

A summary of South Australia's problematic 2022 local government elections

Nicholas Sonza and Victoria Shute KELLEDYJONES LAWYERS

In South Australia, council elections are governed by the Local Government (Elections) Act 1999 (SA) (Elections Act). Periodic elections are held every 4 years in November¹ and the last periodic elections occurred in November 2022. Elections are conducted and overseen by the Electoral Commissioner of South Australia (ECSA).

The 2022 periodic elections were marked by a series of unprecedented events including:

1. hostility between scrutineers and electoral officers²
2. a substantial number of complaints and irregularities
3. serious breaches of the Elections Act by candidates
4. count software errors that impacted the results of numerous elections³
5. failures by elected members to lodge their campaign returns in time resulting in their reinstatement to office only through the Local Government (Casual Vacancies) Amendment Act 2023 (SA).⁴

This article focuses on 3 and 4 above with the count software errors having been discovered through an investigation into the conduct of a successful candidate for election in the Central Ward of the City of Adelaide, which resulted in the election being subsequently declared void.

Serious breaches of the Elections Act — four related decisions of the Court of Disputed Returns spanning over 2 years⁵

Pursuant to s 37 of the Elections Act, the 2022 periodic elections were conducted on the basis of postal voting.⁶ In the City of Adelaide and in accordance with cl 19 of Sch 1 of the City of Adelaide Act 1998 (SA), voting papers must be posted to every natural person and body corporate on the Council's voters roll.⁷

Voting closed on 10 November 2022, after which the usual processes regarding vote scrutiny and rejection were undertaken by ECSA.⁸ On 18 November 2022, a formal declaration was made stating Carmel Noon,

Zhoupeng Hou, David Elliott (who was later elected by the Council as its Deputy Lord Mayor) and Jing Li as duly elected to the Council's Central Ward.⁹

The Petitioner, Alexander Hyde (the Petitioner), was one of 10 unsuccessful candidates in the Central Ward election, having been excluded in the final round of preference vote counting by a margin of just 24 votes.¹⁰ Mr Hyde was previously elected as a member of the Council between 2018 and 2022, serving as Deputy Lord Mayor.

Section 73(1) of the Elections Act provides that the court cannot declare an election void or that a candidate was not duly elected on the grounds of illegal practices, unless satisfied:

- on the balance of probabilities that the "result of the election was affected by illegal practice"¹¹ and
- that the illegal practices affected the result of the election.¹²

The Petitioner alleged that Mr Li, or persons acting on his behalf, committed a series of independent illegal practices contrary to Pt 12 of the Elections Act and as a consequence, 73 voters made false declarations on their voting envelopes or applications for enrolment.¹³

The Petition and alleged illegal practices

The Petition alleged that:

- at a dinner held on 27 May 2022, Mr Li offered a bribe to a number of persons in order to influence them to vote for him at the Elections, contrary to ss 57(1)(b) and (c) of the Elections Act
- between 14 October 2022 and 10 November 2022, persons acting on Mr Li's behalf acted as assistants to persons voting at the Elections, contrary to s 61(1) of the Elections Act, by taking possession of their postal voting papers
- between 14 October 2022 and 10 November 2022, a person acting on behalf of Mr Li took possession or attempted to take possession of postal voting packs, contrary to s 61(4) of the Elections Act and

- between 14 October 2022 and 10 November 2022, at least 73 persons made a statement in their declaration for the postal voting/enrolment that was, to those persons' knowledge, false or misleading in a material respect or had marked a vote on the ballot paper which was not issued to them, contrary to s 64(1) and (2) of the Elections Act.

(together, comprising the "Allegations").¹⁴

The Petitioner alleged that the above actions constituted a scheme whereby Mr Li sought to bribe persons assisting in procuring mass, fraudulent, enrolment of international students, organised the unlawful collection of unopened voting packs from student apartments and at least 57 people who completed the declaration on their ballots, did not sign their enrolment forms.¹⁵

Statutory framework

Part 13 of the Elections Act establishes a Court of Disputed Returns in this case constituted by a District Court Judge, to which the procedures and powers of the District Court when exercising its civil jurisdiction apply.¹⁶

Section 70 sets out the procedure upon the petition and provides that any such petition must be lodged with the court within 28 days after the conclusion of the election.¹⁷ Further, s 71 provides the powers of the court,¹⁸ which, importantly, includes the power to exercise all or any of its powers on such grounds as it sees fit, and establishes that the court "is not bound by the rules of evidence".¹⁹

Relevantly, where the Petitioner has filed the Petition on the alleged grounds that there existed illegal practices during the Elections, s 73(1) provides that the court cannot declare the Elections void (or that a candidate was not duly elected) unless satisfied, on the "balance of probabilities", that an illegal practice affected the result of the Elections.²⁰ Subsection (2) further establishes the presumptive rule that where an illegal practice under ss 57, 58 or 59 are substantiated, the illegal practice will be taken to have affected the result of the election unless the contrary is proved.²¹

Petitioner's application for leave to file amended Petition

Whilst the Petitioner originally filed these proceedings on 16 December 2022, he sought, by way of interlocutory application dated 22 March 2023, that he be granted leave to file an "amended Petition".²²

