SUPREME COURT OF QUEENSLAND

CITATION:	*Innes v Electoral Commission of Queensland & Anor (No 2)* [2020] QSC 293
PARTIES:	**DONALD JAMES INNES** (applicant) **v** **ELECTORAL COMMISSION OF QUEENSLAND** (first respondent) **MARK BRYAN JAMIESON** (second respondent) **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (intervener)
FILE NO:	BS 5067 of 2020
DIVISION:	The Court of Disputed Returns
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane sitting as the Court of Disputed Returns
DELIVERED ON:	24 September 2020
DELIVERED AT:	Brisbane
HEARING DATES:	20 and 29 May; 6 June; 21 August 2020. Application to re-open made on 31 August 2020, dismissed on 22 September 2020.
JUDGE:	Ryan J
ORDERS:	**1. Applicant refused leave to rely on documents 23, 24 and 26.** **2. Applicant granted leave to rely on document 22.** **3. First respondent granted leave to rely on document 25.** **4. Application dismissed.** **5. If the applicant wishes to submit that he ought not to be ordered to pay the costs of the first and second respondents, then he may make submissions by way of email to my associate and the respondents, limited to 500 words, by 8 October 2020; to which the respondents may reply, limited to 500 words, by 13 October 2020. I will determine the issue of costs on the papers.**

6. **If the applicant does not make submissions as per order 5, then he is to pay the respondents' costs of and incidental to this application. (The costs of the unsuccessful application to re-open have been dealt with separately.)**

CATCHWORDS: CONSTITUTIONAL LAW – THE NON-JUDICIAL ORGANS OF GOVERNMENT – THE LEGISLATURE – ELECTIONS AND RELATED MATTERS – DISPUTED ELECTIONS – PRINCIPLES UPON WHICH COURT OR TRIBUNAL ACTS – where the applicant was an unsuccessful candidate for mayor at the Sunshine Coast Regional Council elections held on 28 March 2020 – where the first respondent is the Electoral Commission of Queensland and the second respondent is the mayor of the Sunshine Coast Regional Council – where the applicant applies to the Court of Disputed Returns for orders which would have the effect of quashing the election result and ordering a new election – where at the heart of the application is the applicant's belief that the election ought to have been postponed because of the health risk to voters of COVID-19 – where the applicant contends that it was not "essential" to require persons to attend a polling booth to vote in person – where the applicant claims that the result was distorted by problems with insufficient postal votes and insufficient response to the increased demand for telephone voting – where the applicant contends that many elderly and infirm voters were effectively prohibited from voting – whether there has been a breach of the statutory requirements of the *Local Government Electoral Act* 2011 (Qld) – whether, in the event of a breach, that breach was likely to have affected the result such that it does not reflect the *preference of a majority of electors, voting freely and deliberately* – whether there are any other matters which may have influenced the electoral process such that it would be just and equitable to order a new election

HUMAN RIGHTS – HUMAN RIGHTS LEGISLATION – where the applicant was an unsuccessful candidate for mayor at the Sunshine Coast Regional Council elections held on 28 March 2020 – where the first respondent is the Electoral Commission of Queensland and the second respondent is the mayor of the Sunshine Coast Regional Council – where the applicant asserts that the decision to hold the election (or not to postpone it), having regard to prevailing health conditions, entailed a breach of voters' human rights – where, taken at its highest, the applicant's argument places in issue the right to take part in public life, and the right to recognition and equality before the law – whether the function of the Court of Disputed Returns involves the application and preservation of

those rights – whether any legislative provisions in the *Local Government Electoral Act* 2011 (Qld) need to be read compatibly with human rights in light of s 48 *Human Rights Act* 2019 (Qld) – whether the applicant has demonstrated that he is able to seek, independently of the *Human Rights Act* 2019 (Qld), any relief or remedy in respect of an act or decision of the ECQ such that he can claim under ss 58 and 59 *Human Rights Act* 2019 (Qld)

EVIDENCE – ADMISSIBILITY – EXCLUSIONS: DISCRETIONARY AND MANDATORY – where the *Local Government Electoral Act* 2011 (Qld) conveys an expectation that applications disputing a person's election will be dealt with and resolved expeditiously – where a timetable was set by the Court for the provision of material by the parties – where the applicant seeks leave to rely on material filed out of time – where the applicant explains his delay in filing by the fact that he is self-represented – where the first and second respondents object to the Court's receipt of the late material – whether leave should be granted to the applicant to rely on the material filed late

Acts Interpretation Act 1954 (Qld), s 24AA, s 33
Charter of Human Rights and Responsibilities Act 2006 (Vic), s 4, s 6(2)(b), s 32, s 38, s 39
Commonwealth Electoral Act 1918 (Cth), s 327(1)
Human Rights Act 2019 (Qld), s 5(2)(a), s 8, s 9, s 13, s 15(2), s 16, s 23, s 31, s 48, s 53, s 58, s 59
Local Government Act 2009 (Qld), s 8, s 90A, s 90B, s 90C, s 90D, s 152, s 153, s 171B, s 175K, s 175L, s 182
Local Government Electoral Act 2011 (Qld), s 26, s 45AA, s 49, s 77, s 107, s 113, s 113B, s 113D, s 136, s 140, s 142, s 144, s 145, s 146, s 182, s 200E, s 200G
Local Government Regulation 2012 (Qld), s 290
Public Health Act 2005 (Qld), s 362B

Attorney-General for the State of Queensland v Sri & Ors [2020] QSC 246
Bridge v Bowen (1916) 21 CLR 582; [1916] HCA 38
Caltabiano v Electoral Commission of Queensland & Anor (No 4) [2010] 2 Qd R 1; [2009] QSC 294
Carroll v Electoral Commission of Queensland (No 1) [2001] 1 Qd R 117; [1998] QSC 190
Director of Housing v Sudi (2011) 33 VR 559
Kracke v Mental Health Review Board & Ors [2009] VCAT 646
Momcilovic v The Queen (2011) 245 CLR 1
PJB v Melbourne Health (2011) 39 VR 373
Re JMT [2020] QSC 72
Tanti v Davies (No 3) [1996] 2 Qd R 602; [1995] QSC 298

Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors [2020] QLC 33

COUNSEL: The applicant appeared for himself
J Kapeleris for the first respondent
D Quinn for the second respondent
K A McMillan QC with K J Blore for the Attorney-General intervening

SOLICITORS: The applicant appeared for himself
Crown Law for the first respondent and Attorney-General intervening
Holding Redlich for the second respondent

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Overview

[1] Queensland's Local Government Elections were held on 28 March 2020. Mark Jamieson, the sitting Mayor of the Sunshine Coast Regional Council ("SCRC"), successfully campaigned for re-election as mayor, winning by a margin of 15.95 per cent of the formal vote. The applicant, Mr Innes, was an unsuccessful candidate for mayor of the SCRC.

[2] Mr Innes is aggrieved by the re-election of Mr Jamieson. He has applied to the Court of Disputed Returns for orders which would have the effect of quashing the SCRC election result and ordering a new election.

[3] Mr Innes appears for himself.

[4] Although Part 7 of the *Local Government Electoral Act* 2011 (Qld) ("LGEA") conveys an expectation that applications disputing a person's election will be dealt with and resolved expeditiously, the timetable for this matter, including the hearing in August, was determined having regard to Mr Innes' request that it take into account his work commitments and his status as a self-represented applicant.

[5] The rather protracted timetable may have been of some concern to the second respondent, because it was his election as mayor which was under challenge, but he and the ECQ accommodated Mr Innes' timetabling requests.

[6] After the hearing in August concluded and I had reserved my decision, Mr Innes applied to re-open the hearing to make further arguments. He was not successful.

[7] At the heart of Mr Innes' application is his belief that the election ought to have been postponed because of the health risk to voters of COVID-19. Although every candidate for mayor of the SCRC faced the same challenges thrown up by the pandemic, Mr Innes contends that only he responded to it responsibly, including by attempting to dissuade voters from voting,[1] to his disadvantage. The election was not therefore "#fair for all" as he had been promised.

[8] Mr Innes makes serious allegations about the Electoral Commission of Queensland ("ECQ"), Mr Jamieson and the Chief Health Officer ("CHO").

[9] He asserts that the decision to hold the election (or not to postpone it), having regard to prevailing health conditions, entailed a breach of voters' human rights. The Attorney-General for the State of Queensland intervened on that issue.

[10] For the reasons which follow, I dismiss the whole of Mr Innes' application.

[11] The first and second respondents seek their costs. The intervener does not.

[12] I can see no reason why Mr Innes ought not to be ordered to pay the costs of the first and second respondents, however if Mr Innes wishes to submit that another costs order is appropriate, I will allow him until 8 October 2020 to email written submissions to that effect to my associate (limited to 500 words), with copies to the first and second respondents. The first and second respondents will have 13 October 2020 to respond, if they wish to do so (also limited to 500 words).

The jurisdiction of the Court of Disputed Returns and the onus of proof

[13] Section 136 of the LGEA provides that the election of a person during a local government election may be disputed by an application to the Court of Disputed Returns under Part 7 of the LGEA.

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[1] It is an offence to fail to vote, without a valid and sufficient excuse: s 168 of the LGEA.

[14] The jurisdiction of the Court of Disputed Returns is thus confined by the LGEA to jurisdiction over disputes about the election of a person. The Court does not have jurisdiction to consider complaints about elections generally – including, for example, a complaint that a certain electoral district should have conducted a full postal ballot or a complaint that the 2020 local government elections should have been held at all.

[15] In *Caltabiano v Electoral Commission of Queensland & Anor (No 4)* [2010] 2 Qd R 1 ("*Caltabiano*"), Atkinson J heard an application to the Court of Disputed Returns by an unsuccessful candidate in the 2009 Queensland State election.

[16] Because the application concerned the results of a State – rather than a local government – election, the application was governed by the *Electoral Act* 1992 (Qld) as it stood in 2009 ("EA2009"). The provisions of the EA2009 dealing with the Court of Disputed Returns are equivalent to the provisions of the LGEA which apply in this case. Thus, her Honour's discussion in *Caltabiano* of the role of the Court, the onus of proof and related matters, are apposite here.

[17] I can do no better than her Honour's discussion. Relevant extracts from it follow, adapted for the provisions of the LGEA (footnotes omitted):

> [2] [Section 142] provides that the Court of Disputed Returns may conduct hearings and other proceedings [for an] application. The Court is not bound by "technicalities, legal forms or rules of evidence" [(s142(2))] …
>
> [3] The Court must ensure that, as far as reasonably practicable, the secrecy of the ballot is maintained [(s 144(4))].
>
> [4] The Court has power under [s 144(1), subject to sections 145 and 146] to make any order or exercise any power in relation to the application that the Court considers just and equitable. The orders the Court may make under [s 144(2)] include:
>
> "(a) an order to the effect that a [candidate] elected [at an election] is taken not to have been elected;
>
> (b) an order to the effect that a new election must be held;
>
> (c) an order to the effect that a candidate[,] other than the one elected [at an election,] is taken instead to have been elected; …
>
> (d) an order to dismiss or uphold an application in whole or part.
>
> [5] The Court of Disputed Returns will exercise the powers given to it … where it is "just and equitable to do so". As Ambrose J said in *Tanti v Davies (No 3)*, the Court would:
>
> "so construe [s 144(1)] as to require as a prerequisite for the exercise of 'any power in relation to the petition that the Court considers just and equitable' the determination of a fact or facts going to the validity of the election considered in the light of the statutory requirements to be found in the Act. If established

such facts need to be considered in the light of all the circumstances to determine whether any invalidity leads to the conclusion, to use the words of Griffith CJ in *Bridge v Bowen:*

> 'That there is good ground for believing that the formal result does not represent the free and deliberate choice of the competent electors.'

> [… T]here is no discretion given under [s 144(1)] to order a new election unless the facts show that the election was rendered invalid by virtue of a contravention of a statutory requirement of the Act."

[6] In *Carroll v Electoral Commission of Queensland (No 1)*, Mackenzie J recorded that it was common ground between the parties that he should adopt the same interpretation. His Honour held with regard to that:

"Where the foundation of the case is allegations that practices which infringe against provisions of the *Electoral Act* have been engaged in, the question is not merely whether there is satisfactory proof that that has occurred. It is whether, having regard to what has been proved, it is sufficiently established that such conduct resulted in a situation where there is good ground for believing the result recorded did not reflect the actual preference of a majority of electors. Since this involves a quantitative element, a finding that a contravention or contraventions of the Act are sufficiently proved may not necessarily lead to a finding that the election should be set aside. The extent of the likely effect of any such contraventions on the result is important. This is a matter of judgment which must be performed in the particular factual context of each case."

[7] It was submitted by the applicant, and not disputed by the other parties, that if it can be demonstrated that the number of instances of casting invalid votes and the denial of the opportunity to cast valid votes exceeded the winning margin, it could not be said that such errors were unlikely to have affected the result. That is the approach I intend to take in this case.

[8] It is the approach mandated by [s 145(2)(a)] of the Act … Section [145(2)(a)] provides:

"[(2)] Also, the court must not make an order under section [144(2)] (other than an order to dismiss the application) –

(a) because of an absence or error of, or omission by, a member of the electoral commission's staff that appears unlikely to have had the effect that a candidate elected at an election would not have been elected […]"

[9] The applicant also submitted that additionally there may be other instances where the Court may order a new election where it is "just and equitable" to do so. That may be so if, for example,

> there was evidence of fraud or general corruption or intimidation that influenced the electoral process as a whole. …

Approach to this application

[18] Having regard to the above, I have taken the following approach to this application.

