FEDERAL COURT OF AUSTRALIA

 SITTING AS THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 354(1) OF THE COMMONWEALTH ELECTORAL ACT 1918 (CTH).

Garbett v Liu (No 2) [2020] FCAFC 14

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| File numbers: | VID 1018 of 2019VID 1019 of 2019 |
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| Judges: | **ALLSOP CJ, GREENWOOD AND BESANKO JJ** |
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| Date of judgment: | 20 February 2020 |
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| Catchwords: | **COSTS** – whether petitioners’ costs should be paid by the Commonwealth or the petitioners themselves – whether first respondents’ costs should be paid by the Commonwealth or the petitioners – public benefit and public importance of petitions – whether s 360(4) of the *Commonwealth Electoral Act 1918* (Cth) engaged**COURT OF DISPUTED RETURNS** – whether Court should direct Chief Executive and Principal Registrar of Federal Court to act in compliance with s 363 of the *Commonwealth Electoral Act 1918* (Cth)  |
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| Legislation: | *Commonwealth Electoral Act 1918* (Cth), ss 6, 329, 360, 362, 363  |
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| Cases cited: | *Evans v Crichton-Browne* [1981] HCA 14; 147 CLR 169*Green v Bradbury (No 2)* [2011] FCA 469*Hudson v Lee (No 2)* [1993] HCA 58; 177 CLR 627*Nile v Wood (No 2)* [1988] HCA 30; 167 CLR 133  |
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| Date of hearing: | Determined on the papers |
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| Date of last submissions: | 7 February 2020 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights  |
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| Category: | Catchwords |
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| Number of paragraphs: | 31 |
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| Solicitor for the Second Respondent: | Australian Government Solicitor |

ORDERS

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| **IN THE FEDERAL COURT OF AUSTRALIA SITTING AS THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 354(1) OF THE COMMONWEALTH ELECTORAL ACT (CTH).**  | VID 1018 of 2019 |
|   |
| BETWEEN: | VANESSA CLAIRE GARBETTApplicant |
| AND: | GLADYS LIUFirst RespondentAUSTRALIAN ELECTORAL COMMISSIONSecond Respondent |

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| JUDGES: | ALLSOP CJ, GREENWOOD AND BESANKO JJ |
| DATE OF ORDER: | 20 February 2020  |

THE COURT ORDERS THAT:

1. Within 7 days the applicant and the first respondent jointly notify the Commonwealth Attorney-General of the reasons published today in order that the Commonwealth may, within 28 days thereafter, provide submissions as to why orders should not be made under s 360(4) of the *Commonwealth Electoral Act 1918* (Cth) providing for the costs of the applicant and the first respondent as contemplated in [19] of the reasons of the Court published today.
2. Should the Commonwealth file such submissions, the applicant and the first respondent have a period of 14 days thereafter for the filing of any further submissions on costs.
3. The second respondent bear its own costs.
4. The remaining questions of costs be determined hereafter by the Court on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

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| **IN THE FEDERAL COURT OF AUSTRALIA SITTING AS THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 354(1) OF THE COMMONWEALTH ELECTORAL ACT (CTH).**  | VID 1019 of 2019 |
|   |
| BETWEEN: | OLIVER TENNANT YATESApplicant |
| AND: | JOSHUA ANTHONY FRYDENBERGFirst RespondentAUSTRALIAN ELECTORAL COMMISSIONSecond Respondent |

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| JUDGES: | ALLSOP cJ, GREENWOOD AND BESANKO JJ |
| DATE OF ORDER: | 20 february 2020 |

THE COURT ORDERS THAT:

1. Within 7 days the first respondent notify the Commonwealth Attorney-General of the reasons published today in order that the Commonwealth may, within 28 days thereafter, provide submissions as to why orders should not be made under s 360(4) of the *Commonwealth Electoral Act 1918* (Cth) providing for the costs of the first respondent as contemplated in [19] of the reasons of the Court published today.
2. Should the Commonwealth file such submissions, the applicant and the first respondent have a period of 14 days thereafter for the filing of any further submissions on costs as to who should pay the first respondent’s costs.
3. The second respondent bear its own costs.
4. The remaining questions of costs be determined hereafter by the Court on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. On 24 December 2019, the Court made orders dismissing the petitions brought by Ms Garbett and Mr Yates. Two matters were provided for by way of further submissions: the parties addressing the question of costs and Mr Frost being given an opportunity to address the operation of s 363 of the *Commonwealth Electoral Act 1918* (Cth) (**the Act**), in the light of the Court’s findings as to s 329(1) of the Act.

