SUPREME COURT OF QUEENSLAND No S2028 of 2001

CIVIL JURISDICTION

CHESTERMAN J

ALAN GEORGE SKYRING Applicant

and

ELECTORAL COMMISSION OF QUEENSLAND First Respondent

and

PETER DOUGLAS BEATTIE Second Respondent

BRISBANE

..DATE 27/03/2001

JUDGMENT

HIS HONOUR: Mr Skyring, I have concluded that you do need leave to file your petition. So, the formal order I make is that your application for leave to commence the electoral petition will be adjourned to a date to be fixed to allow you to comply with the procedural requirements of the Act and I publish my reasons.

...

HIS HONOUR: The costs of this appearance and the previous one will be costs in the cause of the application.

SUPREME COURT OF QUEENSLAND FILE NO: S 2028 of 2001

CITATION: *Skyring v Electoral Commission of Queensland & Anor* [2001] QSC 080

PARTIES:

ALAN GEORGE SKYRING (applicant)

v

ELECTORAL COMMISSION OF QUEENSLAND (first respondent)

AND

PETER DOUGLAS BEATTIE (second respondent)

DIVISION: Trial

DELIVERED ON: 27 March 2001

DELIVERED AT: Brisbane

HEARING DATE: 12 March 2001

JUDGE: Chesterman J

ORDER: The application for leave is adjourned to a date to be fixed.

CATCHWORDS:

PROCEDURE - QUEENSLAND - JURISDICTION AND GENERALLY - Where the applicant is a vexatious litigant under the *Vexatious Litigants Act* - Whether the applicant needs leave to institute proceedings under the *Vexatious Litigants Act* - Whether a judge sitting in the Court of Disputed Returns sits in a judicial capacity or as an individual

Elections Act 1915 (Qld)

Electoral Act 1918 (Cmth) s. 354

Electoral Act 1992 (Qld) s. 78, s. 85, s.127, s.128, s.129, s.130, s. 131, s.134, s.136, s. 137

The Constitution (Cmth) s. 73

Vexatious Litigants Act 1981 (Qld) s.2, s. 3, s. 8, s. 9A

Grollo v Palmer (1995) 184 CLR 348, cited.

Holmes v Angwin (1906) 4 CLR 297, distinguished.

Sue v Hill (1999) 73 ALJR 1016, followed.

Webb v Hanlon (1938) 61 CLR 313, cited.

COUNSEL: Mr. A.G. Skyring for the applicant (self-represented)
Mr. K.A. Parrott for the respondents

SOLICITORS: Crown Solicitor for the respondents

[1] **CHESTERMAN J**: The applicant stood as a candidate for the seat of Brisbane Central at the elections for the Legislative Assembly held on 17 February last. The seat was won by the second respondent. Early in March the applicant attempted to file in the Registry of the Supreme Court a petition addressed to the Court of Disputed Returns seeking a declaration that the second respondent was not lawfully returned as the member for Brisbane Central; an order that instead he be returned to represent the electorate; and a declaration that none of the candidates elected to Parliament had validly nominated and none was therefore eligible to become members of the Legislative Assembly. The petition seeks, in consequence, an order that new elections be held.

[2] Although the petition is a lengthy document in essence it advances two grounds in support of the relief sought. The first is that s 85(1) of the *Electoral Act* 1992 (Qld), which requires a candidate for election to pay a deposit of $250 in cash or by bank cheque, can only be satisfied by a payment of the amount in gold coin. The

applicant paid his deposit in gold coin but alleges (no doubt correctly) that no other candidate did so.

The second ground is that the officer of Governor was abolished on 14 February 1986 and could only lawfully be reinstated pursuant to a referendum which has never been held. It follows, so the petition seems to allege, that every gubernatorial act since February 1986 is inefficacious. Therefore no letters patent or order in council made by any Governor since 14 February 1986 has any lawful effect, and, in particular, the writ issued by the Governor pursuant to s 78 of the *Electoral Act* for the recent election was invalid.

It is not clear from the petition why, if the second point is good, the applicant should have spent $1,269 to buy gold coins having a face value of $250 in order to stand at an invalid election, or why the court should order that he be returned as a member of Parliament when the entire election was unlawful. It may be ironic that, on the applicant's submission, the very Electoral Act on which he bases his petition is a nullity, having received Royal Assent from a Governor incompetent to act in that regard.

[3] The Registrar declined to accept the applicant's petition because on 5 April 1995 White J had declared him to be a vexatious litigant under s 3 of the Vexatious *Litigants Act* 1981 (Qld). That section provides that:

> "If the Supreme Court or a Judge thereof is satisfied that a person has frequently and without reasonable ground instituted vexatious legal proceedings . . . the . . . Court or . . . Judge may after hearing such person ... declare such person ... to be a vexatious litigant."

Section 8 of the Act provides that a declared vexatious litigant may not institute or take any legal proceedings without first obtaining the leave of the court or a judge thereof. Section 2(1) of the *Vexatious Litigants Act* defines "legal proceedings" to mean:

> “any cause, matter, action, suit, or proceeding of any kind within the jurisdiction of any court or tribunal...”

Section 9A sets out the procedure to be followed by a declared vexatious litigant who seeks leave to commence proceedings. The section allows the person against whom the litigant wishes to commence proceedings 45 days to oppose the application by affidavit. The section also makes provision for adequate service of the intended process on the putative defendant.

[4] On 5 March 2001 the applicant filed an application for leave to file his petition and a supporting affidavit. His application came before Mackenzie J *ex parte* on 8 March. It was adjourned with a direction that the applicant serve copies of his application, affidavit and petition on the Crown solicitor who might be expected to accept service on behalf of the named respondents. This step was taken and the matter was argued on 12 March 2001.

[5] The applicant, who appeared in person, has not complied with the provisions of s 9A and Mr Parrott who appeared for the respondents insists that the statutory procedure be followed before the respondents should be required to resist the application for leave to institute proceedings is heard. The respondents, in essence, object to having to deal with the matter in such an abbreviated timeframe. It is pointed out that the applicant will not be prejudiced by an adjournment of the application while the statutory procedures are complied with because s 9A(4A) extends the time limited for filing the petition to a date 14 days after the grant of leave to institute proceedings.