The Petitioner's application for leave arose in circumstances where, noting the aforementioned 28-day statutory time limit,²³ the Petitioner's original petition was filed within time, however contained allegations which had yet to be fully investigated or substantiated. Upon

new information being brought to light, the Petitioner sought leave to file the amended petition, beyond the 28-day time limit, which made use of the additional facts and evidence produced therein.²⁴

The court therefore considered whether, in the first instance, s 71 of the Elections Act provided any power to extend the statutory time limit. The Petitioner argued that s 71(1)(i) gave the court the power to amend or allow the amendment of a petition, which argument was ultimately upheld by the court.²⁵

The second matter of construction was whether the power to allow amendment of a petition "alleging new facts relied on to invalidate the Elections" was to be confined to cases where the statutory time limit had not expired.²⁶

In considering these matters, the court held that s 70 of the Elections Act imposed a "strict requirement for petitions to be lodged within 28 days" and emphasised the policy reasons, such as the need for expeditious dispute resolution and the court not being bound by the rules of evidence or legal technicalities, supporting Parliament's creation of such strict timeframes.²⁷ Further, the court noted that while s 70(3) expressly provides for the extension of time for a respondent to file a response to any petition, no such provision was made in respect of the filing of the petition.²⁸

The court considered the principles relied upon in *Crafter v Webster*,²⁹ which case concerned near-identical provisions as they appear in the Electoral Act 1929 (SA),³⁰ and was put before the Full Court to confirm the construction of the powers to extend time for amendments. The reliance on *Crafter v Webster* arose upon the question of whether an amended petition, which sought to introduce new facts, could truly be considered an amendment or, alternatively, constituted a new cause of action being lodged beyond the statutory time limit — which was the position held by the Full Court.³¹

The parties agreed that as a matter of strict application of *stare decisis*, although the court was not bound by the decision in *Crafter v Webster*, it being a different decision under different legislation, it would nevertheless be so highly persuasive and would guide the court in construing the Elections Act absent any distinguishable points of contention.³²

In *Crafter v Webster* the Full Court referred to the decision in *Cameron v Fysh*, wherein Griffith CJ held that to allow an amendment, alleging new facts, beyond the time limit, would be practically extending the time limit for filing a petition.³³

Ultimately, the court held that s 71(1)(i) indeed provided the power to amend a petition, however, the power does not permit an amendment to rely upon new facts to invalidate the election if the amendment was made beyond the 28-day statutory time limit.³⁴

The court was then required to consider whether the amendments sought by the Petitioner raised new facts to be relied upon to invalidate the election, which would be materially equivalent to raising a new cause of action for the purposes of applying the rule in *Weldon v Neal*.³⁵ Indeed, the Full Court in *Crafter v Webster* held that new facts which are sufficient of themselves to invalidate the election are in the nature of new causes of action.³⁶

Judge Burnett considered the relevant principles in determining whether a new cause of action was being added by an amendment, as established by Bond J in *Firstmac Ltd v Hunt and Hunt (a firm)*.³⁷

In distilling said principles, Bond J highlighted that now every amendment seeking to add or alter the facts which are material for the plaintiff to succeed should be regarded as raising a new cause of action.³⁸ If an amendment merely adds detail or a particularity which is reasonable to give to the defendant, the amendment does not raise a new cause of action. Similarly, if it was apparent from a party's pleading that a particular cause of action was sought to be raised, an amendment which remedying the fact that the pleadings omitted certain material facts required to succeed would not be regarded as a pleading which raised a "new" cause of action.³⁹

The court also considered the findings of Doyle CJ in *Aldridge v Electoral Commissioner (SA)*, referring to an earlier decision of Dawson J in *Sykes v Australian Electoral Commission* who observed that the dividing line between what is essential and what amounts to particularity may be difficult to determine, however it was clear that the essential facts must be sufficient to justify a finding of invalidity.⁴⁰

In these circumstances however, the Petitioner had come into possession of additional, new evidence that was not otherwise available at the time of lodging the Petition.⁴¹ Accordingly, the court determined, initially, to only permit the amendments not seeking to rely upon new facts.⁴²

The Petitioner, consequently, contended that if certain amendments were not permitted because they sought to rely on new facts to invalidate the Elections, and were lodged beyond the strict 28-day statutory time limit, the court could rely upon the Limitation of Actions Act 1929 (SA) (the Limitation Act) as the basis of power to extend the statutory time limit to lodge a petition, at its discretion.⁴³

Application of the Limitation of Actions Act

Section 48(1) of the Limitation Act, whose relevant powers were upheld in *Crafter v Webster*, provides that the court may, where an Act prescribes time limits for instituting an action, extend the time so prescribed to such an extent as justice may require.⁴⁴

The court considered the factors laid out by the Full Court in *Ulowski v Miller*⁴⁵ (*Ulowski*), where Bray CJ held that there were five paramount matters to be considered; the length of the delay, the explanation for the delay, the hardship to the plaintiff if the action is discussed and the cause of action left statute-barred, the prejudice to the defendant if the action is allowed and the conduct of the defendant in the litigation.⁴⁶

The Court of Appeal made the point, in *Hall v Carney (No 3)*,⁴⁷ that the policy of statutory time limits being enacted is predicated upon a necessity for finality, such that administrations are not left in stasis. Doyle CJ made the same point in *Aldridge v Electoral Commissioner of SA*, thereafter observing that there was an inherent public interest that people be afforded the individual right to properly challenge the result of an election.⁴⁸ Doyle CJ held that a matter as important as an election result must not be challenged by a petition that fails to adequately identify what the allegations and factual material relied upon to invalidate the result are.⁴⁹