[19] Bearing in mind the onus of proof (see below) –

- I will assess the "validity" of the SCRC election in light of the statutory requirements of the LGEA. In other words, I will consider whether there have been any *breaches* of the statutory requirements of the LGEA;

- If there is satisfactory proof of a breach, then I will consider its *effect* on the election result and whether there are *good grounds for believing* that Mr Jamieson's election does not reflect the *preference of a majority of electors, voting by way of a free and deliberate choice*;

- Even if I am satisfied that there has been a breach of any of the statutory requirements of the LGEA, if the quantitative effect of the breach is small (relative to Mr Jamieson's winning margin), then the fact that there has been a breach is not enough to require the setting aside of the election result;

- If the votes affected by any proven breach do not exceed the winning margin, then it cannot be said that the breach was likely to have affected the result and that the result does not reflect the *preference of a majority of electors (voting freely and deliberately)*;

- I will also consider whether there has been proof of fraud, or general corruption, or intimidation or like matters, which may have influenced the electoral process as a whole *to such an extent as to allow me to conclude that it would be just and equitable to order a new election.*

[20] Many of Mr Innes' complaints allege "unfairness". An allegation of unfairness *per se* does not provide a basis for a successful application to the Court of Disputed Returns. However, if unfairness is the product of a breach of the statutory requirements of the LGEA or of fraud or corruption or intimidation or the like then, in that sense, it may be relevant to the issues for the Court of Disputed Returns.

[21] As to the onus of proof: as explained by Atkinson J in *Caltabiano*, it is borne by the applicant. Her Honour said, "[t]he election result is *presumed to be valid* unless the Court is persuaded to the contrary by *proof of the facts set out in the application*" (emphasis added).[2]

[22] It is therefore for Mr Innes to persuade me – on the basis of *evidence* – of the matters he alleges in his application. And, *if* Mr Innes is able to satisfy me that there has been a breach of a statutory requirement or corruption et cetera, it is for Mr Innes to persuade me that the *effect* of the breach or corruption et cetera is that

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2 At 48, [188].

the result of the SCRC election does not represent the free choice of a majority of electors.

[23] It is *not* the case that the ECQ and Mr Jamieson have to *defend* themselves by producing evidence to counter Mr Innes' accusations.

[24] That is not to say that the ECQ and Mr Jamieson need not tender evidence. Both could have done so. And, in the case of the ECQ, it did. The point is that it is for Mr Innes to persuade me, on the strength of evidence (which may include the evidence produced by the ECQ), that – for example – the ECQ conducted the election unlawfully. It is *not* for the ECQ to disprove that allegation and to prove to me that it conducted the election lawfully.

[25] Nor is it the role of this Court to conduct an *investigation* into the conduct of the SCRC election to determine whether it was "fair" or whether Mr Jamieson's nomination or election was valid. It is for the parties to produce evidence to the Court: not for the Court to go in search of it. And it is for the Court to decide on the evidence placed before it whether Mr Innes' application ought to be granted.

[26] As to the standard of proof: to succeed, Mr Innes must satisfy me of his position, on the basis of evidence, on the balance of probabilities.

[27] I will deal with Mr Innes' human rights' arguments later in these reasons.

Mr Innes' application and contentions

[28] I stress that that which follows are *allegations* made by Mr Innes, not findings by the Court.

[29] Broadly, Mr Innes contends that the ECQ conducted the local government election unfairly – at least in the way in which it was conducted in his electorate, if not across the board. He asserts that, "[t]he general theme was of ongoing incompetence [and] mismanagement in health crisis circumstances". He says that the result was not "democratic".

[30] He alleges that as many as 30 per cent, or 70,000 SCRC voters were "prohibited" from voting and that the result, leading to the election of Mark Jamieson, was "distorted". (I note that the turnout rate for the SCRC election was about 75 per cent.)

[31] Mr Innes claims that there was interference in the result by the "public State Government Health Officer" – that is, the CHO – and by way of SCRC announcements during the election period.

[32] He claims that the result was "significantly distorted" by problems with insufficient postal votes and a "lack of clarity" around decisions made about the dates of execution of those postal votes,[3] and "insufficient capacity for handling the

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[3] This assertion seemed to be the product of some confusion on Mr Innes' part that postal votes could be "backdated" (to before 6 pm on polling day) and that unless "backdated", they would not be counted. Mr Innes seemed to be suggesting that the ECQ ought to have explained backdating to voters who received their postal ballots "late". However, postal votes may not be backdated. To be

increased demand for telephone voting". He alleges that "many elderly and infirm were effectively prohibited from voting".

[33] He argues that it was not "essential" to require persons to attend a polling booth to vote in person, and to require them to do so amounted to "a fundamental breach of Human Rights NOT to be exposed to 'risk of harm'".

[34] As to the impact of all of this on him personally, he says his campaign costs were thrown away and wasted, and that his rights as a candidate were ignored by the ECQ. Further, any complaints he made to the ECQ were ignored.

[35] Also, Mr Innes made allegations against Mr Jamieson, which I will not detail at this point.

[36] On 20 May 2020, the ECQ gave notice to the Attorney-General for the State of Queensland and the Queensland Human Rights Commissioner, under the *Human Rights Act* 2019 ("HR Act") that Mr Innes stated a matter of relevance to the HR Act in his assertion that –

> The manner of PHYSICAL polling was NOT "essential" as stated publicly, and amounted to a fundamental breach of Human Rights NOT to be exposed to "risk of harm".

[37] On 29 May 2020, the Attorney-General gave notice that she would intervene in the application under s 50 of the HR Act.

The material before the Court

[38] Mr Innes relied primarily on his own opinion to support the accusations he made against the ECQ, the CHO, and Mr Jamieson, and often referred to his Facebook posts in support of his application.

[39] Whilst the Court of Disputed Returns is not bound by the *rules* of evidence (such as, for example, the hearsay rules or the best evidence rule), the Court requires some "evidence" upon which to proceed. Mr Innes' opinions are not evidence – although of course they will shape his submissions to the Court.

[40] The ECQ tendered evidence from William Huey, the team leader of electoral operations at the ECQ. Mr Huey was cross-examined by the applicant. A summary of critical aspects of Mr Huey's evidence follows, together with my observations about it.

Evidence of Mr Huey

Election results

[41] A total of 172,921 votes were cast for mayor of the SCRC: 160,224 were formal and 12,697 were informal.

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valid, the postal vote must have been made (by completing the ballot papers) before 6 pm on polling day, and a declaration to that effect by the voter must be witnessed.

[42] The formal votes were cast as follows –

Mark Jamieson	79,334 (49.51%)
Chris Thompson	53,783 (33.57%)
Michael Burgess	16,458 (10.27%)
Don Innes	10,649 (6.65%)

[43] Mr Jamieson won by a margin of 25,551 votes (about 15.95 per cent of the formal vote).[4]

The teleconference held on 16 March 2020

[44] One of Mr Innes' arguments was to the effect that Mr Jamieson had been unfairly advantaged because he took part in a teleconference about the conduct of the election on 16 March 2020 – the last day for making an application for a postal vote.

[45] Mr Huey gave hearsay evidence about that teleconference. He explained that it was attended by the Electoral Commissioner and Assistant Electoral Commissioner of Queensland, Ministers, local government mayors (including Mr Jamieson, I presume) council chief executive officers and departmental officers.

[46] The Commissioner and Assistant Commissioner recalled that those present were informed that –

(a) there was no scope for extending the cut-off date and time for voters to submit postal vote applications, which closed at 7 pm on that day. The deadline was set by legislation;

(b) even if there was power to extend the deadline for when postal vote applications could be made, the ECQ's planning for the 2020 local government election (including for the purchase of postal vote ballot forms) had been conducted on a service delivery model that was based on voters using the following methods of voting at the following rates: 10 per cent postal votes; 30 per cent early voting; and 60 per cent voting on polling day;

(c) the result was that, even if the legislative deadline for postal voting could be extended so that a significantly larger number of electors could vote by post, it would be very difficult, if not impossible at this late stage, to obtain a sufficient supply of printed ballot forms for such a large number of voters to use, because of the significant "lag time" between ordering forms from ECQ's commercial suppliers and their ability to provide the forms to the ECQ;

(d) the decision to proceed with attendance voting had nothing to do with whether there were sufficient ballot forms to conduct a full postal election. That decision was based on careful consideration of the Queensland CHO's advice that it was safe to conduct attendance voting, so long as the relevant directions about social distancing and hygiene were observed. Consideration was also

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4 After preferences, Mr Jamieson's winning margin was 21,905 votes.

> given to the importance of allowing Queenslanders to democratically elect their local council and State government representatives.

[47] At the hearing, Mr Innes took issue with Mr Huey's suggestion (during his testimony) that the CHO actually took part in the teleconference (Mr Huey was not present for it). But for the Court's purposes, the presence or absence of the CHO at the teleconference is irrelevant.[5]

[48] Mr Innes referred to (a) above and suggested to Mr Huey that it was possible to extend the cut-off date and time for the receipt of applications for postal votes, referring to s 38 LGEA. Whether or not it was possible to extend the cut-off is not relevant to the issue for me – which is whether there was something about the conduct of the election *which was in fact held* (such as illegality or fraud or corruption or the like) which means that the result does not reflect the free and deliberate choice of electors.

[49] Also, as to (d), Mr Innes submits that the ECQ should not have considered "the importance of allowing Queenslanders to democratically elect their own local council and State government representatives" in its decision-making, because it is merely a "tally house". Whether that proposition is valid or not, I am required to consider the way in which the election was *in fact conducted*, not when, or how, it *might* have been.

Postal voting

State wide

[50] At the commencement of the local government election, the ECQ possessed 500,000 postal vote declaration envelopes, containing ballot papers for postal voting ("postal ballots").

[51] Between 16 March 2020 and 25 March 2020, an additional 140,000 postal ballots were printed – for reasons including the anticipation of some spoilage *and* to accommodate the number of applications for postal voting the ECQ received prior to the cut-off time/date for such applications – which was 7 pm on 16 March 2020.

[52] On 16 March 2020, the Electoral Commissioner, Mr Pat Vidgen, was interviewed on local radio (ABC) at 6.53 am. He was questioned about his power to extend the cut-off to apply for a postal vote. He said that the ECQ did not have the power to do that: the law specified that the "deadline" was 7 pm, 12 days before polling day (that is, 7 pm on 16 March 2020). There were "issues around supply as well". He said –

> We plan our elections with a certain delivery focus, about 10 per cent postal voting, 30 per cent pre-poll and about 60 per cent on polling day.

[53] More detail of this interview appears below.

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5 For what it is worth, I note that the CHO publicly delivered a similar message to that referred to in (d).

[54] The postal voting statistics – **State wide** – for 2012, 2016, 2020 are as follows:[6]

	2012	2016	2020
The total number of postal ballots **issued**, including to those not required to apply for a postal ballot because they lived in a council or division which voted by full postal ballot or because they fell into the "special postal voter" category	511,368	414,755	567,307
The number of persons who specifically applied for and were sent a postal ballot			467,485
Postal ballots received and scrutinised by ECQ	237,213 (46%)	361,802 (87%)	471,157 (83%)
Postal ballots not returned to ECQ either at all, or in time	274,155 (54%)	52,953 (13%)	96,150 (17%)
Postal ballots accepted by ECQ for counting	225,850	336,821	451,570
Postal ballots rejected, and not counted, by ECQ	11,363	24,981	19,587

[55] In cross-examination, Mr Innes challenged Mr Huey about statements made on behalf of the ECQ that there had been 570,000 (rather than 467,485) *applications* for postal votes.

[56] Assuming for the moment that the ECQ had given that figure for *applications* (rather than postal ballots *issued*), as Mr Huey pointed out, the message that the ECQ intended to convey was that almost 570,000 postal ballots had been *sent* (including to people who had previously applied to be special voters and to people in full postal ballot divisions). That was correct. I read nothing into the fact that the ECQ rounded up 567,307 to 570,000.

[57] Regardless, what the ECQ *said* about the numbers is irrelevant. Insofar as postal votes are concerned, the issue for the Court is whether there was anything about the way in which postal ballots were cast at the 2020 SCRC election which would give rise to a concern about the election outcome.

[58] Mr Huey was asked what postal voters were told about the deadline for the return of their postal votes. Mr Huey explained that that sort of information was on the declaration envelope itself (which contained the ballot papers). Voters were told

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6 All percentages have been rounded up or down to the nearest whole percentage.

that they had to vote by 6 pm on polling day and that the fact that they had voted by that time had to be witnessed by another person.

[59] Mr Innes suggested that many people missed out on postal ballots because some were not *printed* until 25 March (and they had to be completed by 6 pm, 28 March 2020). Mr Huey explained that it was only at 7 pm on 16 March 2020 that the ECQ knew the demand for postal votes. The ECQ realised they did not have enough stock and ordered 140,000 more to make up the shortfall, which were "lodged" with Australia Post *progressively* between 17 March 2020 and 25 March 2020. The number of postal ballots lodged with Australia Post to be sent to electors on 25 March 2020 was "in the hundreds, not the thousands".

[60] Although Mr Innes challenged Mr Huey on his evidence that the last of the postal ballots were sent on 25 March 2020, he based his challenge on "seeing constant references from people complaining that they did not receive their postal votes until over a week after" – that hearsay is of little weight. Nevertheless, I am prepared to accept, on the basis of common sense, that not every person who applied for a postal ballot in the SCRC election received it on time.

SCRC

[61] The postal voting statistics – for the **SCRC** – for 2012, 2016 and 2020 follow.[7] Mr Huey explained that in 2013, previous divisions 11 and 12 of the SCRC de-amalgamated from it. Thus, data from 2012 does not provide a useful comparator for the 2020 results:

	2012	2016	2020
The total number of postal ballots **issued**, including to those not required to apply for a postal ballot because they lived in a council or division which voted by full postal ballot or because they fell into the "special postal voter" category	12,573	14,720	23,896
Postal ballots received and scrutinised by ECQ	10,218 (81%)	12,696 (86%)	22,000 (92%)
Postal ballots not returned to ECQ either at all, or in time	2,355 (19%)	2,024 (14%)	1,696 (7%)
Postal ballots accepted by ECQ for counting	9,503 (93%)	11,500 (90%)	20,949 (88%)
Postal ballots rejected, and not counted, by ECQ	715	1,196	1,251

[7] With rounded percentages, as before.

[62] These postal voting statistics indicate that follow-through on postal ballots (by way of their return) for the SCRC is generally good – with the best follow-through in 2020.

