JUDICIAL REVIEW OF ELECTORAL AFFAIRS

Graeme Orr, Associate Professor, Law, University of Queensland

g.orr@law.uq.edu.au

Introduction

There are four avenues via which courts can be involved in electoral matters:

1. judicial review for constitutional validity
2. criminal jurisdiction over electoral offences.
3. a disputed return petition
4. judicial review of electoral administration or activity

The first type of matter, constitutional validity, is apt for High Court resolution. Given the lack of an Australian bill of rights, such matters have been relatively rare, at least until the last two decades. The second type of matter is, thankfully, not common either. It is just a variation of the general criminal proceeding, applied for example to campaign offences such as unauthorised or misleading publications. The third jurisdiction, where the election or return of a member of parliament is petitioned, has unique properties, as we shall see. The fourth jurisdiction concerns the power to grant injunctions or declarations to ensure compliance with electoral law, whether by administrators or political activists.

The focus of this paper is on this fourth category, the courts' role in oversight of electoral administration, and particularly the availability of judicial review over electoral administration. It requires consideration of the relationship of the disputed returns power, general judicial review and specific grants of review power in some electoral acts. These issues are fairly technical. Given that historically we have not had a litigious culture in the law of politics, the issues may seem arcane. But they are also fundamental. They raise questions about the role of the different branches of government in ensuring electoral democracy, a matter which is fundamental to all public law. They also concern the balance between the rule of law and electoral purity on one hand, and efficiency and trust in electoral administration on the other.

At the heart of the technical questions is a legislative ambiguity. Acts governing parliamentary elections invariably contain a provision of the form 'the validity of the election' may only be challenged in a post-election petition.[1] Australian courts have held that this obscure phrase acts to oust the general judicial review power to oversee electoral administration. The position of the Australian Electoral Commission (AEC) however has evolved to be more open to judicial review.

[1] Local government elections are a different matter. ATSIC elections were covered by a similar provision (below n 33).

The policy behind the issue can be argued either way. Disputed return petitions are untimely, expensive, restricted and generally pointless (unless the electoral margin is wafer thin or the winning candidate disqualified). Conversely, election campaigns are sensitive times. We may prefer to trust the electoral authorities rather than expose them to litigation generated by partisans or cranks, ruled on by harried and hurried judges not used to this specialist branch of governmental integrity. Parliaments could, today, with a few strokes of the pen, resolve the technical ambiguity and clarify when, if at all, general judicial review is available in electoral matters. But to do that would require them to untangle an issue that is over three centuries old. So before detailing the technical questions, let us see what light history can shed on the underlying questions.

Westminster History: Parliaments, Elections and the Courts

In the dawn of the 1700s, in *Ashby v White*, the English courts, Commons and Lords confronted the issue of the courts' involvement in electoral matters.[2] In that case, Ashby had been denied his vote for the election of two borough MPs, by local constables acting as electoral officials.[3] He sued, in effect in the tort of official malfeasance.[4] Lest we see the word 'tort' and invoke modern notions of a public law/private law dichotomy, what we now call judicial review of administrative action 'developed first through tort actions for damages for unauthorised state action.'[5]

At trial Ashby received the sum of £5 damages. (Putting a value on an electoral right may seem odd, but the franchise was then linked to possession of property). However on appeal to the Kings Bench division, Powys J, in the majority, held that the claim lacked jurisdiction:

> the determination of this matter is particularly reserved to the Parliament, as a matter properly conusable by them, and to them it belongs to determine the fundamental rights of their House, and of the constituent parts of it, the members; and the Courts of Westminster shall not tell them who shall sit there. Besides, we are not acquainted with the learning of elections, and there is a particular cunning in it not known to us, nor do we go by the same rules, and they often determine contrary to our opinion without doors.[6]

The framing of this judicial reluctance to intervene is revealing. It is couched not merely in the positive language of a legislature's fundamental privileges and independence, but also in negative language. The judge expresses reluctance to step outside the court's judicial eyrie into the fog of electoral affairs, a realm of special 'learning' and 'cunning', as if courts lacked expertise to rule within that realm. Less charitably, this reluctance could be seen as judicial squeamishness about being drawn into inherently political stoushes. Indeed Powys J went on to say: 'Our business is

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[2] *Ashby v White* (1703) 92 ER 126. With some hyperbole, it was later said that on the dispute hung 'the whole future progress of English law': Ernest Jelf, *Fifteen Decisive Battles of the Law* (Sweet & Maxwell, 1903) 6.

[3] The Sheriff (of Buckinghamshire) having delegated his power to conduct the election under the writ, to the constables of the Borough (of Aylsbury).

[4] Plead as an action on the case. Speculating on the applicability of such an action in contemporary Australian elections, see *Beck v Porter* (1980) 48 FLR 470 at 476-477.

[5] Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, LawBook Co, 2009) 105.

[6] *Ashby v White* (1703) 92 ER 126 at 130.

to determine of *meum* and *tuum* [ie to determine what is mine and what is yours] where the heats do not run so high, as in things belonging to the legislature'.[7]

In the argot of American constitutional law, we might be tempted to say that jurisdiction was declined because electoral matters were political questions. But this would be a mischaracterisation. The political question doctrine far from covers electoral law.[8] The doctrine is based not merely on the separation of powers and comity between branches of government (concerns obviously playing on Powys J's mind). The political questions doctrine also requires that the questions before the court are best left to political, especially executive, discretion because they are not susceptible to determination by judicial standards. The administration of elections may well involve 'heats [which] run so high'. However, that merely means the consequences are politically charged, not that the matters for decision are endlessly political.[9] If they were, electoral administration would be fraught with untrammelled discretion. Yet, especially in modern times under detailed legislation, elections are run according to an exacting set of regulations.[10]

Ashby v White is a fundamental illustration of what is it stake in the question of how far courts should be involved in electoral oversight. Contrary to what Powys J implied, Ashby was not challenging an election outcome – a matter which, for a century past, had been recognised as a matter for Parliament, in the guise of its privilege to determine its own composition and the qualification of someone claiming to be one of its own.[11] Rather, Ashby was claiming a ruling and remedy on a specific electoral incident, a wrong to him in the denial of his franchise.

Moved by the belief that the right to vote was 'a most transcendant thing',[12] in the King's Bench the Chief Justice Lord Holt dissented from the abstentionist position of leaving electoral law controversies to the narrow and likely fruitless route of petitioning the House of Commons. In a dictum still celebrated as a statement of access to justice generally, Holt CJ reasoned:

> [i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and, indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.[13]

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[7] For similar judicial reluctance see *Beck v Porter* (1980) 48 FLR 470.

