SUPREME COURT OF QUEENSLAND

CITATION:	*Sharples v O'Shea & Anor* [2002] QSC 094
PARTIES:	**TERRY PATRICK SHARPLES** (plaintiff) **v** **DESMOND J O'SHEA** (first defendant) AND **PAULINE LEE HANSON** as representative of herself and all members of PAULINE HANSON'S ONE NATION PARTY (as registered under the *Electoral Act* 1992 Qld) (second defendant)
FILE NO:	S 6318 of 1998
DIVISION:	Trial Division
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	11 April 2002
DELIVERED AT:	Brisbane
HEARING DATE:	9 April 2002
JUDGE:	Holmes J
ORDER:	**Application dismissed**
CATCHWORDS:	DECLARATIONS – MANDAMUS – ATTORNEY-GENERAL'S FIAT Whether public right involved – whether Sub-regs 2(b)(c)(d)(e) and 3(a) of *Attorney-General Regulation* 2000 *ultra vires*. *Attorney-General Act* 1999 (Qld) *Attorney-General Regulation* 2000 (Qld)
COUNSEL:	Mr M Plunkett for the first respondent
SOLICITORS:	The applicant appeared on his own behalf Crown Solicitor for the first respondent

[1] **HOLMES J:** The plaintiff Mr Kelly (formerly Sharples) has applied by an amended application filed on 26 March 2002 for the following relief:

> "1. A Declaration that in the interests of justice this matter represents a public right within the meaning of s 7 of the *Attorney-General Act* 1999 (Qld).
>
> 2. A Declaration that the s 2(b)(c)(d)(e) 3(a) *Attorney-General Regulations* 2000 (Qld) are *ultra vires* and unconstitutional.

3. An Order for Mandamus directed to the Attorney-General of Queensland to grant his fiat to the applicant.
4. An Order for a New Trial of this matter."

[2] The proceeding in which this application is now brought was an application under s 180 of the *Electoral Act* 1992 for review of a decision of the Electoral Commissioner to register Pauline Hanson's One Nation as a political party. In that application, Atkinson J decided that the second defendant, Pauline Lee Hanson, had made an application to register Pauline Hanson's One Nation when it was not entitled to such registration because it did not have 500 members. That fact was known to the members of the management committee. The Electoral Commissioner's decision to register the party was thus, her Honour found, induced by fraud or misrepresentation. There was, she concluded, nothing to suggest that the Commissioner "was or should have been alert to such fraud or misrepresentation".

[3] The order Atkinson J made was to set aside the decision of the Commissioner and to decide that Pauline Hanson's One Nation was not entitled to registration as a political party in Queensland. Her Honour subsequently, I am informed, made a costs order by which a proportion of the first defendant's costs were to be borne by Mr Kelly on the ground, apparently, that no allegation as against the Commissioner had been made out. There were, Mr Kelly says, other costs awards made against him in interlocutory proceedings before Ambrose J in the matter, and on an unsuccessful appeal by him against the costs order made by Atkinson J.

[4] Mr Kelly says that he has subsequently discovered material which would have led the court to take a different view of the Electoral Commissioner's role. In effect he says that there was a conspiracy to withhold evidence. He points to the following: –

- A file note dated on or about 25 July 1998 by an employee of the Crown Solicitor's Office referring to counsel's advice "not to include certain information as it will only add weight to Mr Sharples' allegations". He says he saw this document on an inspection under the *Freedom of Information Act*.

- A notation to an exhibit by the then associate of Ambrose J (who had heard an application for an interim injunction). The notes, made on a copy of a facsimile sent by Mr T Abbott MP, member for Warringah, to the Electoral Commissioner, referred to the whereabouts of certain localities – Warringah, Bay Village, and the electorate of Dobell – and were made in an effort, apparently, to establish the source of the facsimile.

- Information from a Ms Cheryl Passfield who said that she had agreed to stand as a candidate for Pauline Hanson's One Nation but became concerned that she was not in fact a member of the party and advised the Electoral Commissioner accordingly. This, Mr Kelly said, should have put the Commissioner on notice that the party may have been improperly registered.

[5] None of this material was discovered, Mr Kelly said, during the trial of the action but those pieces of evidence, he contends, would have pointed to misconduct by the Electoral Commissioner in failing to investigate the entitlement of Pauline Hanson's One Nation to be registered.

[6] Mr Kelly sought the fiat of the Attorney-General to bring proceedings in his name to set aside the orders of Atkinson J. His request is made in a covering letter dated 25 March 1998 which refers to the application to this court (although on the copy which became an exhibit the application is not in fact annexed). It also attaches an application to the Court of Appeal by Mr David Etteridge against the decision of Atkinson J, filed, it seems, in March 2002, and requests the Attorney-General's fiat in respect of that matter also. The covering letter is stamped as having been received on 28 March 2002. Mr Kelly's amended application seeking the relief already set out was filed on 26 March 2002.