[63] Indeed, the follow-through for the SCRC in 2020 of 92 per cent was better than the State wide follow-through of only 83 per cent.

[64] Mr Huey explained that the postal ballots rejected were rejected on the strength of the declaration envelope and usually because the declaration had not been signed by the elector or witnessed as required.

[65] I note that almost the same proportion of postal ballots was accepted for counting (of those returned on time) in 2020 as in 2016 – inconsistent with the suggestion that *large numbers* did not receive their postal ballots in time to vote before 6 pm on polling day.

Telephone voting

[66] Subdivision 2A, Division 5, Part 4 LGEA provides for electronically assisted voting – that is, voting by telephone, with the assistance of a telephone operator. This service was first made available in 2016.

[67] In the ECQ's experience, some persons who register to vote by telephone in fact vote in person.

[68] In 2016, across Queensland, 533 electors registered for the service and 480 used it – a follow-through of 90 per cent.

[69] In the SCRC election in 2016, 36 electors registered for telephone voting and 32 used it – a follow-through of 89 per cent.

[70] Across Queensland, in March 2020 – 46,954 electors registered for telephone voting and 37,942 voted using that method – a follow-through of about 81 per cent.

[71] In the SCRC election in 2020, 4,349 electors registered for the service and 3762 voted using that method – a follow through of about 87 per cent.

[72] As these statistics show, the demand for telephone voting in the 2020 election was considerably higher than previously. The ECQ engaged extra staff to facilitate the service (including by increasing its hours of operation), from a planned 30 persons to over 160, at which point the ECQ reached the limits of its dedicated telephone voting service facility. It also expanded its operating hours to allow more time during the day for voters to use the service.

Declared institutions

[73] Under ss 46(3) and 49 LGEA, all or part of an institution or place may be declared a mobile polling booth which may be used for voting. Typically, aged care facilities and hospitals are so declared to facilitate voting within those institutions.

[74] In the lead up to the 2020 SCRC election, 46 institutions were declared to be "mobile polling booths". These institutions consisted of 4,536 beds. I have

proceeded on the basis that every bed was occupied and there were 4,536 declared institution residents.

[75] On 13 March 2020, by media release (see below), the ECQ informed the public that it would be "offering telephone voting to all electors in 'declared institutions' such as aged care facilities, rather than conducting in-person mobile polling".

[76] Mr Huey suggested that this media release also stated that *visitor* voting would not be made available. I do not read the media release in that way. However it plainly "cancelled" in-person mobile voting at declared institutions.

[77] Mr Huey acknowledged that, once it was decided that in-person mobile voting at declared institutions would be cancelled, electors in those institutions had "only a short window of a day or two" to apply for a postal vote (online or via the ECQ's call centre).

[78] In 2016, 1,177 electors in declared institutions voted. (There was no evidence before me about whether those electors were in the same declared institutions as those declared for 2020 or what that number represented as a proportion of beds.) Assuming every bed was occupied by an elector, and that there were the same number of beds in 2016 as there were in 2020, 1,177 voters represents approximately 26 per cent of electors in declared institutions.

[79] Mr Huey conducted a study of a sample of three of the 46 declared institutions for the 2020 SCRC election. He found that only 10 per cent of those enrolled in those three declared institutions (about 200 electors were enrolled) succeeded in voting using the alternative postal and telephone options. Mr Huey observed that not all persons resident in declared institutions do vote, essentially because of their age.

Electoral visitor voting

[80] In the lead up to the 2020 SCRC election, four persons successfully applied to be visitor electors under s 77 LGEA. Normally, issuing officers visit visitor electors prior to polling day to assist them to vote. However, visitor elector voting was "cancelled" on 15 March 2020 and the visitor elector applications were converted (automatically) into applications for a postal vote.

Pre-poll results

[81] A total of **99,984** votes were cast at early voting centres for the SCRC election – that is about 58 per cent of the votes cast.

"Did not vote" numbers

[82] Whilst almost all persons who are marked off the roll as receiving a ballot in fact cast a vote – some do not. That means that, strictly, one cannot accurately calculate the number of persons who did not vote by subtracting the number of votes counted from the number of persons on the electoral roll.

[83] Nevertheless, based on the votes cast, the participation rate in 2020 for the SCRC election was about 75 per cent. It was 82.1 per cent in 2016 and 80.3 per cent in 2012.

[84] State wide, the participation rate was 77 per cent in 2020. It was 83 per cent in 2016.

Chronology

[85] A relevant chronology, drawn from the evidence or publicly available information, follows.

Date	**Event**
22 February	A notice of election was published on the ECQ website calling for nominations from candidates for the 2020 local government elections by the nomination day, 12 pm (noon) on Tuesday, 3 March 2020.
28 February	The electoral roll closed.
22 February – 3 March	Candidate nominations.
4 March	Ballot paper draw.
11 March	World Health Organisation declares Covid-19 a pandemic.
13 March	Australian Government announces restrictions on gatherings of more than 500 people.
13 March	Media Release, ECQ, "Local government elections proceeding", which included the following – "*Having considered the public statements from First Ministers at COAG [Council of Australian Governments], and taking advice from Queensland's health authorities and experts, the Queensland Electoral Commissioner, Mr Pat Vidgen, has determined that it is in the public interest to proceed with the local government elections and the State by-elections in Bundamba and Currumbin on 28 March 2020.*" The Media Release reminded voters of postal and early voting options. It also stated that ECQ would take relevant measures including *"[o]ffering telephone voting to all electors in 'declared institutions' such as aged care facilities rather than conducting in-person mobile polling."*
15 March	Email from Peter McGraw, Manager Election Operations, Event Planning to All Returning Officers, All Contact Officer Staff, with Julie Cavanagh and Bill Huey in cc. Subject 'Urgent message': *Afternoon everyone*

	Please note that all visits to declared institutions (DI) are now cancelled. *Please contact your DIs and advise them that the alternative is postal voting of [sic] telephone voting. Electoral Visitor voting is cancelled. ECQ will change any EV applications to a postal vote.* *Thanks* *Peter McGraw* *ECQ*
15 March	Mr Jamieson posted on Facebook that "voting commences tomorrow" and provided details about the eight early polling booths. He also displayed an advertisement encouraging voters to vote "1" for him and explaining that it was not necessary to number "the other boxes".
16 March	Mr Vidgen was interviewed by Craig Zonca and Loretta Ryan on ABC radio at 6.53 am during which the following exchange occurred: *Q: The Lord Mayor Adrian Schrinner and others as well have suggested extending the cut-off to apply for a postal ballot. Do you have the power to do that Pat?* *A: Unfortunately not Craig. The law specifies that the deadline is 12 days before polling day and that is 7 pm tonight. So, there's nothing we can do in that space given the state of the law.* *Q: So it would have to effectively take a legislative change to do that?* *A: Yeah, look that's right and that's one thing. And if that could be done, there are issues around supply as well. We plan our elections with a certain delivery focus, about 10 per cent postal voting; 30 per cent pre-poll and about 60 per cent on polling day*.
16 March	Mr Jamieson and other mayors, took part in a teleconference at which similar information was conveyed (see paragraph [44]*ff*).
16 March	Early voting commenced (s 50(4) LGEA).
16 March	Mr Jamieson posted to Facebook a photo of campaign workers canvassing for votes at the Caloundra Community Centre.
16 March	7 pm – Applications for postal votes closed (s 79(2) LGEA).
19 March	Assent was given to the *Public Health and Other Legislation (Public Health Emergency) Amendment Act* 2020 (Qld), which inserted a new Part 9A into the LGEA.

	Section 200A set out the purpose of that part, namely "to facilitate the holding of the quadrennial election for 2020 in a timely way that minimises serious risks to the health and safety of persons caused by the public health emergency involving COVID-19".
19 March	ECQ, 'Direction about Distribution & Display of How-to-Vote Cards and Other Election Material at Polling Booths', Version 1.0, signed by Pat Vidgen. This was a direction under s 200I LGEA, and s 392I of the *Electoral Act* 1992 (Qld). It included the following direction to "all persons distributing a how-to-vote card and/or other election material". Among other things, such persons were directed not to shake hands with electors and to maintain social distancing. It also stated – "*Where available, candidates, political parties and other electoral participants should make use of alternate how-to-vote card and election material distribution methods, including static display, use of a common collection point, or electronic distribution to electors away from a polling booth.*" and "*The Electoral Commissioner also has the power to issue further directions, in the event ECQ staff observe non-compliance. Further directions may include outright prohibition of campaign workers, as well as further restriction or banning of how-to-vote card and election material distribution.* *Candidates, political parties and other electoral participants who have already self-regulated in excess of what is directed above are encouraged to continue with those arrangements.*"
19 March	Direction from the Chief Health Officer, Dr Jeannette Young, in accordance with emergency powers arising from the declared public health emergency. This direction prohibited non-essential indoor gatherings of 100 persons or more.
19 March	The *Public Health and Other Legislation (Public Health Emergency) Amendment Act* 2020 came into effect. *Inter alia*, it amended the LGEA to confer upon the Minister (not the ECQ) the power to conduct the local government elections by postal ballot (s 200E). That power was not exercised.
20 March	ECQ, 'Direction about Display of How-to-Vote cards and Election Material (all polling booths in Queensland), Version 2.0, signed by Pat

	Vidgen. This direction, as foreshadowed, prohibited all persons from canvassing for votes or distributing how-to-vote cards or election material at a polling booth. It was a direction given as a result of the decision made by the National Cabinet on 20 March 2020. It also stated that "if candidates wish[ed] for their how-to-vote cards and/or election material to be available to electors, the material [had to] be provided to the booth supervisor". The booth supervisor would display the material at the polling booth "in a way deemed appropriate to the booth supervisor". A minimum requirement was that the material was to be displayed in ballot paper order as far as practicable.
22 March	Direction from Chief Health Officer, Dr Jeanette Young, in accordance with emergency powers arising from the declared public health emergency. This direction applied to *inter alia* the ECQ and its staff, candidates and voters. Relevantly, it included a direction that the ECQ must take all reasonable steps to ensure that the conduct of the local government election was undertaken in accordance with nominated requirements, including that voting material was to be displayed "statically" at all polling booths and could not be distributed or handed out by candidates. It also included a direction that arrangements for telephone voting were to be made for eligible voters who could not attend a polling booth, including people in aged care facilities and those who had medical advice to remain isolated.
25 March	ECQ, 'Direction about Display of How-to-Vote Cards and Election Material (all polling booths in Queensland), Version 3.0, signed by Pat Vidgen. This direction imposed further restrictions on the display of how-to-vote cards and election material "due to the evolving circumstances". It directed that – "*Any how-to-vote cards or election material to be displayed at a polling booth must be no larger than A4 size, and can be double-sided (in which case, each page will be displayed beside one another).*"
25 March	The last postal ballots were posted to postal vote applicants.
26 March	ECQ, 'Direction about Candidates and Scrutineers at Particular Places', Version 1.0, signed by Pat Vidgen.

	This direction was given under s 7 *Local Government Electoral (2020 Quadrennial Election) Regulation* 2020 and s 8 *Electoral (By-elections Before Next General Election) Regulation* 2020. It was a direction guided by the public health direction made on 22 March 2020 – *Local Government election and State by-elections – Direction from Chief Health Officer in accordance with emergency powers arising from the declared public health emergency*. This direction controlled the conduct and movement of scrutineers.
27 March	ECQ, 'Direction about Candidates and Scrutineers at Particular Places', Version 1.1, signed by Pat Vidgen. This direction made no changes to direction 1.
27 March	'Local Government election and State by-elections Direction (No 2)'. This direction applied to *inter alia* the ECQ and its staff, candidates and voters. It was in the same terms as the direction given on 22 March 2020 in terms of the directions to the ECQ, staff and voters. It also introduced a part governing the use of buildings or premises for the election.
28 March	Election Day
28 March	ECQ, 'Direction about Candidates and Scrutineers at Particular Places', Version 1.2, signed by Pat Vidgen – guided by the public health direction given on 27 March 2020. This direction made no changes to directions 1/1.1.
29 March	ECQ, 'Direction about Candidates and Scrutineers at Particular Places', Version 1.3, signed by Pat Vidgen. This direction made no changes to directions 1/1.1/1.2.
7 April	Last day for receiving postal votes (ss 86(4) and 87(4) LGEA).
17 April	Mark Bryan Jamieson declared duly elected mayor of the Sunshine Coast Regional Council by a margin of 25,551 votes.

Mr Innes' late material

[86] Notwithstanding the timetable set for the provision of material by the parties to each other (a timetable which accommodated Mr Innes' work commitments and the fact that he was self-represented), Mr Innes filed material late. He also included privileged material among the material he filed. Mr Innes' late material has been numbered by the registry as documents 22, 23, 24 and 26.

[87] The first and second respondents objected to my receiving the late material. The intervener took a neutral position on it, observing though the importance of adherence to a court's directions.

[88] Mr Innes' explanation for the lateness of his material was essentially that he did the best he could, as a self-represented person, to get the material filed and served on time.

[89] The ECQ filed affidavit material in response to some of the content of the late-filed material (court document 25).

[90] I directed Mr Innes to remove the privileged material from the filed material and he did so.

[91] I informed the parties that I would make my decision about whether to receive the late material for the purposes of Mr Innes' application in the course of my consideration of the substantive application. I have borne in mind, in deciding whether or not to admit the late material, the need to ensure a fair hearing for Mr Innes and the respondents, and to ensure that only real issues are pursued.

[92] In accordance with certain pre-hearing directions, the applicant was to file material in support of his application and his outline of argument by 19 June 2020; and his reply affidavits and submissions by 17 July 2020.

[93] Court document 22 is an affidavit of Mr Innes, filed on 4 August 2020 and attaching: a written argument sent by email to the parties on 30 July 2020; what appear to be print outs from his Facebook account; and correspondence to and from the ECQ.

[94] The material in court document 22 makes serious accusations about Mr Jamieson and the ECQ. I will return to it in a moment.

[95] Court document 23 is an affidavit of Mr Innes, filed on 4 August 2020, attaching "information … from relevant ECQ records, databases and online publications". There are 304 pages of exhibits to that affidavit.

