IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY
CANBERRA

NO P OF 2013
C17

BETWEEN: **THE AUSTRALIAN ELECTORAL COMMISSION**
Petitioner

AND: **DAVID JOHNSTON**
First Respondent

JOE BULLOCK
Second Respondent

MICHAELIA CASH
Third Respondent

LINDA REYNOLDS
Fourth Respondent

WAYNE DROPULICH
Fifth Respondent

SCOTT LUDLAM
Sixth Respondent

ZHENYA WANG
Seventh Respondent

LOUISE PRATT
Eighth Respondent

HIGH COURT OF AUSTRALIA
FILED
15 NOV 2013
THE REGISTRY CANBERRA

ELECTION PETITION

This petition concerns the election of 6 Senators for the State of Western Australia (**Western Australia**) to serve in the Senate of the Parliament of the Commonwealth (**Parliament**) held on 7 September 2013.

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RETURN OF WRIT

The writ for the election was returned on 6 November 2013.

Filed on behalf of the Petitioner by:

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ENTITLEMENT TO FILE THIS PETITION

The petitioner is entitled to file this petition under s 357(1) of the *Commonwealth Electoral Act 1918* (Cth) (**Act**).

STATEMENT OF FACTS

1. On 5 August 2013, Her Excellency, the Governor-General in Council, pursuant to the Constitution and the Act, issued writs for the election of Members of the House of Representatives for the States and Territories and for the election of Senators for the Australian Capital Territory and the Northern Territory.

The Election

2. On 5 August 2013, His Excellency the Governor of Western Australia, pursuant to the *Election of Senators Act 1903* (WA) (**WA Act**), issued the writ for the election of 6 Senators for Western Australia (**the Election**).

3. Pursuant to s 2 of the WA Act, His Excellency fixed the following dates for the purpose of the Election:

   a) For the close of the Rolls, 12 August 2013.

   b) For the nominations, 15 August 2013.

   c) For the polling, 7 September 2013.

   d) For the return of the writ, on or before 13 November 2013.

4. On 5 August 2013, the Governors of the other States also issued the writs for the election of Senators for those States.

5. The general election conducted on 7 September 2013 included the Election, being a Senate election where six places of Senators were to become vacant on 1 July 2014, and were required to be filled.

6. Candidates at the Election included the First to Eighth Respondents, as well as Jamie van Burgel and Murray Bow.

7. Western Australia is divided into Divisions for the purposes of a general election for the Parliament as follows:

   a) There are 15 Divisions for the House of Representatives.

   b) Each Division has a Divisional Returning Officer (**DRO**).

   c) The DRO for each of the 15 Divisions has responsibilities in relation to the conduct of a general election within and for the Division, including the scrutiny of votes cast for candidates for the House of Representatives seat for that Division and votes cast in that Division for the election of Senators for Western Australia.

d) Two of the Divisions are Forrest and Pearce.

The scrutiny of votes in Senate elections

8. Persons entitled to vote in a Senate election may:

   a) vote by indicating their preferences in accordance with a registered group voting ticket in accordance with s 239(2) of the Act (that is, they may **vote above the line**); or

   b) vote by indicating their consecutively numbered preferences for all the candidates (that is, they may **vote below the line**).

9. A ballot paper is informal for the purposes of a Senate election if the ballot paper comes within the terms of s 268 of the Act (**informal vote**).

10. Pursuant to the provisions of the Act, the scrutiny of Senate votes includes the following procedures, which were followed in the Election, save that the petitioner is not aware of all the material facts in subparagraph (d) below with respect to 1,370 ballot papers:

   a) A first count, described as the 'first scrutiny', is conducted by the Assistant Returning Officer (**ARO**) at the polling place at which the vote is cast in accordance with s 273(2) of the Act, and the results of this scrutiny are entered into the petitioner's election management system (**ELMS**). The ARO then bundles ballot papers into 'parcels' and transmits the relevant parcels, along with ballot boxes not opened by the ARO and ballot papers used for casting declaration votes, to the DRO.

