

## CHAPTER 13: DISPUTE RESOLUTION

This chapter outlines the existing processes related to the resolution of disputes over the result of a federal election and over administrative decisions made by the AEC, before discussing possible options for reform.

### THE CURRENT ARRANGEMENTS

#### *Commonwealth arrangements*

13.1 Disputes may arise over the results of a federal election, or with regard to a number of procedural elements of the electoral process administered by the AEC.

#### *Disputing election results*

13.2 A unique judicial body,<sup>1069</sup> known as the Court of Disputed Returns, is the sole recipient of legal challenges to the validity of federal election results.<sup>1070</sup> The jurisdiction of the Court of Disputed Returns is vested in the High Court.<sup>1071</sup> The High Court is empowered to try the matter itself, or refer the matter, in whole or in part, to the Federal Court of Australia for trial.<sup>1072</sup>

13.3 A petition challenging the validity of an election may be lodged by a candidate who contested the relevant election, a person qualified to vote at the election, or the AEC.<sup>1073</sup> The petition must:<sup>1074</sup>

- outline the facts relied on to challenge the election;
- set out the specific outcome being requested by the petitioner;
- be signed by an eligible person and attested by two witnesses,<sup>1075</sup> and
- be filed in the Registry of the High Court within 40 days of the return of the writ.<sup>1076</sup>

At the time of filing the petition, the petitioner must lodge a deposit of \$500 with the Registry of the High Court as security for costs.<sup>1077</sup>

<sup>1069</sup> There is academic debate as to whether the Court of Disputed Returns is properly described as a 'judicial body': see P Schoff, 'The Electoral Jurisdiction of the High Court as the Court of Disputed Returns: Non-judicial power and Incompatible Function?', *Federal Law Review*, vol. 25, no. 2, 1997, pp. 317-350.

<sup>1070</sup> Electoral Act, op. cit., section 353.

<sup>1071</sup> *ibid.*, subsection 354(1).

<sup>1072</sup> *ibid.*, section 354.

<sup>1073</sup> *ibid.*, subsection 355(c) and section 357. 'Return' refers to the formal return of the election writ which lists the successful candidate.

<sup>1074</sup> *ibid.*, section 355.

<sup>1075</sup> The AEC is exempted from this requirement, see Electoral Act, op. cit., subsection 357(2).

<sup>1076</sup> Note that at each federal election, multiple writs are issued for elections for the House of Representatives and the Senate. Whilst in theory all writs are returnable on the same day, in practice writs can be returned on different days as divisional election results are finalised. In response to confusion about when the time limitations commenced, the *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act 2004* introduced a new subsection 355(e) of the Electoral Act to provide that the 40 day time limitation for the dispute of all writs returned will commence from the date of the return of whichever of the writs for the relevant election is returned last.

<sup>1077</sup> Electoral Act, op. cit., section 356.

13.4 The petition may raise issues including:

- the eligibility of a successful candidate to contest the seat;<sup>1078</sup>
- whether the procedures in the Electoral Act have been complied with;<sup>1079</sup> and
- whether any other illegal practices have been committed.

13.5 The Court of Disputed Returns is given broad powers to consider a petition.<sup>1080</sup> Subject to the other requirements in the Electoral Act, the Court may consider the merits of the case, without being restricted by legal technicalities.<sup>1081</sup> The Electoral Act requires the Court to make its decision on a petition as quickly as is reasonable in the circumstances.<sup>1082</sup> Furthermore, decisions of the Court of Disputed Returns are final and are not subject to review.<sup>1083</sup>

13.6 Historically, petitions to the Court of Disputed Returns have been relatively rare.

- For the House of Representatives, only two of 35 petitions that challenged divisional results between 1958 and 2008 have been successful.<sup>1084</sup> These two petitions alleged that the successful candidates were not qualified under section 44 of the Australian Constitution (specifically, alleging that successful candidates held an office of profit under the crown). The Court declared that the respondents concerned were not duly elected and that the relevant elections were absolutely void.<sup>1085</sup> New elections were held in both cases, and the successful candidates were the same as those elected in the previously disputed election.
- Two successful Senate candidates have also been held to be not qualified under section 44, as they bore an allegiance to a foreign power. The Court declared that the respondents concerned were not duly elected.<sup>1086</sup> In neither case was the whole Senate election declared invalid. The Court found that whilst voters' preferences for the ineligible candidates were invalid, their other preferences were valid and could be allocated to determine a successful candidate.