The court therefore held that, in exercising its discretion to extend the time for lodging the Petition, it must consider both the five matters set out by Bray CJ in *Ulowski*, and also the policy behind the Elections Act and its statutory time limit.⁵⁰

Judge Burnett determined that the Petitioner's amendments were made in circumstances where the material either clearly could not have been set out in the petitions prior to the evidence surfacing, and that for other evidence which was available at the time of lodging the petitions, there were reasonable explanations for the material not being presented at that time.⁵¹

The material that could not have been discovered at the time of lodging the petition, comprised ECSA's discovery of allegedly fraudulent enrolment forms, which were subject to expert investigation of the signatures and declarations on the voting pack. The court held it was clear that such investigations could not have been completed within the 28-day time limit.⁵²

The Petitioner originally alleged that Mr Li offered bribes to persons in order to influence them to vote for him in the Elections. Noting that this was a serious allegation, the Petitioner sought to amend his original pleading and substitute it with a more particularised allegation to include certain evidence he had discovered after conducting further investigations.⁵³

Additionally, certain amendments sought related to the inclusion of the electoral roll in an affidavit filed by ECSA, which roll was available to the Petitioner during the course of the election and prior to the 28-day time limit. Notwithstanding this fact, the court found it was reasonable for the Petitioner to have omitted these new facts, as the new allegations they supported had not yet come to light.⁵⁴

In the absence of any evidence adduced by the respondents,⁵⁵ that there would be any prejudice suffered should the time extension be allowed, his Honour determined that time ought to be extended, by application of the Limitation Act, to allow the Petitioner to file his amended petition.⁵⁶

Hyde v Electoral Commissioner of South Australia (No 2) — Petitioner's application to re-open case

Upon completion of the Trial, and with judgment reserved and yet to be delivered, the Petitioner sought to reopen the case in order to tender a further 1900 pages of documents.⁵⁷

The Petitioner alleged that the second respondent, Mr Li, whose alleged conduct formed the basis of the Petitioner bringing forth the petition, had failed to make proper discovery of certain communications.⁵⁸ The court earlier found that Mr Li had failed to make discovery as required, and ordered that said discovery be undertaken, with those additional documents forming the basis of the Petitioner's application to reopen.⁵⁹

The nature of the documents sought to be tendered varied. Document 1 comprised documents produced by the City of Adelaide on subpoena as a result of a freedom of information request by the Honourable Ben Hood, member of parliament, and included emails communications with Mr Li in relation to enrolment application forms.⁶⁰ The production of the aforementioned correspondence gave rise to the matter of Mr Li not having made proper discovery of that relevant material.

The subsequent documents comprised those further documents discovered by Mr Li, including various email and WeChat communications between other persons identified in the Petitioner's allegations.⁶¹ The production of these further documents then necessitated investigations and subpoenas for documents from those additional persons identified to be involved in the matter as a result.⁶²

Legal principles on re-opening

There was no dispute that, pursuant to s 71 of the Elections Act,⁶³ the court is provided the power to reopen a case at its discretion and in exceptional circumstances, at all times considering what action the justice of the case favours.⁶⁴

The court outlined that there exist four broad categories where a court may grant leave to re-open a case, being where:⁶⁵

- fresh evidence, not previously discoverable, becomes known
- there has been an inadvertent error

- there has been a mistaken apprehension of the facts or
- there has been a mistaken apprehension of the law.

As the parties could not agree on the legal position as to reopening the case, the court considered, in great detail, the various authorities relating to reopening, outlining a summary of the relevant principles.⁶⁶

The court held that, per the criteria expressed in cases such as *Reid v Brett*,⁶⁷ the further evidence sought to be tendered must be so material that the interests of justice requires its admission and that the evidence would most probably affect the result of the case.⁶⁸ Generally, this can be expanded as that the overriding principle, considering the interests of justice in circumstances where the new evidence could not be reasonably discovered at trial, is the prejudice to the other party.

However, in cases of re-opening after a perfected judgment where there has been an, unexplained, failure to make proper discovery which leads to the new evidence, the court ought not impose such a high standard before re-opening.⁶⁹ This case involves a challenge to the Elections Act, where the rules of evidence do not apply and the court must act according to good conscience and the substantial merits of the case. The court should not prevent a party from re-opening and adducing evidence which had been ascertained by the failure of the other party to make proper discovery.