   b) After this transmission, a second count, described as a 'fresh scrutiny', must be conducted by the DRO in accordance with s 273 of the Act in the case of a manual scrutiny or s 273A of the Act in the case of a computerised scrutiny, or, as allowed by s 273B, partly under s 273 and partly under s 273A.

   c) The result of the fresh scrutiny by the DRO will be a count of the first preference votes for each candidate and a transmission under s 273(5)(d) of the Act to the Australian Electoral Officer (**AEO**) of information as to the number of first preference votes for each candidate and the total number of ballot papers rejected as informal.

   d) The DRO further seals up the parcels of ballot papers under s 273(5) and/or s 273A(3) of the Act and then transmits them in the following ways:

      i. if the parcels contain unrejected ballot papers for votes below the line, the DRO transmits them to the AEO under s 273(5)(f) and/or s 273A(3)(e) of the Act; and

      ii. if the parcels contain either unrejected ballot papers for votes above the line or ballot papers rejected as informal, the DRO sends the parcels for storage and remains responsible for their safe custody in accordance with the directions of the Electoral Commissioner, until they are destroyed, by reason of s 393A(3) of the Act.

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e) The next critical stage in ascertaining the successful candidates and their order of election is for the AEO to apply the principles set out in ss 273(8)-(32), including by use of a computer as authorised by s 273A, with respect to the information and ballot papers transmitted by the DRO to the AEO.

11. The AEO used for the Election a computer system called EasyCount Senate (**ECS**) for the purposes of s 273A of the Act in relation to the Election. ECS enables the AEC to manage the vote recording process for Senate ballot papers for votes below the line. ECS also incorporates the results of votes above the line. The results of votes above the line are downloaded from ELMS into ECS.

12. ECS applies the rules for the scrutiny of Senate ballot papers that are contained in Part XVIII of the Act. This includes the application of the quotas, transfer values and the order of standing of candidates who are not excluded as determined by the AEO. ECS also applies the registered group voting tickets and their related preferences, which have been received by the petitioner under s 211 of the Act.

13. ECS reports the distribution of preferences as a series of 'counts' that act either to elect or exclude the various candidates. A 'count' occurs when the number of votes of the same value is ascertained. For example, the first count will include all of the first preference votes cast for each candidate at a value of one: s 273(8). After any candidate is elected, the surplus votes above the quota for the elected candidate are transferred at a lesser value to the remaining candidates: ss 273(9)-(12). An 'exclusion point' occurs when no surpluses remain to be distributed and the number of vacancies remaining to be filled is less than the number of continuing candidates. The candidate with the fewest votes is excluded. In the event of a tie a candidate will be excluded by the operation of s 273(31). The excluded candidate's votes are passed on to continuing candidates according to the next available preference at the appropriate transfer value: ss 273(13)-(17). A count will therefore include each ascertainment of the votes that have been transferred from the elected or excluded candidates at the same transfer value.

The role of scrutineers under the Act

14. The Act provides for the following mechanisms for candidates to scrutineer the petitioner's scrutiny of votes:

    a) Candidates may appoint scrutineers to represent the candidate at the scrutiny under s 264 of the Act.

    b) Duly appointed scrutineers may be present at the scrutiny and carry out the functions stated in s 265(2) of the Act.

    c) Sections 273 and 273A of the Act provide that scrutineers may be present at the first and fresh scrutinies under Part XVIII of the Act.

    d) Section 279B envisions that scrutineers may also be present at any re-count.

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Initial results of the Election

15. On or about 2 October 2013, for the purposes of s 273(7) of the Act, the AEO for Western Australia ascertained:

    a) that the total number of ballot papers, informal and unrejected, was 1,349,635;

    b) that the number of unrejected ballot papers was 1,311,440;

    c) that the number of informal ballot papers was 38,195;

    d) that the quota for the purposes of s 273(7) was 187,349;

    e) the appropriate transfer values as described in s 273(7); and

    f) the order of standing of continuing candidates as described in s 273(7).

