HopgoodGanim

8 October 2013

URGENT

Mr Ed Killesteyn PSM
Electoral Commissioner
Australian Electoral Commission
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Our ref: 1238086 - Peter Burge/Julia O'Connor

Dear Mr Killesteyn

Submissions on behalf of the Palmer United Party, Mr Zhenya Wang and Ms Chamonix Terblanche regarding appeal from the decision of the Australian Electoral Officer (WA) not to conduct a recount of the ballot papers cast for the election of Senators for the State of Western Australia

We refer to:

1. the request for a recount by Senator Ludlam dated 2 October 2013 (**Ludlam Request**);
2. the additional material submitted to the Australian Electoral Officer (WA) by Senator Ludlam dated 3 October 2013 (**Additional Ludlam Recount Material**);
3. the request for a recount by Mr Dropulich dated 2 October 2013 (**Dropulich Request**);
4. the decision of the Australian Electoral Officer (WA) refusing the Ludlam Request dated 3 October 2013 (**Ludlam Decision**);
5. the decision of the Australian Electoral Officer (WA) refusing the Dropulich Request dated 3 October 2013 (**Dropulich Decision**);
6. the appeal to the Electoral Commissioner by Senator Ludlam dated 3 October 2013 (**Ludlam Appeal**);
7. the additional material submitted to the Electoral Commissioner by Senator

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Ludlam dated 4 October 2013 (**Additional Ludlam Appeal Material**); and

8. the appeal to the Electoral Commissioner by Mr. Dropulich dated 4 October 2013 (**Dropulich Appeal**),

and our client thanks you for the opportunity to be heard on the Ludlam and Dropulich Appeals.

In this submission, references to:

1. the "AEC" is a reference to the Australian Electoral Commission;
2. the "AEC's Recount Policy" is a reference to the policy set out under the heading "Evaluating a request for a recount" on page 64 of the Candidates Handbook as currently published on the AEC's website at www.aec.gov.au;
3. the "AEO" is a reference to the Australian Electoral Officer for Western Australia, Mr Peter Kramer;
4. to the "Appeals" is a collective reference to both the Ludlam Appeal and the Dropulich Appeal;
5. the "CEA" is a reference to the *Commonwealth Electoral Act 1918* (Cth);
6. the "Election" is a reference to the election of Senators for the State of Western Australia;
7. the "Recount" is a reference to a recount of ballot papers cast in the Election pursuant to section 278 of the CEA, whether conducted as a general recount or of any particular parcels or categories of ballot papers cast in the Election; and
8. "our client" is a reference to each of the Palmer United Party, Mr Zhenya Wang and Ms Chamonix Terblanche.

Submissions

In our client's respectful submission you should exercise your discretion under section 278 (2) of the CEA to *refuse* both of the Appeals.

Further, our client submits that it is appropriate that the AEO declare the results of the Election as soon as is convenient. As you would be aware, the AEO has a statutory duty to do so under Section 283 of the CEA, "*as soon as conveniently may be after the result of the election has been ascertained...declare the result of the election and the names of the candidates elected.*" In our client's respectful submission, Wednesday 9 October 2013 would be a time that is "*as soon as [is] convenient ...after the result of the election has been ascertained*".

Reasons

Our client submits that you should refuse the Appeals for the following reasons.

Reliance upon previous decisions by the AEO

1. Our client agrees with and adopts the reasoning set out in each of the Ludlam and Dropulich Decisions, and respectfully submits that nothing contained in any of:
   (a) the Ludlam and Dropulich Requests;

(b) the Additional Ludlam Recount Material;

(c) the Ludlam and Dropulich Appeals; or

(d) the Additional Ludlam Appeal Material,

advances any compelling reasons why you should exercise your discretion to allow the Appeals and interfere with the decision of the AEO to not conduct a Recount.

Considerations that you should take into account in deciding the Appeals

2. While requests for recounts and appeals against decisions not to recount are made pursuant to section 278 of the CEA, section 278 does not set out the relevant considerations that either the AEO or you must take into account when considering a request for a recount.

3. In our client's submission, you should consider any appeal under section 278 (2) of the CEA from a decision to refuse a request for a Recount under section 278 (1) of the CEA, primarily against the bullet points set out in the AEC's Recount Policy. Candidates and the electorate are entitled to rely on the assumption that the AEC will act in accordance with its own stated policy.