### Administrative disputes

13.7 As part of the electoral process, the AEC makes a number of administrative decisions with regard to matters such as electoral boundaries and redistributions, qualifications and disqualification of voters, removal of voters from the electoral roll, registration of political parties, nomination of candidates and the scrutiny of votes.<sup>1087</sup>

<sup>1078</sup> In *Sykes v Cleary (No 1)* (1992) 66 ALJR 577, Dawson J held at 578 that a 'disputed election may involve a question of the qualification of a person to be chosen as a senator or member'. In *Sue v Hill* (1999) 199 CLR 462, Gleeson CJ, Gummow and Hayne JJ cited Dawson J with approval (at 480) and noted that '[t]he constitutional incapacity of an individual to be chosen as a Senator or Member of the House is a matter going to the validity of the election of that person and may be a matter going to the validity of the election process in part or in whole'. Gaudron J also cited Dawson J with approval (at 508). Parliament may also refer the qualification of Senators or members of the House of Representatives to the Court of Disputed Returns: Electoral Act, op. cit., section 376.

<sup>1079</sup> See, for instance, *Mitchell v Bailey (No 2)* [2008] FCA 692.

<sup>1080</sup> Electoral Act, op. cit., section 360.

<sup>1081</sup> *ibid.*, section 364.

<sup>1082</sup> *ibid.*, section 363A.

<sup>1083</sup> *ibid.*, section 368; see also *Smith v Australian Electoral Commission* [2009] FCAFC 43.

<sup>1084</sup> House of Representatives Practice, Commonwealth Parliament, Appendix 13, pp. 777-781.

<sup>1085</sup> In 1992 I Sykes lodged a successful petition against the election of P Cleary as Member for Wills, Victoria. In 1996 R V Free lodged a successful petition against the election of J Kelly as Member for Lindsay, New South Wales.

<sup>1086</sup> In 1998, H Sue lodged a successful petition against the election of H Hill as a Senator for the state of Queensland. In 1988, the Senate referred the question of the qualification of W R Wood as a Senator for the state of New South Wales to the Court of Disputed Returns.

<sup>1087</sup> Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and related legislation*, Report 92, October 2001, p. 122.

- 13.8 In a number of instances, the Electoral Act provides avenues for internal review by another AEC officer if an initial decision of the AEC is disputed.<sup>1088</sup> In addition, certain administrative decisions made by the AEC are also able to be reviewed externally by the Administrative Appeals Tribunal.<sup>1089</sup>
- 13.9 Certain applicants may also be able to apply for judicial review of an AEC decision under either the *Administrative Decisions (Judicial Review) Act 1977* or the *Judiciary Act 1903*.<sup>1090</sup> The application of judicial review to electoral matters is qualified by the operation of section 353 of the Electoral Act, which provides that ‘the validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise’. As a result, challenges to administrative action undertaken during the period of an election must wait to be heard by the Court of Disputed Returns until after the result of the election.
- 13.10 Complaints about administrative decisions made by the AEC can also be lodged with the Commonwealth Ombudsman and, where relevant, the Federal Privacy Commissioner and the Australian Human Rights Commission.<sup>1091</sup> Aggrieved parties can also raise alleged breaches of electoral law or other concerns with JSCEM or with the media.