[8] On the contrary, US electoral law is a notoriously litigious field compared to the rest of the common law world. Even the legislative power to apportion itself was taken out of the 'political questions' basked in *Baker v Carr* 369 US 186 (1962). This overrode *Colegrove v Green* 328 US 549 (1946) at 552 holding such questions to be of a 'peculiarly political nature' and beyond jurisdiction. For Australian perspectives see Geoffrey Sawer, 'Political Questions' (1964) 15 *University of Toronto Law Journal* 49 and Geoffrey Lindell, 'The Justiciability of Political Questions: Recent Developments' in HP Lee and George Winterton, *Australian Constitutional Perspectives* (LawBook Co, 1992) 180.

[9] The alternative, as US Justice Holmes said in a case resembling *Ashby v White*, is a mere 'play upon words': *Nixon v Herndon* 273 US 536 (1927).

[10] Michael Maley, 'Australian Electoral Law: Not a Model for Others' in Graeme Orr, Bryan Mercurio and George Williams, *Realising Democracy: Electoral Law in Australia* (The Federation Press, 2003) 40 at 41-42 (discussing the highly 'prescriptive' and lengthy drafting style of Australian electoral legislation).

[11] On the history of disputed returns power, see Caroline Morris, 'From "Arms, Malice, and Menacing" to the Courts: Disputed Returns and the Reform of the Election Petitions System' (2011) *Legal Studies* (under review).

[12] *Ashby v White* (1703) 92 ER 126 at 136.

[13] Ibid at 136. Compare Brennan J in *Oceanic Sun Line Special Shipping Co v Fay* (1988) 165 CLR 197 at 239: it is 'of the nature of a legal right that the person in whom it is vested is entitled to invoke the state's power [ie courts] to enforce it...'

In a less well known dictum, of direct relevance to election law, Holt CJ continued:

> If the House of Commons do determine this matter, it is not that they have an original right, but as incident to elections. But we do not deny them their right of examining elections, but we must not be frighted when a matter of property comes before us, by saying it belongs to the Parliament; we must exert the Queen's jurisdiction.[14]

Although in dissent in his own court, Holt CJ's ruling was upheld on appeal to the House of Lords.[15] The Lords (guided by speeches from 10 Law Lords) held that the general law of the Queen's jurisdiction ran everywhere in relation to electoral matters, except for the special remedy of claiming that an MP was not entitled to sit, because he was unduly elected or suffering a disqualification. For an electoral right to be without a remedy would be an especially unusual thing, given the importance of elections, 'upon the security whereof the lives, liberty, and property of all the people of England so much depend'.[16]

Some in the Commons objected to the Lords' pronouncement, on the basis that one house should not rule on the privileges of the other.[17] The Commons then resolved that no electoral matter should be tried in another tribunal without an act of parliament bestowing that jurisdiction;[18] it also found Ashby technically in breach of privilege for bringing the original action.[19] Eventually, the Commons and Lords met in conference to try to heal what had escalated into a constitutional schism over privileges and comity between the lower and upper houses.[20]

Importantly, for our purposes, not even the Commons argued that there was some kind of privilege for electoral officials. At most, members of that house worried that an electoral official could find himself 'crucified' in a kind of double jeopardy, if the court ruled one way on his actions but a parliamentary committee, hearing a disputed return, ruled the other.[21] Two judges in the Kings Bench had sought to argue that electoral officials ought be seen as judges in their

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[14] *Ashby*, ibid at 138. The denial of the vote – a franchise then based on property holdings – was framed as a denial of a valuable form of property.

[15] Ibid at 138-139. The full report of the parliamentary proceedings over *Ashby v White* is in (1704-05) 14 St Tr 695-888. For the Lords' resolutions, see 799-800.

[16] Ibid, 778 at 785 (Report of the Lords' Committees).

[17] Eg, 'the privileges of the Commons ... are dangerously invaded by the Lords pretence of judicature upon them': ibid at 705 (Mr Brewer MP). Some even alleged enmity on the part of the Lords against the Commons, eg Sir Edward Seymour at 730-731: 'the axe is laid to the root ... they dislike the House of Commons and endeavour to get rid of them.' But not all in the Commons disagreed with the Lords' judgment: see, eg the former Solicitor-General Sir John Howles at 724 and following and Mr Walpole at 773 and following.

[18] Ibid at 775-776.

[19] Ibid at 778. Ashby was not taken into custody. But later his lawyer, and several others complaining of similar denials of the right to vote, were seized for alleged contempt of Commons privilege: see ibid at 804-810. As if to complete the circle, habeas corpus proceedings over those men were then heard before the same Kings' Bench as had heard Ashby's claim, with the issue now being the courts' ability to interpret or rule on claims of parliamentary privilege (see ibid at 849 and following).

[20] Ibid at 813 and following.

[21] Eg, ibid at 722 (Sir Thomas Powis). At the time the Commons often exercised powers to punish officials (see Sir John Howles at 727)

own cause.[22] But two of their brethren in the same court rejected this, reasoning more sensibly that an electoral official merely executed the law.[23]

In truth, what was in play in the early 1700s were the remnants of a long battle, not so much between Parliament and the Courts as between Parliament and the Crown. As Caroline Morris has described, the power over disputed elections had rested for centuries in 'multiple and concurrent jurisdictions': the Crown directly, Chancery where electoral writs were returned, the County Courts and even Star Chamber through supervision of the sheriffs who administered elections on the ground and, eventually, the Commons itself.[24] It was a natural, even necessary step for the Commons to assert its independence from the Crown and Chancery. By the late 17th century, prior to Ashby v White, Chief Justice North in the House of Lords had accepted that Parliament rather than the courts should determine disputed elections.[25] This came to be framed in statutory language as a rule that only parliament could rule on a contested return.[26] But to dispute an election *outcome or return* is not the same thing as an 'electoral dispute' in the sense of any legal question arising from the running of an election.