4. The first and second bullet points of the AEC Recount Policy are that:

- "A recount may take place where there are ***valid and specific grounds*** for supposing that it could change the result of the election in the division or where there are ***specific grounds*** for determining the need for a recount of ***specific ballot papers*** (such as in response to specific allegations or incidents).

- A request for a recount which does not plead any ***valid and specific grounds*** must be refused. A request for a recount needs to identify ***specific ballot papers*** and associated ***significant*** counting process errors or irregularities that could change the result of an election within a division." (emphasis added).

5. As applied to the Appeals, the AEC's Recount Policy would require each of the Appellants to plead valid and ***specific*** grounds in relation to ***specific*** ballot papers that are affected by either associated significant:

(a) counting process errors; or

(b) irregularities,

that could change the result of an election within a division.

6. As to what would constitute ***specific*** ballot papers that are affected by significant ***irregularities***, our client submits that these would be ballot papers that fail to comply with the requirements of sections 268 to 270 of the CEA.

The Ludlam Appeal

7. Considering the Ludlam Appeal, in essence Senator Ludlam argues that:

(a) "The result of the election for the final places turned on...just 14 votes", and that given how small this margin is, there should be an automatic recount because the "AEC has a policy of automatically recounting in House of Representatives seats where the margin is less than 100 votes".

(b) There has been one recount in a Senate election previously and three recounts for elections to the upper house in Victoria. Having said that, Senator Ludlam does concede that there is no AEC policy as to automatic recounts in the Senate, but essentially argues that the same policy should apply to recounts in respect of elections to both Houses of Parliament. In this case, the margin is, he believes, significantly smaller than the margin that has prompted recounts in previous cases.

(c) Given that none of the Senators elected will take their seats until July 2014, there is no urgency to declare the result now.

(d) As regards the reasoning in the Ludlam Decision, the principle consideration for "a matter of course" recount in the House of Representatives is apparently where there is a relative margin between the winner and the runner-up of less than 100 votes at the end of the distribution of preferences (as explained by the AEO in the Ludlam Decision). In Senator Ludlam's view that should not be the principle consideration as regards a recount for a Senate election; in respect of a Senate election, margins at the points of exclusion in a Senate count are more likely to affect the outcome than a small relative margin at the end of the distribution of preferences.

(e) In the Senator's opinion, the test of whether or not a recount is warranted:

"must be...wherever there is a reasonable prospect that a further scrutiny of the votes would yield a different result. Indeed, the AEC policy for a 100 vote 'trigger' for the House of Representatives recount is in accordance with such a test.... The very small margin at the critical exclusion point leaves open a real prospect of human error, and is apt to leave the community dissatisfied with a result where the option of a recount has not been taken." (See paragraph (d) of the Ludlam Appeal)

Presumably, Senator Ludlam relies on the matters raised in Ludlam Request and the Additional Ludlam Recount Material to support his view that there is a "reasonable prospect that a further scrutiny of the votes would yield a different result" – see paragraph 6 of the Ludlam Appeal.

(f) Finally, as there were "some errors picked up during the initial count – other [errors] may not have been [picked up]."

8. In our client's submission, the reasons set out in the Ludlam Appeal fail to address those matters that a request for a Recount must address under the AEC's Recount Policy in order to be granted, in addition to failing the very test proposed by Senator Ludlam himself and quoted in paragraph 7 (e) above.

9. In particular, the Ludlam Appeal fails to meet the test set out in the AEC Recount Policy as it fails to identify *specific ballot papers* that are tainted by *significant counting process errors or irregularities*. To the extent that the Ludlam Appeal does identify *any* counting process errors or irregularities (which our client does not accept), they are not of such a nature that they could change the result of the Election. In this respect, we note that:

(a) The specific "evidence" of errors or irregularities upon which Senator Ludlam relies are set out in the Ludlam Request, the Additional Ludlam Recount Material, and the Additional Ludlam Appeal Material. In these documents, the Senator makes no reference to "*specific* ballot papers" that are affected by these so called errors or irregularities. Rather, those documents simply refer to curious "jumps in votes" for minor party candidates, voting "trends", the "potential" for the result to "have been impacted by human error in counting", "considerable difference[s] in the number of votes cast in the House of Representatives and the Senate in each division" and

"non-standard ballots". None of these refers to "specific ballot papers and associated significant counting process errors or irregularities". Again, they are simply a collection of broad allegations without evidence of substance.