[6] The applicant's real point is that he does not need leave to institute his challenge to the second respondent's election and that he made the application only because of the Registrar's refusal to accept his petition. The point involves a question of law which was argued on the basis that, if the applicant succeeded, I would make an order directing the Registrar to accept the petition. On the other hand if the applicant did not make good his point

his application for leave would be adjourned until he had fulfilled the procedural requirements of the *Vexatious Litigants Act*.

[7] The point at issue is whether the prohibition contained in the *Vexatious Litigants Act* applies to proceeding in the Court of Disputed Returns. Read literally s 8 of the *Vexatious Litigants Act* applies to election petitions determined by the Court of Disputed Returns which is, after all, made a Court by Part 8 of the Electoral Act. Legal proceedings are defined by the *Vexatious Litigants Act* to mean any proceeding within the jurisdiction of any court and these words are apt to catch proceedings commenced by a petition to the Court of Disputed Returns. Despite the width of the definition the applicant argues that it does not extend to the Court of Disputed Returns because, properly understood, that institution is not a court at all. The judge who is appointed to constitute it does not sit as a judge exercising the jurisdiction of the court but as a person designated to perform the functions described in the *Electoral Act*.

[8] There is authority for the proposition. *Holmes v Angwin* (1906) 4 CLR 297 concerned an appeal to the High Court from the Supreme Court of Western Australia sitting as a Court of Disputed Returns under the *Electoral Act* of that state. It was held that the judge appointed to hear the petition was not the "Supreme Court" for the purposes of s 73 of the Australian Constitution and, therefore, no appeal laid to the High Court. Griffith CJ said (304-307):

> "Before the Act of 1904 there was an Act ... passed in 1899 by which a Court of Disputed Returns was constituted. That court consisted of two judges of the Supreme Court, but it was not the Supreme Court, and did not exercise the jurisdiction of the Supreme Court. The two members of the Supreme Court were personally designated to exercise the powers of the new Court, which were conferred in language almost verbally identical with that of . . . the Act of 1904 now under consideration. ... By s 163 it is enacted that the Court shall be constituted by "a judge sitting in open court" ...

> Although s 159 says that the Supreme Court should have jurisdiction, yet in substance it is not the Supreme Court, in the sense in which that term is used in the Constitution, that has jurisdiction, but that the real Tribunal is a new Tribunal consisting of a judge of the Supreme Court as a *persona designata* to whose arbitrament the necessary questions of fact are to be referred for the assistance of the House of Parliament."

Barton J said at 309:

> "... it is not in the character of lawyers, but in the character of men whose arbitrament would be fair and should be final that the powers committed to the Supreme Court whether designated as Judges or collectively designated as the Court. If then, as my opinion is, this is not the creation of a new jurisdiction but the transfer of an incident of the legislative and deliberative power to the court for special purposes ... there is a clear line drawn between the decision of the Supreme Court upon an election petition and that judgment decree order or sentence which is the object of the provision in the constitution."

[9] *Webb v Hanlon* (1938) 61 CLR 313 was to the same effect. It concerned the Court of Disputed Returns constituted by the *Elections Act* 1915 (Qld). Section 101 established an Elections Tribunal "which shall be constituted by a Judge of the Supreme Court (and) shall be a Court of Record". The Chief Justice was required to notify the speaker of the Legislative Assembly each year of "the name of one of the Judges ... who will ... preside at sittings of the Elections Tribunal".

Latham CJ said (319):

> "I agree that the Elections Tribunal is not the Supreme Court of Queensland and that the judge constituting the tribunal does not in that tribunal exercise any functions as a judge of the Supreme Court. Section 101 creates the tribunal by words which ... expressly provide that the tribunal shall be a court of record ... it must ...be held to be a new tribunal depending upon such creation and it cannot be identified with any other court."

Stark J at 324 and Evatt J at 330 expressed the same opinion.

[10] The distinction is between the vesting of power and duties in a specified individual ("designated person") because of his recognised attributes so that he acts in a personal capacity, detached from the court of which he is a member, or whether the powers are conferred on the court, any member of which may exercise the function. See *Grollo v Palmer* (1995) 184 CLR 348 at 360-362.

[11] If it were the case that s 127 of the *Electoral Act* conferred power on a judge constituting the Court of Disputed Returns as a designated person rather than on the Supreme Court there may be substance to the applicant's contention.

[12] Section 127 of the *Electoral Act* provides that:

> "(1) The Supreme Court is the Court of Disputed Returns for the purposes of this Act...
>
> (2) A single judge may constitute, and exercise all the jurisdiction and powers of the Court of Disputed Returns."

Section 128 provides that an election may be disputed by a petition to the Court of Disputed Returns in accordance with the provisions of Division 2 of Part 8 of the Act. Section 129 specifies by whom an election may be disputed and s 130 sets out the requirements of a valid petition. Section 134 is entitled "How Petition is to be Dealt with by a Court" and provides:

> "(1) The Court of Disputed Returns may conduct hearings and other proceedings in relation to the petition.
>
> (2) The Court must not have regard to legal forms and technicalities, and is not required to apply the rules of evidence.

(3) The court must deal with the petition as quickly as is reasonable in the circumstances.

(4) ...

(5) ...

(6) The rules of court of the Supreme Court may include provision, not inconsistent with this division, with respect to the practices and procedures of the Court of Disputed Returns.

(7) ...”

Sections 136 and 137 set out the powers of the Court. It may order a new election or declare a candidate other than the one elected to be a member of the Legislative Assembly, or it may dismiss the petition.