16. On 2 October 2013, the AEO for Western Australia announced that for the purposes of s 273A(5) he had ascertained that the successful candidates at the Election in order of their election were the First, Second, Third, Fourth, Seventh and Eighth Respondents.

17. In ascertaining those successful candidates, and in application of the principles under ss 273(8)-(32) of the Act, the AEO of Western Australia took the following material steps and the following matters occurred:

    a) The total number of separate 'counts' in the exclusion process was 166.

    b) At 'count' 4, the 1st exclusion point, there was a tie between two candidates, namely Heather Dewar and Sean Butler each having 8 votes, which was resolved in accordance with s 273(31) and resulted in Mr Butler's exclusion.

    c) At 'count' 10, the 5th exclusion point, there was another tie between two candidates, namely Joe Lopez and Al Lackovic each having 22 votes, which was resolved in accordance with s 273(31) and resulted in Mr Lackovic's exclusion.

    d) After the 49th exclusion point, Mr van Burgel had a greater number of votes than Mr Bow.

    e) At 'count' 141, the 50th exclusion point, Mr van Burgel and Mr Bow were the two remaining candidates with the lowest number of votes. At this exclusion point, Mr van Burgel had gained (through preference flows) another 2,216 votes, bringing his total to 23,501 and Mr Bow had gained (through preference flows) another 9,965 votes, bringing his total to 23,515.

f) The impact of the 14 vote difference between Mr van Burgel and Mr Bow at the 50th exclusion point was that Mr van Burgel, as the candidate standing lowest in the count, was excluded and his preferences were then distributed to the other remaining candidates in accordance with either the registered group voting ticket in the case of above the line votes, or the direction of the individual voter in the case of below the line votes.

g) By reason of the previous matters and the working through of the further counts and the further exclusions, the result in the final count was the election of the Seventh and Eighth Respondents to the fifth and sixth vacancies respectively.

h) Had Mr van Burgel and Mr Bow been tied at the 50th exclusion point, the exclusion would have been resolved in accordance with s 273(31) and would have resulted in Mr van Burgel leading on the 'count back' (that is, by reference to his lead on the earlier count). This is because Mr van Burgel had a greater number of votes at the 49th exclusion point. Such a scenario would have resulted in the Fifth and Sixth Respondents being elected to the fifth and sixth vacancies respectively.

i) Had the votes for Mr van Burgel been greater than the votes for Mr Bow at the 50th exclusion point, then Mr Bow would have been excluded, and his preferences distributed. Such a scenario would have resulted in the Fifth and Sixth Respondents being elected to the fifth and sixth vacancies respectively.

18. In the premises, the question of which of Mr van Burgel or Mr Bow was to be excluded at the 50th exclusion point was critical in determining who would be elected to fill the fifth and sixth vacancies respectively. That is because the preferences that would be directed upon the exclusion of Mr van Burgel were such as to favour decisively the election of the Seventh and Eighth Respondents and the preferences that would be directed upon the exclusion of Mr Bow were such as to favour decisively the election of the Fifth and Sixth Respondents.

Request for a re-count

19. On 2 October 2013, the Fifth and Sixth Respondents each made a formal request for a re-count.

20. On 2 October 2013, and in light of the above requests, the AEO for Western Australia announced that the declaration of the result of the Election and the names of the candidates elected under s 283(1)(a) would be deferred.

21. On 3 October 2013, the AEO for Western Australia refused the respective requests of the Fifth and Sixth Respondents.

22. On 3 October 2013, the Sixth Respondent appealed to the Electoral Commissioner to direct a re-count.

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23. On 4 October 2013, the Fifth Respondent appealed to the Electoral Commissioner to direct a re-count.

24. On 4 October 2013, the AEO for Western Australia further deferred the declaration of the results of the election in light of the appeals for a direction for a re-count.

25. On 10 October 2013, the Electoral Commissioner directed the AEO for Western Australia to conduct a re-count of ballot papers citing as the critical reasons:

> While I have no direct evidence in my possession of any error or irregularity that may have materially affected the election results, the criticality of the particular Senate candidate exclusion together with the small margin leads me to conclude that it is prudent to confirm the result in the interests of the electorate's confidence in the outcome.