### **State and territory arrangements**

- 13.11 Methods for determining disputes about election results are similar in most respects in all states and territories. Electoral legislation in all states and the ACT specifies that an existing court, the Supreme Court, is to perform the role of the Court of Disputed Returns. The Court of Disputed Returns in the NT differs slightly from the other states and territories in that similar to the Commonwealth arrangements, it is established as a separate court, and is constituted by a Judge from the Supreme Court.<sup>1092</sup>
- 13.12 Most state and territory jurisdictions have a 40 day time period following the return of the writ during which an election petition can be lodged,<sup>1093</sup> though Queensland (seven days),<sup>1094</sup> Tasmania (90 days)<sup>1095</sup> and the NT (21 days)<sup>1096</sup> differ on this issue. Tasmania also uniquely allows appeals from its Court of Disputed Returns to be lodged with the Full Court of its Supreme Court within 7 days after the initial decision was delivered.<sup>1097</sup> Decisions of Courts of Disputed Return in all other jurisdictions are said to be final and non-appealable.<sup>1098</sup> All jurisdictions set out strict criteria, similar to those at the Commonwealth level, which must be followed with regard to the form and content of a petition.<sup>1099</sup>

<sup>1088</sup> See for instance Electoral Act, op. cit., section 120 (review of a decision relating to eligibility for enrolment), section 141 (review of decision relating to registration of political party), and section 281 (decisions on formality of ballot papers).

<sup>1089</sup> For instance, section 121 of the Electoral Act allows decisions about the eligibility of electors for enrolment to be reviewed by the Administrative Appeals Tribunal and section 141(5) permits decisions about party registration to be reviewed.

<sup>1090</sup> Australian Electoral Commission, *Annual Report 2007-08*, 2008, p. 130.

<sup>1091</sup> *ibid.*, p. 128.

<sup>1092</sup> *Electoral Act 2004* (NT) sections 232 and 233.

<sup>1093</sup> *Parliamentary Electorates and Elections Act 1912* (NSW) subsection 157(e); *Electoral Act 2002* (Vic) paragraph 135(1)(d); *Electoral Act 1907* (WA) subsection 158(5); *Electoral Act 1985* (SA) paragraph 104(1)(e); *Electoral Act 1992* (ACT) section 259.

<sup>1094</sup> *Electoral Act 1992* (Qld) paragraph 130(3)(a).

<sup>1095</sup> *Electoral Act 2004* (Tas) subsection 209(1).

<sup>1096</sup> *Electoral Act 2004* (NT) subsection 238(1).

<sup>1097</sup> *Electoral Act 2004* (Tas) section 219.

<sup>1098</sup> Note however that the *Judiciary Act 1903* (Cth) would allow appeals to the High Court from decisions of state or territory Courts of Disputed Returns if judicial power were being exercised.

<sup>1099</sup> *Parliamentary Electorates and Elections Act 1912* (NSW) section 157 ; *Electoral Act 2002* (Vic) section 135; *Electoral Act 1992* (Qld) section 130; *Electoral Act 1907* (WA) section 158; *Electoral Act 1985* (SA) section 104; *Electoral Act 2004* (Tas) section 207; *Electoral Act 1992* (ACT) section 258; *Electoral Act 2004* (NT) section 238.

- 13.13 The amount of the deposit which petitioners must lodge as security for costs varies across jurisdictions, from a low of \$100 in Western Australia<sup>1100</sup> to a high of \$2000 in the ACT.<sup>1101</sup> Most jurisdictions allow the Court to order that costs of the court proceedings be paid by the Crown.<sup>1102</sup> In Queensland, South Australia and the NT, the Electoral Commission is automatically deemed to be a respondent to any petition disputing the validity of an election or return,<sup>1103</sup> and thus costs may be awarded against it.
- 13.14 All state and territory jurisdictions also employ a range of internal and external review mechanisms to resolve disputes over various administrative decisions made by relevant electoral management bodies.

