to cause writs to be issued for general elections of members of the House of Representatives and that such elections should thereby be invalidated. It fails in consequence to satisfy the requirements of s 355(a) of the Act even if the petition could be read down as one to invalidate the election of the member for the Division of Blair in the House of Representatives.

51 Paragraphs 3 and 6(b) of the particulars contained in the petition deal with the alleged

invalidity of the acts of the Governor of Queensland. There is no allegation that His Excellency, Maj Gen Peter Arnison was not at all relevant times the Governor of Queensland. Indeed, the assertion is that he was the Governor of Queensland, albeit with diminished powers attaching to his office. As the Governor of Queensland, the second respondent derives his power to cause writs to be issued for the election of Senators for Queensland from s 12 of the Constitution of the Commonwealth of Australia. Clause 5 of the covering clauses to the Constitution operates to prevent anything contained in an enactment of the Queensland legislature limiting the powers of the second respondent under s 12 of the Constitution. Clause 5 provides :

“This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; ...”

52 The assertion by the petitioner that the powers of the Governor of Queensland under s 12 of the Constitution have been diminished by the Letters Patent of 8 March 1986 or the provisions of the *Constitution (Office of Governor) Act 1987* (Qld) is both misconceived and wrong.

53 The *Constitution (Office of Governor) Act 1987* (Qld) by s 13 suspended, for so long as the provisions of Part II of that Act remained in force, the operation of the Letters Patent constituting the Office of the Governor of Queensland made by Her Majesty Queen Elizabeth II on 14 February 1986 and proclaimed on 6 March 1986. That Act commenced on 1 December 1987, the date on which it received assent and remained in force at the time the second respondent exercised his powers under s 12 of the Constitution of Australia. The second respondent was not at any relevant time subject to the operation of the Letters Patent of which the petitioner complains.

54 The *Constitution (Office of Governor) Act 1987* (Qld) was a valid enactment of the Queensland legislature notwithstanding that it was not put to a referendum of electors in Queensland, and, did not operate so as to abolish the office of Governor of Queensland, nor diminish the powers attaching to that office: *Sharples v Arnison & Ors* [2001] QCA 518 at [14], [15], [21], [26], [29]; *Skyring v Crown Solicitor* [2001] QSC 350; *Skyring v Electoral Commission of Queensland* [2001] QSC 080; *Sharples v Arnison* [2001] QCA 274.

55 The petition fails to make out on its face facts which rendered the exercise of power by the second respondent under s 12 of the Constitution ineffective for the purposes of issuing a writ for the election of Senators for Queensland at the general election held on 10 November 2001. It fails in consequence to satisfy the requirements of s 355(a) of the Act in relation to a petition to invalidate the election of Senators for Queensland to the Senate on 10 November 2001.

56 There are no facts alleged which would entitle the petitioner to the relief claimed in paragraph (a) of the prayer for relief even if that paragraph could be read down to bring the petition within the jurisdiction of the Court of Disputed Returns.

57 The argument that “paper money” is not “legal tender” which underlies the allegations in sub-paragraphs 6(f), (g), (h) and (i) and 7(a) of the particulars in the petition and paragraphs (b) and (c) of the prayer for relief, in the various formulations in which it has been put, has been totally rejected as wrong in law: see, for example, *Re Skyring’s Application [No 2]* (1985) 59 ALJR 561; 58 ALR 629 confirmed on appeal by the Full Court of the High Court of Australia (unreported 9/7/1985); *Skyring v Australia & New Zealand Banking Group Ltd* (unreported) Qld CA 12 May 1994; *Skyring v Commissioner of Taxation* (unreported) Qld CA 25 March 1993; *Re Skyring* [1994] 68 ALJR 618; *Re Attorney General (Cth) Ex parte Skyring* (1996) 135 ALR 29; *Re Cusack* (1985) 66 ALR 93; *Skyring v Electoral Commission of Queensland* [2001] QSC 080.

58 There is nothing alleged in those paragraphs which, if proved, would entitle the petitioner to the relief claimed in paragraphs (b) and (c) of the prayer for relief. The petition in this respect fails to satisfy the requirements of s 355(a) of the Act.

59 The petitioner submits that the Court is obliged under s 364 of the Act to act on the substantial merits of his claim in good conscience and that “rules of law are thrown to the wind”. Therefore, he submits, the matters raised as objections by the fourth respondent should not be allowed to stand in the way of having his petition heard and of his raising additional arguments not pleaded in the petition as to why the election should be set aside, eg a failure to properly prorogue Parliament before issuing the writs for the election.

60 Section 364 of the Act states :

“The Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not.”

Section 364 directs the Court as to how it should go about the task of deciding the issues presented under the Act by the petition. It does not give the Court power to re-write the Act or ignore provisions contained in the Act. The section does not exonerate the Court from the application of substantive rules of law: *Sue v Hill* (1999) 199 CLR 462 at 485; *McClure v Australian Electoral Commission* at 742. Accordingly, the requirements of s 355(a) and (b) and (c) and s 358(1) of the Act may not be disregarded and a general wide ranging enquiry held as to why the general election held on 10 November 2001 should be set aside.

CONCLUSION

61 I am satisfied that the fourth respondent makes out both grounds of objection and that the appropriate course is to dismiss the petition pursuant to the power conferred by s 360 (1)(viii) of the Act.

I certify that the preceding sixty-one (61) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Cooper.

Associate:

Dated: 29 July 2002

Applicant appeared in person	Mr Gunter
Counsel for the First and Fourth Respondents:	Mr S Gageler SC and Mr Swan
Solicitor for the First and Fourth Respondents Respondent:	Australian Government Solicitor
Counsel for the Second and Third Respondents:	Mr MD Hinson QC
Solicitor fore the Second and Third Respondents	Crown Law

Fifth Respondent in person:	Mr AG Skyring
Sixth Respondent in person:	Mr JE Stewart
Seventh Respondent in person:	Mr T Acworth
Eighth Respondent in person:	Mr D Cameron
Ninth Respondent in person:	Mr DG Cameron

Date of Hearing:	22 July 2002
Date of Judgment:	29 July 2002