As to the prejudice to the party opposing the re-opening, the court considered that, as per the approach taken in *Hines Exports Pty Ltd v Mediterranean Shipping Co SA*,⁷⁰ any such prejudice could be cured by allowing that party the right to re-open and adduce evidence in response.⁷¹

Upon considering all of the documents and categories of material presented for reopening and tender on the case, in light of the various applicable authorities, Burnett J granted leave for the Petitioner to file the majority of the documents, with some excluded on the basis they were either not relevant or would otherwise not have any effect on the outcome of the proceedings.⁷² The respondents were also granted permission to re-open for the purposes of tendering documents or adducing evidence in response to the new material tendered by the Petitioner.⁷³

Hyde v Electoral Commissioner of South Australia (No 3) — judgment

As iterated prior, the Petitioner, in his opening, alleged that Mr Li had engaged in a scheme to unlawfully affect the outcome of the Elections including by offering bribes, encouraging international students to enrol and instructing his associates to collect voting packs and fraudulently complete ballot papers in his favour.⁷⁴

The Petitioner's opening was broader than the material in the petition and was not presented within the 28-day time limit after the conclusion. Nevertheless, the court held that this made little practical difference where the individual acts alleged within, if established, would provide grounds for the relief sought.⁷⁵

The court considered that the Petitioner's case was, in part, a circumstantial case relying upon facts which, if established, would support a finding that the court should infer some other, pleaded act, has taken place. That is to say, the more probable inference from a combination of established facts, is that some other act occurred.⁷⁶ Specifically, the court explained the example of the Petitioner's allegation that a photograph of persons handling ballot packs in an apartment building lobby, in conjunction with other evidence and witness testimony, was evidence that multiple ballot packs, including open ballot packs, had been handled and passed between agents of Mr Li.⁷⁷

In *Masters Home Improvement Pty Ltd v North East Solution Pty Ltd*,⁷⁸ the court held, in relation to the principles of drawing inferences in civil cases, that firstly, any inference must be based on facts established by admissible evidence and, secondly, that the process of reasoning must constitute a valid inference rather than speculation or guesswork.⁷⁹ The court must determine the inference to be the more reasonably probable inference from the facts, and must consider the totality of all of the relevant facts together, rather than in isolation.⁸⁰

Procedure and evidentiary framework

Application of the Briginshaw Standard

All of the parties accepted that the *Briginshaw Standard* applied,⁸¹ being that the petition complained of illegal practices that constitute serious offences, if proven in criminal proceedings.

The court applied the comments made by Dixon J, that the seriousness of an allegation made, together with the inherent gravity of the consequences flowing from a particular finding are considerations which must affect the question of whether an issue has been proved to the "reasonable satisfaction" of the court.⁸² In such matters, reasonable satisfaction should not be produced by inexact proofs, indefinite testimony or indirect inferences.⁸³

Essentially, though a civil matter to be proven on a balance of probabilities, this case concerned serious acts that would otherwise constitute criminal offences if proven and should therefore attract a higher standard regarding the quality of proof required in evidence of the allegations therein.⁸⁴

Admission of hearsay evidence

It is established that the court is not bound by the rules of evidence but must act in good conscience and

according to the substantial merits of the case, without regard to legal technicalities.⁸⁵

In relation to hearsay evidence submitted by the Petitioner, the court considered the statements of principle outlined by Bleby J in *Featherston v Tully*.⁸⁶ The court must act judicially to apply the requirements of the legislation and the common law in accordance with the principles of natural justice.⁸⁷

In *Minister for Immigration and Ethnic Affairs v Pochi*,⁸⁸ Brennan J concluded that the decision maker was entitled to have regard to evidence which was logically probative irrespective of whether it was legally admissible or not.⁸⁹

The parties agreed that any weight given to admissible hearsay evidence in the proceedings ought to be determined separately in relation to each hearsay statement sought to be relied upon.⁹⁰ The court did not accept the Petitioner's submission that all of the hearsay evidence he sought to tender was admissible, subject only to being afforded appropriate weight, instead determining that any hearsay lacking cogency or reliability would not be admitted.⁹¹

Evidence of Mr Oscar Ong

Witness evidence was given by Mr Oscar Ong, an Adelaide University student with prominence in the space of student politics, about a dinner in which Mr Li allegedly offered a bribe, and regarding a separate conversation with Mr Trinity Zhang, an associate of Mr Li, in relation to a news article about certain conduct alleged to have occurred during the Elections.⁹²

Mr Zhang reportedly told Mr Ong that he had helped collect unfilled ballot papers from student apartments, namely the Realm apartments, on behalf of Mr Li. The conversation also alleged that Mr Li had instructed one of the persons photographed in Exhibit P7, to collect the ballot papers. Mr Zhang also said that Mr Li had arranged several people to sign the unfilled ballot papers and fill them out, ensuring the handwriting would be different so as to avoid detection.⁹³

The question arose, in relation to Mr Ong's evidence, which was clearly hearsay, as to whether any weight could be placed on it.

The court considered to be an intelligent witness, who answered questions carefully and made appropriate qualifications or concessions when necessary. Evidence was produced displaying Mr Ong's close ties to the Petitioner emanating from their shared space in the realm of, particularly, international student issues and politics.⁹⁴ Accordingly, Judge Burnett did not find that the relationship between Mr Ong and the Petitioner gave

rise to doubts regarding his credibility as a witness, and that his statements were clear and did not appear to involve elements of reconstruction regarding his conversations with Mr Zhang.⁹⁵

Judge Burnett turned his mind to the circumstances of the alleged conversation, finding it entirely reasonable that Mr Ong, deemed an honest and reliable witness, could have had the conversation with Mr Zhang, who was proven to be assisting Mr Li's election campaign by evidence of WeChat messages, upon publication of news articles regarding the mishandling of ballot papers.

His Honour found the hearsay evidence admissible, as it was cogent and logically probative of the matters in issue. No disadvantage was placed upon Mr Li as he was able to respond to the allegations of Mr Zhang in his campaign, though notable Mr Li failed to call Mr Zhang as a witness.