[13] I do not think it possible to regard Part 8 of the *Electoral Act* as designating one or more persons to determine the validity of disputed elections. The language of s 127, s 131 and s 134(6) is inconsistent with that concept. The scheme of s 127 is that the particular jurisdiction of deciding contested elections to the Legislative Assembly is conferred on the Supreme Court, and the terms of s 8 of the *Vexatious Litigants Act* read with the definition of “legal proceedings” applies to proceedings within that special jurisdiction. Section 127(2) is inconsistent with the notion that the Court of Disputed Returns is, in reality, a person designated to perform certain functions independently of his or her appointment as a Judge of the Supreme Court. It is the Supreme Court that is made the Court of Disputed Returns and the clear implication of s 127(2) is that the court may exercise that jurisdiction sitting *in banc*. It is thus impossible to regard the Court of Disputed Returns as a designated person performing a function divorced from the jurisdiction of the court. Section 134(6) which provides that the Rules of the Supreme Court may include specific procedures when dealing with election petitions is a strong

pointer towards the conclusion that Part 8 has conferred a special jurisdiction on the Supreme Court.

[14] The opinion that Part 8 confers jurisdiction on the Supreme Court is supported by the decision of the High Court in *Sue v Hill* (1999) 73 ALJR 1016, concerned with the Electoral Act 1918 (Cwth), that the Act conferred jurisdiction on the High Court to determine the eligibility of candidates for election to Federal Parliament. The terms of the Commonwealth Act are similar to those of the *Electoral Act* 1992 (Qld) which in turn are very different to the provisions of the earlier *Elections Act* 1915 which the High Court thought did not make the Supreme Court the Court of Disputed Returns. It will be recalled that the *Elections Act* created an Elections Tribunal which was itself made a Court of Record and was thus clearly distinct from the Supreme Court. The Tribunal was constituted by a Judge whose name was given to the Speaker each year by the Chief Justice. Such a scheme is quite different from the present which confers the role of determining disputed returns on the Supreme Court, does not create any separate tribunal and does not require the selection of any individually named judge to perform the role. Section 354 of the Commonwealth Act which, similarly to s 127 of the State Act, provided that the High Court "shall be the Court of Disputed Returns" and should have jurisdiction to try an election petition. This was said to make the High Court a Court of Disputed Returns. It differed from the earlier legislation which had been the subject of controversy in *Holmes v Angwin*. Gleeson CJ, Gummow and Hayne JJ said in their joint judgment (1023):

> "Counsel ... relied upon what was said to be involved in the reasoning in the judgments in *Holmes v Angwin*. Section 354 ... differs from the provisions of the *Electoral Act* ... (WA) which ... was construed as ... creating a new and separate tribunal consisting of a judge of the Supreme Court of Western Australia as a *persona designata*. On the other hand, s 354(1) fixes upon "the High Court" and specifies two matters in respect of the High Court. First (it) "shall be the Court of

> Disputed Returns" and secondly, it "shall have jurisdiction" to try ... the petition."

[15] Gaudron J came to the same conclusion. At 1045-6 her Honour held that the *Electoral Act* (Cwth) conferred a special jurisdiction on the High Court and did not constitute a separate, special, tribunal to be known as the Court of Disputed Returns. Her Honour found in a number of provisions which have their counterpart in the *Electoral Act* (Qld) (s 134(2), s 136) indications that the Court of Disputed Returns was to exercise judicial power. The significance of this point is that a factor influencing the outcome of the early decisions concerned with state Electoral Acts was that the power conferred on the "Court" of Disputed Returns was not judicial but was legislative, being an adjunct to the power of Parliaments to determine who should constitute their membership. See *Holmes v Angwin* at 205-6 per Griffiths CJ and 309 per Barton J. In *Sue v Hill* Gleeson CJ, Gummow and Hayne JJ pointed out that more recent legal analysis of power conferred by statute shows that it may change character depending upon who is to exercise it: 73 ALJR 1023 (para 32 - para 33) and Gaudron J at 1043-4 (para 134-136).

[16] The fact that the power to determine electoral disputes is judicial rather than administrative or legislative indicates that a judge sitting as the Court of Disputed Returns does so in a judicial capacity, as a member of the Supreme Court, and not as an individual chosen by name. The power so exercised is that of the Supreme Court.

[17] The terms of s 127 of the *Electoral Act* (Qld), and more generally of the provisions in Part 8 of that Act, the marked differences between the legislation and the earlier Acts, and the approach taken by the High Court to similar Commonwealth legislation all leave me to think that the Court of Disputed Returns is the Supreme Court exercising a particular jurisdiction. It follows that the *Vexatious Litigants Act* applies to a proceeding in that special jurisdiction of the Supreme Court and that the

applicant must obtain leave before he can file his petition.

[18] The appropriate order is that the application for leave should be adjourned to a date to be fixed to allow the applicant to comply with s 9A of the *Vexatious Litigants Act*.

TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF QUEENSLAND No S2028 of 2001

CIVIL JURISDICTION

MUIR J

ALAN GEORGE SKYRING Applicant

and

ELECTORAL COMMISSION OF QUEENSLAND First Respondent

and

PETER DOUGLAS BEATTIE Second Respondent

BRISBANE

..DATE 17/05/2001

JUDGMENT

HIS HONOUR: I publish my reasons.

...

HIS HONOUR: I order in terms of paragraph 40 of the reasons.

SUPREME COURT OF QUEENSLAND FILE NO: S2028 of 2001

CITATION: *Skyring v Electoral Commission of Qld & Anor* [2001] QSC 080

PARTIES:

ALAN GEORGE SKYRING (applicant)

v

ELECTORAL COMMISSION OF QUEENSLAND (first respondent)
PETER DOUGLAS BEATTIE (second respondent)

DIVISION: Trial Division

PROCEEDING: Miscellaneous Application - Civil

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 17 May 2001

DELIVERED AT: Brisbane

JUDGE: Muir J

ORDER: That the application be dismissed and that the applicant pay the first respondents' costs including reserved costs of and incidental to the application fixed at $3,000; and that the applicant pay the second respondent's costs including reserved costs of and incidental to the application fixed at $1,200.