(b) Senator Ludlam does refer to a number of "errors" which he acknowledges were "corrected at various stages during the count". He then goes on to state that given that these errors occurred (albeit that they were picked up by the AEC's counting processes and corrected), "the prospect that some errors were made and went undiscovered is a live possibility". This is notwithstanding that the Senator has expressly acknowledged that his "scrutineers witnessed the professional way of counting the below the line votes".

(c) In summary, Senator Ludlam:

(1) acknowledges that errors were made and that the system picked up those errors and corrected them;

(2) acknowledges that the counting and scrutiny was undertaken in a professional fashion; but

(3) supposes that there *may* have been other errors that were not picked up.

The Senator does not state what must be the inevitable conclusion to draw from his submissions: errors occur, but the 3 scrutiny system works to pick them up, and the very fact that in this case those errors were picked up, makes it less likely than not that no other significant errors went undetected and corrected.

(d) To the extent that Senator Ludlam identifies unusual voting trends in particular booths, no conclusions as to the reasons for those voting trends can be drawn without significant, rigorous and detailed analysis as to the reasons why. Differences in apparent "elector behaviour" from one polling place to another may arise for any number of reasons, none of which would justify a Recount. For example, the fact that "voting trends" at one polling booth may be "significantly different" from trends at another polling booth, may simply reflect different demographics or socio-economic circumstances at each locality. Until such time as a more thorough and significant investigation is undertaken, our client submits that Senator Ludlam's explanation for those voting trends amounts to no more than mere speculation. In this regard we refer to the issues raised under the headings "Shifting tallies for Shooters and Fishers lead" and the "Difference between Senate and House of Reps tallies" in the Additional Ludlam Recount Material, and the issues raised under each of the headings "Prepoll discrepancy on the 16th of September", the "Unusual total vote count for booths in Durack and Brand", "Significant discrepancies between the Australian Christians HOR and Senate vote at particular booths" in the Additional Ludlam Appeal Material.

(e) The Senator specifically refers to demonstrated problems in vote counting in previous elections. He does not provide any evidence to suggest that those problems were replicated in this Election. It is instructive that the Senator simply states "We have not examined such issues in this election in WA..." With respect, and given the Senator's concession that he has not "examined such issues", nothing the Senator says in this regard has any probative weight and is utterly irrelevant to the threshold requirements that must be met before a Recount should be conducted.

10. Further, as to the Senator's own test (as stated above), none of the issues raised in Senator Ludlam's material would satisfy his test for determining whether or not a Recount should be

conducted. That is, in none of the material that Senator Ludlam has submitted, has he identified any issue which would indicate that there is "a ***reasonable prospect*** that a further scrutiny of the votes would yield a ***different*** result". In particular as the AEO indicated in the Ludlam Decision "At the end of the distribution of preferences in the Senate count, the difference in votes between [Senator Ludlam] and the sixth elected candidate, Louise Pratt, is considerable."

11. Finally, even if the errors that Senator Ludlam had identified were sufficient to meet the requirements of the AEC Recount Policy or his own test (which we deny), the evidence upon which he relies amounts to no more than mere assertions by his scrutineers and unqualified "bloggers" who claim to have conducted statistical analysis on the data reported on the AEC virtual tally room. In our client's view, such evidence is unsatisfactory, unreliable and does not of itself justify a Recount being conducted, particularly given the enormity of the work and the cost associated with that task. A decision of such significance should only be taken on the basis of highly credible, fully substantiated and attributed evidence from both experts and scrutineers as necessary. In this regard we refer to the issues raised under the heading "Analysis of Durack Geraldton Waggrakine Booth" in the Additional Ludlam Appeal Material. For this reason alone, the Ludlam Appeal should be refused.

The Dropulich Appeal

12. As to the Dropulich Appeal, our client notes that it does not advance any additional reasons to those set out in the Dropulich Request and nor does it attempt to respond to the reasons given in the Dropulich Decision for refusing the request for a Recount. For this reason alone, the Dropulich Appeal should be refused.