[96] Of note is that the first of the exhibits is a copy of a joint media release from the ECQ, the Office of the Independent Assessor, the Crime and Corruption Commission and the Queensland Integrity Commissioner which explains that the entities have "adopted a group mantra of making 2020 fair for all". The headline of the media release is "Making 2020 local government elections #fairforall". This "mantra" places into context the arguments made by Mr Innes about things not being in fact "#fairforall" for him as "promised" but does not take his arguments any further. Several of the other exhibits to this affidavit (including relevant directions) are already in evidence.

[97] Bearing in mind the jurisdiction of the Court of Disputed Returns; the need to expeditiously deal with this matter; the importance of adherence to the directions of the Court; and having regard to the nature of the material attached to the affidavit, which does not, in my view, raise any real issue, I am not prepared to admit document 23 into evidence in this matter.

[98] Court document 24 is an affidavit of Mr Innes filed 4 August 2020. It is said to attach information derived from "online Queensland State Government Records". The "Schedule of Exhibits" to the affidavit reveals that many of the exhibits have no relevance to the issues for me – for example, directions concerning border restrictions, or information about contact tracing or the coronavirus generally. Again, bearing in mind the Court's jurisdiction; the need to deal with this matter expeditiously; the importance of adherence to the directions of the court; and, the nature of the material attached to the affidavit, which does not, in my view, raise any real issue, I am not prepared to admit document 24 into evidence in this matter.

[99] Court document 26 is an affidavit of Mr Innes filed on 17 August 2020 – that is, four days before the hearing. It suggests "bias" because "everyone bar" Mr Innes is from Brisbane and "probably has no knowledge of the Sunshine Coast, the history of the candidates or of the Election". It attaches a selection of Mr Innes' Facebook pages; transcripts of press conferences; his emails to the ECQ; correspondence to him from ECQ about his various complaints; newspaper articles; screenshots of the ECQ tally page and more. For the same reasons as above, I am not prepared to admit document 26 into evidence in this matter.

[100] I will now return to document 22. It contains an accusation that Mr Jamieson had not lawfully or properly nominated for the election, based on, as I understand it, his nomination form as it appeared on the ECQ website. The ECQ has met that argument by way of document 25. It explains, via Mr Huey, that a paper copy of Mr Jamieson's nomination form was received by the ECQ in response to its notice of election and call for nominations, and attaches a copy. It explains that the whole of the paper nomination form, including its attachments, was uploaded to the ECQ's Election Management System to a non-publicly accessible location. There is no suggestion that the paper nomination form was incomplete or invalidly completed.

[101] The information in the paper nomination form was then manually uploaded for publication on the ECQ website on 2 March 2020.

[102] As I understood Mr Huey, the manual upload was intended to capture the whole of the nomination form. However, in the case of Mr Jamieson's form, certain sections of the electronic nomination form did not "populate" as expected. This meant that certain information, which Mr Jamieson was required to provide and which he had in fact provided in his handwritten form, did not appear on the ECQ's website.

[103] On 20 April 2020, the electronic nomination form was amended to include the omitted information. Mr Innes suggests that there was some sort of impropriety attached to this amendment.

[104] Mr Innes further alleges that there has been some sort of tampering with the electronic nomination form by ECQ, because it did not list "Mayor" as Mr Jamieson's occupation – instead, it stated "Manager".

[105] In oral evidence, Mr Huey explained that the reason why Mr Jamieson's occupation appeared electronically as "Manager" and not "Mayor" as written in his form was that "[t]he election management system interrogates the roll when it checks a candidate to see that they are correctly enrolled and entitled to stand as a candidate, in this case, in the Sunshine Coast. It pulls forward some of the data from the electoral roll and pre-populates – automatically populates … some of the data fields

within the election management system. I believe that's what occurred in this case".

[106] Because the ECQ engaged with the accusation made in document 22, and because of the nature of the accusation, I will admit documents 22 and 25 into evidence at this hearing.

Mr Innes' filed-on-time material

[107] In Mr Innes' filed-on-time material, he explains that he relied upon the "common law" of elections. Referring to *Bridge v Bowen* (1916) 21 CLR 582 and *Cameron v Fysh* (1904) 1 CLR 314, he submits that his dispute about the election of Mr Jamieson was not "merely" about "statutory 'illegal practices'" but rather relied upon the principle that an election ought to be declared void if its result did not represent the "free and deliberate choice of the competent electors". He also argues that the election result was vitiated by "undue influence" (by, I assume, the CHO).

[108] Mr Innes argues that every vote for Mr Jamieson was "tainted" and that every vote that Mr Innes "forwent" should be "accounted" to him. He suggests that, had the election been conducted properly, Chris Thompson would have won. Although, he also suggests that every person who did not vote (that is 25 per cent of the SCRC electorate) ought to be awarded to him, in which case he was likely to have won on preferences.

[109] Mr Innes' written submissions make many accusations which are irrelevant to the jurisdiction of the Court of Disputed Returns. I have reduced his complaints to the following list of matters which include matters which arguably touch upon the issues for this Court.

[110] I have also indicated in this list the basis upon which these complaints have been made, ignoring for the moment the fact that the Court has no jurisdiction over many of these complaints.

The impact of COVID-19

- 57,519 out of 230,440 voters were "prohibited" from voting or "too fearful" to vote (assertion without evidence);
- Because of COVID-19, Mr Innes altered his campaign strategy and advised his "supporters & electors alike" that they could not be compulsorily compelled to vote in person (evidence from "the bar table" upon which I am prepared to act);
- A "significant volume" of his supporters agreed with him and accordingly, Mr Innes' vote was "greatly diminished" (assertion without evidence);
- The Human Rights Commissioner was not consulted about the "decision" to "allow" the election to proceed (assertion without evidence);
- Mr Innes was "entitled to claim" the support of the 57,519 voters who did not vote because of the health risk – in which case, Mr Innes would have come second and likely received preferences (assertion without evidence).

The Chief Health Officer and decisions about the election

- It was unnecessary to hold the local government election at the end of March 2020 (commentary/opinion);

- The election was not "essential" (commentary/opinion);

- The CHO "sought to inject her sphere of influence" over voters and gave advice about "decision-making" (commentary/opinion);

- The CHO observed that people knew who they were going to vote for and she advised voters to go into a voting booth, with their own pen, and to make their decision and leave (evidence);

- The CHO's advice was consistent with a full page advertisement, authorised by the Queensland Government, which appeared in the Sunshine Coast Daily on polling day (28 March 2020) – which included the statement "Make your choice before you go" (no evidence);

- The CHO's advice was, effectively, "if you are sick – just miss out" (commentary/opinion);

- Voters were therefore influenced to make their decision "NOT on campaign grounds – but at the 'say so' of the CHO, who was ostensibly in charge at all times" (no evidence; commentary/opinion);

- By telling voters not to delay, the CHO was "openly saying don't wait until you've heard all that the candidates have to offer" – which disadvantaged Mr Innes because he was anticipating a percentage of voters waiting until polling day to make their choice (commentary/opinion);

- The CHO should have told people to number their preferences – not simply to walk into the booth, vote and walk out (commentary/opinion);

The ECQ

- The election was "a debacle" (commentary/opinion);

- There was a significant decrease in the participation rate (overstatement – relevant evidence produced by the ECQ);

- It was not "#fairforall" as it should have been – at best it was "fair enough" (commentary/opinion);

- "[V]ery many missed out" on telephone voting (assertion without evidence from Mr Innes; relevant evidence produced by the ECQ);

- The ECQ did not do all that was physically possible to facilitate telephone voting (commentary/opinion by Mr Innes; relevant evidence produced by the ECQ);

- Voters valued the opportunity to vote by post, yet they were "sold short on supply and access" (commentary/opinion by Mr Innes; relevant evidence produced by the ECQ);

- Postal votes were "all over the shop" (commentary/opinion by Mr Innes; relevant evidence produced by the ECQ) –

    - there was an unprecedented level of demand for postal votes;

    - not everyone who wished to vote by mail received a postal vote form in time;

    - voters who received their postal vote forms after polling day were not told whether it was acceptable to backdate them;

    - 10,000 + voters may have applied for, and not received, postal votes and thus are "in play" in the SCRC election result.

- The ECQ was "happy to just leave out" a whole sector of society – namely, the elderly and the infirm (commentary/opinion by Mr Innes; relevant evidence produced by the ECQ) –

    - visitor voting was cancelled on "no notice";

    - the declaration that aged care homes were mobile polling booths was revoked on no notice – also, it was unlawful;

    - it was unsatisfactory to rely upon "aged care management agents" to provide advice about alternatives;

    - telephone lines were "jammed";

    - those in aged care facilities and hospitals did not have ready access to computers to apply for a postal vote.

- The ECQ had the power to change, and should have changed, polling day (under s 38 LGEA) (irrelevant);

- An extraordinary number of "Compliance and Directions" publications (including public health directives) were issued as a result of the "flawed decision" to hold the local government election – creating an "enormous unforeseen impost [upon a candidate like Mr Innes] of time and compliance". This had a "devastating impact" on his "self-managed" election campaign (legal argument/commentary/opinion/evidence "from the bar table" about which I am cautious);

- The ECQ did not make "proper efforts" to control candidates and workers; it was not "proper" to ask candidates to be careful voluntarily (no evidence; commentary/opinion);

- The risk of being fined for failing to vote was "an awful stick" used to frighten people (commentary/opinion);

- The ECQ ignored Mr Innes' complaints about the way in which it was conducting the election. He complained about –
    - tampering with a postal vote;
    - an aged care resident who was unable to get through to "vote online";
    - prohibiting residents at Sundale Gardens (an aged care facility) from voting.
- It was not true that "those residing in declared institutions were advised that postal or telephone voting were alternative options" – the *returning officers* were to contact the *declared institutions* who were to advise residents of the cancellation (commentary/opinion on evidence – Mr Innes is drawing a distinction between contacting "those residing in declared institutions" and contacting the "institution" itself, via contact with its management);
- Planned visits were cancelled (unlawfully) before the enactment of s 200G LGEA. The visits were cancelled on 15 March 2020 – s 200G LGEA came into force on 19 March 2020 (legal argument);
- The ECQ should never have permitted Mr Jamieson to hand out how-to-vote cards or election material pre-poll because Mr Innes had publicly indicated that he would be the "no harassment candidate" who would not use how-to-vote cards or corflutes. It was "scandalously negligent" to allow the use of how-to-vote cards or corflutes (legal argument/commentary/opinion).

Mr Jamieson

- Mr Jamieson sought to "leverage" the "health crisis" (commentary/opinion);
- There was a breach of s 327(1) *Commonwealth Electoral Act* 1918 (Cth) because Mr Jamieson offered inducements to "7200 SCRC businesses with tens of thousands of voting employees" (This seems to be a complaint that the SCRC indicated, before the election, that it would accelerate certain payments which it owed to creditors. I could find no evidence of these alleged inducements.);
- Mr Jamieson was unfairly advantaged by the fact that he was able to make announcements as the chair of the Local Disaster Management Group and was responsible for public statements during the election – allowing him to "leverage the covids [*sic*] crisis" (commentary/opinion/legal argument).
- An "unprecedented" number of people voted pre-poll (57.82 per cent) which allowed for an "unfair advantage" to Mr Jamieson in his use of "How To Vote" cards and other campaign material (commentary/opinion);

- Mr Jamieson exceeded sign limits (no evidence/Mr Innes informed the Court that this – like many of the matters he raised – was the subject of several of his Facebook posts);[8]

- He erected "a whole fresh new set of half sized corflutes" on election day – which were "specifically themed to co-ordinate with the [Sunshine Coast Daily] article of the same day reporting that it was Sunshine Coast Business Council (a publicly perceived ally of Mark Jamieson) advice NOT to change [government]" (no evidence);

- Mr Jamieson used an unapproved how-to-vote card – even though the ECQ found that it was not a how-to-vote card. Mr Jamieson was misleading and deceiving, and in breach of consumer law in describing it as a how-to-vote card (legal argument);

- During the campaign, Mr Jamieson "made over" the mayoral Facebook page as his "True Direction Campaign" page – contrary to the recommendation of the ECQ that councillors separate their official councillor page and their campaign page – although they were not legislatively required to do so (no evidence);

- In utilising his mayoral Facebook page during the campaign, Mr Jamieson was able to promote himself to, and access, about 3000 Facebook friends – a group which Mr Innes and other candidates could not access (legal argument);

- The "payola" announcement was in breach of ss 90B and 90D *Local Government Act* 2009 (Qld) ("LGA") ("**Prohibition on major policy decision in caretaker period**") and in breach of the Code of Conduct. Mr Innes asserts that there were announcements made at press conferences by Mr Jamieson about payments to businesses (legal argument);

- Mr Jamieson benefitted from information conveyed to him during a Local Disaster Management Group teleconference on 16 March 2020 (commentary/opinion/no evidence) –

    - He understood that there would be problems with postal votes, thereby placing a bonus on pre-poll votes;

    - He understood that there was a chance that the election polling day would be cancelled, thereby putting a further bonus on pre-poll votes; and

    - He understood that candidates campaigning to the final day (rather than, I assume, focusing on the time pre-poll) would be disadvantaged.

- On 16 March 2020, he had celebrity campaign workers not practising social distancing and handing out how-to-vote cards in breach of relevant guidelines and directives (legal argument);

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[8] Mr Innes complained that Mr Jamieson had not provided details of his invoices to "verify" that he did not exceed limits. This complaint reflects Mr Innes' failure to understand the onus of proof in this matter. As I have said, it is not for him to make allegations for Mr Jamieson to disprove. He bears the onus.

- Mr Jamieson filed a false register of interests with the ECQ – he was thus technically disqualified as a candidate. It was for the Court to decide whether he had committed a disqualifying offence – namely an offence under s 169 LGEA (legal argument);

- Being charged with, or convicted of, a disqualifying offence is "NOT the necessary prerequisite for disqualification from nomination IF the nomination form is not duly informed and executed" (legal argument);

- Mr Jamieson "circumvented" the legislation by failing to apply for a prohibited donor exemption. He and his wife funded his election campaign – "a candidate is only one SELF, not two" (legal argument).