26. On 10 October 2013, the Electoral Commissioner directed the AEO to conduct the re-count in the following terms:

> To the Australian Electoral Officer for Western Australia
>
> Pursuant to section 278(2) of the *Commonwealth Electoral Act 1918* (Electoral Act 1918) you are hereby directed to conduct a re-count of the following category of ballot papers cast by voters in the election of Senators for Western Australia:
>
> > All the Senate ballot papers marked above the line together with those informal ballot papers that have been determined as obviously informal by Divisional Returning Officers in accordance with section 273A(3) of the Electoral Act.
>
> To be clear, the above category of Senate ballot papers excludes those ballot papers that proceeded to the Centralised Senate Scrutiny and which were previously considered by you under section 273A(4) of the Electoral Act.

The re-count

27. The re-count involved the scrutiny of approximately 96% of the votes that were cast at the Election.

28. The AEO commenced the re-count on 17 October 2013.

29. Candidate-appointed scrutineers were present during the re-count, including to the extent permitted in relation to the computerised scrutiny under s 273A of the Act.

30. During the course of the re-count, the following matters emerged:

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a) A total of 1,370 ballot papers for votes which had been cast in either the Division of Forrest or the Division of Pearce – consisting of 120 informal votes and 1,250 unrejected above the line votes – could not be located and brought within the re-count.

b) The re-count proceeded with respect to the balance of ballot papers falling within the scope of the Electoral Commissioner's direction.

c) That balance of ballot papers comprised of 38,519 ballot papers for informal votes and 1,310,278 ballot papers for unrejected above the line votes. That was a total of 1,348,797 ballot papers.

d) Conducting the re-count solely on the balance of ballot papers, the AEO for Western Australia ascertained that the total number of informal votes was 38,519, which was 324 votes more than the AEO had ascertained during the scrutiny up to 2 October 2013.

e) There were 164 'counts' in the distribution of preferences process on the re-count.

f) As in the fresh scrutiny, at 'count' 4, the 1st exclusion point, there was a tie between two candidates, which was resolved in accordance with s 273A(8).

g) At the 50th exclusion point of the re-count, Mr van Burgel and Mr Bow were again the two candidates remaining with the lowest number of votes. At this exclusion point, Mr van Burgel had gained (through preference flows) another 2,216 votes, bringing his total to 23,526 and Mr Bow had gained (through preference flows) another 9,971 votes, bringing his total to 23,514. The impact of the 12 vote difference between Mr van Burgel and Mr Bow at the 50th exclusion point was that Mr Bow, as the candidate standing lowest in the count, was excluded and his preferences distributed with the result that after the working through of the further counts and the further exclusions the result in the final count was the election of the Fifth and Sixth Respondents to the fifth and sixth vacancies respectively.

31. The petitioner repeats paragraph 18 above for the purposes of the re-count.

The notional re-count

32. If the results from the re-count of the available ballot papers were combined with what was known about the intent of the voters in respect of the 1,370 missing ballot papers from records of the fresh scrutiny, and on the assumption that the formality of those votes and the recording of the above the line votes (as noted in the records) was accurate, the following result on such a re-count (the **notional re-count**) would have occurred:

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a) The Election would have comprised an additional 120 ballot papers for informal votes and 1,250 ballot papers to be counted as unrejected above the line votes;

b) At the 50th exclusion point, Mr van Burgel and Mr Bow would have again been the two candidates remaining with the lowest number of votes. At this exclusion point, Mr van Burgel would have gained (through preference flows) another 2,218 votes, bringing his total to 23,531 and Mr Bow would have gained (through preference flows) another 9,975 votes, bringing his total to 23,532. Accordingly, Mr van Burgel, as the candidate standing lowest in the count – by a single vote – would have been excluded and his preferences distributed with the result that after the working through of the further counts and the further exclusions the result in the final count would have been the election of the Seventh and Eighth Respondents to the fifth and sixth vacancies respectively.