CATCHWORDS:

PROCEDURE - Whether vexatious litigant should be granted leave to institute proceedings

CONSTITUTIONAL LAW - GENERALLY - Whether failure to obtain approval for Bill for *Constitution (Office of Governor) Act*

1987 by referendum rendered Act invalid - Whether all subsequent elections, legislation and any steps taken in administering such legislation are invalid - Whether the *Australia Act* 1986 (Cth) was enacted in breach of s 53 *Constitution Act* 1867 (Qld)

Australia Act 1986 (Cth), s 3(1), s 6

Australia Act 1986 (UK), s3(1), s 6

Australia Acts (Request) Act 1985 (Qld)

Colonial Laws Validity Act 1865 (Imperial), s 1, s 5

Constitution Act 1867 (Qld), s 11A, s 53

Constitution Act Amendment Act 1977 (Qld)

Constitution (Office of Governor) Act 1987 (Qld), s 4(2), s 9, s 10, s 11, s 13

Electoral Act 1992 (Qld), s 85

Letters Patent 1986 (Qld)

Vexatious Litigant's Act 1981, s 3, s 8, s9A, s 11

Attorney-General (NSW) v Trethowan (1931) 44 CLR 394; (1932) AC 527, discussed

Bribery Commissioner v Ranasinghe [1965] AC 172, cited

Clayton v Heffron (1960) 105 CLR 214, followed

Hunter v Chief Constable of the West Midlands Police [1982] AC 529, cited

Minister for Natural Resources v New South Wales Aboriginal Land Council (1987) 9 NSWLR 154, referred to

Re Attorney-General; ex parte Skyring (1996) 70 ALJR 321, referred to

Re Poundall; ex parte Williams (1931) 48 W N (NSW) 228, cited

Re Skyring (1994) 68 ALJR 618, cited

Sharples v Arnison & Ors Supreme Court of Qld 5 March 2001, unreported, discussed

Skyring v Australia and New Zealand Banking Group Ltd Court of Appeal Qld 7 August 1995, unreported, referred to *Skyring v Ramsey* [2000] FCA 774, referred to

The Queen v The Minister for Justice and Attorney-General of Queensland, ex parte Alan George Skyring Supreme Court of Queensland 17 February 1986, unreported, discussed

Victoria v The Commonwealth (1975) 134 CLR 81, cited

APPEARANCES: The applicant appeared on his own behalf
Mr Parrot for the first respondent
Mr Carne (*sol*.) for the second respondent
SOLICITORS: Mr Lohe Crown Solicitor for the first respondent
Carne & Herd for the second respondent

The nature of the proceedings

[1] The applicant Alan George Skyring was declared a vexatious litigant under section 3 of the *Vexatious Litigant's Act* 1981 on 5 April 1995. The declaration remains in effect and, consequently, Mr Skyring cannot "institute or take any legal proceedings" without obtaining leave pursuant to Section 8 of the *Vexatious Litigant's Act* 1981.

[2] Mr Skyring wants to institute proceedings by means of a petition addressed to the Court of Disputed Returns seeking the following relief—

(a) an order that Peter Douglas Beattie has not been lawfully returned as a member for the division of Brisbane Central;

(b) an order that Mr Skyring be returned in Mr Beattie's stead as the member for Brisbane Central;

(c) a declaration that no other candidate has been validly elected to any other electoral division in the State elections; and

(d) alternatively, an order that a new election be ordered for the State of Queensland.

[3] The Registrar of the Supreme Court in compliance with section 8 of the *Vexatious Litigant's Act* ("the Act") declined to accept the applicant's petition. Mr Skyring contended that the prohibition in section 8 did not apply to election petitions determinable by the Court of Disputed Returns. On 27 March 2001, Chesterman J decided that point against Mr Skyring. The parties then went through the procedure required by section 9A of the Act and Mr Skyring's application is now before me for determination under section 9A(6).

The issues which Mr Skyring wishes to litigate

[4] The petition is lengthy and contains much argumentative material. However, one can discern that Mr Skyring wishes to attack the validity of the recent State elections on two broad grounds. One is based on the contention that it is beyond the constitutional power of the Commonwealth Parliament to legislate to make paper money, as distinct from gold, legal tender in Australia. From this premise Mr Skyring argues that the requirements of section 85(1) of the *Electoral Act* obliging a candidate for election to pay a deposit of $250 in cash or by bank cheque can be satisfied only by payment of that amount in gold coin and that, as the applicant was the only candidate who paid by means of gold coin, the other candidates were incapable of being validly elected.

[5] The second ground was summarised as follows in the first respondent's written submissions which were adopted by Mr Carne who appeared for the second respondent—

"(iv) The *Constitution (Office of Governor) Act* 1987 ("the ***1987 Act***") expressly or impliedly provided for the alteration in the office of Governor, and that, pursuant to ss.11A and 53 of the ***Constitution Act 1867*** ("the ***1867 Act***"), the Bill for the ***1987 Act*** could not lawfully be presented for assent by or in the name of the Queen except with the prior assent of the electorate at a referendum.

(v) The ***1987 Act*** was enacted in breach of ss.11A and 53 of the ***1867 Act*** and as a consequence of the failure to obtain approval of the Bill for the ***1987 Act*** by referendum before it was presented for assent, all subsequent elections, legislation passed including the ***Electoral Act*** and any steps taken in administering such legislation are invalid.

(vi) The validity and legal effect of the actions of the Respondents pursuant to the ***Electoral Act*** in connection with the State General Election are, also, invalid at least to the extent that they rely upon the provisions of the ***1987 Act***.

(vii) The ***Australia Act 1986 (Cth)*** ('the ***Australia Act***) was enacted by the Commonwealth Parliament in breach of s.53 of the ***1867 Act*** with the consequence that such invalidity affects the 1986 Letters Patent ('the **Office of Governor Issue**')."

Mr Skyring's attempt to re-litigate the currency point is an abuse of process.

[6] A court, to which a person declared to be a vexatious litigant makes application for leave to commence proceedings, may not grant leave unless satisfied "that instituting or taking those proceedings is not an abuse of process and that there is prima facie ground therefor".[1]1

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1 *Vexatious Litigants Act* s 11.

