



RESEARCH NOTE

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Disputed Elections and The Role of The High Court

This *Research Note* will briefly address the doctrine of the separation of powers and how the High Court's role as the Court of Disputed Returns interacts with this doctrine. The criminal offences under the electoral law will not be addressed.

Examples of disputes that have been or could be scrutinised by the High Court are set out in the table at the end of this *Research Note*.

The Separation of Powers Doctrine

The doctrine of the separation of powers is the underlying premise of the Australian system of government. Originally proffered by the French writer, Baron Charles de Montesquieu, in his book *The Spirit of the Laws*, the doctrine is designed to provide for a free society by avoiding giving one person or one entity a concentration of powers. Summarised in simple terms, the doctrine requires that the Parliament's power to make laws, the executive's power to administer laws, and the judiciary's power to hear and determine disputes according to law all remain distinct and separate from one another.

The Commonwealth Constitution is based on the doctrine of the separation of powers and confers legislative, executive and judicial

powers upon separate entities: the Federal Parliament; The Queen (exercisable by the Governor-General as the Queen's representative); and the High Court respectively. However, there is a degree of overlap between the three entities since absolute separation could not be preserved "if efficient and practical government is to be maintained". (See *Starke J R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 577.)

Constitutional Issues Raised by the High Court Determining Disputed Elections

Section 47 of the Commonwealth Constitution provides:

Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

Parliament has divested itself of the right to determine disputed elections by enacting the *Commonwealth Electoral Act 1918*. Section 354 of that act vests the jurisdiction of the Court of Disputed Returns in the High Court. Section 354 also provides that a single judge of the High

Court may try the petition, or the High Court may refer the matter to the Supreme Court in the State or Territory where the disputed election took place.

The jurisdiction of the High Court to determine the validity of parliamentary elections raises the issue of a possible contravention of the doctrine of separation of powers. The argument is that section 354 confers either a legislative power or an incidental legislative power upon the judiciary thereby infringing the doctrine of separation of powers. This point was raised in argument before the High Court in the case of *Re: The Honourable Justice Sir Gerard Brennan and Anor; Ex parte Muldowney* (1993) 116 ALR 619. In that case, the prosecutor argued, amongst other things, that section 354 was unconstitutional because it conferred a legislative power on the High Court which contradicted the *Boilermakers'* case [*R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (High Court); (1957) 95 CLR 529 (Privy Council).]

Whilst acknowledging that it was a serious question, Brennan J found that the facts of the case did not require him to rule on this issue:

The first constitutional question is interesting and important. If it were necessary to decide the

question I would take appropriate action to refer it to the Full Court....However, I have decided that I should not take this course because...on the view I take of the arguments of the prosecutor on the merits of the application for the order nisi, the application should be refused.

The above comments leave open the possibility of arguing that section 354 of the *Commonwealth Electoral Act 1918* is unconstitutional in future. The chances of the argument succeeding, however, depend on the interpretation given by the High Court to the introductory wording of section 47 of the Commonwealth Constitution. A strong argument can be put that the use of the words "Until the Parliament otherwise provides" contemplate that Parliament may confer the 'legislative' power of deciding disputed elections upon another authority. Certainly, the High Court would seem to be the logical choice for such an

authority, given that deciding disputed elections is in the nature of a judicial task (as well as being a legislative task). Therefore, despite amounting to a slight blurring of legislative and judicial power, section 354 appears to have been contemplated in the wording of the Constitution. The fact that Parliament has not chosen to repeal the *Commonwealth Electoral Act 1918* would also be of some relevance.

Other Relevant Provisions

Section 355 of the *Commonwealth Electoral Act 1918* provides that any action challenging the validity of an election must be filed within 40 days of the return of the writ.

Section 360(1) requires the High Court, when it is sitting as the Court of Disputed Returns, to be an open court.

The *Commonwealth Electoral Act 1918* does not set out in detail how the High Court is to determine disputes. Sub-section 360(2) gives some guidance in that the High Court must exercise its powers "on such grounds as the Court in its discretion thinks just and sufficient".

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Examples of Grounds For Challenging The Validity of Election Results

- allegations of interference with ballot-papers;
- allegations that a candidate was incapable of being elected due to any of the following reasons:
 1. the fact that they owed allegiance to a foreign power,
 2. the fact that they were an undischarged bankrupt or were insolvent,
 3. the fact that they held any office of profit or pension under the Crown,
 4. the fact that they had a direct or indirect pecuniary interest in any agreement with the Public Service
- allegations that the formal election result does not represent the free and deliberate choice of the competent electors (This is a common law ground and the relevant authority is *Bridge v Bowen* (1916) 21 CLR 582)