[111] In oral submissions, Mr Innes told me that he suspected that a number of people voted at the election because they feared being fined – even though their health was at risk. He also submitted that people were motivated to vote because of the size of the fine.

[112] Mr Innes confirmed that at the heart of his complaint is the fact that his responsible approach to campaigning (as he sees it), bearing in mind the health crisis, worked to his disadvantage and for that reason, there has to be a new election. Although he had informed the ECQ of his view of the risks, his views were ignored. He expected that things would have been "fair" for him. But instead, the way in which the ECQ ran the election was to the benefit of the candidate who was a party to the teleconference on 16 March 2020. Mr Innes complained that Mr Jamieson ought not to have been a part of that teleconference. In his view, there was no role for mayors at that meeting and most of them were running as incumbents.

[113] Mr Innes seemed to be suggesting that the ECQ *knew* that Mr Innes did not want the election to proceed (and that he had tailored his campaign accordingly) and that by proceeding, Mr Jamieson, who was "full steam ahead" campaigning, was advantaged. He acknowledged that the other mayoral candidates campaigned in the same way as Mr Jamieson.

Discussion

The impact of COVID-19

[114] Mr Innes' complaints about the way in which the ECQ responded to issues he raised with it are not something for the Court of Disputed Returns to resolve. Its jurisdiction is limited, as discussed above.

[115] The Court of Disputed Returns has no jurisdiction to decide whether or not the 2020 local government election ought to have been held *when* it was held, or whether or not the 2020 local government election ought to have been held *how* it was held. Rather, the Court of Disputed Returns is to consider the validity of the outcome of the election *which was in fact held*, in which Mr Jamieson was elected Mayor.

[116] Also, Mr Innes' complaints about the volume of directions issued and their impost on his time as a "self-managed" candidate carry no weight in my view. Every candidate was subject to the same directions and "impost". That one candidate might have had more resources than another to deal with those directions does not

render the election relevantly unfair. Nor, in my view, was the volume of directions so large, or their content so complex, as to have had such an effect upon an election campaign as to raise concerns about the SCRC election outcome. Nor was the ECQ obliged to contact Mr Innes directly about its requirements for the election (as he suggested). Its media statements were sufficient and candidates were made aware that requirements might change over time.

[117] The suggestion that the ECQ did not make "proper efforts" to "control" candidates et cetera is unfounded in evidence.

[118] There is nothing in the complaint that returning officers did not *directly* contact *residents* of declared institutions to let them know of alternative voting options but rather contacted the institutions themselves. In any event, the way in which the residents were informed about the need to vote other than by way of in-person mobile voting at their declared institution is irrelevant to the issue for the Court. The Court is interested in matters such as the proportion of residents in declared institutions who in fact voted.

[119] Mr Innes' suggestion that 57,519 out of 230,440 voters (about 25 per cent) were "prohibited" from voting or "too fearful" to vote is not substantiated evidentially.

[120] Also, in terms of quantum, it is based on the false assumption that voter turnout rates are "normally" 100 per cent. Voter turnout for the SCRC elections is usually in the low 80 per cents.

[121] The accusation that voters were "prohibited" from voting is simply groundless if Mr Innes was intending to convey that voters who wished to vote had been actively prevented from doing so. However, I am prepared to accept that some voters may not have voted because of health concerns.

[122] I also accept that some persons in declared institutions who wished to vote were unable to do so because of difficulties around postal and telephone voting.

[123] On the strength of Mr Huey's sample, I am prepared to accept that only around 10 per cent of residents of declared institutions voted in 2020. However it is wrong to reason therefrom that 90 per cent of those residents were capable of voting, and wished to vote, but were not able to. Such reasoning ignores the low voting rate of 26 per cent at declared institutions in 2016 (on the assumptions discussed earlier).

[124] Mr Innes' suggestion that he is "entitled to claim" the support of the 57,519 voters who did not vote is completely unsustainable. It –

- ignores the fact that voter turnout is usually around the low 80 per cent mark – not at 100 per cent;
- wrongly assumes that every voter votes formally;
- ignores the fact that not every voter is capable of voting; and
- assumes, completely unreasonably, that all those who did not vote, but were capable of doing so, would have voted for Mr Innes. The reasonable assumption is that *not* all of those capable voters who did not vote would have

voted for Mr Innes. Indeed, they were likely to vote in the proportions reflected in the voting patterns of the 75 per cent of voters who did vote.

[125] Further, when it is remembered that voter turnout is around the low 80 per cent mark, Mr Innes' suggestion that because of the health situation, his vote was "greatly diminished" significantly overstates matters (even apart from the unreasonable assumption that all those who did not vote would have voted for him; and even apart from the unreasonable assumption that all of those who did not vote were motivated by health concerns and, in that sense, aligned with him). The turnout rate in 2020 was only seven or so per cent less than it was in 2016 and 5.3 per cent or so less than it was in 2012: it was not "greatly diminished". And further, it is reasonable to assume that every candidate's vote, in terms of raw numbers, was affected by the reduced turnout – not just Mr Innes'.

[126] Although Mr Innes complains, in effect, that his cautious response to the pandemic disadvantaged only him, and that that was unfair, it was his *choice* to respond as he did. Every candidate was confronted with the same COVID-19 related challenges and the same instructions from the ECQ and the CHO. Beyond that which they were obliged to do under ECQ or health directives, every candidate had a choice about how they would respond to the pandemic. That Mr Innes chose to respond in a way which was different from the responses of the other candidates, and which he perceived to work to his disadvantage, does not reflect adversely on the way in which the ECQ conducted the election or the way in which the other candidates conducted their campaigns.

[127] Even if Mr Innes had been able to back up with evidence his accusations that one postal vote had been tampered with, one aged care resident was not able to vote by telephone, and that the residents of one aged care facility were prohibited from voting, the margin between Mr Innes and the winning candidate, and Mr Jamieson's winning margin overall, means that there is no basis for concluding that those matters would have had any bearing on the outcome of the election.

[128] Mr Innes seems to suggest that Mr Jamieson understood, more so than Mr Innes, that pre-polling was important because of the pandemic and the public's reluctance to vote on polling day (because of health concerns). But, *on the evidence*, relevant information about pre-polling and other matters was available to candidates at the same time. The ECQ's media release, dated 13 March 2020, reminded voters of their early voting options. It is reasonable to assume that Mr Vidgen's ABC radio appearance at 6.53 am on 16 March 2020 was *before* the teleconference involving Mr Jamieson – at which similar information was conveyed. There is nothing to suggest that Mr Jamieson was in possession of anything other than information which was made public to candidates and the rest of Queensland.

[129] Even if Mr Jamieson heard the information sooner (or was in a position to hear it sooner) than other candidates, there is no basis for concluding that he used the information improperly to his advantage.

[130] Common sense leads one to appreciate that it will often be the case that an incumbent of any seat, who is running for re-election, might have, or be perceived to have, an advantage of one kind or another over other candidates – be it name recognition, or a following as (in this case) mayor, or a larger public persona than

other candidates. But that does not make an election unfair in a relevant sense. That is simply the electoral landscape.

[131] Also, it is impossible to say whether the votes pre-poll favoured Mr Jamieson more so than on polling day. And even if they did, there is simply no *evidence* that that was because of anything untoward in Mr Jamieson's conduct. Mr Innes suggested that certain persons campaigning for Mr Jamieson did so in breach of social distancing requirements and the rules around campaign material, but that was simply not so. The photograph of those persons campaigning for Mr Jamieson was taken on 16 March 2020 – before any relevant direction was made.

[132] Mr Innes also suggested that Mr Jamieson exceeded sign limits or otherwise breached rules around campaigning but produced no evidence about those matters.

[133] Rumours are not evidence. Facebook exchanges between Mr Innes and others are not evidence. Nor are strongly held opinions.

Complaints about "interference" by the CHO

[134] Mr Innes' suggestion that the CHO interfered in the election is unfounded. Her advice to voters, to make their choice before they went to vote, was, respectfully, sensible and measured advice. On no *reasonable* view of the CHO's advice were voters told to vote for only one candidate and not to add preferences. Nor did the CHO tell electors who to vote for or how to vote. Mr Innes' other suggestions about the CHO are unreasonable or illogical. I note for completeness that the CHO's directions about the conduct of the election were authorised under s 362B *Public Health Act* 2005. By s 362B ("Power to give directions"), the CHO was empowered to give directions which she reasonably believed were "necessary … to assist in containing, or to respond to, the spread of COVID-19 within the community". The relevant directions were lawful.

Complaints about the ECQ

[135] I have already responded to some complaints about the ECQ under the headings above.

[136] As to the balance: viewed reasonably, the ECQ did all it was able to do to deal with the extra demand for telephone voting. It operated the telephone voting service facility at capacity and extended its hours of operation. State wide, and in the SCRC elections, about 80 per cent of those who applied to vote by telephone were able to. It is not reasonable to reason therefrom that 20 per cent of voters who wished to vote by telephone missed out. Historically, some who apply for telephone voting vote in person. And some of those who may have wished to vote by telephone might not have been eligible to do so.

[137] I have already commented on the high proportion of postal ballots returned for the SCRC electorate. The facts do not support Mr Innes' assertion that voters were "sold short on supply and access". The evidence is to the effect that the ECQ had more than enough postal ballot papers to meet demand.

[138] I have already discussed the voting by residents in declared institutions. Mr Innes also asserts that there was no power to "cancel" mobile polling booth voting at

declared institutions or visitor voting on 13 of 15 March 2020 because section 200G LGEA was not enacted until 19 March 2020.

[139] Section 200G states –

> **200G Electoral visitor voting**
>
> (1) This section applies if the electoral commission is satisfied it would pose a risk to the health and safety of an issuing officer to visit, under section 77 –
>
> (a) an elector who has applied to vote as a visitor elector to the returning officer under section 77; or
>
> (b) electors of a particular class; or
>
> (c) any electors.
>
> (2) Section 77 applies to the issuing officer subject to the direction.
>
> (3) The returning officer may direct the issuing officer not to visit the elector, or electors of the class, or any electors.
>
> (4) The issuing officer must make alternative arrangements to enable an elector affected by the direction to vote in the election, including, for example, by casting an electronically assisted vote or postal vote.

[140] The ECQ cancelled mobile polling booth voting before the enactment of section 200G. However, it submits that it had the power to lawfully cancel the mobile polling booth declarations by way of s 24AA of the *Acts Interpretation Act* 1954 (Qld). Section 24AA(a) provides that "[i]f an Act authorises or requires the making of … [a] decision … the power includes power to amend or repeal the … decision".

[141] In my view, s 24AA *Acts Interpretation Act* 1954 states its effect clearly. I consider that it is applicable here and empowered the ECQ to cancel mobile polling booth declarations.

[142] I am prepared to accept that not every declared institution resident, capable and desirous of voting, was able to vote in 2020, based on relevant 2016 statistics which revealed a 26 per cent voting rate compared to the 10 per cent voting rate in 2020. But I completely reject Mr Innes' suggestion that the ECQ was "happy" to "leave them out". Such a suggestion is unfair and groundless. I accept that the ECQ did all it could in difficult circumstances.

[143] Relevantly though, on the evidence, the number of voters in declared institutions who "missed out" on voting was not so great as to cause concern about the outcome of the election overall, bearing in mind Mr Jamieson's winning margin.

[144] Mr Innes also complains that the ECQ unlawfully cancelled visitor elector voting because it was cancelled before s 200G LGEA was passed.

[145] "An elector who is entitled to be a visitor elector may apply to the returning officer to vote as a visitor elector" under s 77(2) LGEA. Upon receipt of such an application (in approved form) before a specified day and time, the returning officer *must* direct the issuing officer to visit the elector to enable the elector to vote: s 77(4). Section 77(6) requires the returning officer to direct an issuing officer to visit an elector at a reasonable hour before 6 pm on polling day.

[146] Visitor elector voting is something which is initiated by the elector. It does not involve a decision by the ECQ, such as a decision to "declare" all or part of an institution as a mobile polling booth. Thus s 24AA *Acts Interpretation Act* 1954 cannot apply to the decision to cancel visitor elector voting.

[147] The ECQ acknowledges that announcements were made on 13 and 15 March that visitor elector voting was "cancelled", before s 200G was passed. I proceed therefore on the basis that the ECQ was not (yet) empowered by law to cancel visitor elector voting when it announced that it was cancelled.

[148] The ECQ submits that even if the decision to cancel this form of voting was an "error or omission" on the part of the ECQ, s 145(2)(a) LGEA applies. That section provides that the Court of Disputed Returns must not make an order under s 144(2), such as an order that a candidate is not to be taken as having been elected, or an order to the effect that a new election must be held "because of an absence or error of, or omission by, a member of the electoral commission's staff that appears *unlikely to have the effect that a candidate elected at an election would not have been elected*".

[149] There were only four persons who applied for electoral visitor voting. Any error or unlawfulness around the cancellation of voting via that method changed nothing about the election result.

Complaints about Mr Jamieson

[150] I have already responded to some of Mr Innes' complaints about Mr Jamieson above. I will deal below with those which *might* be considered of relevance to the issue for the Court of Disputed Returns.

Alleged breach of s 327(1) Commonwealth Electoral Act 1918 (Cth)

[151] Section 327(1) of the *Commonwealth Electoral Act* 1918 (Cth) is entitled "Interference with political liberty". It is concerned with elections under that federal law. It does not apply to local government elections.

Alleged breaches involving how-to-vote cards and campaign material

[152] Mr Innes' argument about how-to-vote cards is difficult to follow. He seems to be arguing that Mr Jamieson or his campaign workers were handing out how-to-vote cards which were not in fact how-to-vote cards and that this was dishonest.

[153] The document to which Mr Innes referred was in evidence. It may be described as a pamphlet, divided into two halves.