## CHALLENGES, OPPORTUNITIES AND OPTIONS FOR CHANGE

- 13.15 Current dispute resolution processes, and options for change, can be considered against a number of the key principles outlined in chapter 2. For example, to promote integrity, it could be argued that electoral processes should be appropriately open to scrutiny and legal challenge by parties, candidates and voters. To maintain efficiency, it can be contended that electoral dispute resolution should take place in a timely way, using effective and appropriate legal systems. Finally, to uphold the rule of law and promote neutrality, it may be argued that electoral processes should be governed by clear and unambiguous laws and procedures, providing genuine opportunities for complaints about the process to be lodged and dealt with in an even-handed and transparent way.
- 13.16 Electoral dispute resolution mechanisms in Australia are generally viewed as appropriate and effective. The resolution of electoral disputes through the courts is well accepted within the framework of a respected domestic legal system regarded as an independent and unbiased arbiter of legal claims. Consequently, most elements of the current electoral dispute resolution regime, including administrative decision review processes, have not been the subject of calls for reform. However, there are two aspects of the electoral dispute resolution process which have been subject to some debate:
- the accessibility of the Court of Disputed Returns for those with electoral grievances; and
  - the inability of the Court of Disputed Returns to inquire into the accuracy of the electoral roll.

### *Access to the Court of Disputed Returns*

- 13.17 The level of accessibility of the Court of Disputed Returns for those with electoral grievances remains a contentious issue. The debate revolves around competing notions of integrity (in that electoral processes should be open to legitimate challenge by any interested voter), and efficiency (in that the electoral process should not be held up by frivolous electoral challenges).
- 13.18 On the one hand, the High Court has commented that it is 'a commendable feature' of the dispute resolution process that 'very few impediments are placed in the way of a person who

<sup>1100</sup> *Electoral Act 1907* (WA) section 160.

<sup>1101</sup> *Electoral Act 1992* (ACT) subsection 260(1) and *Court Procedures Rules 2006* (ACT) regulation 3355. Deposit amounts in other jurisdictions are \$250 (NSW – *Parliamentary Electorates and Elections Act 1912* section 158); \$116.90 (Victoria – *Electoral Act 2002* paragraph 135 (1)(e), Victorian Government Gazette, Special Gazette Number S132, 15 May 2009 sets the value of a fee unit at \$11.69); \$400 (QLD – *Electoral Act 1992* subparagraph 130(3)(b)(i)); \$200 (SA – *Electoral Act 1985* subsection 104(2)); and \$500 (NT – *Electoral Act 2004* section 239).

<sup>1102</sup> *Parliamentary Electorates and Elections Act 1912* (NSW) section 172; *Electoral Act 2002* (Vic) subsection 130(b); *Electoral Act 1907* (WA) section 169; *Electoral Act 2004* (Tas) paragraph 217(1)(b); *Electoral Act 1992* (ACT) section 284.

<sup>1103</sup> *Electoral Act 1992* (Qld) subsection 133(2); *Electoral Act 1985* (SA) section 105; *Electoral Act 2004* (NT) sections 240 and 241.

wishes to bring proceedings challenging an election in the Court of Disputed Returns'.<sup>1104</sup> It might be argued that a wide range of people should be given unrestricted access to challenge election results in order to uphold confidence and certainty in our democratic system.