There matters effectively lay until 1868 when Disraeli moved that the Commons cede its jurisdiction over electoral petitions to the courts.[27] One reason, perceptions of partiality, will seem obvious to modern eyes; another was the need for a stronger tribunal as an ally in the battle against electoral corruption.[28] As the historian Charles Seymour put it, 'the competence and impartiality of the tribunal was of higher importance than the conservation of a constitutional principle'.[29] In Australia, the colonies followed Disraeli's suit by creating courts of disputed returns, piggy-backing on superior courts and their judges.[30] Section 47 of the Constitution reflects the history, by allowing that 'until Parliament otherwise provides' any question of an MP's qualification, a vacancy or a disputed election, shall be determined by the relevant house. The Commonwealth Parliament did so provide in the first electoral act of 1902, establishing the High Court as the Court of Disputed Returns for national elections.[31]

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[22] *Ashby v White* (1703) 92 ER 126 at 129 per Gould J and 129-130 per Powys J: the constables were 'judges of the thing, and act herein as judges', for 'The King's [electoral] writ constitutes [the electoral official] a judge [in the sense that it] gives him the power to allow or disallow the plaintiff's vote.'

[23] Ibid at 132 (per Powell J), see also Holt LJ.

[24] Morris, above n 10 at . See also Anon, 'Controverted Elections' (1846) 4(8) *The Law Review and Quarterly Journal of British and Foreign Jurisprudence* 292 at 303-306.

[25] *Barnadiston v Soames* (1689) St Tr 1902 (HL). See also the earlier case of *Goodwin v Fortescue* (1604) St Tr 91. For discussion see Morris, ibid at .

[26] *Parliamentary Elections (Returns) Act 1695* s 1.

[27] *The Parliamentary Elections Act 1868* (UK). See generally Morris above n 10; see also Graeme Orr and George Williams, 'Electoral Challenges: Judicial Review of Parliamentary Elections in Australia' (2001) 23 *Sydney Law Review* 53 at 59-60.

[28] Graeme Orr, 'Suppressing Vote-Buying: the "War" on Electoral Bribery from 1868' (2006) 27 *Journal of Legal History* 289.

[29] Charles Seymour, *Electoral Reform in England and Wales* (Yale University Press 1915, David & Charles reprint 1970) at 422.

[30] Though hybrid models were also available. For instance in Queensland from 1886 to 1915 a jury of MPs heard disputes, guided by a Supreme Court judge as to legal interpretation.

[31] *Commonwealth Electoral Act 1902* (Cth) Pt XVI. See now *Commonwealth Electoral Act 1918* (Cth) Pt XXII.

Petitioning Elections: Exclusiveness, Finality and Expedition

The power to dispute an electoral outcome therefore now resides either in a timely petition by an elector to the Court of Disputed Returns or (very rarely) in convincing the legislative chamber in question to rule on (or perhaps refer to the courts) any ongoing disqualification issue, such as an MP who remains bankrupt, under conviction or with dual nationality.[32] A key provision of the Commonwealth Electoral Act, s 353, erects a rule about the exclusiveness of the process of disputing elections.

> **Method of disputing elections**
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> (1) The *validity of any election or return* may be disputed by petition addressed to the Court of Disputed Returns and not otherwise. (emphasis added).[33]

Other Australian jurisdictions have virtually identical exclusivity provisions, although some just refer to 'the validity of an election',[34] and Queensland's is phrased so that 'an election may not be disputed in any way' except by post-election petition.[35] The obvious intent of such provisions is that the exclusivity of the disputed returns process for resolving an MP's entitlement to sit cannot be circumvented through proceedings in another form. For example, by reframing the question as a claim under the old writ of quo warranto challenging a person's right to hold executive or ministerial office.[36] Or by seeking a modern administrative law injunction to amend, overturn or delay the return of the writ.

As an MP, responding successfully to a Caribbean election petition, argued:

> The right of an elected member of a legislative assembly to be or remain a member can be determined in one of two ways: (1) either by the legislature itself, or (2) by reference to a court to which this jurisdiction has been especially assigned or delegated.[37]

The reasoning behind that statement is the historical tussle described earlier, which generated the belief that questions of MP's entitlement to sit are uniquely linked to legislative power, or at least to the independence of the legislature. According to the Privy Council, the jurisdiction to challenge an election is 'extremely special',[38] for it:

> concerns what, according to British ideas, are normally the rights and privileges of the Assembly itself, always jealously maintained and guarded in complete independence of the Crown ... .[39]

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[32] Compare *Commonwealth Electoral Act 1918* (Cth) Pt XXII Div 1 (disputed return petitions immediately post election) and Div 2 (references on qualification or vacancy questions arising during a parliamentary term). For elaboration see *Sue v Hill* (1999) 199 CLR 46.
[33] Regional elections for councillors to the now-defunct national indigenous body ATSIC were covered by a similar exclusivity clause: *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) Sch 4, cl 2(1).
[34] Victoria, ACT and Northern Territory, see note immediately below.
[35] *Parliamentary Electorates and Elections Act 1912* (NSW) 155; *Electoral Act 2002* (Vic) s 133; *Electoral Act 1992* (Qld) s 128; *Electoral Act 1907* (WA) s 157; *Electoral Act 1985* (SA) s 102; *Electoral Act 2004* (Tas) s 205; *Electoral Act 1992* (ACT) s 256; *Electoral Act 2004* (NT) s 236.
[36] *Paterson v Solomon* [1960] AC 579 at 590.
[37] Ibid at 587.
[38] *Théberge v Laudry* (1876) 2 App Cas 102 at 106.
[39] *Strickland v Grima* [1930] AC 285 at 296.

In truth, it was only ever a myth that resolving disputed elections was an ancient, exclusive parliamentary privilege.[40]

An aspect of this specialness is the view that the jurisdiction *belongs* in parliament, although parliament can assign it to a judicial body. What is important, for present purposes, is to realise that the 'special' jurisdiction is rooted in the make-up of parliament and an MP's title and right to be seated. As the stalemate in *Ashby v White* showed, it is not rooted in any more general sense that the *administration* of elections involves matters foreign to the courts or normal judicial process. To confuse the two is a categorical error.[41]

Understood this way, there is no necessary reason to view an exclusivity provision, such as s 353 above, as covering the entirety of electoral process. The existence of courts of disputed returns need not oust judicial review in administrative law. Rather, exclusivity provisions preserve the uniqueness of the disputed returns process as the only way to question an election, understood as the outcome of naming successful candidates in the writ. In particular, the disputed returns processes need not limit the availability of modern administrative law procedure to oversee the legality of electoral administration during an election campaign, on polling day, or even during the count (except in extreme cases where the remedy sought, in effect, denies the legitimacy of the electoral writ and its return).