[154] In the top half of the document is a photo of Mr Jamieson, with text above it and to the left of it stating "Mark Jamieson for Mayor Vote 1" (with the "1" styled to look hand-written, and placed inside a square; ballot paper style). The bottom half of the document states "HOW TO VOTE: Just put a number **1** in the box as shown. It is not necessary to number the other boxes. If you make a mistake, don't worry, just ask for another ballot paper".

[155] Below that statement is a list of the four mayoral candidates, ballot paper style, with squares to the left of their names. Mr Jamieson's name appears in a font which is larger than the font used for the other names. Also, his name is in bold. A "1" is included in the square to the left of Mr Jamieson's name. The squares to the left of the names of the other candidates are empty.

[156] Mr Innes asserts that the ECQ had determined that this document was not a how-to-vote card. This was not established by anything in the evidence. It seems that the assertion is based on the fact that the document does not indicate who a voter should vote for after voting 1 for Mr Jamieson.[9]

[157] Mr Innes went on to suggest that Mr Jamieson's intention was "to openly imply that the material HAS ECQ approval AS a HTV [how-to-vote] card, when in fact it does NOT because ECQ say that an approval is not required because it is not a HTV card it is election material". Mr Innes alleges that this was "misleading and deceptive" and that the *Competition and Consumer Act* 2010 (Cth) applies.

[158] Mr Innes seems to be contending that Mr Jamieson deliberately campaigned with material which conveyed that it had been approved by the ECQ and that that misled voters. I reject those suggestions.

[159] First, I do not consider that the intention imputed to Mr Jamieson may be reasonably imputed. Secondly, I doubt that any voter would have given a second thought to whether the ECQ approved the document or not.

[160] Also, the *Competition and Consumer Act* 2010 does not apply. Section 182(1) LGEA may be relevant. It states that "[d]uring an election period for an election, a person must not print, publish, distribute or broadcast anything that is intended or likely to mislead an elector about the ways of voting at the election". Having considered that section, I find nothing misleading about the document. It correctly explained, in lay terms, that the method of election was optional preferential.

[161] Mr Jamieson committed no breach involving how-to-vote cards or his campaign material.

Alleged breach involving Facebook page

[162] This complaint is difficult to understand. It involves an allegation that Mr Jamieson "made over" his Facebook page to his unfair advantage.

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[9] It seems to me that the pamphlet does fit the definition of a how-to-vote card in Schedule 2 of the LGEA. However, I do not need to make a finding about that for the purposes of considering Mr Innes' argument.

[163] On the evidence presented, I was unable to get a sense of any advantage Mr Jamieson was said to have gained by "making over" his Facebook page. And even if Mr Jamieson was at an advantage in the electoral campaign because he was the sitting mayor with a Facebook following that was simply something Mr Innes and the other candidates had to deal with.

Alleged breach of ss 90B and 90D LGA

[164] As I understood Mr Innes' argument, it was that the "payola" announcement was in breach of ss 90B and 90D of the LGA. Notwithstanding the absence of evidence about the announcement, I will proceed on the assumption that it was made.

[165] Section 90B LGA prohibits a local government making "major policy decisions" during a caretaker period without ministerial approval. "Caretaker period" is defined in s 90A as the period which "starts on the day when public notice of the holding of the election is given … and ends at the conclusion of the election". By s 90C, a major policy decision made during caretaker period without approval is invalid.

[166] Section 90D prohibits a local government from distributing or publishing election material during a caretaker period. "Election material" is defined in s 90D(2) as anything able to, or intended to, "influence an elector about voting … or affect the result of an election". Also s 90D "does not apply to making a how-to-vote card available" under s 179(6) LGEA.

[167] A "local government" is defined as "an elected body that is responsible for the good rule and local government of a part of Queensland": section 8(1) LGA.

[168] Sections 90A – 90D LGA were inserted by s 272 LGEA when it was first passed. The explanatory notes to those sections state –

> Caretaker arrangements ensure transparency and accountability during this period and diminish the potential for any perception of councillors' abuse of decision-making powers.
>
> The arrangements prohibit the council making a major policy decision during the caretaker period, except in exceptional circumstances. If a major policy decision is made, it is not valid unless approved by the Minister as required under [Part 5, Chapter 3 of the LGA] … [T]he council must not disseminate election material during a caretaker period.

[169] "Major policy decision" is defined in Schedule 4 of the LGA as follows –

> ***major policy decision***, for a local government, means a decision –
>
> (a) about the appointment of a chief executive officer of the local government; or
>
> (b) about the remuneration of the chief executive officer of the local government; or
>
> (c) to terminate the employment of the chief executive officer of the local government; or

(d) to enter into a contract the total value of which is more than the greater of the following –

(i) $200,000;

(ii) 1% of the local government's net rate and utility charges …

[170] Whilst the phrase "major policy decision" does not appear in bold italics where it is used in s 90A (in keeping with Parliamentary Counsel's drafting practices), the phrase is defined as per schedule 4.[10]

[171] It seems to me that the "payola" announcement was not a major policy decision, as defined, because it did not concern new contracts.

[172] But regardless, the consequences of a breach of s 90B are spelt out in s 90C. A breach of s 90D *might* breach the Code of Conduct for Councillors in Queensland – although I express no firm view on that. The point made by the ECQ, with which I agree, is that a contravention of ss 90B or 90D LGA – even if proven – does not amount to *an offence* and certainly not to a disqualifying offence. (If Mr Jamieson had been charged with, or convicted of, a disqualifying offence, then he would be automatically suspended as a councillor – see below.)

Alleged issue with register of interests

[173] Mr Innes alleges that Mr Jamieson did not sign the bottom of the pages of the register of interests declaration as required – suggesting that Mr Jamieson is thereby guilty of some relevant impropriety.

[174] To put that complaint in perspective, I note the following –

- *Local Government Regulation* 2012, chapter 8, part 5, provides for the chief executive officer ("CEO") of a council to maintain a register of council members' interests (s 290).

- An intentional failure to inform, *in the approved form*, the CEO of the particulars of an interest, or a change to an interest, within 30 days after the interest arises, or the change happens, is an offence (see s 171B LGA).

- A "Form 2", was approved by the Director-General of the Department of Local Government, Racing and Multicultural Affairs for registers of interests as required.

- The Form 2 is 20 pages long. It consists of a cover page, 13 pages for completion by the councillor and six pages of "notes", which are, as explained on the cover page, designed to assist a councillor to complete their register of interests.

- On the first page of the Form 2, there is a signature block about two-thirds of the way down the page. On every other page, there is a smaller signature

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[10] Mr Innes seemed to argue that there was something in the fact that a different font was used in the schedule to that which was used in the body of the Act. There is not.

block in the footer – including at the bottom of every page of notes even though the councillor is not contributing content to those pages.

- In his register of interests lodged on 20 February 2020, Mr Jamieson signed and dated the first page and every page *apart from the notes pages*. In other words, he signed the pages containing information about his interests.

- On 18 May 2020, he resubmitted the Form 2, having signed every single page of it.

[175] I proceed on the basis that the Minister approved a form which *intentionally required* a signature on the bottom of every page of the *notes* to the form. I proceed on the basis that Mr Jamieson did not sign every page of notes as required.

[176] However, by failing to sign the notes pages, Mr Jamieson has committed no offence. There is nothing in Mr Innes' suggestion that Mr Jamieson was therefore disqualified from nomination as a candidate. Nor does the conduct *per se*, in failing to sign the notes pages, suggest anything untoward.

Alleged issue around prohibited donor exemption.

[177] Mr Innes alleges that Mr Jamieson and his wife are property developers who have each breached the prohibition on property developers making political donations established by Division 1A of Part 6 of the LGEA ("Electoral funding and financial disclosure: Political donations from property developers").

[178] This allegation is misconceived.

[179] Broadly, under Division 1A of Part 6, property developers (as defined) and their close associates, including their spouses, are prohibited donors (see s 113). Political donations (which include a gift to a candidate in an election) by prohibited donors are unlawful (see s 113B). Under s 113D, a person may apply to the Electoral Commissioner for a determination that the person, or another entity, is not a prohibited donor.

[180] Mr Innes alleges that Mr Jamieson breached the prohibited donor regime by self-funding his campaign, and that his spouse also breached the regime by gifting funds from their joint account to Mr Jamieson's campaign.

[181] A gift is defined in s 107(1) LGEA *inter alia* as "the disposition of property, or provision of a service, for no consideration or inadequate consideration".

[182] Mr Jamieson's use of his own funds for his campaign is not a gift. He and his wife jointly own all of the funds in their joint account. It is his property as much as hers. There has been no breach by him of the prohibited donor regime. And regardless, he has not been charged with, or convicted of, an offence arising out of that regime. Mr Jamieson was not disqualified from candidacy for mayor. Nor is he ineligible to serve as mayor.

[183] Further, there is no foundation for Mr Innes' contention that property developers should not stand for office.

Alleged breach of sign limits

[184] There is no evidence of this.

Allegation that Mr Jamieson was disqualified from nomination as a candidate

[185] The applicant alleges that Mr Jamieson was disqualified from nomination as a candidate.

[186] Section 26 of the LGEA is entitled "Who may be nominated". By s 26(1)(b), a person may only be nominated as a councillor (for councils other than the Brisbane City Council) if they are qualified to be a councillor under s 152 LGA.

[187] Section 152 LGA is entitled "Qualifications of councillors". Relevantly, s 152(d) says that a person is qualified to be a councillor "only if the person is not disqualified from being a councillor because of a section in [Division 1 of Part 2 of Chapter 6 of the LGA]".

[188] Section 153 ("Disqualification for certain offences…") of the LGA is relevant here. It provides that a person cannot be a councillor for certain periods of time after they have been convicted of certain nominated offences. Also, a person cannot be a councillor for the remainder of their term if they have been dismissed from office.

[189] Also, s 175K of the LGA (which was enacted in response to the Crime and Corruption Commission's Operation Belcarra) provides that a person is automatically suspended as a councillor when they are charged with a disqualifying offence (see also s 175L).

[190] The question is whether a potential candidate has been *charged with* or *convicted of* a disqualifying offence. Mr Jamieson has not been either charged with or convicted of a disqualifying offence. Mr Innes misconceives this Court's role in this regard. It is not for this Court to decide whether Mr Jamieson is guilty of a disqualifying offence.

Conclusion

[191] I am not persuaded by any of Mr Innes' arguments that it would be just and equitable to make the orders he seeks.

[192] The only relevant statutory breach identified by Mr Innes is that concerning the cancellation of visitor elector voting, before the power to cancel was enacted.

[193] That breach affected four electors only (who may in fact have voted by post). Regardless, the effect of the breach was miniscule and does not raise good grounds for believing that Mr Jamieson's election does not reflect the preference of a majority of electors, voting by way of a free and deliberate choice.

[194] Nothing in Mr Jamieson's conduct rendered him an ineligible candidate or mayor.

[195] Also – even though no breach of statute was involved – *even if* persons received postal ballots too late or some capable persons in declared institutions were not able to vote or Mr Jamieson's nomination form was not properly displayed on the ECQ

website, the margin of Mr Jamieson's win was large enough to satisfy me that it would not be just or equitable to grant Mr Innes' application.

Human rights

[196] Mr Innes' complaints included an explicit assertion that his (and voters') human rights were compromised by the conduct of the March local government election thus, potentially at least, raising issues under the HR Act.

[197] The HR Act does not give the human rights stated in it any free-standing operation. Rather, the HR Act sets out the human rights which Parliament seeks to protect and promote, and contains operative provisions by which those human rights may be protected and promoted.

[198] The HR Act commenced on 1 January 2020 and few authorities in Queensland have considered it.

[199] The Attorney-General provided comprehensive written and oral submissions to the Court on the human rights aspects of Mr Innes' arguments.[11] However, it seems that Mr Innes did not intentionally raise HR Act issues, and indeed objected to the way in which his arguments were re-cast by the Attorney-General in terms of the HR Act.

[200] While he did his best to respond to the Attorney-General's submissions and his re-cast arguments, Mr Innes' submissions were not of assistance to me in resolving the HR Act's complexities. In his written submissions, Mr Innes said –

> I am afraid that it is unclear to me what is expected regarding the AG intervention on this primary human rights issue. I believe that it was at all times quite clear that whilst continuity of government is necessary and democracy dictates that it be by the will of the people, a health crisis centering [*sic*] around contact and proximity could never be a backdrop for a safe attendance election. There were always alternatives, as can be seen by other Southern Council elections being postponed.

[201] The Attorney-General urged me to approach the HR Act in a way which was consistent with the approach of the majority of Victorian Courts to very similar legislation.

[202] While I do not consider this matter an appropriate vehicle for reaching solid conclusions about the operation of the HR Act in Queensland (because I do not have the benefit of legally informed submissions from the applicant), I consider it reasonable to approach the HR Act issues as suggested by the Attorney-General because of the similarities between the Victorian and Queensland Acts.

[203] The Attorney-General's ultimate submission is that the election was conducted compatibly with human rights. I agree.

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[11] See T1-71: "And, obviously, it was probably, I should say, have become clear why the attorney intervened, this being a very new piece of legislation and there being limited authority in Queensland thus far…".

Potentially relevant provisions of the HR Act

[204] The HR Act provides for 23 human rights which are held by all individuals in Queensland.

[205] Mr Innes claimed that the ECQ's failure to prohibit physical polling breached his human right "NOT to be exposed to 'risk of harm'". No such right exists under the HR Act but Mr Innes submits that it would be "a bridge altogether too far" to suggest that he was alleging a breach of any other human right (such as the right to life).

[206] The Attorney-General submits that Mr Innes' originating application and outline of argument, taken at their highest, place in issue the right to life (s 16 of the HR Act); and the right to take part in public life (s 23 of the HR Act). The latter right is said to be placed in issue by Mr Innes' claims about the cancellation of voting at declared institutions and electoral visitor voting, and in his claim that there were inadequate postal ballots available and insufficient capacity to deal with telephone voting.