## The question of costs

1. The petitioners seek to have their costs paid by the Commonwealth pursuant to the power given by s 360(4) of the Act. They make this submission based on the public benefit of the litigation, supported, it was submitted, by the resolution of the various important matters of construction of ss 329(1) and 362(3) of the Act, and upon what they submitted was the failure of the second respondent (the AEC) to discharge its proper function on the day of the election. The petitioners also submit that they should not have to pay the costs of Ms Liu and Mr Frydenberg. They do not say that Ms Liu or Mr Frydenberg should not have their costs, but submit that the Commonwealth should pay them. In support of the submission that they should not have to pay the costs of Ms Liu and Mr Frydenberg the petitioners point to the fact that the subject of the complaint was the result of the conduct of the Acting State Director (Mr Frost) of “their party”. In support of the submission that the Commonwealth pay their costs, implicitly, they rely on their earlier submissions of public benefit and the asserted failings of the AEC.
2. The first respondents (Ms Liu and Mr Frydenberg) seek their costs, paid either by the petitioners or the Commonwealth. As a partial alternative Mr Frydenberg submitted that whatever public benefit may be perceived in Ms Liu’s case being brought, Mr Yates’ petition was also brought. It had no additional public benefit and, further, it faced the huge hurdle of Mr Frydenberg’s 11,287 vote majority.
3. The second respondent (the AEC) submitted that there should be no order as to costs as to its costs. It further submitted that there was no occasion for an order to be made against the Commonwealth under s 360(4).
4. At least two matters flow from the orders made and reasons published on 24 December 2019. First, the first respondents should have their costs. Secondly, the AEC should bear its own costs.
5. The further questions that arise are whether the petitioners should pay their own costs as well as the costs of the first respondents or whether the Commonwealth should pay some or all of the costs of the petitioners and the first respondents.
6. The position of the Commonwealth was defended by submissions filed by counsel (including senior counsel) for the AEC, instructed by the Australian Government Solicitor. The AEC is established by s 6 of the Act:

(1) There is established by this section a Commission by the name of the Australian Electoral Commission.

(2) The Commission shall consist of:

1. a Chairperson;
2. the Electoral Commissioner; and
3. one other member.

(2A) For the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act* 2013):

1. the Commission is a listed entity; and
2. the Electoral Commissioner is the accountable authority of the Commission; and
3. the following persons are officials of the Commission:
	1. the Electoral Commissioner;
	2. the Deputy Electoral Commissioner;
	3. the Australian Electoral Officer for a State or Territory;
	4. the staff of the Commission referred to in section 29; and
4. the purposes of the Commission include:
	1. the functions of the Commission referred to in section 7; and
	2. the functions of the Electoral Commissioner referred to in subsection 18(2).

(3) The Chairperson and the non-judicial appointee shall be appointed by the Governor-General and shall hold office on a part-time basis.

(4) The person appointed as Chairperson shall be a person whose name is included in a list of the names of 3 eligible Judges submitted to the Governor-General for the purposes of this section by the Chief Justice of the Federal Court of Australia.

(5) A person shall not be appointed as the non-judicial appointee unless the person is the holder of:

1. an office of Agency Head (within the meaning of the *Public Service Act 1999*); or
2. an office established by or under an Act and having, in the opinion of the Governor-General, a status equivalent to that of an office referred to in paragraph (a).

(6) The performance of the functions or the exercise of the powers of the Commission is not affected by reason only of there being one vacancy in the membership of the Commission.

1. The position of the AEC and its juridical relationship with the Commonwealth, generally and specifically for the purpose of s 360(4), was not explored in submissions, other than by bare assertion of the petitioners that the AEC was not the Commonwealth and that it was not for the AEC to make submissions defending the positon of the Commonwealth. We do not consider it appropriate to seek to resolve this issue on the current submissions.
2. Before coming to the position of the Commonwealth, something needs to be said about the litigation. Undoubtedly, the petitions raised important questions in relation to the construction of the Act. Further, the petitions concerned behaviour about which there was some basis to think that both the Liberal Party and the Labor Party had engaged in (this election as to the former, and at the 2017 Bennelong by-election as to the latter: see [154] of the December reasons): that is, the display of corflutes looking like, or designed to look like, signs of the AEC. We do not intend to repeat what we said in December about this practice or about the width of the phrase “in relation to the casting of the vote”. This subject matter, and such clarification as the reasons of December brought to the consideration of conduct that might be seen to undermine the AEC’s independence can be viewed as public benefit and not just as a matter of public importance: cf *Green v Bradbury (No 2)* [2011] FCA 469 at [8].
3. As is apparent from our December reasons, we disagreed with the submissions of the AEC about whether the conduct was capable of satisfying s 329(1) in the light of *Evans v Crichton-Browne* [1981] HCA 14; 147 CLR 169. The evidence revealed that officers of the AEC at some polling stations took action: see [132] of the December reasons. There was no step taken generally, however, for the reason, we infer, that the view was taken that there could be no contravention of s 329(1) even where the offending corflute was placed adjacent to an AEC sign. That submission was put to us. We rejected it. We do not consider, however, that the submission was untenable or that the AEC can be criticised for having failed properly to execute its functions. Rather, its view was mistaken, in our respectful view.
4. Section 360(4) is in the following terms:

The power of the Court of Disputed Returns under paragraph (1)(ix) to award costs includes the power to order costs to be paid by the Commonwealth where the Court considers it appropriate to do so.