13. In any event, we note that the reasons set out in the Dropulich Appeal are substantially the same as some of those raised by Senator Ludlam and in our submission, our comments above apply with equal force to the reasons given by Mr Dropulich to support his appeal.

Other relevant matters

14. In addition to the reasons set out above, our client submits that in making your decision you should have regard to:

    (a) the number of votes that will need to be recounted – over 1.5 million votes if the Dropulich Appeal is allowed and an unknown but significant number if the Ludlam Appeal is allowed;

    (b) the significant work that will need to be undertaken by AEC staff for the conduct of the Recount;

    (c) the inordinate expense that will be incurred by taxpayers arising from the work referred to in (b) above; and

    (d) the fact that three rigorous counts of ballot papers cast in the Election, have been undertaken in the presence of many scrutineers, and there is no guarantee or indeed likelihood that a fourth count will be any more likely to uncover errors significant enough to change the outcome of the Election.

15. Further, we note that section 353(1) of the CEA states:

    "The validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns *and not otherwise*". (emphasis added)

On any view, each of the matters raised by Senator Ludlam and Mr Dropulich are concerns in relation to the validity of the Election as opposed to reasons in support of a request for a Recount. This is evident from the fact that neither Senator Ludlam nor Mr Dropulich has met the requirements for a recount under the AEC's Recount Policy. As section 353(1) of the CEA makes clear, the only avenue which can address the legitimacy of those concerns or otherwise is the Court of Disputed Returns. In these circumstances, our client submits that each of the Appeals should be denied because they are without legal basis and are improperly made.

16. Finally, we note that Senator Ludlam has not requested a Recount of *all* ballot papers, but merely "a recount of all the batches contributing to the contest between the candidates of the Australian Christians and Shooters and Fishers. These include votes for candidates of the No Carbon Tax Climate Sceptics, Australian Fishing & Lifestyle, Australian Independents Australian voice whose preferences are directed via the GVTs" (the **Relevant Ballot Papers**).

17. While our client maintains its position that you should ***not*** direct that ***any*** Recount take place, our client submits that if you are minded to direct that a Recount should be conducted, then you should direct a Recount of *all* ballot papers cast in the Election, and *not* merely a Recount of the Relevant Ballot Papers as requested by Senator Ludlam.

18. As our client has submitted above, Senator Ludlam has produced no compelling evidence that *any specific ballot papers* or indeed *any* particular parcel or category of ballot papers were the subject of "associated *significant* counting process errors or irregularities that could change the result of an election within a division". Our client notes again that the following statement is telling of the Senator's motives:

> "We have not examined such issues in this election in WA, *but believe we should be provided with the opportunity to recount the votes to [see] if any errors in counting formal votes occurred.*" See last sentence on page 3 of the Additional Ludlam Appeal Material. (emphasis added).

19. In other words the Senator is simply "fishing". He has no evidence whatsoever that the initial counts of the Relevant Ballot papers were in error. However the Senator has theorised that if a Recount of that particular category of ballot papers were to change "the relative positions of the Shooters and Fishers Party and the Australian Christians", it may result in the Senator being re-elected.

20. In our client's submission such a blatant attempt by the Senator to "game" the result in this fashion without any evidence of wrongdoing with respect to the Relevant Ballot Papers, would be highly prejudicial to and discriminatory against all other candidates whose "relative positions" may be different were there to be a Recount of another *different* category or categories of ballot papers.

21. If in the final analysis, the only substantive ground that the Senator can advance to justify a Recount is that "[t]he difference between [the Shooters and Fishers Party and the Australian Christians] at [one] point of the count was just 14 votes", then the request for the Recount should be denied. However if you are mindful to direct a Recount on this basis alone, then without any justifiable reason to distinguish this category of ballot papers from any other category of ballot papers cast in the Election, fairness dictates that you should direct a Recount of *all* ballot papers cast in the Election so as not to prejudice one candidate over another.

In conclusion, our client submits that you should exercise your discretion to refuse the Appeals for the reasons stated above.

We look forward to your confirmation that this is the case and your notice regarding when the AEO's declaration will be made.

Please do not hesitate to contact us should you require any further information.

Yours faithfully

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