One sub-aspect of the specialness of the disputed returns jurisdiction is the absence of an ability to appeal an ultimate decision on a disputed return, unless an appeal right is specifically granted by statute.[42] (Interlocutory rulings may, however, be appealable).[43] In some jurisdictions, the presumption against review is reinforced by an explicit clause, such as Commonwealth Electoral Act s 368:

> **Decisions to be final**
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> All decisions of the Court [of Disputed Returns] shall be final and conclusive and without appeal, and shall not be questioned in any way.[44]

A second sub-aspect of the specialness of the jurisdiction is the breakneck (by usual litigational standards) speed with which it is to be exercised. The typical rule in Australia is that a disputed return petition must be launched within a mere 40 days of the return of the writ.[45] This period

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[40] Orr and Williams, above n 27 at 58.
[41] One committed by Zelling J in *Beck v Porter* (1980) 48 FLR 470.
[42] Ibid; see also *Arzu v Arthurs* [1965] 1 WLR 675.
[43] *Devan Nair v Yong Kuan Teik* [1967] 2 AC 31: with the caveat that the discretion to entertain interlocutory appeals may only be used in cases raising 'a question of exceptional public importance' such as a significant statutory interpretation issue (at 43).
[44] See *Smith v AEC* (2009) 175 FCR 523. There is debate about if and when appeals to the High Court from *state* disputed returns courts might be guaranteed by s 73 of the Constitution. The answer depends on the nature of disputed returns power and whether it is exercised by a Supreme Court or a notionally distinct tribunal: Paul Schoff, 'The Electoral Jurisdiction of the High Court as the Court of Disputed Returns: Non-Judicial Power and Incompatible Function?' (1997) 25 *Federal Law Review* 316 and Kirsten Walker, 'Disputed Returns and Parliamentary Qualifications: Is the High Court's Jurisdiction Constitutional' (1997) 20 *UNSW Law Journal* 257. As to the nature of the power see *Sue v Hill* (1999) 199 CLR 162 at [28]-[45] and [130]-[156].
[45] The period is even less in Queensland (7 days) and the Northern Territory (21 days), but stretches to 90 days in Tasmania.

cannot be extended, unlike ordinary civil litigation.[46] The legislation even exhorts the court to hurry up: the High Court as the federal Court of Disputed Returns 'must make its decision on a petition as quickly as is reasonable in the circumstances'.[47] The Privy Council has explained that the policy rationale behind such haste lies in the public importance of settling the legislature's make-up:

> [the power] should be exercised in a way that should as soon as possible become conclusive [to] enable the constitution of the Legislative Assembly to be distinctly and speedily known.[48]

Of course legislation cannot be legally impugned because of doubts cast on the make-up of parliament after an election – even if the election were improperly called.[49] A candidate declared elected occupies their office until such time as they are unseated by an order of the court of disputed returns (or, in the case of an ongoing disqualification, by motion of the parliament itself).[50] So there is no formal sense in which the legitimacy of parliament is questioned simply because one or more election races are subject to a disputed return. But in political terms, the fate of a minority or knife-edge government, of the kind increasingly common in Australia, may hang on a disputed return. The Goss government, re-elected on a knife-edge in 1995, fell after losing a disputed return and the subsequent by election.[51]

Bespoke Provisions for Electoral Injunctions

In 1966, it was held that not even a candidate could invoke the general equitable jurisdiction of a superior court (in this case the Victorian Supreme Court) to enforce electoral law. The case, *Webster v Dobson*, involved a claim by conservative candidates against the fledgling, centrist Liberal Reform Group.[52] They alleged misleading advertising in breach of the Commonwealth Electoral Act. The judge took the then orthodox approach that where legislation provides a duty, with a bare penalty as sanction but no explicit provision for an injunction, then the duty was 'enforceable only at the hands of the [s]tate'.[53] Thus only the relevant prosecuting authority could sue for the sanction and no-one but the Attorney-General, acting in the public interest, could seek an injunction. In obiter, the judge pondered the position had the plaintiffs sought an injunction against electoral officials rather than their political rivals. He concluded that electoral legislation created no enforceable rights but merely duties to the state.[54]

The litigation in this case, as is not uncommon in electoral matters, formed 'hurried proceedings'.[55] The judge could be forgiven for not reflecting on the unfortunate consequences

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46 Eg *Rudolphy v Lightfoot* (1999) 197 CLR 500. It extends in most Australian jurisdictions to preventing amendments to (necessarily rushed) pleadings: see *Cameron v Fysh* (1904) 1 CLR 314.

47 *Commonwealth Electoral Act* 1918 (Cth) s 363A.

48 *Théberge v. Laudry* (1876) 2 App Cas 102 at 106; affirmed in *Strickland v Grima* [1930] AC 285 at 296.

49 *Victoria v Commonwealth* (1975) 134 CLR 81 at 157 (per Gibbs CJ).

50 An election is only void from the date of the court of disputed return order: Crafter v South Australia (1981) 28 SASR 86. See also *Linnett v Connah* [1902] St R Qd 104 at 110 (MP defending their seat entitled to full salary whilst petition heard).

51 See the Mundingburra petition: Tanti v Davies (No 3) (1996) 2 QdR 602.

52 *Webster v Dobson* [1966] ALR 309; the decision was criticised in Anon (1967) 41 *Australian Law Journal* 171.

53 Ibid at 311.

54 Ibid.

55 Ibid at 309.

of denying standing. Attorneys-General, being members of political parties, are unlikely to be seen as impartial guardians of highly charged electoral matters. Further, the decision denied electoral authorities standing to enforce electoral legislation, as much as it denied candidates, activists and electors that role. Finally, the case arose before the flowering of the 'new' administrative law in the 1970s. After the precedent was affirmed in a South Australian case pitting a National-Country Party candidate against a Liberal candidate,[56] the Commonwealth *Electoral Act* was amended to add an explicit injunctive provision.

Section 383 now permits:

- a candidate, but only in respect to conduct in 'relation to an election',[57] or
- the AEC

to seek a mandatory or prohibitory injunction from the Federal Court, to restrain or overcome likely or ongoing breaches of the electoral act. Curiously, as Pirani observes, the AEC is not a formal legal entity, although both it and the Electoral Commissioner feature as respondents in matters.[58] Half the States and Territories have enacted similar provisions.[59] All bar one of these explicitly notes that these bespoke powers are in *addition to* any other powers the court might have,[60] most obviously administrative review under the prerogative writs or judicial review legislation. Those powers are broader than the bespoke electoral injunction, both in the remedies available and the potential grounds, which include quashing decisions for fundamental breaches of natural justice.