[207] Those rights are expressed as follows –

> **16 Right to life**
>
> Every person has the right to life and has the right not to be arbitrarily deprived of life.
>
> **23 Taking part in public life**
>
> (1) Every person in Queensland has the right, and is to have the opportunity, without discrimination to participate in the conduct of public affairs, directly or through freely chosen representatives.
>
> (2) Every eligible person has the right, and is to have the opportunity, without discrimination –
>
> (a) to vote and be elected at periodic State and local government elections that guarantee the free expression of the will of the electors; and
>
> (b) to have access, on general terms of equality, to the public service and to public office.

[208] I agree that, at their highest, Mr Innes' arguments allege a breach of the human right to part in public life as per section 23.

[209] However, in my view, even at their highest, Mr Innes' arguments do not allege a breach of the human right not to be arbitrarily deprived of life.

[210] Also, to the extent that Mr Innes' complains about the cancellation of mobile polling booth declarations for declared institutions and visitor elector voting, his arguments allege a breach of the human right to recognition and equality before the law – especially s 15(2) of the HR Act which states "Every person has the right to enjoy the person's human rights without discrimination".

Consideration of the HR Act in legal proceedings

[211] There are three ways in which the HR Act may be engaged in proceedings before a court, including the Court of Disputed Returns, exercising *judicial* (as distinct from administrative) power,[12] namely –

1. under s 5(2)(a), to the extent that the Court of Disputed Returns has functions under Part 2 and Part 3 of Division 3 of the Act;
2. under s 48, to the extent that the Court of Disputed Returns is required to interpret relevant statutory provisions; and
3. under ss 58 and 59, to the extent that Mr Innes has an existing right to claim for a remedy outside of any unlawfulness arising under the HR Act.

[212] The Attorney-General's position with respect to each of the above is that –

1. this Court does not need to make any decision about s 5(2)(a) because the appropriate exercise of power under s 144 LGEA will promote relevant human rights;
2. section 48 is not engaged because the relevant sections of the legislation are not ambiguous – the only reading of them available is consistent with their purpose; and
3. sections 58 and 59 are not engaged.

[213] I will deal with ss 5(2)(a); 48; 58 and 59 in turn.

Section 5(2)(a) of the HR Act

[214] Relevantly, s 5 of the HR Act states (my emphasis) –

> **5 Act binds all persons**
>
> (1) This Act binds all persons, including the State and, to the extent the legislative power of the Parliament permits, the Commonwealth and the other States.
>
> (2) This Act applies to –
>
> (a) **a court** or tribunal, **to the extent the court or tribunal has functions under part 2 and part 3, division 3** ...
>
> …

[215] Part 2 of the HR Act is entitled "Human Rights in Queensland". It contains the 23 human rights protected under the HR Act.

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12 In the exercise of the discretion conferred by s 144 LGEA, the Court is exercising judicial power. The Court is not therefore a "public entity" for the purposes of this application and s 9 of the HR Act does not apply.

[216] Division 3 of Part 3 is entitled "Interpretation of laws". It includes s 48, which states, in sub-section (1), that all statutory provisions are to be interpreted in a way that is compatible with human rights "to the extent possible that is consistent with their purpose".

[217] Division 3 of Part 3, via s 53, confers upon the Supreme Court the power to make a declaration to the effect that it is of the opinion that a statutory provision cannot be interpreted in a way compatible with human rights.

[218] By referring to a court's functions under Part 2, s 5(2)(a) imposes direct obligations on courts or tribunals to act compatibly with human rights.

[219] Section 5(2)(a) of the HR Act is expressed in terms almost identical to the terms of s 6(2)(b) of the Victorian *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (the "Charter").

[220] Victorian courts have observed that the direct application of Charter rights to courts and tribunals via s 6(2)(b) appears to conflict with other provisions of the Charter which state that courts and tribunals are only bound to act compatibly with rights when acting in an administrative capacity. In Victoria, the relevant "other" provisions are ss 4 and 38, which are equivalent to ss 9 and 58 of the HR Act.

[221] It is not necessary in this case to undertake a detailed evaluation of the way in which the Victorian courts, or the majority of them, have resolved this conflict. It is enough to say that three constructions have been proposed – broad, intermediate and narrow – and that the weight of Victorian authority favours the intermediate construction.

[222] The three constructions were considered by Bell J (sitting as the President of the Victorian Civil and Administrative Tribunal) in *Kracke v Mental Health Review Board & Ors* [2009] VCAT 646 ("*Kracke*"). Of his Honour's favoured intermediate construction he said –

> [250] The intermediate interpretation is that the functions under Part 2 referred to in s 6(2)(b) are the functions of applying or enforcing those human rights that relate to court and tribunal proceedings. I think this is the correct interpretation because it respects the structure of the Charter, is most consistent with its purposes in the context of that structure and gives the opening words of s 6(2), and the words "functions under Part 2" in s 6(2)(b), an appropriately general meaning.
>
> …
>
> [254] In conclusion, under s 6(2)(b), the Charter applies to courts and tribunals "to the extent that they have functions under Part 2 and Division 3 of Part 3". The functions under Part 2 that potentially apply are the functions of applying or enforcing the human rights specified in Part 2 that relate to court or tribunal proceedings being those specified in ss 10(b) (in its reference to punishment), 21(5)(c), 21(6), 21(7), 21(8) [instances of the right to liberty and security of person which speak of the court's role], 23(2), 23(3) [children in the

> criminal process], 24(1), 24(2), 24(3) [fair hearing], 25 [rights in criminal proceedings], 26 [right not to be tried or punished more than once] and 27 [retrospective criminal laws] of the Charter. The actual engagement and application of the human rights for courts and tribunals depends upon the scope of the right concerned and the facts and circumstances of the individual proceeding.

[223] Queensland courts have yet to consider s 5(2)(a) of the HR Act. However, counsel for the Attorney-General referred me to the *obiter* observation of Davis J in *Re JMT* [2020] QSC 72, in which his Honour cited *Kracke* with approval and mentioned, "in passing", that the HR Act "primarily casts obligations upon the executive and the parliament and only impacts the exercise of judicial power in limited ways".

[224] For the purposes of this matter, I will proceed on the basis of the intermediate construction

The functional approach to identifying the rights which the Court is to apply

[225] Applying the intermediate construction, courts in Victoria have applied two different methods of identifying the rights which a court, in any given case, is to apply.

[226] The first method, known as the "list of rights" approach, which was applied in early decisions, focused on the nature of each *right* to determine whether it conferred a function on the Court (such as the right to fair hearing under s 31 HR Act).

[227] The second method, applied more recently, focuses on the nature of the *function* that the *court* is performing and identifies rights which relate to that function (the "functional approach"): see *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61; (2017) 51 VR 624 ("*Matsoukatidou*").

[228] Bell J discussed these methods in *Matsoukatidou* (emphasis added, citations omitted) –

> [37] We have seen that the "functions" of courts and tribunals under pt 2 of the Charter specified in s 6(2)(b) are "the functions of applying or enforcing those human rights that relate to court and tribunal proceedings". As submitted on behalf of the Attorney-General, it may conveniently be said that **those functions may be identified by reference to a list of rights approach or a functional approach**. The list of rights approach focusses on the functions that may be derived from the nature of the rights that are specified in pt 2 of the Charter while the functional approach focusses upon the functions that are performed by a court or tribunal in legal proceedings in a given case.
>
> [38] In *Kracke,* I adopted the list of rights approach and identified a number of human rights in pt 2 of the Charter as being human rights which, by their nature, related to legal proceedings conducted by courts and tribunals. I there concluded that, under s 6(2)(b), courts and tribunals were

> obligated to apply those human rights. However, the list was not intended to be and has not been immutable. For example, the right in s 15 of the Charter to freedom of expression was not included in the list yet, correctly with respect, it has been applied in two cases in this court concerning suppression orders. Further, the right in s 8(3) to equality was not included in the list yet it has been recently applied in the procedural respect in two of the three cases I mentioned concerning children.
>
> [39] That being said, I accept the submission of the Attorney-General that a limitation of the list of rights approach is the risk of under and over-inclusion. Moreover, the relevance of a human right to a particular court and tribunal proceeding may only become apparent when the issues in the proceeding have been properly examined. Therefore, when applying s 6(2)(b), it is always necessary to examine whether, in the given case, the court or tribunal is exercising functions involving the application of human rights that "relate to court or tribunal proceedings".

[229] Under the functional approach, the HR Act applies to courts and tribunals to the full extent of *all relevant* human rights specified in Part 2. As Bell J said in *Kracke,* requiring courts to consider rights which relate to the *substance* of the proceeding, as well as its *process*, enhances "their legitimacy as institutions of justice" with responsibility for interpreting and enforcing human rights.

[230] I will apply the functional approach.

What is the function of the Court of Disputed Returns?

[231] The Court of Disputed Return's overarching purpose is to ensure that the formal result of an election represents the free and deliberate choice of competent electors (see the discussion above of *Tanti v Davies* [1996] 2 Qd R 602 and *Caltabiano*).

[232] That purpose is achieved by Parliament's conferral upon the Court of the *function* to hear disputes about the election of a person.

[233] The function would seem to include applying or enforcing the right to take part in public life (s 23 of the HR Act) as a human right relating to the Court's proceeding. As the Attorney-General explained in written submissions (my emphasis) –

> In relation to the equivalent right under art 25 of the *International Covenant on Civil and Political Rights,* the Human Rights Committee has stated that the **scope of the right includes 'access to judicial review or other equivalent process** so that electors have confidence in the security of the ballot and the counting of the votes …

[234] The Attorney-General was unable to find direct authority in relation to the function of Courts of Disputed Returns in Australian jurisdictions with comparable human rights legislation. However, she submitted that it was not necessary for this Court to

conclusively determine whether the human right in s 23 HR Act applied to the Court's functions directly, because the proper exercise of power under s 144 of the LGEA would, in any event, promote the right to take part in public life. It may be recalled that under s 144 of the LGEA, the Court of Disputed returns is empowered to make orders the Court considers to be just and equitable.

[235] The purpose of the LGEA is to *inter alia* "ensure the transparent conduct of elections of councillors of Queensland's local governments" (s 3). Its provisions provide for equal opportunity, for those who meet the qualification requirements, to stand for public office, including by –

- publicising the selection and appointment process;
- creating enforcement mechanisms to ward against fraud and corruption; and
- standardising and regulating advertisements.

[236] In so far as s 23 of the HR Act requires access, on general terms of equality, to public office, this would be achieved through a proper exercise of the Court's function.

[237] The other two limbs of s 23 of the HR Act concern the rights to "participate in the conduct of public affairs, directly or through *freely chosen representatives*" and to "vote and be elected at … elections that guarantee the *free expression* of the will of the electors". Those rights too are promoted by the proper exercise of the Court's discretion.

[238] In my view, responsibility for the enforcement of s 23 rights underpins the role of the Court of Disputed Returns, as first articulated by Dixon CJ in *Bridge v Bowen*.

[239] Section 23 and *Bridge v Bowen* each require a consideration of whether voters' "choice" was exercised "freely". Additionally, the test articulated by Dixon CJ includes the requirement that the Court is to ensure that the free choice is a "deliberate" one. And in that sense it *adds* to the Court's responsibility under the HR Act in this context.

[240] Also, as to the right of every person to enjoyment of their human rights (here, the right to participate in public life), the LGEA accommodates those who may not be able to attend polling booths by s 49 ("Declaration of mobile polling booths"); subdivision 2A ("Electronically assisted voting"), and especially subdivision 3 ("Special arrangements for particular electors") of the LGEA.

[241] Thus, even without the HR Act, a Court asked to ensure that an election outcome reflects the "free and deliberate choice" of voters would pay great attention to rights which attach to individuals in a democracy to take part in public life without discrimination.

[242] To conclude, I do not consider it necessary for me to decide whether I am required by s 5(2)(a) to directly apply s 23 in these proceedings. I will anyway. My task under the legislation involves the application and preservation of rights which are as broad, if not broader, than the right to take part in public life without discrimination.

Section 48 of the HR Act

[243] The second way in which a court exercising judicial power may apply the HR Act is via s 48. As noted above, s 48(1) provides that all statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.

[244] The Attorney-General submitted that no question of statutory interpretation was raised in these proceedings. Nor was it suggested that a relevant provision was ambiguous. Thus, s 48 has no work to do in this matter.

[245] Mr Innes argued strongly to the contrary. However, several of Mr Innes' arguments reflect his lay, rather than legal, understanding of statutory interpretation. For example, he claims that the LGEA is ambiguous in its references to "the Minister" – because the relevant department is not named. But of course, s 33(2) of the *Acts Interpretation Act* 1954 (Qld) explains that a reference in an Act to "the Minister … is a reference to the Minister administering the provision" – in this case, the Minister for Local Government.

[246] Taking a generous view of Mr Innes' submissions, they might be thought to raise issues about the interpretation of s 136 of the LGEA (which was raised at a directions hearing on 5 June 2020) and the provisions of Part 9A of the LGEA.

[247] Section 32 of the Victorian Charter is the equivalent of s 48 of the HR Act (although the sections are expressed a little differently). For the purposes of this judgment, it is not necessary to discuss relevant Victorian and High Court (*Momcilovic v The Queen* (2011) 245 CLR 1) authority about its interpretation. It is enough to note that it is widely accepted that, with respect to s 32(1), it has been held that the ordinary rules of construction apply and, consequently, a remedial interpretation, which involves a departure from the ordinary rules of interpretation in order to find a rights compatible meaning, is not allowed.

[248] In Queensland, s 48 of the HR Act has been applied in a Queensland Civil and Administrative Tribunal ("QCAT") decision, with Tribunal member Alan Walsh following the approach from *Momcilovic*.[13]

[249] I will follow the *Momcilovic* approach in deciding whether s 48 of the HR Act has work to do in this case.

Section 136 of the LGEA and the directions hearing

[250] Section 136 of the LGEA provides as follows –

> **136 Local government election may be disputed under this part**
>
> (1) The election of a person under this Act may be disputed by an application to the Court of Disputed Returns under this part.

---

13 See *The State of Queensland through the Department of Housing and Public Works v Tenant* [2020] QCAT 144, [176] – [187].

(2) The election may not be disputed in any other way.