- 13.19 On the other hand, it has been argued that a lack of impediments for potential litigants means that electoral petitions 'provide the forum of choice for a surprising number of people to air institutional grievances or propound constitutional theories often having little or nothing to do with the conduct of an election'.<sup>1105</sup> It might be contended that unrestricted access to the Court of Disputed Returns will unnecessarily delay the conclusive determination of electoral results, thereby creating unstable government whilst parliamentarians remain subject to challenge.
- 13.20 It has been argued that Australia's current electoral laws lean towards 'limited intervention' by the Court of Disputed Returns, with emphasis placed on the 'pragmatic goal of stable governance' and 'the need for finality' 'over abstract questions of rights and the purity of elections'.<sup>1106</sup>
- 13.21 However, it might be argued that specific aspects of the dispute resolution process appear to place differing levels of emphasis on the merits of accessibility. For instance, aspects that appear to create few barriers for prospective litigants include:
- the large number of people able to lodge a petition or enter an appearance before the Court of Disputed Returns; and
  - the substantially lower costs of electoral litigation as compared to other forms of litigation.
- 13.22 Conversely, aspects seemingly placing more onerous barriers on the ability of petitioners to access the Court of Disputed Returns include:
- strict procedural requirements as to the form and content of an election petition;
  - short time limitations for the filing of a petition; and
  - a rule that petitions will only be judicable if a successful challenge will alter the outcome of an election or return.
- 13.23 Whilst each of the above individual aspects of the court process will be discussed in turn below, it is worth bearing in mind that access to the Court of Disputed Returns should be judged in totality. The contribution of each aspect of the dispute resolution process to the overall level of accessibility should be considered.

#### *Ability to lodge a petition*

- 13.24 It is generally accepted that few barriers are placed in front of prospective electoral petitioners, particularly in comparison to other civil litigants. Any person who voted or had a right to vote in the election being disputed is able to lodge a petition. In addition, any other voter can become a party to the proceedings on the petition without being subject to court filing fees, simply by entering an appearance within 14 days of its publication.<sup>1107</sup> It has been argued by some that the relative ease with which a petition can be lodged might create the possibility for abuse of the dispute resolution process.<sup>1108</sup>

<sup>1104</sup> *Hudson v Lee and Another* (1993) 177 CLR 627 at 633 (Gaudron J).

<sup>1105</sup> S Gageler, 'The Practice of Disputed Returns for Commonwealth Elections', in G Orr, B Mercurio and G Williams (eds.), *op. cit.*, p. 187.

<sup>1106</sup> G Orr and G Williams, 'Electoral Challenges: Judicial Review of Parliamentary Elections in Australia', *Sydney Law Review*, vol. 23, no. 1, 2001, p. 93.

<sup>1107</sup> *High Court Rules 2004*, Order 31, Rule 1.3. For instance, in *McClure v Australian Electoral Commission* (1999) 163 ALR 734, 384 individuals managed to validly file an appearance simply by signing a petition in support of Mr McClure's action: see Australian Electoral Commission, 'Supplementary Submission – Petitions to the Court of Disputed Returns', to JSCEM, *Inquiry into the 1998 federal election and matters related thereto*, 1999, paras. 6.1.9-6.1.14.

<sup>1108</sup> S Gageler, *op. cit.*, p. 190.

13.25 Opportunities for change in this area might include:

- restricting access to the Court of Disputed Returns to only the candidates or parties that were involved in the disputed election or return; or
- the imposition of more onerous restrictions on the ability of electors to become involved as a party in existing electoral proceedings.

13.26 However, it might also be argued that the existing broad accessibility arrangements should be retained, because in some circumstances affected parties or candidates may not challenge the result of a tainted election or return, even though there may be a public interest in having the Court of Disputed Returns consider the validity of the final result.

### *Court costs*

13.27 As noted in paragraph 13.3, voters seeking to lodge a petition before the Court of Disputed Returns need only deposit the sum of \$500 with the High Court Registry as security for costs before proceeding with their action.<sup>1109</sup> Standard High Court filing fees also apply,<sup>1110</sup> but these filing fees do not apply to petitioners who are recipients of legal aid or hold certain concession cards.<sup>1111</sup> Waiver of two-thirds of the filing fee is also available in the case of financial hardship. Commentators have cited the preponderance of pensioners as electoral petitioners, meaning that ‘the cost of bringing a petition to many people is usually no more than \$500 payable in advance’.<sup>1112</sup>