The New South Wales, Western Australian and Northern Territorian electoral acts contain no such explicit injunction power. In South Australia, there is a bespoke power, but only in favour of the electoral commission.[61] Whether the omission to follow the Commonwealth lead in those four jurisdictions speaks of an intention to deny political actors the right to seek injunctions against electoral authorities, is a mere oversight, or is based on an assumption that the general administrative law creates such a right, is anyone's guess. What the omission does do is make the availability of general judicial review of electoral administration in those jurisdictions an especially poignant question, especially as constitutional, prerogative writs are not available at state level.

The injunctive power in the hands of the electoral commission has been criticised by the AEC itself as inadequate, due to the difficulty of assembling prima facie evidence in a timely fashion, most particularly on polling day. The AEC as a model governmental litigant also will not act without clear and admissible evidence of a prima facie breach.[62] As a result the AEC has sought a graded set of regulatory sanctions for it to administer or seek, along the model of the

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56 *Beck v Porter* (1980) 48 FLR 470.
57 That term excludes the processes of registering electors or parties (as to which see n 61) and political finance law.
58 Paul Pirani, 'Elections and Administrative Law', Paper to the AIAL National Administrative Law Forum, Canberra, 2011 at [4]. Pirani is the AEC's Chief Legal Officer.
59 *Electoral Act 2002* (Vic) s 176; *Electoral Act 1992* (Qld) s 177; *Electoral Act 2004* (Tas) s 233; *Electoral Act 1992* (ACT) ss 321-322.
60 The ACT is the odd one out: compare *Commonwealth Electoral Act 1918* (Cth) s 383(10).
61 *Electoral Act 1985* (SA) s 132.
62 Pirani, above n 58 at [122].

Braithwaite Pyramid. (These could range from warning letters up to civil penalties or deductions from public funding entitlements where parties are the offenders.)[63] But our interest is not in the enforcement power in the hands of electoral administrators, but the reverse, that is the ability to challenge administrators themselves.

Ouster of General Administrative Law Process?

'Judicial review', as Aronson, Dyer and Groves remind us, 'is presumptively available in respect of all statutory decision-making, at least if those powers are being exercised by government, if the powers have legal limits, and if the dispute is justiciable.'[64] Presumptively means in the absence of ouster. Our electoral commissions are key agencies of the 'integrity' branch of government, and everything they do is guided or limited by the dense statutory remits of the various electoral acts.[65] As we have seen, there is no doubt that electoral affairs are justiciable – they are not covered by some political question doctrine. (Conversely, only a few matters, relating to the registration of voters and parties, can be taken to merits review tribunals).[66]

Is there any express or necessarily implied ouster of the general power to judicially review electoral administration? For all their density, the electoral acts do not resolve the question with any clarity. This is particularly odd, given that legislation tends to be explicit in limiting any judicial review of the process of redistributing electoral boundaries – understandably given redistributions involve electoral commissions and even judges conscripted to chair boundary commissions to juggle broad criteria.[67]

Instead, the courts have been left to fashion limits on their general judicial review jurisdiction out of the fabric of the disputed returns' exclusivity clauses described above. That fabric is old and long pre-dates modern administrative law. As we have seen, exclusivity clauses appeared in the 19th century, when legislature's surrendered power over disputed returns to courts. The fabric is also ill-fitting. It deals with the historical hot potato of unseating MPs and determining the composition of the legislature after an election, not the more quotidian questions of electoral administration during a campaign.

In *McDonald v Keats*, the New South Wales Supreme Court faced a claim for equitable remedies concerning the proper counting of votes, in particular whether ballots marked with ticks or crosses were informal.[68] Powell J held that the electoral act formed a code, and that the

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[63] Joint Standing Committee on Electoral Commission, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto* (June 2009) paras [10.8]-[10.14].
[64] Aronson, Dyer and Groves, above n 5 at 134, citing *Mohit v DPP (Mauritius)* [2006] 1 WLR 3343 (PC).
[65] For instance the Australian Electoral Commission works head legislation of over 500 pages and over 500 distinct sections: the *Commonwealth Electoral Act 1918* (Cth). That amount will swell if campaign finance restrictions are adopted: such reforms recently doubled the size of the *Electoral Act 1992* (Qld).
[66] The Administrative Appeals Tribunal has jurisdiction under *Commonwealth Electoral Act 1918* (Cth) s 121 (voter registration) and 141 (party registration). For similar State provisions, see *Electoral Act 2002* (Vic) ss 42 and 60. Where there is no such tribunal or provision, judicial review may be resorted to since registration decisions do not implicate the outcome of an election.
[67] Eg *Administrative Decisions (Judicial Review) Act 1977* (Cth) Sch 1, s 3(q). For discussion of the peculiar nature of the redistribution power and judges' roles in heading redistribution commissions, see Graeme Orr, *The Law of Politics* (The Federation Press, 2010) at 39-44.
[68] Preferences being optional in NSW state elections.

exclusivity rule precluded such a claim.[69] The claimants would have to wait till the result was declared then take their chances in the Court of Disputed Returns. The rule that 'the validity of an *election* or return may be disputed by petition ... and not otherwise', he reasoned, was to be read broadly.[70] The central justification was a broad, literal approach to the term 'an election', so that it covered every step from the formal issuing of an electoral writ to the final declaration of the result. A 'valid election' was to be seen as an ongoing process and not merely its culmination or outcome.

Angela O'Neill has written forcefully in support of the *McDonald v Keats* approach.[71] She points to precedent for the term 'election' to be read broadly.[72] Griffith CJ in Vardon v O'Loghlin, an early Commonwealth disputed return, reasoned that:

> [t]he term 'election' [in s 13 of the Constitution] ... comprises the whole proceedings from the issue of the writ to the valid return.

But s 13 of the Constitution uses the term 'election' in a different context: it concerns the allocation of Senators to short and long terms. Indeed, s 13 employs 'election' in *both* broad and narrow senses in a *single* sentence! '[T]he term of service of as senator shall [begin on 1 July] following the day of his election, except [for] the election next after any dissolution of the Senate...' Here, 'his election' refers not to a process but the outcome of being elected. Whereas the second reference, to 'the election', is to a whole event.

A simpler literal justification for ousting judicial review is to argue that reading 'an election' narrowly, as only covering the result, risks tautology within the phrase 'an election or return may be disputed by petition ... and not otherwise'. This follows the interpretive presumption in favour of giving distinct words separate meanings. However, as is often the case, literal arguments can be arid. The term 'validity of' an election also has to be given meaning. 'Validity' implies a dichotomy with 'invalidity', which marries with the fact that disputed returns are limited to overturning an election result. (An insight captured in old phrases such as 'unduly elected'). Most attempts to seek an injunction to ensure compliance with electoral rules are not challenges to the 'validity' of an election. A citizen seeking an injunction against misleading party advertising, for instance, is hardly challenging the validity of the election. To give a piquant, second example to which we will return, what of a would-be candidate whose nomination is denied? If she seeks a mandatory injunction so her name appears on the ballot, perhaps a month before polling day, in what sense is she challenging the 'validity' of the election?