[7] Mr Kelly has, he says, made a number of unsuccessful previous applications to the Attorney-General for fiats in relation to the various proceedings he has been involved in. The first of those was in relation to the original application in this matter, before it was heard by Atkinson J; he sought the Attorney-General's fiat for the prosecution of the action. Other applications for the Attorney-General's fiat in various proceedings were made subsequent to the enactment of the *Attorney-General Act* 1999. Mr Kelly has annexed the reports of the Attorney-General to the Legislative Assembly which are required by s 10 of that Act where an application for a fiat is refused. There are copies of five such reports annexed in Mr Kelly's affidavit, three of which concern applications by him. One concerns the refusal of a fiat to allow Mr Kelly to bring an action against the Queensland Government seeking an order for mandamus in connection, apparently, with the non-appointment of a legal ombudsman, Mr Kelly having unsuccessfully made a complaint to the Queensland Law Society about the conduct of a solicitor. A second concerns the refusal of a fiat in relation to an appeal against a decision of Muir J declining to order a statement of reasons from the Electoral Commissioner for a decision not to impose interest on funds to be repaid by Pauline Hanson. The third involves the refusal of an application for a fiat to seek some form of review of a decision by the Electoral Commissioner to refuse an *ex gratia* payment of electoral expenses to Mr Kelly. These refusals, Mr Kelly contends, are evidence that the Attorney-General will inevitably refuse his and others' requests for a fiat in any case.

[8] Mr Plunkett for the Crown points to the decision in *Gouriet v Union of Post Office Workers & Ors*, at [1977] 1 QB 729 and on appeal at [1978] AC 435, for the proposition that the Attorney-General's exercise of his discretion to refuse consent to the bringing of relator proceedings was beyond review. He conceded, however that in the light of comments made in *Batemans Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Limited* (1998) 194 CLR 247 at 261-263 it may be doubted whether *Gouriet* is good law on this point. The Attorney-General's power to grant fiats is now contained within s 7(1)(g) of the *Attorney General Act* 1999 which enables him to "grant fiats to enable entities, that would not otherwise have standing, to start proceedings in (his) name", *inter alia* "to enforce and protect public rights". Given that the power is now circumscribed by

statute, without provision to exempt it from the effects of the *Judicial Review Act* 1991, I think that the application of *Gouriet* must indeed be doubted. However, I do not find it necessary to resolve that point.

[9] Mr Plunkett argues that in any event Mr Kelly has standing to seek to set aside the decision of Atkinson J, and therefore is not entitled to seek the fiat of the Attorney-General. It seems to me that there is a more fundamental problem. The decision of Atkinson J was, firstly that the Electoral Commissioner's decision should be set aside, and, secondly, that Pauline Hanson's One Nation was not entitled to registration as a political party in Queensland. That was the order sought by Mr Kelly. What he is really complaining of is an absence of findings critical of the Electoral Commissioner, as opposed to wanting that order set aside. Essentially what he wants is for the Attorney-General to support him in a new trial as a means of exploring the conduct of the Electoral Commissioner but arriving, it would seem, at the same result. Even if there were some public interest to be served by doing so, there is no public right which could thus be established. If there were a public right entailed in this action, it was established when her Honour made her decision that Pauline Hanson's One Nation was not entitled to registration. So far as the various cost decisions adverse to Mr Kelly are concerned, he conceded, I think, that they did not involve public rights; thus there could be no basis, it follows, for the Attorney-General to give his fiat in respect of them. I cannot therefore see any basis for making the declaration sought that this matter represents a public right within the meaning of s 7 of the *Attorney-General Act* 1999.

[10] So far as the order for mandamus is sought, there is the difficulty for Mr Kelly that he has sought relief before, it appears, the Attorney-General had any opportunity to exercise his discretion. He seeks to answer this problem by saying that what he seeks is a kind of short-cut: since the Attorney-General on past form will not grant the fiat, this court should make an order which would compel him to do so. Quite apart from the issue I have already ventilated as to the absence of any public right which could be enforced by proceedings, there is no basis for the making of an order in the nature of mandamus when there is no evidence at all that the Attorney-General has yet declined to do anything.

[11] Mr Kelly has sought a declaration that certain sub-regulations of regulation 2 and regulation 3 of the *Attorney-General Regulation* 2000 are *ultra vires.* These sub-regulations require an application for a fiat to be accompanied by, among other things, a certificate signed by counsel as to, in effect, the appropriateness of the granting of a fiat; an opinion from counsel as to the likelihood of success, detailing the facts of the case and explaining the proceeding; a certificate from the applicant's solicitor stating that he is an appropriate person to act as relator; and an undertaking as to various matters which may be signed by the applicant or the applicant's solicitors. Sub-regulation 3(a) applies those requirements to any proceeding already started. Mr Kelly says that the regulations were made to defeat applications by him and other unrepresented litigants.

[12] The requirements of the regulations, as I observed in argument, are extremely restrictive, and might well engender a sense of grievance, because they effectively preclude application for a fiat by an applicant without the means to obtain legal

advice. It does not follow, however, that they are *ultra vires* the Act for those reasons. Similar requirements have long been imposed as a matter of practice here and in England. Mr Kelly was, when he first sought a fiat prior to the enactment of the *Attorney-General Act*, referred to such requirements set out in *Butterworths Court Forms, Precedents and Pleadings.* For the English equivalent, see eg *Chitty & Jacobs Queen's Bench Forms* which prescribes the form of a certificate of counsel that the action is proper, and the certificate of a solicitor as to the relator's competency to be lodged with the Attorney-General's office in order to obtain his signature to a writ in a relator action. *Kanak v Minister for Land & Water Conservation* [2000] FCA 258 makes reference to the equivalent practice in respect of applications to the Commonwealth Attorney-General. I do not consider therefore that any ground had been made out for a declaration that the regulations are *ultra vires*, nor is there any mala fides against Mr Kelly shown in their making.

[13] Finally, I do not propose to make an order for a new trial of the matter, when what is essentially sought is not a setting aside of Atkinson J's decision as to the absence of entitlement to registration of Pauline Hanson's One Nation, but a revisiting of the process by which she reached that decision.

[14] I dismiss the application and will hear the parties as to costs.