[7] It is an abuse of process for a litigant to seek to litigate a matter which has already been litigated and decided adversely to him on a final basis.[2]2

[8] Mr Skyring has pursued his currency argument, unsuccessfully, in many courts on many occasions. Some of these proceedings are listed in the reasons for judgment of Davies JA in *Skyring v Australia and New Zealand Banking Group Ltd*[3]3. Mr Skyring sought to differentiate the present currency argument from that previously advanced by making it referable to section 36(2) of the *Reserve Bank Act* 1959, rather than section 36(1), on which he had relied in other proceedings. However, the substance of his argument remains unaltered and, in any event, the section 36(2) "refinement" has been raised unsuccessfully by Mr Skyring in other proceedings.[4]4

[9] As mentioned above, the currency argument is a necessary element of the first ground Mr Skyring wishes to raise in the petition. It is therefore plain that he cannot be given leave to institute proceedings as long as the currency issue is a matter for determination. That conclusion is sufficient to dispose of the application, there being no suggestion that Mr Skyring is prepared to abandon the currency issue.

[10] However, in deference to the extensive submission made by the parties, I will now address Mr Skyring's constitutional point.

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2 *Re Skyring* (1994) 68 ALJR 618; *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 542.

3 Court of Appeal Qld 7 August 1995, unreported.

4 In the Federal Court in *Skyring v Ramsey* [2000] FCA 774 and in the High Court in *Re Attorney General; ex parte Skyring* (1996) 70 ALJR 321.

The Statutory Framework

[11] The starting point for an examination of the constitutional point lies with sections 1 and 5 of the *Colonial Laws Validity Act* 1865 (Imperial). Those sections relevantly provide—

> "**1. Definitions. The term 'colony' shall in this Act include all of Her Majesty's possessions abroad in which there shall exist a legislature, as herein-after defined**, ...
>
> The terms 'legislature' and 'colonial legislature' shall severally signify the authority other than the Imperial Parliament or Her Majesty in Council, competent to make laws for any colony:
>
> The term 'representative legislature' shall signify any colonial legislature which shall comprise a legislative body of which one half are elected by inhabitants of the colony:
>
> The term 'colonial law' shall include laws made for any colony either by such legislature as aforesaid or by Her Majesty in Council:
>
> An Act of Parliament or any provision thereof, shall, in construing this Act, be said to extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any Act of Parliament:
>
> The term 'governor' shall mean the officer lawfully administering the government of any colony:
>
> The term 'letters patent' shall mean letters patent under the Great Seal of the United Kingdom of Great Britain and Ireland.

5. Colonial legislatures may establish, etc., courts of law. Representative legislatures may alter their constitutions.

> ...every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; *provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament*, letters patent, Order in Council, *or* colonial law *for the time being* in force in the said colony." (emphasis supplied)

[12] The next relevant provision is section 53 of the *Constitution Act* 1867, inserted by the *Constitution Act Amendment Act* 1977. Subsection 1 of section 53 provides—

> "REQUIREMENT FOR REFERENDUM
>
> **53. Certain measures to be supported by referendum**. (1) A Bill that expressly or impliedly provides for the abolition of or alteration in the office of Governor or that expressly or impliedly in any way affects any of the following sections of this Act namely-
>
> sections 1, 2, 2A, 11 A, 11B, 14; and
>
> this section 53
>
> shall not be presented for assent by or in the name of the Queen unless it has first been approved by the electors in accordance with this section and a Bill so assented to consequent upon its presentation in contravention of this subsection shall be of no effect as an Act."

[13] By the *Australia Acts (Request) Act* 1985 (Qld), the Parliament and Government of the State of Queensland requested and consented to the enactment by the Parliament of the United Kingdom and of the Commonwealth of an Act in substantially the terms set out in the Second Schedule to

the 1985 Act. Other State Parliaments and Governments did likewise. Consequent upon that request, the *Australia Act* 1986 (Commonwealth) and the *Australia Act* 1986 (UK) were passed. Sections 3(1) and 6 of the *Australia Act* respectively provide—

> "**Termination of restrictions on legislative powers of Parliaments of States**
>
> **3(1)** The Colonial Laws Validity Act 1865 shall not apply to any law made after the commencement of this Act by the Parliament of a State."
>
> "**Manner and form of making certain State laws**
>
> **6** Notwithstanding sections 2 and 3(2) above, a law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act."

[14] The Australia Act also amended section 11A, 11B and 14 of the *Constitution Act* in a number of minor respects.

[15] In proceedings in the Supreme Court in 1986[5]5 Mr Skyring sought a declaration that the *Australia Acts (Request) Act* 1985 (Qld) was invalid, contending that it brought about an alteration in the office of Governor and thus contravened section 53 of the *Constitution Act*. Connolly J rejected the argument finding that: the *Australia Acts (Request) Act* made no alteration to the *Constitution Act*; Section 53 of the Queensland Constitution could not restrict the legislative powers of the Parliament

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5 *The Queen v The Minister for Justice and Attorney-General of Queensland, ex parte Alan George Skyring* Supreme Court Qld 17 February 1986, unreported

at Westminster; there was no limit to that Parliament's legislative power and that any relevant alteration to the *Constitution Act* was effected by an enactment of the Parliament at Westminster (and/or by the Commonwealth Parliament). The decision, with respect, is plainly correct. Even if one of the *Australia Act* (UK) or the *Australia Act* 1986 (Cth) were to be found invalid or ineffective for present purposes, the other Act would have been effective in repealing the *Colonial Laws Validity Act* 1865.

[16] The *Constitution (Office of Governor) Act* 1987 (Qld) ("the 1987 Act") was assented to on 1 December 1987. Section 13 of the 1987 Act provided—

> **"Suspension of letters patent**
>
> 13. For as long as the provisions of this Part are in force the provisions of the letters patent constituting the Office of the Governor of Queensland made by Her Majesty Queen Elizabeth II on 14 February 1986 and proclaimed in the State by His Excellency the Governor on 6 March 1986 are suspended in their operation."