1. In *Nile v Wood (No 2)* [1988] HCA 30; 167 CLR 133 Brennan J said the following of s 360(4) at 142:

In my opinion the discretion may properly be exercised when the proceedings have arisen because an officer of the Commonwealth has failed properly to perform his function or when the proceedings have resulted in some public benefit. In such cases it may be appropriate that the public purse ought bear the costs or some of them. I do not suggest that these categories are exhaustive, but it would not be appropriate to exercise the discretion whenever a litigant chooses to put the validity of an election to the test. Some warrant for imposing a liability on the funds of the Commonwealth must appear before it is appropriate to make an order.

1. Justices Deane and Toohey said at 143:

It is a general power conferred upon the Court of Disputed Returns, in the exercise of its special jurisdiction, to order that the Commonwealth pay the costs of a party whenever the Court considers it appropriate so to do. We would not attempt to confine it by definition beyond saying that it should be exercised when considerations of what is fair and just support, on balance, an order indemnifying a party against costs which the party may have incurred in connexion with an electoral petition.

1. In *Hudson v Lee (No 2)* [1993] HCA 58; 177 CLR 627 at 633 Gaudron J expressed a preference for what her Honour saw on the “wider view” of Deane J and Toohey J, “[g]iven the subject matter of the Act and the nature of the jurisdiction exercised…”.
2. To the extent there can be seen a difference in the flexibility of the approach of Deane J and Toohey J, we, like Gaudron J, prefer it, for the same short reasons as expressed by her Honour.
3. We consider that there was public importance and public benefit in bringing the issues before the Court, in particular in circumstances where the AEC had taken (and was maintaining) a position that conduct of this kind was not capable of contravening s 329(1).
4. Ms Hall brought the first petition. She was replaced as petitioner by Ms Garbett. Mr Yates filed his petition on the same day as Ms Hall filed hers. The public benefit and public importance was common to both cases. Nevertheless, the likely outcomes of the two cases were not the same. The issues of the application of s 329(1) were common, but at all times it must have been evident that the provisions of s 362(3) made upsetting the election of Mr Frydenberg extremely unlikely. Any likelihood of over 5,000 electors voting for him who would not have voted for him but for reading the offending corflute should have been seen as almost far-fetched. Yet, Mr Yates persisted with his petition. A proposition akin to this was put to senior counsel for the petitioners during the hearing and no substantive answer was forthcoming (which is not said with any intended disrespect to senior counsel).
5. Looking at the two petitions, without the available operation of s 360(4) of the Act, we consider that there would be little doubt about the proper order for costs: each petitioner would pay the costs of the first respondent, and the AEC would pay its own costs. We consider, however that there is warrant for the engagement, to some degree, of s 360(4). For the reasons that we have given, we consider that there was both public importance and public benefit in the issues thrown up by the petitions being ventilated and decided. That did not, however, require two petitions; and it certainly did not require a second petition where it was necessary to demonstrate that over 5,000 votes were affected by the conduct in question for substantive relief to be given about Mr Frydenberg’s election.
6. Given these considerations we would be minded (subject to the Commonwealth, through the Attorney-General, being given an opportunity to resist the order) to order that the Commonwealth pay Ms Garbett’s, Ms Liu’s and Mr Frydenberg’s costs as agreed or assessed; but that Mr Yates be responsible for his own costs. It may be that the considerations attending our view that Mr Yates should at least pay his own costs (see [18] above) may found a view that he, rather than the Commonwealth, should pay Mr Frydenberg’s costs. Subject to any submission by the Commonwealth we would give some weight to the vindication by him of points not only of public importance but also of public benefit.

## The position of Mr Frost

1. Sections 329 and 363 of the Act are in the following terms:

**329 Misleading or deceptive publications etc.**

(1) A person shall not, during the relevant period in relation to an election under this Act, print, publish or distribute, or cause, permit or authorize to be printed, published or distributed, any matter or thing that is likely to mislead or deceive an elector in relation to the casting of a vote.

(4) A person who contravenes subsection (1) commits an offence punishable on conviction:

1. if the offender is a natural person—by imprisonment for a period not exceeding 6 months or a fine not exceeding 10 penalty units, or both; or
2. if the offender is a body corporate—by a fine not exceeding 50 penalty units.