To avoid the intractably artificial wordplay of literalism, we need to consider the purposive or policy arguments in play. But before we do, it is worth noting that the *McDonald v Keats* approach has been both applied - and not applied - in subsequent cases. Examples of it being

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[69] *McDonald v Keats* [1981] 2 NSWLR 268. Similarly see *Osborne v Shepherd* [1981] 2 NSWLR 277.
[70] *Parliamentary Electorates and Elections Act 1912* (NSW) s 155.
[71] Angela O'Neill, 'Justiciability: The Role of Courts in Reviewing Electoral Administration', in Graeme Orr, Bryan Mercurio and George Williams, *Realising Democracy: Electoral Law in Australia* (The Federation Press, 2003). O'Neill was then a manager of litigation for the Australian Electoral Commission.
[72] Ibid at 221.

followed are common enough.[73] This is unsurprising given electoral litigation often involves an electoral commission rebuffing a poorly prepared litigant-in-person. A busy judge facing a politically sensitive claim, in the hothouse of a campaign, could be forgiven for finding a jurisdictional barrier. Examples of courts not following *McDonald v Keats* are rarer. One example, *Courtice v AEC*, involved Pincus J of the Federal Court agreeing to hear a claim under the *Administrative Decisions (Judicial Review) Act,* in a question of whether a nomination was out of time and hence wrongly accepted.[74] His Honour reasoned that the *McDonald v Keats* denial of administrative law access risked 'an odd gap' in electoral law.[75]

The bespoke injunction provisions, where they exist, specifically permit the relevant court to grant injunctions, interim or final, to ensure compliance with the Act. Standing is, however, limited to commission or 'a candidate in the election'. 'Candidate' means someone whose nomination has been accepted and declared (at least that is how the term is used throughout the electoral acts). Where the problem is with electoral administration, therefore, a disgruntled candidate has to be found and agree to litigate. The same applies if a political activist needs restraining but the AEC chooses not to act. Standing is not conferred on electors generally, nor on registered parties or their officials, and action may not be able to be taken until several weeks after the campaign has begun and candidates are finalised. In *Courtice*, Pincus J held that the existence of a bespoke injunction provision did not deny access to general judicial review.[76]

Policy Arguments about allowing Administrative Review of Electoral Matters

Orr and Williams have argued that, as a matter of principle, administrative review of electoral matters should not be ousted.[77] Subject to any bespoke injunction provision, the *McDonald v Keats* approach reads disputed returns processes as an exclusive avenue to litigate electoral matters. But access to the court of disputed returns is dramatically limited. We have seen how it is procedurally limited by very short time limitations and rigid rules against amending pleadings. It is even more limited because disputed returns have only ever been designed to settle a narrow type of question: 'was this MP duly elected?'. This is reflected in the rule that a petition can only succeed if the errors in the electoral process were so great as to 'affect the result of the election'.[78] Since the errors must be sufficient to have affected the result, petitioning is not a method for oversight of administrative compliance. Instead, election petitions are rare birds.

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[73] Eg *Woods v Sullivan* (1993) 30 NSWLR 586, *Kelly v Australian Electoral Office* [2001] FCA 1557 and *Ponnuswamy v AEC* [2002] FCA 1086.

[74] *Courtice v AEC* (1990) 21 FCR 554. (At the time, State Supreme Courts rather than the Federal Court were vested with the bespoke injunction power). Similarly to *Courtice* see *Cusack v AEC* (unreported, FCA, Spender J, 6/11/1984) and *Hodgetts v AEC* [1998] AEC 1285.

[75] *Courtice v AEC* (1990) 21 FCR 554 at 556. His Honour did not explicitly address the exclusivity argument. For an example of a putative candidate being allowed to argue the merits of the rejection of her nomination see *Noah v Campbell* [2007] FMCA 2128.

[76] Ibid at 556-557, relying on *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 10 ('Rights conferred by this Act to be additional to other rights').

[77] Orr and Williams, above n 27, 89-90.

[78] Compare *Commonwealth Electoral Act 1918* (Cth) s 362(3). Only cases of bribery or undue influence by a candidate lead to automatic unseating: s 362(1). A disqualified winning candidate (but not losing candidate) also causes the election to fail: *Sykes v Cleary* (1992) 176 CLR 177.

Outside of cases involving unqualified candidates, serious petitions can only arise in the odd, ultra-marginal race.[79]

To quote from the Lords in *Ashby v White*, errors in electoral administration should be remediable even though the outcome of the election would have been identical.[80] Electoral purity is not just an end in itself: each primary vote, for instance, is worth money via public funding. It is no answer to say that the merits of an election can be queried by a disputed return; to invoke *Ashby v White* again, a disputed return considers electoral matters only to decide 'which Person hath the Right to join with [the legislature] in the making of Laws, and other public Services'.[81]

A body deciding a disputed return cannot address electoral rights or administration as ends in themselves, least of all in a timely fashion before polling day. A petition after the event shuts the door after the horse has bolted. By necessity a petition draws in the winning candidate as well as the electoral commission, exacerbating costs compared to a focused injunctive claim. A petition, by definition, casts doubt on the validity of the election result; an injunction does not do that. An injunction hearing, by contrast, gives timely judicial resolution of the matter, perhaps even forestalling a post-election petition. The position is even acuter in the case of referendums, where the margin between 'yes' and 'no' will almost never be so close as to justify a petition. (Perhaps as a result, the exclusiveness rule does not seem to apply to Commonwealth referendums).[82]

The central purpose of judicial involvement in administrative law is to give reassurance that administrators act according to law.[83] It also enables citizens, at least those legally advised, to participate in oversight and accountability of administration, and provides for open and reasoned interpretation and development of the law, through judicial opinions. On its face, electoral law is a field, par excellence, for judicial oversight. The appearance of free and fair elections is fundamental to social stability and representative democracy. Elections are all about citizen participation. Blocking off judicial involvement leaves electoral law an under-developed mass of statutory rules.[84]

However there are counter-arguments against an open-slather approach to administrative review of electoral matters. O'Neill argues that the principle of expedition applies not just to settling the make-up of parliament (itself a possible pre-requisite to lifting government from the hiatus of

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[79] For recent examples proving this point, see *Caltabiano v Electoral Commission Queensland* [2009] QSC 294 *and Hanna v Sibbons* [2010] SASC 291.