[17] The 1987 Act, consisting of 13 relatively brief sections, makes provision for: the office of Governor; an Executive Council; meetings of the Executive Council; powers of the Governor; the fulfilment of the Governor's duties in the event of the Governor's absence from the State or illness and suspension of letters patent constituting the office of the Governor of Queensland made by the Queen on 14 February 1986 ("the 1986 letters patent").

[18] The 1987 Act re-states much of the content of the 1986 letters patent in words which are identical in fact or substance to those used in the letters patent. The 1987 Act, however, does provide for matters not dealt with in the letters patent. In that regard it: provides for the Chief Justice or failing him, the next senior judge of the State to act should there be no Lieutenant Governor appointed and able to act (s 9); for the Governor to keep

and use “the Public Seal of the State (s 4(2)); provides that various matters are not justiciable (11); omits the provision for seniority of Executive Council members in cl V of the letters patent; provides for the appointment of a deputy *when there are reasonable grounds* for believing an illness will be of short duration (s10(1)) whereas the 1986 letters patent condition the exercise of the power on the Governor's having *reason to believe* (cl IX); provides without qualification that the appointment of a deputy does not affect the Governor's authority and power (s 10(3)) whereas the 1986 letters patent include the qualifying words “otherwise than as we may at any time herafter think proper to direct” (cl (ix)). The Act also omits a limitation on the Governor's prerogative of mercy in respect of offences “of a political nature” which is to be found in the letters patent (cl VII and, as noted in paragraph [13], the Act suspends the 1986 letters patent (s 13).

[19] Mr Skyring's primary contention is that the *Constitution (Office of Governor)* Bill 1987 was a bill which expressly or impliedly provided for the abolition of or the alteration of the office of Governor or was a bill which “expressly or impliedly ... affect(ed) sections of the *Constitution Act* 1867. It follows, according to the argument, that the Bill could not have been lawfully presented unless first approved by the electors of the State of Queensland in accordance with section 53 of the *Constitution Act* 1867. Not having been so approved, the Act is of no effect. Furthermore, it is contended that all actions by the Governor of Queensland taken after the coming into force of the 1987 Act are invalid.

The efficacy of a provision such as section 53 of the *Constitution* Act to bind future Parliaments

[20] In *Attorney-General (NSW) v Trethowan*[6]6, the High Court considered the efficacy of section 7A of the *Constitution Act* 1902-1929 (NSW) which provided that the Legislative Council could not be abolished or its constitution altered except in the manner provided by the section. The section required that a bill for a purpose falling within the section not be presented for assent unless approved by the electors in accordance with the section. It was further provided that section 7A itself could only be amended by such means. It was held, by a majority, that the section introduced a "manner and form requirement" as to the way in which a future law within its scope was to be passed and that, in consequence, no such law could be validly enacted without complying with the manner and form requirements of the section.

[21] In *Trethowan*, each member of the majority adverted to the lack of sovereign power on the part of the legislatures of the States. An appeal from the decision of the High Court was dismissed by the Privy Council.[7]7

[22] It is well established that when the law requires the legislature to enact legislation in a particular manner, the courts may investigate whether the legislature has exercised its powers in the manner required.[8]8 It is also established that a legislature, whose powers are derived from a written instrument, does not have inherent power derived from the mere fact of its establishment to pass laws by resolution of a bare majority in disregard of

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6 (1931) 44 CLR 394.

7 *Attorney-General (NSW) v Trethowan* [1932] AC 526

8 *Victoria v The Commonwealth* (1975) 134 CLR 81 at 163; *Bribery Commissioner v Ranasinghe* [1965] AC 172 and *McCawley v The King* [1920] AC 691.

a legal requirement that they be passed in a specified manner or form.[9]9

[23] Section 6 of the *Australia Act* is materially *the same in effect* as the proviso to section 5 of the *Colonial Laws Validity Act*. The former refers to "laws ... (having) been passed" whereas section 6 refers to a law "*made* in such manner". In *Trethowan*, Dixon J[10]10 the rejected the contention that the word "passed" had a more restricted meaning than "made". The other members of the majority (Rich and Starke JJ) did not mention the point expressly, but that they shared the views of Dixon J in that regard is necessarily implicit in their respective reasons.

Consideration of the constitutional arguments

[24] Section 53 of the 1977 Act, in stipulating that a bill within the purview of the section shall not be presented for assent unless it has first been approved by the electors in accordance with the section, is a manner and form requirement for the purposes of section 6 of the *Australia Act*. That being so, any Act purportedly made in contravention of the requirements of section 53 is invalid.

[25] It is common ground that the Bill for the 1987 Act was not approved by the electors in accordance with section 53 of the 1977 Act prior to the enactment of the 1987 Act.

[26] In meeting Mr Skyring's arguments, the first respondent relied heavily on the judgment of Ambrose J in *Sharples v Arnison & Ors.*[11]11 In his reasons for judgment

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9 *Bribery Commissioner v Ranasinghe* (supra)

10 At 432.

11 Supreme Court of Qld 5 March 2001, unreported.

Ambrose J considered the constitutional points on which Mr Skyring wishes to rely in his *Electoral Act* petition and found that—

(i) the Bill for the 1987 Act did not come within the scope of section 53(1) of the *Constitution Act* as it did not propose an alteration to the "Office of Governor". His Honour's conclusion, in substance, was that insofar as there were differences between the provisions of the 1987 Act and the previously existing law those differences were *de minimus*;

(ii) even if the 1987 Act was invalid, as the plaintiff in that case contended, the invalidity was of no relevant effect as the 1986 letters patent would necessarily remain in full force and effect.

[27] For the purposes of this application it is unnecessary for me to re-traverse the ground covered in Ambrose J's judgment. The argument based on an alleged breach of section 53(1) of the *Constitution Act*, in my view, is not unarguable. Mr Skyring, however, loses nothing through not being able to pursue the point, and any associated points, in his proposed *Electoral Act* petition. Mr Sharples has appealed against Ambrose J's decision and, as I am about to explain, even if the constitutional point is determined by the Court of Appeal in favour of the appellant, the outcome of Mr Skyring's proposed petition would not be affected.

