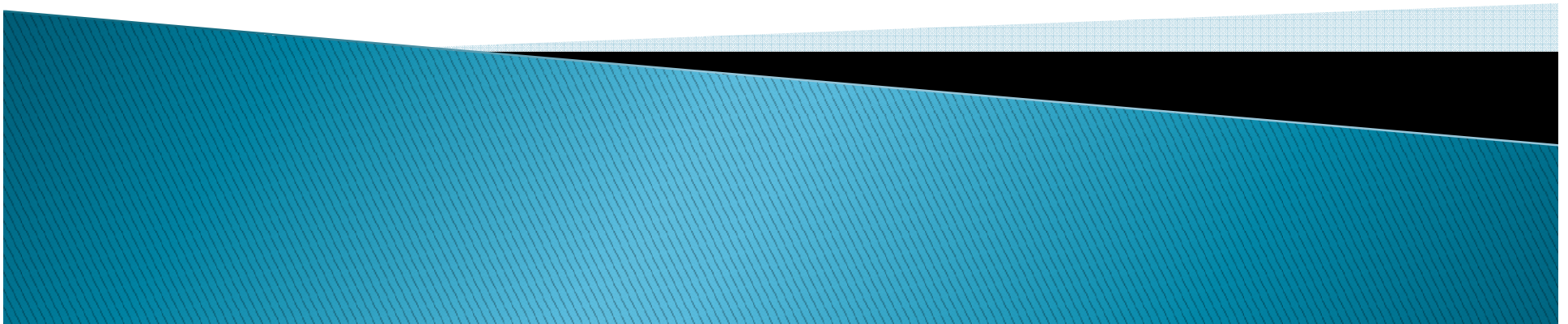


Judicial Review of Electoral Affairs

AIAL National Administrative Law Forum, 2011
Graeme Orr, University of Queensland Law School



Electoral Administration: trust the judges, the ECs, or both?



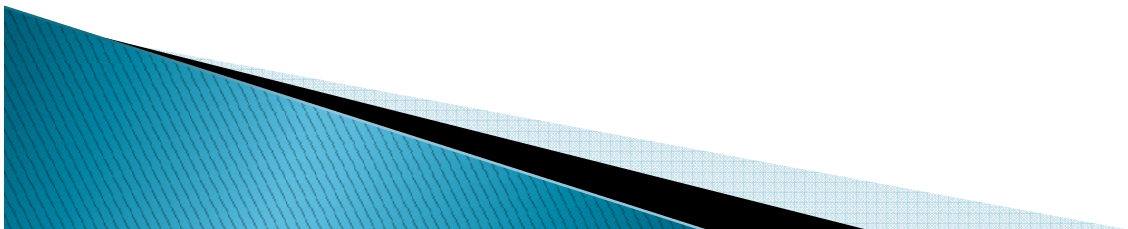
The Commissions



The Courts

4 avenues of judicial involvement

1. Review for constitutional validity
2. Criminal offences
3. Disputed Return petitions
4. Review of electoral administration



Ashby v White (1703)

‘the determination of [electoral matters] is particularly reserved to parliament

We [judges] are not acquainted with the learning of elections, and there is a particular cunning in it not known to us...’

Powys J

‘If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it

...’

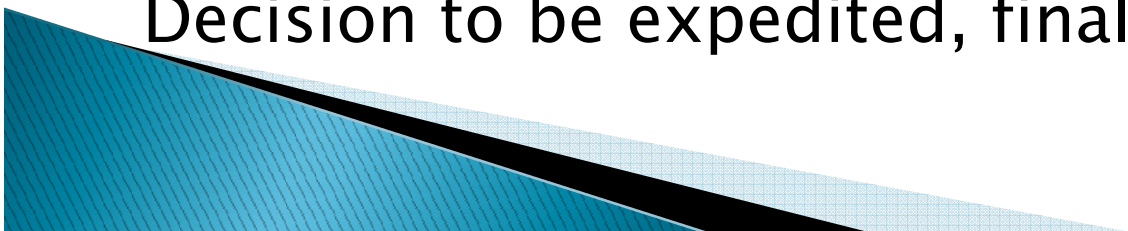
We must not be frightened when a matter ... comes before us, by saying it belongs to Parliament; we must exert the Queen’s jurisdiction.’

Holt CJ

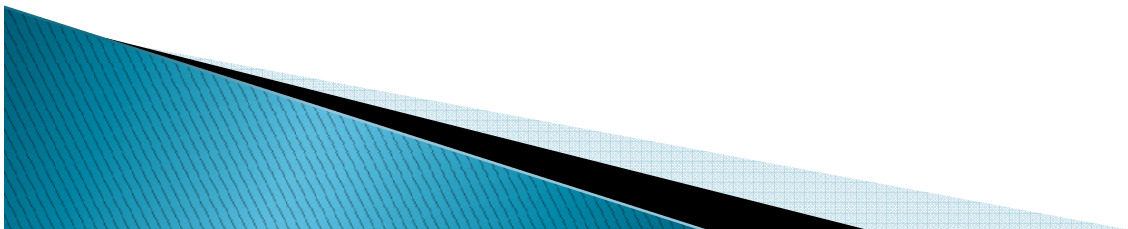
- ▶ 1868 Westminster cedes disputed returns to courts. (Compare Constitution s 47).
- ▶ Standard electoral act exclusivity provision:
‘*Validity of any election or return* may be disputed by petition .. and not otherwise’

Does this oust administrative review of electoral matters?

Must petition within 40 days of writ's return.
Decision to be expedited, final.



- ▶ Only A-G could enforce electoral law
(*Webster v Dobson*, *Beck v Porter*)
- ▶ Led to bespoke injunction provision
Cth Electoral Act s 383:
 1. Candidate (over conduct of election) or
 2. AEC generallycan seek Federal Court injunction.



Should availability of disputed return petition oust administrative review?

- ▶ 'election' different from 'return' (outcome). Covers conduct (*McDonald v Keats*).
- ▶ Opens ECs and courts to crank litigants in hurried heat of campaign.
- ▶ ECs are integrity agencies; judges unused to electoral matters.
- ▶ Electoral Acts form code.
- ▶ Judicial review evolved recently for rule of law / accountability.
- ▶ Would leave 'odd gap' (*Courtice v AEC*).
- ▶ Stitch in time.
- ▶ Remedies are discretionary.
- ▶ Electoral law is fundamental.
- ▶ Disputed returns an inapt cloak.

Yes

No

Today, AEC policy is to accept judicial review
unless relief sought threatens polling
timetable.

Yet precedent still exists to oust judicial review
State elections not covered by AEC.

In sum: requires parliamentary clarification.