Summary concerning the 50th exclusion point

33. The critical juncture of the 50th exclusion point on the fresh scrutiny, the re-count and the notional re-count therefore yielded the following results:

a) The fresh scrutiny showed a margin of difference between Mr van Burgel and Mr Bow of 14 votes in Mr Bow's favour, leading to the eventual success of the Seventh and Eighth Respondents.

b) The re-count showed a margin of difference between Mr van Burgel and Mr Bow of 12 votes in Mr van Burgel's favour, leading to the eventual success of the Fifth and Sixth Respondents and the declaration of the result in their favour.

c) The notional re-count, incorporating the facts known about the 1,370 missing ballot papers as they stood at the fresh scrutiny, models a margin of difference between Mr van Burgel and Mr Bow of one vote in Mr Bow's favour, which if accurate, would have led to the eventual success of the Seventh and Eighth Respondents.

Facts about the 1,370 missing ballot papers

34. The facts in relation to the 1,370 missing ballot papers, so far as they are currently known to the petitioner, are as follows:

a) All 1,370 missing ballot papers were the subject of the fresh scrutiny by the DRO for the Division of Forrest or the DRO for the Division of Pearce. The fresh scrutiny commenced on or about 9 September 2013 and continued until on or about 23 September 2013.

b) All 1,370 missing ballot papers were either for informal votes or votes above the line and the DRO remained responsible for their safe custody in

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accordance with the directions of the Electoral Commissioner under s 393A(3).

c) In order for the DRO for the Division of Forrest to discharge the responsibility under s 393A(3), the procedures put in place involved the ballot papers being transferred by a courier company engaged by the petitioner (Toll Ipec) to an initial transit point in the Perth suburb of Hazelmere and subsequently to the petitioner's warehouse at the Perth suburb of Welshpool from where they would be available for any subsequent purpose under the Act, such as transfer to a re-count centre for a re-count.

d) In order for the DRO for the Division of Pearce to discharge the responsibility under s 393A(3), the procedures put in place involved the ballot papers being transferred direct to the petitioner's warehouse at Welshpool from where they would be available for any subsequent purpose under the Act, such as transfer to a re-count centre for a re-count.

e) After the re-count commenced on 17 October 2013 and the relevant ballot boxes and parcels of ballot papers were transmitted from the warehouse at Welshpool to the re-count centre, it was ascertained that:

i. ballot papers were missing from the Division of Forrest, which can be identified from records of the fresh scrutiny as being 151 above the line votes and 80 informal votes; and

ii. ballot papers were missing from the Division of Pearce, which can be identified from records of the fresh scrutiny as being 1,099 above the line votes and 40 informal votes.

f) Following the discovery that the 1,370 ballot papers were missing, the petitioner has taken the following steps:

i. The Deputy Electoral Commissioner went to Perth and had oversight of the petitioner's searches;

ii. The petitioner caused, by its officers, staff and agents, the following things to occur:

A. inspection of its warehouse in Welshpool on three separate occasions;

B. inspection of all other premises occupied by the petitioner in Western Australia;

C. inspection of all polling places and counting centres in the Divisions of Forrest and Pearce;

D. inspection of a truck hired by the petitioner, a vehicle hired by Toll Ipec and other vehicles owned and operated by Toll Ipec;

E. inspection of the premises of Toll Ipec;

F. the examination of available closed circuit television footage of the Toll Ipec premises; and

G. the questioning of staff of the petitioner and polling officials.

35. As at the date of this petition, and despite the extensive publicity of the loss of the 1,370 missing ballot papers, those ballot papers remain lost.

36. In the circumstances referred to in paragraphs 34-35 above, the 1,370 missing ballot papers are not in the possession, custody or control of the petitioner.

37. Further, in those circumstances, the 1,370 missing ballot papers are unlikely to be found at all or under conditions in which the integrity of the ballot papers could be established without real doubt as to whether they could be safely counted for the purposes of any power that this Court might exercise.