[28] It is submitted on behalf of the first respondent that even if the 1987 Act was invalid the consequence would be that the 1977 legislation, amended by the *Australia Act*, would remain in force, as would the 14 February 1987 letters patent purportedly suspended by section 13 of the 1987 Act. That being the case, it is argued that all acts of the respondents done pursuant to the *Electoral Act* would have been based upon the valid exercise of powers and the valid performance of duties of the first respondent on the basis that Governors of Queensland at relevant times were

duly appointed and performed their respective duties pursuant to the 1986 letters patent.

[29] I respectfully agree with Ambrose J's conclusions in *Sharples v Arnison & Ors* in that regard. Under both the letters patent and the 1987 Act: the appointment of Governor is to be under the sovereign's Sign Manual; an appointee to the Office of Governor is required before commencing any of the duties of the office to cause the Commission appointing such person “to be read and published at the seat of Government in the State in the presence of the Chief Justice or the next senior Judge of the State and of at least two Members of the Executive Council ... and to take the oath of allegiance”. Both the 1987 Act and the letters patent make provision for an Executive Council, for meetings of the Executive Council and for the way in which it is to despatch business. The respective provisions are identical for all intents and purposes.

[30] Mr Skyring has not identified any differences in substance between the 1986 letters patent and the provisions of the 1987 Act or suggested ways in which actions of the Governor or the Executive council may have miscarried having regard to discrepancies between the two sets of provisions.

[31] The fact that a Chief Justice “or next senior Judge of the State” may have acted in the absence of the Governor from time to time since the coming into force of the 1987 Act does not affect the above conclusion. Mr Skying does not advance any argument in reliance on the role of acting Governors or identify any relevant act or event as having occurred whilst any such person was fulfilling the role of Governor. Nor is it suggested that such persons were not acting under the authority of a dormant commission. Section 11A of the *Constitution Act* (inserted by the 1977 Act) provides that references in Acts of Parliament to “the Governor” include a reference to “any other person appointed by dormant or other Commission ...” Since October 1900 there has been a dormant commission

under which the Chief Justice of Queensland has been authorised to exercise the Governor's powers in the Governor's absence or in the event of his or her incapacity.

[32] These are also obvious circumstances in which the presumption of regularity would have application. As McHugh J.A. observed in *Minister for Natural Resources v New South Wales Aboriginal Land Council*[12]12—

> "The natural home of the maxim (*omnia praesumuntur rite esse acta*) is public law. Where a public official or authority purports to exercise a power or to do an act in the course of his or its duties, a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled."[13]13

The Respondents' alternative argument

[33] An alternative argument advanced by the respondents relies on the fact that section 6 of the *Australia Act* relates only to "a law ... respecting the constitution, powers or procedure of the Parliament ..." It is contended that for the 1987 Act to breach the manner and form requirements of section 53 of the *Constitution Act*, it must be capable of being characterised as a law "respecting the constitution, powers or procedures of the Parliament" and that it cannot be so categorised.

[34] The argument assumes that since the repeal of section 5 of the *Colonial Laws Validity Act*, section 6 is the sole source of a State Parliament's power to impose manner and form requirements binding on future parliaments. The contention does not appear to me to be correct.

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12 [1987] 9 NSWLR 154 at 164

13 see also *Carpenter v Carpenter Grazing Co Ltd* (1987) 5 ACLC 506 at 514 and *Re Poundall; ex parte Williams* (1931) 48 W N (NSW) 228 at 230.

[35] In *Clayton v Heffron*[14]14, Dixon CJ, McTiernan, Taylor and Windeyer JJ, in a joint judgment, concluded that a State Parliament also derived power to enact manner and form requirements from its power to make laws for the peace, welfare and good government of the State.[15]15

[36] In the joint judgment it is said at 250-251—

> "But be that as it may, s. 5 of the *Constitution Act*, 1902-1956 appears on consideration to contain a sufficient power not only to change the bicameral system into a unicameral system but also to enable the resolution of disagreements between the two Houses by submitting an Act passed by the Assembly for the approval of the electors in substitution for the assent of the Council and moreover to include in the application of that legislative process Bills for the abolition of the Legislative Council and Bills otherwise falling within the description dealt with by s. 7A. The reasoning supporting this conclusion is indeed simple. It rests on the plain if very general words of s. 5 of the *Constitution Act*. The first paragraph of the section is as follows: "The Legislature shall, subject to the provisions of the *Commonwealth of Australia Constitution Act*, have power to make laws for the peace welfare and good government of New South Wales in all cases whatsoever." The expression "Legislature" is defined in s. 3 to mean the Sovereign with the consent of the Legislative Council and Legislative Assembly. ...
>
> The first paragraph [of s.5] confers a complete and unrestricted power to make laws with reference to New South Wales. There is doubtless a territorial limitation implied in the reference to New South Wales but there is no limitation of subject matter. The laws may be constitutional or at the other extreme they may deal with subjects of little significance. Clearly the power extends to laws altering the *Constitution Act* itself: cf.

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14 (1960) 105 CLR 214.

15 At 250-252.

> *McCawley v. The King* (1920) AC 691, at pp. 703-706, 709; (1920) 28 CLR 106, at pp. 114-117, 120. ...
>
> The purpose of the provision is to express the full legislative power of a State the authority of which is continued under ss. 106 and 107 of the Constitution of the Commonwealth. The Legislature was endowed with constituent as well as ordinary legislative power. Section 5 was of course enacted by the Legislature of New South Wales. But it was enacted in the exercise of the State's constituent legislative power and that in turn depended upon an existing source of authority. That existing source of authority consisted in the Imperial Act (18 & 19 Vict. c. 54), commonly called the *Constitution Statute* 1855, and the Act of the Colony as amended which forms the schedule of that statute, otherwise 17 Vict. No. 41, commonly called the *Constitution Act*. ...
>
> But what matters here is that the two instruments contain the source whence the constituent power of the Legislature is derived. It is therefore enough to say that in intended pursuance of a power conferred by ss. 32 and 33 of 13 & 14 Vict. c. 59 upon the then Legislative Council to establish separate legislative Houses and the like the Legislative Council passed a Bill which was reserved for the Royal Assent. ..."