[80] '[I]t is not material whether the person for whom the plaintiff voted was chosen, or would have been chosen if his vote had been taken; his right and privilege is to give his suffrage, to be a party in the election; if he be excluded from it he is wronged, though the persons for whom he would have given his vote were elected.' *Ashby v White* (1704-05) 14 St Tr 778 at 786-787 (Report of the Lords Committees).

[81] Ibid at 793.

[82] The validity of a referendum 'may' (rather than 'shall only') be disputed by post-referendum petition: *Referendum (Machinery Provisions) Act 1984* (Cth) s 100. In both *Benwell v Gray* [1999] FCA 1532 and *Re Ford* (1999) 166 ALR 661 the Federal Court accepted the legitimacy of the prerogative writ process to question referendum administration. But compare *Berrill v Hughes* (1984) 59 ALJR 64 (Mason J holding that federal referendum process was only challengeable by petition) with *McKenzie v Commonwealth* (1985) 59 ALJR 190 (Gibbs CJ holding that, at a minimum, a court must intervene if constitutional issues are raised).

[83] See W B Lane and Simon Young, *Administrative Law in Australia* (Thomson/LBC, 2007) at 1-2.

[84] 'Overwrought and underdeveloped': Orr, above n 67 at 3-6.

the caretaker mode.) She argues that expedition is essential for the whole of the electoral process.[85] Under our law, election campaigns are conducted as fairly tight events. The longest national campaign would be 58 days from the issuing of the writ;[86] but modern campaigns are invariably much shorter, in the order of 5 weeks.[87] Northern Territory campaigns can be as short as 18 days.[88]

Electoral authorities may harbour concerns about litigating disturbing efficient and smooth electoral administration. Of course, every government agency would like to claim such an interest was paramount. But electoral administrators work under special exigencies and pressures. They have to meet not simply the formal timetable set by the writ and legislation, for closing rolls and nomination, issuing postal ballots and conducting polling day itself. They also have to work within internal timeframes which may have limited flexibility. Elections after all are logistical behemoths, the largest peace-time exercise in the life of any nation. O'Neill candidly admits that perfection is unattainable in such circumstances: 'administrative errors and irregularities will occur and are unavoidable'.[89]

There is also a question about whether broad administrative review – however desirable in theory – is altogether necessary in practice. One can always hatch 'in terrorem' or extreme examples of cases where a democratic election could be radically tainted without such review. An example would be if partisans in an electoral commission conspired to refuse the nominations of some candidates, based on their political persuasion. If the candidates were from a major party, courts of disputed returns may or may not find the results in those electorates were unsafe (if the candidates were from minor parties, there might be no remedy). But the history of electoral administration in Australia isn't replete with such conspiracies. It is decidedly sober, if not dull. As Colin Hughes has explained, Australian electoral administration was practically independent of political influence long before the formality of the creation of electoral commissioners with statutory office and tenure.[90] Indeed, to many outsiders, Australia's model of relatively centralised electoral bureaucracy is as professional as anyone could hope for.[91] Judges, roped into developing an area of law that they may only come across once every three years, may be prone to mis-stepping. Australia lacks a 'due deference' rule, unlike say US administrative law where judges are not lightly to overrule agency interpretations of their governing statutes.[92]

Nor is it the case that judicial review could ever be the prime, let alone only, mechanism for accountability in electoral administration. Certainly only a court order will have binding force.

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85 O'Neill, above n 71 at 196-197.
86 As a result of adding the days allowed by *Commonwealth Electoral Act 1918* (Cth) ss 156-157.
87 AEC, *Electoral Pocketbook* (Revised Edition, April 2009) at 38-41.
88 O'Neill, above n 71 at 196.
89 Ibid at 197
90 Colin A Hughes, 'The Independence of the Commissions: The Legislative Framework and the Bureaucratic Reality' in Graeme Orr, Bryan Mercurio and George Williams, eds, *Realising Democracy: Electoral Law in Australia* (The Federation Press, 2003) ch 16 at 205-206.
91 This is most evident to those American authors wary of the US system of partisan and localised officials: eg Richard L Hasen, 'Beyond the Margin of Litigation: Reforming US Election Administration to Avoid Election Meltdown' (2005) 62 *Washington and Lee Law Review* 937 at 973-991, including praise for the Australian model.
92 Known as the Chevron rule, but rejected in *Corporation of the City of Enfield v Development Assistance Commission* (2000) 199 CLR 135 at 151-154.

But electoral commissions have cordial, professional relationships with party machines and candidates, and are amenable to requests to reconsider or at least explain their actions. There is also, in many Australian jurisdictions, an institutionalised process of review and reflection about what worked well and what needs improvement after each general election, through parliamentary electoral matters committees. Since 1983 – across 11 national election cycles – the Joint Standing Committee on Electoral Matters and its predecessor have produced reports after extensive public consultation. Much of those reports deals not with weighty law reform issues, but machinery matters arising from infelicities in how law, administrative practice and resource constraints have chafed together during the hot-house of the election.[93]

Conclusion: trust the judges, the electoral commissions or both?

Much of the argument against judicial review in electoral matters stems from a fear of the sluggishness of court process. In the post-election petition process, as we have seen, there is a legislated concern for expedition and finality. The concern extends beyond the sensitivity for a rapid settlement of parliamentary membership, to a concern that polling day and its related logistics not be upset by pre-election claims for judicial review. But modern courts are not caught in Bleak House time-warps. Several recent examples of judicial speediness in electoral matters should suffice. In *Dent v AEC*, the Federal Court showed sensitivity to the tight time line facing the electoral commission in the 2007 campaign, in its discretion to refuse an interim injunction at the suit of a potential candidate.[94] (Mr Albert Langer, a famous figure in the constitutionality of electoral law, was objecting to an electoral official's refusal to re-enrol him as 'Arthur Dent').[95] In a much weightier case during the 2010 campaign, the High Court expedited a full hearing on a constitutional challenge to the cut-off period for the electoral roll. From initial filing to full bench hearing took barely a week, orders were given the following day.[96] The election went ahead smoothly, with many tens of thousands of extra electors enfranchised or properly enrolled thanks to the decision. In another case during the 2010 election, the activist group Get Up! obtained a Federal Court declaration just 8 days out from polling day, that required the electoral commission to reverse its practice and accept enrolment forms lodged electronically.[97]