13.28 It has been contended that the costs of a petition in the Court of Disputed Returns might remain ‘too heavy to be borne by an individual’, given the costs of legal representation and the possibility of an adverse costs order.<sup>1113</sup> This is said to mean that ‘decisions about the prospects of a challenge are left to the hard-nosed men of the major parties rather than the defeated candidates’.<sup>1114</sup> The possibility of the Court ordering an unmeritorious petitioner to pay the court costs of the other parties, including the AEC, can impose a disincentive to likely litigants. The normal rule on costs, as applied in Australian courts, is that ‘costs follow the event’, which means in essence that the loser usually pays the winner’s legal costs.<sup>1115</sup>

13.29 Indeed, the Court has the power to award costs to any party involved in the proceedings,<sup>1116</sup> but also has the power to order costs be paid by the Commonwealth where it considers it appropriate to do so.<sup>1117</sup> The High Court has in the past taken the view that where an election petition has some merit and is not frivolous, then it is in the public interest that the petition has been brought and it is appropriate that the Commonwealth bear the legal costs.<sup>1118</sup> However, the risk of bearing costs arguably still remains to discourage frivolous or vexatious petitions devoid of merit.

13.30 Depending on views as to the current appropriateness of the likely legal costs of lodging an electoral petition, possible options for change could include:

<sup>1109</sup> Electoral Act, op. cit., section 356.

<sup>1110</sup> *High Court of Australia (Fees) Regulations 2004* (Cth) subregulation 6(1) and schedule 1.

<sup>1111</sup> *ibid.*, regulation 9.

<sup>1112</sup> S Gageler, op. cit., p. 188.

<sup>1113</sup> C Hughes, ‘The Illusive Phenomenon of Fraudulent Voting Practices: A Review Article’, *Australian Journal of Politics and History*, vol. 44, no. 3, 1998, p. 477, citing C Copeman and A McGrath (eds.), *Corrupt Elections: Recent Australian Studies and Experiences of Ballot Rigging*, Tower House Publications, Kensington, 1997.

<sup>1114</sup> *ibid.*

<sup>1115</sup> For a recent example of the use of this rule in the electoral context, see *Scott-Irving v Oakeshott* [2009] FCA 487 at [65].

<sup>1116</sup> Electoral Act, op. cit., paragraph 360(1)(ix).

<sup>1117</sup> *ibid.*, subsection 360(4).

<sup>1118</sup> *Nile v Wood* (1987) 167 CLR 133 at 142 (Brennan J); *Hudson v Lee and Another* (1993) 177 CLR 627 at 633-634 (Gaudron J).

- increasing the court costs of lodging a petition in order to deter unmeritorious or nuisance claims;
- removing the exemption or waiver of filing fees for lodgement of electoral petitions;
- requiring the Commonwealth to bear all costs in electoral proceedings, except where the proceedings are summarily dismissed as being vexatious or frivolous, or for not complying with procedural requirements; or
- introducing an additional costs penalty for petitions found to be frivolous or lacking in substance or merit.

### *Procedural requirements*

- 13.31 Strict procedural requirements can pose a more onerous hurdle for prospective electoral litigants. Under arrangements introduced in 1989,<sup>1119</sup> the Electoral Act requires a petition to contain the essential facts on which the petitioner relies to invalidate the election or return with sufficient particularity to identify the specific matter or matters on which the claim for relief rests.<sup>1120</sup> Commentators have noted that ‘petitions need to be drafted carefully’ to comply with these requirements, with all facts necessary to establish the case for relief contained in the petition’.<sup>1121</sup>
- 13.32 The contents of the petition become even more important as the Court has held that no petition can be amended, at least in a matter of substance, after the 40 day time limitation period has ended.<sup>1122</sup> As a result, no new evidence can be raised after the short time limitation period has elapsed.<sup>1123</sup> The rationale for these time limitations is discussed below, in particular at paragraph 13.35.
- 13.33 These procedural requirements have been described as ‘a significant hurdle at which most petitions fail’,<sup>1124</sup> which means that ‘getting the pleading wrong in an electoral case is sudden death’.<sup>1125</sup> On the other hand, it has also been argued that these strict procedural requirements are necessary to balance the ease of access to the Court of Disputed Returns provided by low court costs and large numbers of citizens with standing. Commentators have suggested that ‘this need for strict formal compliance has the practical effect of ameliorating the potential for abuse that might otherwise arise from the relative ease with which a petition can be brought’.<sup>1126</sup> The requirements might also be argued to prevent ‘fishing expeditions’ by petitioners seeking to challenge the result on an election without requisite evidence.
- 13.34 Options for changing the current procedural requirements might include:
- allowing petitions to be amended after the 40 day time limitation period has expired;
  - reducing the strictness of the procedural requirements for all potential litigants; or
  - the publication of publicly available guidelines for the drafting of a petition to the Court of Disputed Returns to assist potential litigants.

