

Election Invalidity – Court of Disputed Returns

By Denis McLeod

In the October 2021 North Ward election for the Shire of Serpentine Jarrahdale, an unusual and extreme set of irregularities occurred, and resulted in a decision by the Court of Disputed Returns to invalidate the election, terminating the appointment of the two successful candidates, and requiring a re-election.

Background

The CEO of the Shire under s.5.20(2) of the *Local Government Act 1995* (WA) (**LG Act**), having first obtained the written agreement of the Electoral Commissioner, declared the Electoral Commissioner to be responsible for the conduct of the Shire's 2021 elections. The elections were conducted by the Commission by the postal voting method.

On 29 September 2021, 17 days before the election day, two persons, a male and a female, were observed removing postal voting packages from letterboxes in the North Ward. This was in broad daylight. They were apprehended by a neighbour by citizen's arrest, and subsequently dealt with by the Police, and in due course were convicted on their pleas of 'guilty' of stealing the voting packages. Over 40 voting packages were found in their possession.

There were indications from various parts of the North Ward of interferences with the postal voting system, which may or may not have been the work of the two discovered thieves. The Electoral Commission (**WAEC**) authorised an investigation of the North Ward election process by a private investigation firm.

In the final analysis, it was established that 46 voting packages had been stolen from a number of letterboxes in the North Ward, and they had been found in the possession of the two thieves. Although the electors from whom the 46 voting packages had been stolen were sent replacement voting packages by the WAEC, there were still other voting irregularities. Out of a relatively small sample of 55 electors in one area, it was established with reasonable certainty that the signatures of at least 31 electors were forged, and a further 13 electors from the sample were unable to be contacted by the investigators. Two voters from another part of the North Ward were unable to cast their ballots on election day as impersonator votes had already been recorded in the WAEC system against those electors' names.

The female convicted thief was the former spouse of one of the two successful candidates, and for various purposes had continued to share a residence with him after their separation, and the male thief was a person who had previously served as campaign manager for that same successful candidate, in an earlier local government election. There was no evidence establishing that the successful candidate, who had a relationship with the two thieves, had knowledge or involvement in the thefts or any other irregularity in the North Ward election.

In the 16 October 2021 election, two candidates had been elected out of a field of six. The first successful candidate had a

clear majority. There was a margin of 174 votes between the vote of the second candidate elected and the closest unsuccessful candidate. Ordinarily, it would have required an irregularity affecting 87 votes before the result of the election was changed. However, in the case in question, there had been widespread publicity of the voting package thefts, and generally widespread knowledge throughout the North Ward of significant irregularities in the election, which information was disseminated well in advance of the election day.

Court of Disputed Returns

The Court of Disputed Returns was constituted as a result of invalidity complaints under s.4.81(2) of the LG Act. An invalidity complaint was lodged on behalf of the closest unsuccessful candidate, and a further invalidity complaint was made by the Shire, the Council and Administration being anxious to clear up the irregularities, and to remove the taint on the election outcome.

In accordance with the provisions of the LG Act and the Elections Regulations, a Magistrate constituted the Court of Disputed Returns. The parties in the proceedings were: the closest unsuccessful candidate and the Shire, as complainants; the Electoral Commissioner as Intervener; and the two candidates who had been elected, as Other Parties. The second candidate elected took an active role in the proceedings and was legally represented, but the first successful candidate whose majority had been substantial did not actively participate, though he did indicate his support for the election being invalidated, so as to remove the taint on the outcome.

The two thieves had explained their activities as an attempt to prejudice the second elected candidate, but the Magistrate considered there was an equal possibility, on the evidence, that they were motivated to prejudice the second successful candidate as to assist him. But in any event there was no clear evidence of the candidate's complicity in the irregularities.

There having been a 174 vote difference in the votes cast for the second successful candidate and the votes cast for the closest unsuccessful candidate, there would ordinarily have needed to be proof of at least an 87 vote irregularity to invalidate the election. There was less than half that number in the present case. However the Magistrate, after three days of hearing, considered that the totality of the irregularities had left such a taint on the outcome, that the election ought not to stand.

In reaching his decision, the Magistrate in his written Reasons at [112] stated –

‘Ultimately, I am swayed by:

- a. The seriousness of the fraud;
- b. The uncertainty of the extent of that fraud;
- c. The degree to which the election may have been affected;

to take the serious step of declaring the election void.’

There will need to be a fresh election, and in the meantime the election of the two successful candidates is voided.



Comment on postal voting

For State and Federal elections, postal voting packages are only posted to electors who request them, and they won't all be posted out on the same day and to the same locality. By comparison, where postal voting is the method chosen for a local government election, voting packages are sent to all electors, and generally on the same day. That opens up the possibility of fraud tainting local government postal vote elections that will need to be addressed.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information on matters discussed in this Update please contact Denis McLeod by email to dmcleod@mcleods.com.au.

Liability limited by a scheme approved under Professional Standards Legislation.