38. On 8 November 2013, the petitioner appointed a former Commissioner of the Australian Federal Police, Mr Mick Keelty AO APM, to examine the facts and circumstances regarding the 1,370 missing ballot papers. The specific terms of reference for Mr Keelty's inquiry are to:

a) Make findings on what factors may have contributed to the misplacing of the ballot papers.

b) Recommend what changes could be made in the future to reduce the risk of similar incidents occurring in future elections.

c) Recommend any other actions that might be regarded as necessary or prudent.

39. Mr Keelty is due to provide an interim report to the petitioner by the end of November 2013.

The course taken by the AEO to declare the result of the Election

40. As at 4 November 2013, the AEO for Western Australia, in carrying out his duty under s 273 to ascertain the successful candidates and the order of their election, was faced with the following dilemma:

a) if he proceeded to ascertain the successful candidates and the order of their election excluding the 1,370 missing ballot papers, he would fail in the task of conducting the re-count in accordance with the direction of the Electoral Commissioner; and

b) if he proceeded to ascertain the successful candidates and the order of their election according to the ballot papers that were available and the petitioner's records as to the contents of the missing ballot papers so as to generate a notional re-count:

i. it was not possible to say with certainty, or on the balance of probabilities, that this would produce a more reliable result than the re-count that excluded the missing ballot papers;

ii. this would not constitute a valid re-count in accordance with the requirements of s 279B of the Act and the Electoral Commissioner's direction under s 278 of the Act as a re-count must be conducted by reference to the actual ballot papers; and

iii. there would be no opportunity to test whether the 1,370 missing ballot papers, having been counted in the fresh scrutiny in the absence of scrutineers, were counted correctly so as to determine whether any of the ballot papers that were rejected as informal should have been counted, and whether any ballot papers counted as above the line votes in accordance with a registered voting ticket should have been counted for votes other than in accordance with that registered voting ticket or rejected as informal.

41. The AEO for Western Australia considered that it was appropriate to declare the results of the Election on the basis of the re-count without the 1,370 missing ballot papers in all the circumstances, including the matters pleaded in paragraph 40 above, and that:

a) it was highly likely that the missing ballot papers were irretrievably lost so that no additional information would be forthcoming that would justify any further delay;

b) it was necessary to declare a result and return the writ within the time fixed by the Governor of Western Australia, pursuant to s 2 of the WA Act, of 13 November 2013;

c) no petition to dispute the Election before the Court could be brought until the writ was returned and it was important that any petition be resolved expeditiously so that if a fresh election were necessary it could be conducted in time to provide for the representation of Western Australia in the Senate with a full complement of Senators from 1 July 2014 in accordance with s 13 of the Constitution; and

d) the writs for all the other elections in the 2013 general election already having been returned, because of s 355(e)(ii) of the Act, the declaration and return of the writ was necessary to start time running on the conclusive period in which a petitioner could dispute before the Court any Senate or House of Representatives election held as a result of the

general election and therefore it was important to provide certainty in a timely manner about the outcome of the 2013 general election.

Declaration of results of the Election and return of writs

42. On 4 November 2013, the AEO for Western Australia declared under s 283(1)(a) of the Act that the First to Sixth Respondents were elected in that order.

43. On 6 November 2013, the AEO for Western Australia returned the writ for the Election to the Governor of Western Australia. That writ was the last of the writs for the 2013 general election to be returned, the writs for the elections of Senators for the other States and the Territories having been returned by 8 October 2013 and the writs for elections of members of the House of Representatives having been returned by 1 November 2013.

Contraventions of the Act

44. The following contraventions of the Act have occurred:

    a) by reason of the 1,370 missing ballot papers, the AEO for Western Australia has failed to conduct the re-count of ballot papers in accordance with the direction of the Electoral Commissioner for the purposes of s 278(2) and s 279B in contravention of those provisions and s 18(3) and s 20 of the Act; and

    b) the DRO for the Division of Forrest and the DRO for the Division of Pearce have failed to maintain the safe custody of the 1,370 missing ballot papers, in accordance with the directions of the Electoral Commissioner, in contravention of s 393A(3) of the Act.