<sup>1119</sup> *Electoral and Referendum Amendment Act 1989*, section 111.

<sup>1120</sup> *Electoral Act*, op. cit., subsection 355(aa).

<sup>1121</sup> G Carney, ‘The High Court and the Constitutionalism of Electoral Law’, in G Orr, B Mercurio and G Williams (eds.), op. cit., p. 183

<sup>1122</sup> *Cameron v Fysh* (1904) 1 CLR 314 at 316; *Re Berrill’s Petition* (1978) 52 ALJR 359; *Nile v Wood* (1988) 167 CLR 133.

<sup>1123</sup> G Orr and G Williams, op. cit., p. 76.

<sup>1124</sup> S Gageler, op. cit., p. 191.

<sup>1125</sup> *ibid.*, p. 192.

<sup>1126</sup> *ibid.*, p. 190.

*Time limitations*

- 13.35 Presently, a petition to the Court of Disputed Returns must be filed within 40 days after the writ to which the petition relates is actually returned.<sup>1127</sup> The time limitation has been strictly interpreted, with petitions not able to continue unless lodged within the 40 day time period.<sup>1128</sup> The short time period has been criticised on the grounds that it 'does not allow sufficient time to investigate the facts' and that it is often 'only some time after the election that discrepancies...are detected'.<sup>1129</sup> On the other hand, the Court of Disputed Returns has stated that the time limit 'is designed to produce criteria which are objective and certain' and reflects 'the public interest in resolving expeditiously and with finality questions respecting disputed elections and returns'.<sup>1130</sup>
- 13.36 Opportunities for change in relation to time limitations could encompass:
- the introduction of an extended period of time within which a petition can be lodged;
  - the creation of a rule which would allow for petitions to still be lodged after the 40 day period, with the leave of the Court, where evidence of the alleged electoral irregularity 'could not have been obtained by the time of filing of the petition challenging the poll';<sup>1131</sup> or
  - the conferral of a discretion on the Court to extend the time within which a petition can be lodged if it considers it appropriate in all the circumstances of the case.

*Petition must change outcome of election or return*

- 13.37 The Court of Disputed Returns has also held that an electoral petition will only be valid if it will affect the outcome of the election or the return of a particular candidate. Lesser disputes which affect only the size of a final majority or the overall result in terms of statistical returns will not be ruled on by the Court.<sup>1132</sup>
- 13.38 Commentators have noted that, with the exception of widespread misapplication of electoral laws or corruption, it 'is a rare case in which an electoral petition will be valid despite the allegations raised being insufficient to cast probable doubt on the outcome'.<sup>1133</sup> It is also argued that this rule means that 'serious violations may go unlitigated where the result of an election is not very close'.<sup>1134</sup>
- 13.39 On the other hand, it might be argued that electoral petitioners have the ability to divert even more resources if allowed to be conducted in instances which would not affect the final result. It has been suggested that in these cases, violations should not go unnoticed if the media and JSCEM are performing their roles.<sup>1135</sup>

<sup>1127</sup> Electoral Act, op. cit., subsection 355(e).