Ultimately, His Honour found that parts of Mr Ong's statement were able to be evidenced, by inference and WeChat messages, confirming that Mr Zhang was working to obtain ballot papers for the benefit of Mr Li and that Mr Zhang had identified one of the persons photographed in Exhibit P7. The submissions of ECSA and Mr Li, that no weight ought be afforded to the hearsay evidence was thereby rebutted.

Jones v Dunkel

The court considered that the rule in *Jones v Dunkel* applied in this matter, which rule states that an adverse inference may be drawn from the failure of a party to adduce particular evidence, where such evidence would reasonably have been expected.⁹⁶

Relevantly, Mr Li failed to give evidence himself, abstaining from such on the basis that his answers might incriminate himself. This is contrary to the position held by Kirby P in *Accident Insurance Mutual Holdings Ltd v McFadden*, wherein the proper procedure is to take to the witness stand and object to each question posed, rather than refusing to be sworn in or making a global denial to all questions.⁹⁷

The court further found that the rule in *Jones v Dunkel* also applied to Mr Li's failure to call Mr Keith Jin, Mr Zhang and Mr Bai to give evidence, as all of the named parties would have been able to give evidence about their involvement in the matter.⁹⁸

Material facts to be considered

Throughout the proceedings, evidence given by several witnesses was dismissed for lack of weight or inability to be substantiated. Mr Li, on several occasions, failed to adduce any evidence to absolve the Petitioners claims in circumstances where it would have been proper to do so.

Encouragement of Chinese persons to enrol on the supplementary voters roll

It was found, on the basis of witness evidence, that on several occasions, Mr Li encouraged other associates to enrol Chinese international students so that they would be eligible to vote in the Elections.⁹⁹ The court held that, in relation to encouraging enrolment and the handling of enrolment forms by Mr Li's associates could not constitute any illegal practice in the circumstances.

With respect to certain acts witnessed by Mr Ong, including at a dinner where he saw a number of completed enrolment forms being handed to Mr Li by Mr Robert Zhu, which enrolment forms were completed by members of the Chinese international student community. These acts did not constitute any illegal conduct, however, as submitted by the Petitioner, the evidence from Mr Ong supported the finding that Mr Li had taken steps to encourage enrolment and was assisted in doing so by Mr Zhu.¹⁰⁰

Relevantly, under s 71 of the Elections Act, the entitlement to vote of a person whose name appears on the voters roll as an elector cannot be called into question by the court.¹⁰¹

Persons handling voter packs outside Vision on Morphett — 27 October 2022

On 27 October 2022, elected member Simon Hou (one of the now-removed elected members), witnessed two persons handling a number of voting packs outside the Vision on Morphett Apartment building. Three photographs of the event were submitted as evidence (Exhibit P7), depicting the two persons reviewing an opened ballot paper, while holding several others.¹⁰²

In cross examination, it was suggested that the ballot papers were those of the City of Burnside, rather than the Council, however this argument was promptly dismissed by Burnett J, when considering the likelihood of six voter packs for the City of Burnside being handled in an apartment within Adelaide City.¹⁰³

In considering whether the persons photographed in Exhibit P7 were acting on behalf of Mr Li, the court found it reasonable to infer that they were.¹⁰⁴ His Honour relied on the *Jones v Dunkel* rule — that an adverse inference may be drawn from the failure of a party to adduce particular evidence, where such evidence would reasonably have been expected.¹⁰⁵

Mr Li failed to give evidence denying that the persons in Exhibit P7 acted on his behalf, leading Burnett J to place more weight on the evidence presented by Mr Ong lending to that conclusion. Counsel for Mr Li, eventually conceding that the ballot papers were unlikely to be those of the Burnside Council, submitted that the evidence only led to the possible

inference that the two men photographed were in possession of the ballot papers but nothing more.¹⁰⁶ The court found it inherently unlikely that the two persons were discussing ballot papers that were legally in their possession, in public and in an apartment, nor to pass them between each other.

Judge Burnett, in determining the evidence in Exhibit P7, accepted the hearsay evidence from Mr Ong regarding a conversation with Mr Zhang, in which Mr Zhang confirmed that one of the persons in the photograph was on Mr Li's campaign team.¹⁰⁷

Accordingly, the court held that the persons photographed in Exhibit P7 were acting on behalf of Mr Li and therefore were acting as assistants to a person voting at the election and had in their possession postal voting papers, contrary to the Elections Act.¹⁰⁸

Mr Bai and Mr Jin handling ballot papers — Stonemill Restaurant — 27 October 2022

Immediately after the above-described observation of the men in Exhibit P7, elected member Hou entered the nearby Stonemill Restaurant and witnessed Mr Bai and Mr Jin, with Mr Jin holding approximately 10 ballot papers.¹⁰⁹

It was argued that these ballot papers were issued to companies owned by Mr Bai, however the court did not find any reasonable inference that this was the case.¹¹⁰ Judge Burnett found this second interaction was clearly related to the two persons seen handling ballot papers at the Vision on Morphett Apartments.¹¹¹

His Honour could not make any finding as to whether this incident occurred with or without the authority of Mr Li, however could infer that Mr Bai and Mr Jin were acting on behalf of Mr Li.¹¹²