45. The contraventions of the Act constitute illegal practices within the definition in s 352(1) of the Act committed by a person other than a candidate and without the knowledge and authority of the candidate.

46. Alternatively, the loss of the 1,370 missing ballot papers (which arose as a result of the DRO for the Division of Forrest and the DRO for the Division of Pearce failing to maintain safe custody of the ballot papers, and which then prevented those ballot papers from being brought within the re-count and prevented the voting intentions expressed in those ballot papers from being safely ascertained) constitutes an error or omission for the purposes of s 365 of the Act.

The result of the Election was likely to be affected

47. If the 1,370 missing ballot papers had been available for the re-count, it was likely, in the sense of there being a real chance, that the result of the Election would have been different. Specifically, the result of the Election would have

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been different if the 1,370 missing ballot papers had been available and a re-count including those ballot papers had demonstrated that:

a) the notional re-count, referred to in paragraph 32 above, was correct in that the 1,370 missing ballot papers were counted correctly at the fresh scrutiny; that is, that the ballot papers rejected as informal were confirmed on the re-count to be informal, and each ballot paper counted as a vote for a particular registered group voting ticket was not rejected as informal on the re-count and was confirmed to be a vote for that registered group voting ticket; or

b) there were no errors made in the fresh scrutiny of the 1,370 missing ballot papers that were sufficient to disturb the relative order of standing of Mr Bow and Mr van Burgel such that Mr van Burgel would be excluded before Mr Bow.

48. In the scenarios described in paragraph 47 above, the two candidates that should have been elected to the fifth and sixth vacancies were the Seventh and Eighth Respondents.

49. In order for the declared result of the Election that was certified in the returned writ to stand as the correct result had the 1,370 missing ballot papers been available for the re-count, it would be necessary for there to have been one or more errors in the fresh scrutiny of the missing ballot papers with the effect that, on the re-count, the relative order of standing of Mr Bow and Mr van Burgel was such that Mr Bow would be excluded before Mr van Burgel.

50. In all the circumstances – including the number of missing ballot papers, the narrowness of the margin at the 50th exclusion point and the differences which, in the usual case, emerge between the fresh scrutiny and a re-count, where that re-count is conducted with more time, and by a more experienced and senior officer of the petitioner, and in the presence of experienced candidate-appointed scrutineers – it is not possible to conclude either with certainty, or on the balance of probabilities, either that:

a) the Fifth and Sixth Respondents have been correctly returned; or

b) an alternative return of the Seventh and Eighth Respondents accurately, or more accurately, reflects the true intention of the voters.

51. In the premises, for the purposes of s 362(3) of the Act, the Court should be satisfied that the result of the Election was likely to be affected, and that it is just that the Election should be declared void.

52. In the alternative to paragraph 51 above, for the purposes of s 365 of the Act, the nature and circumstances of the error or omission referred to in paragraph 46 above are such that it cannot be concluded that the error or

omission did not affect the result of the Election and, accordingly, the Election should be declared void.

RELIEF

The petitioner asks the Court to make the following orders:

1. Declare that, pursuant to para 360(1)(vii) of the Act, the election of 6 Senators for the State of Western Australia to serve in the Senate of the Parliament of the Commonwealth held on 7 September 2013, is absolutely void.

2. The Commonwealth pay the costs of the First to Eighth Respondents as necessarily and reasonably incurred in answering this petition.

3. Such further or other orders as the Court deems fit.

DATED 15 November 2013

.....

Ed Killesteyn
Electoral Commissioner
for and on behalf of
the Australian Electoral Commission

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TO:

THE FIRST RESPONDENT

David Johnston

Parliament House
Canberra
Australian Capital Territory

AND TO:

THE SECOND RESPONDENT

Joe Bullock

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AND TO:

THE THIRD RESPONDENT

Michaelia Cash

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AND TO:

THE FOURTH RESPONDENT

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AND TO:

THE FIFTH RESPONDENT

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THE SEVENTH RESPONDENT

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AND TO:

THE EIGHTH RESPONDENT

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The petitioner's address for service is:

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