(5) In a prosecution of a person for an offence against subsection (4) by virtue of a contravention of subsection (1), it is a defence if the person proves that he or she did not know, and could not reasonably be expected to have known, that the matter or thing was likely to mislead an elector in relation to the casting of a vote.

 Note: A defendant bears a legal burden in relation to the defence in subsection (5) (see section 13.4 of the *Criminal Code*).

(5A) Section 15.2 of the *Criminal Code* (extended geographical jurisdiction—category B) applies to an offence against subsection (4).

(6) In this section, ***publish*** includes publish by radio, television, internet or telephone.

 **363 Court to report cases of illegal practices**

When the Court of Disputed Returns finds that any person has committed an illegal practice, the Chief Executive and Principal Registrar of the High Court shall forthwith report the finding to the Minister.

1. By subsection 362(2):

No finding by the Court of Disputed Returns shall bar or prejudice any prosecution for any illegal practice.

1. The parties approached the hearing on the basis set out in [156] of the December reasons. We did not examine, and no party addressed the Court on, the engagement of the *Criminal Code* or on any satisfaction of any relevant fault element by Mr Frost. He gave evidence that he did not intend to mislead anyone, but he also gave evidence that he intended the sign to appear to be an AEC sign. The corflute was only misleading or deceptive when placed adjacent to AEC material. Mr Frost was not cross-examined on any instructions about placement of the corflutes: see [129] of the December reasons.
2. Our findings were that Mr Frost authorised the corflutes: [119] of the December reasons; and that the corflutes were likely to mislead or deceive an elector in relation to the casting of a vote. Those matters amount to the physical elements of s 329(1). Mr Frost authorised the printing, publishing and distribution of the corflutes. The corflutes were matters or things that were likely to mislead or deceive an elector in relation to the casting of a vote, when placed adjacent to AEC signage. We made no findings about any fault element. We made limited findings about what Mr Frost plainly knew, recognising, as we did, that he was not cross-examined on his evidence that he did not intend to mislead anyone.
3. We sought submissions on s 363 from Mr Frost. We received helpful submissions from counsel on his behalf. Those submissions correctly pointed out that Mr Frost was not represented and that there were many loose ends in his evidence, to a degree favourable to him, that concerned his state of mind and intention that were not drawn together in cross-examination, re-examination or submission.
4. The petitions were addressed by us in the manner they were presented: Did someone authorise the corflutes? Yes: Mr Frost; no: Ms Liu and Mr Frydenberg. Were the corflutes likely to mislead or deceive an elector in relation to the casting of a vote? Yes, if placed adjacent to AEC signage. No findings were made, nor did the proceeding address, any fault element to allow any conclusion that Mr Frost acted in a way that may be said to amount to the committal of an offence.
5. The question is: What **must**, by the terms of s 363, be reported to the Minister? The words “committed an illegal practice” in s 363 and the terms of s 329(4) “A person who contravenes subsection (1) commits an offence…” tend to the conclusion that the report should be made only where the Court considers that the relevant fault element was present. This is perhaps supported by the terms of s 362(2).
6. Such an approach would not gainsay the authority of the Court of Disputed Returns to exercise jurisdiction and power under s 360 without being persuaded that a person satisfied the relevant fault elements relevant to s 329, but being satisfied that material was authorised and published that was likely to mislead or deceive an elector in relation to the casting of a vote. Thus, as here, persuaded as we were of the physical elements of s 329(1) we considered the matters under s 362(3) in order to vindicate the policy of the Act which is to protect the democratic franchise.
7. We think the better view is that the Court is obliged to comply with s 363 when it is persuaded that there is material from which it can be concluded that a person not only was responsible for the physical elements of a contravention of s 329(1), but also that the relevant fault element was satisfied.
8. Given the limited nature of our findings in the December reasons and the way the hearing of the petitions was conducted we are not in a position to draw such conclusion about Mr Frost’s state of mind and knowledge and it would be unfair on him so to do.
9. For these reasons we do not propose to direct the Chief Executive and Principal Registrar to act as contemplated by s 363.

## Orders

1. The second respondent to the petition (the AEC) should bear its own costs. The only other substantial order that we will make is one that provides for these reasons to be provided to the Attorney-General with the intention that should the Commonwealth wish to resist the costs orders contemplated in [19], it have leave to file submissions within 28 days. If it does, Ms Garbett, Ms Liu and Mr Frydenberg should have an opportunity to address the Commonwealth’s submissions. We will then deal with the matter on the papers. If the Commonwealth does not wish to resist the orders, we will make these orders in chambers.

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| I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop and Justices Greenwood and Besanko. |

Associate:

Dated: 20 February 2020