Again, applying the *Jones v Dunkel* rule, in the absence of evidence from Mr Li, the court concluded that Mr Bai and Mr Jin were acting as an assistant to a person voting at the election by collecting ballot papers.¹¹³ In doing so, the men "contravened s 61(1) of the Elections Act and committed an offence".¹¹⁴

Complaints to ECSA

After becoming aware of matters raised by elected member Hou and Mr Ong, the Petitioner made a number of complaints to ECSA, the first being on 25 October 2022 and relating to the persons in Exhibit P7.¹¹⁵

The Petitioner's complaints, at this stage, comprised of second-hand hearsay until provision of the photographs in Exhibit P7. The ECSA, in the first instance, undertook the initial scrutiny process pursuant to s 47 of the Elections Act, which saw 368 ballots rejected.¹¹⁶

Second, after the complaints raised by the Petitioner, the ECSA commenced an investigation under s 92 of the Elections Act, involving the examination of the ballot

papers returned from four apartment buildings. 90 ballot papers were scrutinised, with 21 being rejected on the basis they had been filled out by a person other than the voter — indicating a high ratio of exclusion.¹¹⁷

The Petitioner scrutinised the actions of ECSA's investigation, however, Burnett J rejected this scrutiny, finding that ECSA, conducting its investigation expeditiously so that the results of the Elections could be certified, conducted a necessarily limited investigation into the complaint.¹¹⁸

The court noted the large number of elections occurring in the state, highlighting the inability to undertake a more detailed investigation at this time. As mentioned prior, the conduct of ECSA should also be considered in conjunction with the failures it made in conducting its electronic vote-counting, which saw disastrous effects for the Adelaide Plains Council election.¹¹⁹

Allegations of bribery

Evidence adduced from Mr Ong alleged that Mr Li, at a dinner held on 27 May 2022 with leaders of the Adelaide international student community, attempted to bribe attendees in exchange for them securing his votes, and arranging events to enrol other students and getting them to vote for him, in the Elections.¹²⁰

The allegation of bribery arose from a statement by Mr Robert Wu that whoever enrolled the most people would be offered a job.¹²¹ It was not clear what that job would be, nor was the offer raised at any subsequent events or any evidence produced demonstrating the offer being followed up on.¹²² The statement, which his Honour found may have been said, was done so in the context of, firstly, intoxication, and secondly, a Chinese idiom meaning "whatever is said on the drinking table, remains on the drinking table".¹²³

Ultimately, Burnett J found that, for the several uncertainties in the evidence of Mr Ong, including that he could not repeat the idiom or attest to other statements of Mr Jin at a meeting regarding an event where students would bring their ballots, the court could not be satisfied on the balance of probabilities that Mr Wu's uncertain and impromptu statement amounted to a bribe in contravention of s 57 of the Elections Act.¹²⁴

As such a contravention would be a serious criminal offence, the *Briginshaw Standard* applies. Further, the *Jones v Dunkel* rule cannot be used to fill a deficiency on the evidence, that is to say there can be no adverse inference, from Mr Wu's failure to give evidence, as to the purpose or intent of what was said.¹²⁵

It was additionally held that, in light of it not being unlawful to encourage enrolment, the alleged bribe, occurring at the enrolment period of the election process, would have to comprise an illegal practise that continued into the election period.¹²⁶

Mr Zhang collecting unfilled ballot papers

On the basis of evidence including Mr Ong's conversation with Mr Zhang, and additional WeChat messages indicating his involvement, Burnett J found that Mr Zhang had collected unfilled ballot papers from student apartments by knocking on student's doors to obtain them.¹²⁷ Mr Zhang is evidenced to have been heavily involved in Mr Li's campaign and was often in contact with him.¹²⁸

His Honour found that Mr Zhang was acting on behalf of Mr Li when he had possession of the unfilled ballot papers. Accordingly, Mr Zhang "contravened s 61(4) of the Elections Act and committed an offence".¹²⁹ Mr Li was aware that ballot papers were being collected under his name, however, no evidence established that Mr Li was aware of Mr Zhang collecting unfilled ballot papers, but that is not necessary for there to be a contravention of the Elections Act.¹³⁰

Importantly, when considering the effect of the illegal practice identified, the court was unable to ascertain exactly how many ballot papers Mr Zhang had in his possession and could only find that there were a least a number of ballot papers.¹³¹

Allegations of knowingly making a misleading or false declaration on voting papers

Section 58 of the Elections Act provides that a person who dishonestly exercises, or attempts to exercise, a vote at an election or poll to which that person is not entitled, is guilty of an offence.¹³² Similarly, s 64 makes it an offence to make false or misleading declarations in relation to ballot papers.¹³³

The Petitioner pleaded breaches of the above provisions, based upon evidence that the signatures on the declarations contained within voting papers, differed from the signatures on the corresponding enrolment applications for the same persons, thereby giving rise to fraudulent declarations and forgeries.¹³⁴

The court considered a substantial volume of information regarding a number of individual ballot papers and applications for enrolment that were alleged to contain differing signatures, relying upon the expert reports of Mr Hobden and Ms Holt, comparing over 100 pairs of signatures, to determine the occurrence of any forgeries and therefore illegal practices under the Elections Act.¹³⁵