What these cases suggest is not merely that courts can act expeditiously when required, but that there is no neat line as to when relief sought risks the 'validity' of an 'election'. The AEC today accepts that it is subject to general judicial review, unless the remedy sought would imperil the *result* of the election -[98] a much neater line to enforce.[99] For instance, during the 2004 election it

[93] Uhr, whilst praising the electoral matters committee's role as a watchdog permitting community and especially party involvement in reviewing electoral administration, laments its lack of focus on the bigger picture questions of public trust in the parties/democracy: John Uhr, 'Measuring Parliaments Against the Spence Standard in Graeme Orr, Bryan Mercurio and George Williams, eds, *Realising Democracy: Electoral Law in Australia* (The Federation Press, 2003) ch 6 at 76-78.
[94] *Dent v Australian Electoral Commission* [2007] FCA 2112 at [8]-[9].
[95] The famous case revolved around Langer's gaoling for advocating a certain type of voting, and the High Court's unwillingness to apply its implied freedom of political communication to free him: *Langer v Commonwealth* (1996) 186 CLR 302. 'Arthur Dent', his assumed name, is borrowed from the science-fiction satire *The Hitch-Hiker's Guide to the Galaxy*.
[96] *Rowe v Electoral Commissioner* (2010) 85 ALJR 213.
[97] *Get Up Ltd v Electoral Commissioner* (2010) 189 FCR 165.
[98] Pirani, above n 58 at [13]; reflected in the cases below n 101.

did not raise the ouster precedents when questions were raised about the drawing of lots to determine candidate order on the ballot paper.[100] Where the point of law or practice is clearly in need of clarification (as in the *Get Up!* case) electoral authorities may even welcome judicial review.

The AEC however does not speak for all electoral authorities, and could resile from its openness and invoke the precedents against judicial review. An electoral commission might be sorely tempted to do so against a litigant-in-person with a claim of dubious merit.[101] (As the present Solicitor-General has observed, a fair amount of electoral litigation is driven by litigants-in-person with bees in their bonnet.)[102] In the alternative, a commission could object to the standing of busy-bodies,[103] or endure a hearing on the merits, but object to ill-considered equitable relief on grounds such as breadth, delay or inconvenience.[104]

What we are left with then is a tangle: the national electoral commission is willing to accept general judicial review, but there is precedent against that position. Even where a commission does not raise any ouster argument, a judge may do so. In a case prior to the 2010 election, for instance, consistent with its present position the AEC did not object to jurisdiction but the judge appeared to, suggesting that the electoral act formed a code and hence that only the bespoke injunction provision was available, not general procedures or remedies.[105] When they do rely on exclusivity provisions to oust judicial review, judges or electoral commissions are not acting in an unprincipled way: indeed the principle dates back over 300 years, to echo Powys J's approach in Ashby v White as opposed to Holt CJ's.

Ashby v White well predated the modern conception of administrative law and its remedies. The remedy Ashby sought was both after the election and in damages, not during a campaign and in the form of an injunction. The case was driven not by some humdrum matter of electoral administration, but the elemental the right to vote. And it was decided at a time when parliament still exercised disputed returns power. Today there is little reason for the courts to be jealous of parliament's role over elections: disputed returns have been ceded to the court and, in

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99 Though not a perfectly neat one. Challenging the writ underlying the election could amount to impugning the election outcome, but what of remedies upsetting a key timeline, like polling day itself? Compare *Kelly v Australian Electoral Office* [2001] FCA 1557.

100 Both a single judge and full bench entertained the proceedings under the *Administrative Decisions (Judicial Review)* process *Assaf v AEC* [2004] FCA 1239; *Assaf v AEC* (2004) 212 ALR 337. The applicant, Assaf, was a candidate: presumably he could have reframed his claim as one based on the bespoke injunction provision, or even perhaps as a prerogative writ under s 75(v) of the Constitution. Amending the proceedings would have wasted valuable time when the ballot paper needed to be finalised

101 Even though such litigants tend to be the easiest to beat. But compare the *Assaf* litigation, above n 100, *Noah v Campbell* [2007] FMCA 212 and *Peebles v Burke (No 2)* [2010] FCA 861, where the AEC did not seek to oust jurisdiction.

102 Stephen Gageler, 'The Practice of Disputed Returns for Commonwealth Elections' in Graeme Orr, Bryan Mercurio and George Williams, *Realising Democracy: Electoral Law in Australia* (The Federation Press, 2003) ch 14 at 186-190. Of course crank litigation might be addressed by levying substantial security for costs, but only at a cost to access to justice for worthy cases. In the field of party registration, party members have been held to have 'affected interests': *Re Williams and the AEC* (1995) 21 AAR 467 and *Sharples v O'Shea* [1990] QSC 190.

103 The standard test for standing in judicial review is that the person be 'aggrieved' by the decision: *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1).

104 For an example of judicial openness to not upsetting the electoral timetable see *Noah v Campbell* [2007] FMCA 2128 at [8]-[12].

105 *Peebles v Burke (No 2)* [2010] FCA 861 at [6].

some jurisdictions at least there are bespoke injunction provisions giving standing to candidates. Those bespoke provisions, however, are not available to ordinary electors – the Ashby's of today – or other political actors such as party secretaries or prospective candidates.

For a variety of practical reasons, as we have seen, disputed returns are an inapt jurisdictional cloak to hold up as protection for electoral rights. Modern parliaments could – and for clarity should – make it clear whether the mere availability of disputed returns to oust the general jurisdiction courts would otherwise have over electoral administration. It is unsatisfactory to leave the matter to electoral commission discretion as to whether to invoke precedent in its favour, or to judicial speculation over the obscure phrase 'the validity of an election or return may be disputed' by petition after the event and not otherwise.

Some electoral commissioners may prefer to be guardians, in their professionalism, of the 'particular cunning' of electoral law and the deep public interest in electoral matters. Independent electoral commissions are, after all, like courts, play a role in governmental integrity. In Australia they are not discretion-rich, given the detailed, code-like nature of most electoral acts.[106] Though not full of discretion, however, the electoral acts are complex, even convoluted, and may benefit from considered judicial interpretation. To raise the electoral commissions above general judicial review would be to make the 'integrity' branch a fourth branch, constitutionally co-ordinate with the other three. In the spirit of *Ashby v White*, it would be better if parliament clarified the law in favour of wider availability of judicial review in electoral matters rather than by recognising a tight ouster clause.

[106] On this legislative density see nn 9 and 65 above.