[37] Section 2 of the 1867 Act gives the Legislative Assembly "... power by and with the advice and consent of the said Assembly to make laws for the peace welfare and good government of the colony in all cases whatsoever". As was the case with section 5 of the *Constitution Act* 1902-1956 (NSW), section 2 was enacted under the authority of Imperial Statute[16]16. The above observations in *Clayton v Heffron* are thus directly applicable to the position pertaining in Queensland.

[38] Having regard to the views expressed earlier by me, I do not find it necessary to decide this alternative argument but the preceding analysis suggests that the

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16 Order in Council made pursuant to Act 18 219 Vict., C. 54 sec 7.

correct issue is the one addressed by Ambrose J in *Sharples*, namely whether the Bill for the 1987 Act is one which expressly or impliedly provides for alteration in the *Office of Governor* or which expressly or impliedly affects any of sections 1, 2, 2A, 11A, 11B, 14 or 53 of the *Constitution Act*.

Conclusion

[39] As Mr Skyring's proposed petition seeks relief directed to the efficacy of acts done under the *Electoral Act* 1992 and to invalidity allegedly resulting from invalidity of acts of the Governor in Council since the enactment of the 1987 Act, it is plain that the petition has no prospects of success. I am not satisfied that there is a prima facie ground for the proceedings Mr Skyring seeks to institute and therefore refuse leave for those proceedings to be instituted.

[40] I order that the application be dismissed and that the applicant pay the first respondents' costs including reserved costs of and incidental to the application fixed at $3,000, and that the applicant pay the second respondent's costs including reserved costs of and incidental to the application fixed at $1,200. The difference in amounts arises from the fact that the carriage of the matter on behalf of the respondents rested with the first respondent. Section 10 of the *Vexatious Litigants Act* requires the amount of costs awarded against the applicant on applications such as this to be fixed. I determined the amount of costs drawing on my own experience refreshed by general discussion with registry staff about the levels of assessed costs in chamber applications. The sums awarded are and are intended to be set at conservative levels. The material before me strongly suggests that Mr Skyring will be unable to satisfy any costs orders made against him and I did not wish to put the parties to unnecessary expense by inviting further submissions on costs.

[41] I note that, when this matter was mentioned before me in Supreme Court Chambers, there was discussion concerning the desirability of its being determined by a judge appointed before the coming into force of the 1987 Act. On reflection, it seemed to me that having regard to the scope of Mr Skyring's arguments, any judge, whenever appointed, would have at least an indirect interest in the outcome of the proceedings. That being the case, I saw no reason why I should not have determined the matter and, as matters turned out, it was administratively more convenient for the matter to be dealt with by a judge in the Civil list.

TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF QUEENSLAND No S2028 of 2001

CIVIL JURISDICTION

MACKENZIE J

ALAN GEORGE SKYRING Applicant

and

ELECTORAL COMMISSION OF QUEENSLAND First Respondent

and

PETER DOUGLAS BEATTIE Second Respondent

BRISBANE

..DATE 06/06/2001

JUDGMENT

HIS HONOUR: The order that I make is that it is declared and directed that the Registrar may refuse to accept the documents.

I publish my reasons.

SUPREME COURT OF QUEENSLAND FILE NO: S2028 of 2001

CITATION: *Skyring v Electoral Commission of Qld & Anor* [2001] QSC 080

PARTIES:

ALAN GEORGE SKYRING (applicant)

v

ELECTORAL COMMISSION OF QUEENSLAND (first respondent)

and

PETER DOUGLAS BEATTIE (second respondent)

DIVISION: Trial Division

DELIVERED ON: 6 June 2001

DELIVERED AT: Brisbane

HEARING DATE: 1 June 2001

JUDGE: Mackenzie J

ORDER: It is declared and directed that the Registrar may refuse to accept the documents.

CATCHWORDS:

PROCEDURE - SUPREME COURT PROCEDURE - QUEENSLAND - PRACTICE UNDER RULES OF COURT - REGISTRY AND REGISTRARS - where

applicant declared a vexatious litigant - whether Registrar can accept and register documents seeking leave to appeal against a costs order by a vexatious litigant - whether leave may be granted in accordance with s 9A *Vexatious Litigants Act* - whether application is expressly prohibited by s 9A(8) *Vexatious Litigants Act*.

Vexatious Litigants Act 1981 (Qld) s 2, s 9A, s 9A(6), s 9A(8)

APPEARANCES: Deputy-Registrar Mr J McNamara (*sol*.)
Mr AG Skyring appearing on his own behalf.

[1] **MACKENZIE J**: Mr Skyring has been declared a vexatious litigant under the *Vexatious Litigants Act* 1981. He has sought to file documents in the Registry in consequence of the refusal with costs by Muir J to grant him leave to institute proceedings in the Court of Disputed Returns. The application presented in the Registry seeks leave to appeal against the costs order made by Muir J and "such further or other orders as to the court shall seem meet, having due regard for all of the circumstances of this case".

[2] In the proceedings before the Court of Disputed Returns he would wish to challenge the return of the second respondent as Member for Brisbane Central in the State Election held on 17 February 2001. Chesterman J had held that proceedings before the Court of Disputed Returns are "legal proceedings" within the meaning of s 2 of the *Vexatious Litigants Act*. In order to progress them Mr Skyring therefore needed leave from a judge.

[3] The procedure for an application for leave is set out in s 9A of the *Vexatious Litigants Act* 1981. Under s 9A(6) the application is decided in the absence of the parties. When an application is refused under s 9A(6) an application for leave may not be made in relation to that decision (s 9A(8)).

[4] The present application is unequivocally an application in relation to a decision under s 9A(6). Section 9A(8) expressly prohibits such an application. The matter came before me on a reference from the Registrar as to his obligation to accept the documents. For the reasons set out above, I declare and direct that the Registrar may refuse to accept the documents.