After lengthy consideration of certain individual voter packs where there was additional circumstantial evidence of false declarations, the court ultimately found that in respect of 16 voters whose documents and signatures were inspected, 16 instances where to the person's knowledge who completed the declaration, a false statement in a material respect or that the vote had been dishonestly exercised, "in contravention of ss 58(1), 64(1) and 64(2) of the Elections Act".¹³⁶

Summary of findings on contraventions of the Elections Act

In summary, Burnett J found that:¹³⁷

- the two persons in Exhibit P7, photographed holding when they had 5 ballot papers in their possession on 27 October 2022 outside the Vision on Morphett Apartments
- Mr Bai and Mr Jin when they had 10 ballot papers in their possession on 27 October 2022 at the Stonemill Restaurant and
- Mr Zhang when he collected an unspecified number of ballot papers from student apartments; were persons acting on behalf of Mr Li, who had in their possession postal voting papers to which they had no entitlement in "contravention of s 61(4) of the Elections Act".

Additionally, after the lengthy consideration of expert evidence on the signatures of enrolment and ballot papers, Burnett J found a further 16 instances of contraventions of the Act.¹³⁸

Effect of the illegal practices on the result of the election

In the decision of 7 March 2025, Burnett J found that Mr Li had not offered a bribe, however, his Honour found that on multiple occasions, persons had dishonestly exercised a vote at an election to which they were not entitled contrary to s 58(1) of the Elections Act.¹³⁹

The court found that contraventions of the following sections of the Elections Act occurred:¹⁴⁰

- sections 61(1) and 61(4) by the persons in Exhibit P7
- sections 61(1) and 61(4) by Mr Bai and Mr Jin
- section 61(4) by Mr Zhang
- sections 58(1), 64(1) and 64(2) in relation to the 16 instances of contraventions
- sections of 58(1), 64(1) and 64(2) by Mr Zhang collecting unfilled ballot papers from apartments and subsequently filling them in
- sections 58(1), 64(1) and 64(2) in relation to the 5 ballot papers being handled by the person in Exhibit P7.

The above finding that a person had dishonestly exercised a vote was reached in relation to 16 instances of contraventions and 5 ballot papers being improperly handled, meaning the effect of these individual breaches of s 58(1) of the Elections Act were identifiable.¹⁴¹

Section 73(2) of the Elections Act states that, if illegal practices under ss 57, 58 or 59 are found by the court to have been committed, it will be presumed that

the illegal practices have affected the result of the election, unless the contrary is proved.¹⁴² This presumption arises due to the serious and often unascertainable impact of illegal practices contravening the named sections of the Elections Act.¹⁴³

The court noted that the impact of breaches of s 58(1) were more ascertainable by nature and, upon finding that only one vote had been dishonestly exercised, determined that the presumption ought be displaced in the circumstances.¹⁴⁴

His Honour, however, identified that the breaches went beyond the 16 instances of contravention and mishandling of 5 ballot papers, by reason of Mr Zhang collecting an undetermined number of unfilled ballot papers from student apartments.¹⁴⁵

Because the court could not ascertain the exact number of unfilled ballot papers collecting by Mr Zhang, in circumstances where it was inferred Mr Zhang would complete these ballot papers on behalf of the persons they were intended for, the presumption of s 73(2), that the result of the election was affected, was found to apply.¹⁴⁶

No evidence was adduced by ECSA, or Mr Li as Second Respondent, to rebut the presumption. The ECSA argued that the presumption is not intended to apply in respect of multiple, cumulative illegal practices affecting the result of an election, however the court dismissed this position.¹⁴⁷

While it was accepted that Mr Li had encouraged a number of people to enrol and vote in the Elections, it was argued that this in itself did not guarantee those votes would be cast in favour of Mr Li.¹⁴⁸ The court agreed, however, that the encouragement of voters was not the sole basis for questioning the legitimacy of those votes and could not otherwise be divorced from the evidence relating to, in circumstances of, the other contraventions of the Elections Act found to have occurred.¹⁴⁹

The court found Mr Jin, Mr Bai and Mr Zhang all acted on behalf of Mr Li when they contravened the Elections Act, thereby committing illegal practices, and did so for the benefit of securing votes for Mr Li in the Elections.¹⁵⁰

The court found that Mr Li had engaged in a coordinated scheme to enrol voters and had engaged a number of persons to assist in doing so. His Honour found the following contraventions to be established:¹⁵¹

- The two persons photographed in Exhibit P7 were acting on behalf of Mr Li and were shown to be accepting and reviewing ballot papers in circumstances where there was no proper reason for them

to have those papers. It is inferred that these two persons were reviewing the papers to ensure they were cast in favour of Mr Li, thereby constituting an illegal practice.

- Mr Bai and Mr Jin were acting on behalf of Mr Li when they were witnessed passing 10 ballot papers between them at a restaurant on 27 October 2022. Again, there was no proper reason for Mr Bai or Mr Jin to be handling these papers, other than the inference that these were votes cast in favour of Mr Li. In respect of this illegal practice, Burnett J found another 10 votes to be cast in favour of Mr Li.
- Mr Zhang was acting on behalf of Mr Li when he collected unfilled ballot papers from several apartment buildings. Mr Zhang, and other associates, had the means to know the personal details of the voters to whom the papers were intended. Although not possible to discern the number of papers collected, it is proper to infer the votes were cast in favour of Mr Li in circumstances where illegal practices had occurred.
- In respect of the 16 contraventions, an illegal practice had occurred in that false declarations or dishonestly exercised votes were cast, in circumstances where it is inferred these votes were cast for Mr Li.