<sup>1128</sup> *ibid.*, subsection 358(1), as cited in G Orr and G Williams, op. cit., p. 74.

<sup>1129</sup> M Cooke, *Address to the HS Chapman Society*, 12 August 1999, as cited in A McGrath, *The Case for an Electoral Ombudsman*, HS Chapman Society, undated, available at [www.hschapman.org/case\\_for\\_an\\_electoral\\_ombudsman.htm](http://www.hschapman.org/case_for_an_electoral_ombudsman.htm).

<sup>1130</sup> *Rudolphy v Lightfoot* (1999) 197 CLR 500 at 508.

<sup>1131</sup> G Orr and G Williams, op. cit., pp. 93-94.

<sup>1132</sup> *Kean v Kerby* (1920) 27 CLR 449 at 458 (Isaacs J).

<sup>1133</sup> G Orr and G Williams, op. cit., p. 71.

<sup>1134</sup> *ibid.*, p. 73.

<sup>1135</sup> *ibid.*

### *Checking the accuracy of the roll*

13.40 The Electoral Act expressly provides that the Court of Disputed Returns shall assume the electoral roll to be correct and 'shall not inquire into the correctness of any roll'.<sup>1136</sup> The Court is able to inquire into the identity of voters listed on the electoral roll, but cannot challenge the validity of the listing of an individual on the electoral roll.

13.41 Although this feature has been criticised by some,<sup>1137</sup> the Court of Disputed Returns has commented that:

'Any electoral system which, instead of providing a means of putting the electoral rolls in order before an election, allows alleged errors in those rolls to ground an attack upon the subsequent election exposes to risks of dislocation the democratic process it is designed to serve.'<sup>1138</sup>

13.42 The Court pointed to the 'adequate remedies' available for voters 'who are wrongly removed from the rolls or who are wrongly refused entry upon the rolls' as reasons why there should be no judicial inquiry into the accuracy of the roll following the filing of an electoral petition.<sup>1139</sup>

13.43 As outlined in chapter 7, it can also be argued that there are now greater opportunities for the roll to be scrutinised, as it is available (often in electronic form) to a range of participants in the electoral process, including candidates and parties. Further, political parties, Senators and members are now explicitly authorised to use electoral roll information to monitor the accuracy of the roll, and the AEC is legislatively empowered to access information from a wide range of sources to identify persons whose enrolment may need to be updated.

### *Harmonisation of dispute resolution practices*

13.44 As seen above, each state and territory jurisdiction gives judicial authority to a superior state or territory court to resolve electoral disputes. Whilst there are some limited opportunities for harmonisation of dispute resolution processes, such as uniform time limitations for the filing of a disputed returns petition,<sup>1140</sup> consistent procedural requirements for the form and content of electoral petitions, and standardised deposit amounts as security for costs, it appears that harmonisation of fundamental electoral practices and processes will be required before harmonisation of dispute resolution processes can take place. If full harmonisation was to be considered, questions might be raised as to the appropriateness of having a federal court examining and adjudicating disputes involving state and territory electoral legislation.

## DISCUSSION POINTS

13.45 Submissions are invited on what aspects (if any) of the dispute resolution process might be reformed. In particular, comments are invited on the following questions:

- Do you think the current role, practices and procedures of the Court of Disputed Returns are appropriate?
  - If not, which individual aspects of the dispute resolution process require reform?

<sup>1136</sup> Electoral Act, op. cit., subsection 361(1).

<sup>1137</sup> A McGrath, *The Case for an Electoral Ombudsman*, op. cit.

<sup>1138</sup> *Re Berrill's Petition* (1976) 134 CLR 470 at 474 (Stephen J).

<sup>1139</sup> *ibid.*, at 473 (Stephen J).

<sup>1140</sup> G Orr and G Williams, op. cit., p. 74.