As a result of the above findings, Burnett J was satisfied on the balance of probabilities that more than 24 votes, being the margin by which Mr Li was elected, had been cast in favour of Mr Li where there had been illegal practices. It follows that his Honour found the illegal practices to have affected the result of the Elections.¹⁵²

Consequently, on Friday 11 April 2025, Burnett J handed down his final decision that the Central Ward Elections for the City of Adelaide be declared void and a supplementary election undertaken to fill the vacancies.¹⁵³

In relation to Costs, Mr Li will bear 70% of the Petitioner's costs, whilst ECSA will be responsible for the remaining 30%.¹⁵⁴ This comes in light of the court's earlier decision, in the case of the Adelaide Plains Council elections, that ECSA bear all of the costs, on an indemnity basis, of the elected member's effected by ECSA's failure to properly conduct its electronic vote counting, resulting in two incorrect candidates being elected.¹⁵⁵

Count software error

As part of its investigation into the Petitioner's pleading, ECSA discovered, on 5 December 2023,¹⁵⁶ that a particular setting on their electronic vote-counting software, had been incorrectly entered.¹⁵⁷

Under the Elections Act, the ECSA is permitted to use computer software to count votes in an election and did so for 25 of the 184 counts during the 2022 Periodic Elections.¹⁵⁸

Due to the incorrect settings on the computer software, election counting for the Adelaide Plains Council resulted in the two elected members being wrongly declared elected.¹⁵⁹ Subsequently, an additional elected member who was declared elected to fill a casual vacancy in 2023, under the new recount provisions, was also impacted by the ECSA error on the basis that he had been elected from an incorrect pool of candidates.¹⁶⁰

On 5 February 2024, some 445 days after the conclusion of the November 2022 periodic elections and 62 days after the error was discovered, ECSA filed two petitions with the Court of Disputed Returns, disputing the validity of the Election results on the basis of an error in counting of the votes.¹⁶¹

As these petitions were lodged beyond the 28-day statutory time limit, ECSA sought an extraordinary extension of time within which to file. Relying on the earlier decisions in *Hyde*, specifically in relation to the application of s 48 of the Limitation Act and *Crafter v Webster*, ECSA argued that similar application was appropriate in these circumstances, to allow the filing of the petitions.¹⁶²

Despite contentions being raised by counsel for the affected councillors, as to the perfection of the decision reached in *Crafter v Webster* and the contrast between the Petitioner seeking to amend a petition filed in time versus ECSA seeking to file the original petition so far out of time, the court nevertheless held that s 48 of the Limitation Act applied to permit ECSA's extension.¹⁶³

The court ultimately determined it was in the interests of justice to exercise its discretion to grant the extension of time to allow ECSA to file the petitions.¹⁶⁴ In reaching its decision, the court had regard to those same five paramount considerations identified in *Ulowski* and relied upon by the court in *Hyde*.¹⁶⁵

The decision to extend the time-limit was reached on the basis that the interests of the election and the objective that the results reflect the interests of those voting in the election, weighed strongly in favour of granting the extension, so the court could determine whether the election result should stand or be declared void.¹⁶⁶

Accordingly, the court made Orders on 2 December 2024 to declare that the two affected councillors were "not duly elected", and instead, that the two candidates who would have been elected but for the error, were duly elected.¹⁶⁷

In determining the second petition, and in line with its reasoning in the first petition, the court declared the third elected member was not duly elected because the

casual vacancy recount was undertaken with the incorrect candidates (who should have already been elected).

The court was then required to decide whether the casual vacancy, arising from the removal of this elected member, should be filled by way of a supplementary election, or by conducting a repeat of the "recount" but now with the "correct" candidates in the pool. Ultimately, the court held it was appropriate to conduct a recount with the correct candidates, which saw one of the elected members removed by decision of the petition duly re-elected to the Council.¹⁶⁸

Conclusion

The decisions above demonstrate the complexity of matters within the Court of Disputed Returns and the fact that the impacts of same, including loss of office, can occur many years after an election. Unfortunately for three of the former elected members of the Central Ward who were duly elected without any assertion as to illegal activity or breaches of the Elections Act, they have lost office as a result of the actions of Mr Li.

It remains to be seen what the outcome of the supplementary election will be with the term for same being around 12 months, hardly a desirable situation for candidates given that most elected members in South Australia (with the exception of some Mayors) are paid an allowance only.

ECSA's report¹⁶⁹ identifies a series of recommended legislative reforms, funding recommendations and other improvements to be considered and, possibly, adopted by the State Government prior to the 2026 periodic election.

Whether any legislative or other response to these recommendations or to the outcomes of the decisions in the judgments summarised above occur remains to be seen.



Nicholas Sonza

Lawyer

Kelley Jones Lawyers

nsonza@kelledyjones.com.au

<https://kelledyjones.com.au/>



Victoria Shute

Lawyer and Associate Director

Kelley Jones Lawyers

vshute@kelledyjones.com.au

<https://kelledyjones.com.au/>