[251] Section 140 of the LGEA provides as follows –

> **140 Application to court for order relating to documents etc**.
>
> (1) An applicant may apply to the Court of Disputed Returns for an order requiring the electoral commission or a returning officer to give the court stated documents or other things held by the electoral commission or a returning officer that relate to an election.
>
> (2) The court may make the order about an application it considers appropriate.

[252] At the directions hearing on 5 June 2020, an issue arose about the material that the Court could order the ECQ to provide under s 140 (1) LGEA.

[253] At the directions hearing, Mr Innes contended that he could challenge the conduct of the election as a whole under the LGEA (and was thus entitled to material concerning the conduct of the election as a whole). He argued that the reference to "the election" in s 136(2) was to the local government election and that the words "the election" were not limited by the need to be "of a person" (in contrast with s 136(1)). He submitted that this interpretation was supported by the heading of the section "Local government election may be disputed under this part".

[254] In writing, in reply to the submissions of the Attorney-General, Mr Innes said –

> At this point is most important to establish that "the election" mentioned (looked at in its proper context and the sentence use and construction) is, in point of fact, the Queensland Quadrennial Local Government Elections 2020.
>
> …
>
> That the ECQ sought (through a *bushwhacking*) to have this Honourable Court limit the scope away from the whole of Queensland down to only the SCRC when The Solicitor General on behalf of the Attorney-General participates, intervening, on the former basis, not the latter.

[255] Applying the usual approach to statutory construction, reading the section as a whole and not allowing the heading to override the operative provisions, it is clear that s 136 limits the disputes over which the Court of Disputed Returns has jurisdiction to disputes about the election of a person. Section 136(2) is a limiting, not an empowering or permissive, provision.

[256] There is nothing ambiguous about s 136 LGEA. Its purpose is clear. I do not need recourse to s 48 HR Act in its interpretation.

Part 9A

[257] Mr Innes complained that the election was not "essential"; that the Human Rights Commissioner was not consulted (in decisions about it); and that Mr Innes'

warnings to the ECQ that it ought not to be held were ignored. In the context of those complaints, he argued that the newly inserted Part 9A empowered the ECQ to alter the election date and to dispose of physical pre-polling.

[258] In effect, Mr Innes asked the Court to decide whether or not the 2020 local election ought to have been held *when* it was held and *how* it was held. As I have explained above, the Court has no jurisdiction over those questions. The Court is to consider the validity of the outcome of the election *which was in fact held*. Thus, Part 9A and the interpretation of its provisions are irrelevant to the issues before me.

The "piggyback" provisions: ss 58 and 59 HR Act

[259] Sections 58 and 59 of the HR Act provide as follows –

> **58 Conduct of public entities**
>
> (1) It is unlawful for a public entity –
>
> (a) to act or make a decision in a way that is not compatible with human rights; or
>
> (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.
>
> (2) Subsection (1) does not apply to a public entity if the entity could not reasonably have acted differently or made a different decision because of a statutory provision, a law of the Commonwealth or another State or otherwise under law.
>
> *Example –*
>
> *[260] A public entity is acting to give effect to a statutory provision that is not compatible with human rights.*
>
> (3) Also, subsection (1) does not apply to a body established for a religious purpose if the act or decision is done or made in accordance with the doctrine of the religion concerned and is necessary to avoid offending the religious sensitivities of the people of the religion.
>
> (4) This section does not apply to an act or decision of a private nature.
>
> (5) For subsection (1)(b), giving proper consideration to a human right in making a decision includes, but is not limited to –
>
> (a) identifying the human rights that may be affected by the decision; and
>
> (b) considering whether the decision would be compatible with human rights.
>
> (6) To remove any doubt, it is declared that –

(a) an act or decision of a public entity is not invalid merely because, by doing the act or making the decision, the entity contravenes subsection (1); and

(b) a person does not commit an offence against this Act or another Act merely because the person acts or makes a decision in contravention of subsection (1).

59 Legal proceedings

(1) Subsection (2) applies if a person may seek any relief or remedy in relation to an act or decision of a public entity on the ground that the act or decision was, other than because of section 58, unlawful.

(2) The person may seek the relief or remedy mentioned in subsection (1) on the ground of unlawfulness arising under section 58, even if the person may not be successful in obtaining the relief or remedy on the ground mentioned in subsection (1).

(3) However, the person is not entitled to be awarded damages on the ground of unlawfulness arising under section 58.

(4) This section does not affect a right a person has, other than under this Act, to seek any relief or remedy in relation to an act or decision of a public entity, including –

(a) a right to seek judicial review under the *Judicial Review Act 1991* or the *Uniform Civil Procedure Rules 1999*; and

(b) a right to seek a declaration of unlawfulness and, associated relief including an injunction, a stay of proceedings or an exclusion of evidence.

(5) A person may seek relief or remedy on a ground of unlawfulness arising under section 58 only under this section.

(6) Nothing in this section affects a right a person may have to damages apart from the operation of this section.

Conduct alleged to be unlawful under the HR Act

[261] Section 58 creates two obligations. The first is to act in a way that is compatible with human rights; that is, the substantive limb (s 58(1)(a)). The second is to give proper consideration to human rights when making a decision; that is, the procedural limb (s 58(1)(b)).

[262] Upon a generous reading of Mr Innes' submissions, he alleges that the ECQ engaged in conduct which was unlawful in a substantive and procedural sense.

Substantive HR unlawfulness

[263] The substantive allegations appear to be that the ECQ acted unlawfully by –

- failing to prepare sufficient postal votes;
- failing to arrange sufficient capacity to handle the increased demand for telephone voting;
- cancelling declared institution and electoral visitor voting; and
- failing to cancel/prohibit physical polling.

Procedural HR unlawfulness

[264] Mr Innes takes issue with the fact that the 13 March 2020 media release did not refer to the ECQ's "having considered the impacts of the HR Act 2019, nor sought advice from the Human Rights Commission or the Council for Civil Liberties…" The Attorney-General infers from this that Mr Innes is making an allegation of unlawfulness in the procedural sense.

[265] I will deal briefly with the alleged procedural unlawfulness now.

[266] The procedural limb of section 58 was considered in *PJB v Melbourne Health* (2011) 39 VR 373, in which Bell J stated –

> The so-called "procedural limb" of s 38(1) that "proper consideration" be given to relevant human rights requires public authorities to do so in a practical and common-sense manner. As Emerton J said in *Castles v Secretary of Department of Justice,* there is "no formula" and the authority must "seriously turn his or her mind" to the human rights impact of what is proposed and identify "the countervailing interests or obligations". That can be done in a variety of ways which may be suited to particular circumstances. Decision-makers are not expected to approach the application of human rights like a judge "with textbooks on human rights at their elbows", said Lord Hoffman in *R (SB) v Denbigh High School.*

[267] Mr Innes' complaint that the ECQ did not seek advice from the Human Rights Commission does not advance an argument under s 58(1)(b). The HR Act does not cast upon an entity like the ECQ an obligation to consult with, or seek advice from, the Human Rights Commission or Commissioner in their decision-making. And indeed the functions of the Human Rights Commission do not include engaging with an agency during its decision-making.

[268] There was no direct evidence before me about the matters considered by the ECQ before making the media release on 13 March 2020. The failure to make a reference to "the impacts of the HR Act" in the media release is not evidence that human rights were not properly considered. But nothing about the decision made at that time reflected incompatibility with a relevant human right. Rather, in my view, the reminder to the electorate of the availability of postal and early voting options suggests that the ECQ was taking into account the human rights contained in s 23 HR Act.

The operation of ss 58 and 59 HR Act

[269] Sections 58 and 59 are commonly referred to as the "piggyback" provisions.

[270] A person who claims that a public entity has breached s 58 can only bring legal proceedings to vindicate that claim by attaching it to an independent ground of unlawfulness (s 59(1)). In other words, a contravention of s 58 does not *of itself* give rise to any claim to relief or remedy. To achieve relief or remedy, the person alleging a breach of s 58 must *also* have a claim arising independently of the HR Act upon which the s 58 claim might "piggyback".

[271] Maxwell P analysed the operation of the analogous provisions of the Victorian Charter (ss 38 and 39) in *Director of Housing v Sudi* (2011) 33 VR 559 ("*Sudi*")

[272] That matter concerned the powers of the Victorian Civil and Administrative Tribunal ("VCAT") in the exercise of its original jurisdiction. The applicant, the Director of Housing, applied to VCAT under the *Residential Tenancies Act* 1997 (Vic) ("RTA") for an order for possession of premises occupied by the respondent, Mr Sudi, and his son.

[273] Bell J, sitting as the President of VCAT at first instance, concluded that VCAT had power to review the *lawfulness of the director's decision* to make the application to the tribunal. His Honour decided that the Director of Housing's decision was unlawful under s 38(1) of the Charter and that the purported application was therefore a nullity. This amounted to a collateral review of the Director's decision.

[274] On appeal, Maxwell P had to decide whether VCAT had the power to conduct such a collateral review. Relevantly, one of the questions for his Honour was whether the provisions of the Charter (specifically, s 38) evinced a legislative intention to confer on VCAT a power of collateral review which the RTA itself did not confer.

[275] In answering this question in the negative, Maxwell P said at [94] –[96] –

> Under s 38(1) of the Charter, it is unlawful for a public authority to act "in a way that is incompatible with a human right". As noted earlier, the conclusion of the tribunal in the present case was that the director (who is undoubtedly a public authority for this purpose) had "acted unlawfully" under s 38(1) in seeking to evict Mr Sudi and his son, and in applying for the possession order.
>
> Section 39(1) of the Charter is in these terms:
>
> > If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.
>
> Plainly enough, s 39(1) has an operation which is both conditional and supplementary … The condition to be satisfied is that a person be able to seek, independently of the Charter, "any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful". If – but only if – that condition is satisfied,

> then s 39(1) enables that person to seek "that relief or remedy" on a supplementary ground of unlawfulness, that is, unlawfulness arising because of the Charter

[276] In the present case, to pursue a claim of unlawfulness under s 58 of the HR Act, I agree with the submissions of the Attorney-General that the applicant must –

- identify a 'public entity' (under s 9) – it is without question that the ECQ is a public entity;
- identify the relevant act or decision of the public entity which engaged human rights (under s 58(1));
- seek some relief or remedy in relation to the *same* act or decision on the basis that it was unlawful for some reason *other than s 58(1)* so as to "piggy-back", onto that independent ground of unlawfulness, an allegation that the public entity breached s 58(1);
- establish that the relevant acts or decisions were not mandated by law (the exception in s 58(2));
- identify the limit on human rights caused by the act or decision (s 8(a)); and,
- establish that that limit is not reasonably and demonstrably justifiable (under ss 8(b) and 13).

[277] And of course, even if all of the above is established, I must be satisfied that it would be just and equitable to make the orders sought.

Mr Innes' submissions

[278] It is simplest to repeat Mr Innes' points in full –

> The condition [in s 59(1)] has been met, at least as far as I understand. Invalidity has been made out, both partial segmental and complete.
>
> How a candidate applicant who is self-acting "put his case" in broad terms in the O A [originating application], the substance of the outlines and reply is where matters are more thoroughly traversed. The submissions on this point should be wholly rejected given the complete lack of similarity or attachment to what IS set out at [1] in the O A.
>
> And on the point of 'scant regard for ANY of the relevant laws' "but without specifically alleging a breach of any law" it is of paramount importance to refer to the wilful failure of the quadrumvirate "peak integrity agencies" refusal to provide any of the "all relevant laws" they say they were "monitoring the election to ensure all relevant laws are adhered to during this important time".
>
> The onus is also quite clearly on those promisors to provide details.

> The unlawfulness arises from omissions and failures, as clearly led in oral submissions to the Court long ago, and when it suits the A G we can refer to them.
>
> The same is true as regards claims that it is alleged the second respondent has contravened the LGEA, but the reality is that ECQ failure to duly and dutifully act (and OIA, CCC) is the root cause as equally the contravention by the second respondent. The third-party aspect must be looked at in conjunction with the failures and omissions in any event, but in this case with the #fairforall guarantee it is even more imperative to do so.
>
> It was the lack of timely actions by the Quadrumvirate, dispute a promise to do so, that led the electors into a state of misinformation about the second respondents *bona fides*.
>
> As such the independent ground of unlawfulness does relate to the same inaction of the public entity.

Attorney-General's submissions

[279] The Attorney-General submits that the applicant fails in any claim to relief under s 58 HR Act.

[280] She submits that the applicant has not satisfied s 59(1) in that he has not demonstrated that he is able to seek, independently of the HR Act, any relief or remedy in respect of an act or decision of the ECQ.

[281] She argues that, whilst ordinarily, an applicant to the Court of Disputed Returns will need to show the contravention of a provision of the LGEA to succeed, the applicant had put his case in terms of unfairness, rather than *unlawfulness*.

[282] Although he alleged that the ECQ had "scant regard for ANY of the relevant laws", he did not specifically allege a breach of any law – which was what s 59(1) required.

[283] Thus, as the condition in s 59(1) has not been satisfied, the supplementary operation in s 59(2) has not been enlivened and Mr Innes can not raise any non-compliance by the ECQ with s 58(1) in this proceeding.

[284] Further, the Attorney-General argues that the exception in s 58(2) applied to the "decision" to conduct the election with in-person voting.

[285] And further still, the Attorney-General argues that, even if the applicant were able to establish that an act or decision of the ECQ limited human rights, such a limit was justified.

Consideration

[286] Interpreting Mr Innes' position generously, notwithstanding his emphasis on "unfairness", some of his allegations identified acts or decisions of the ECQ which were arguably unlawful and engaged human rights, namely, his allegations that –

- the election ought not to have proceeded with in-person voting;

- it was unlawful to cancel mobile polling booth voting and elector visitor voting;
- there were insufficient postal ballots available; and
- the ECQ failed to arrange for sufficient capacity to handle telephone voting.

[287] Thus, I must –

- consider whether the ECQ's acts or decisions were mandated by law;
- identify the limits on human rights they caused; and
- consider whether that limit was reasonably and demonstrably justifiable.

[288] The relevant provisions of the HR Act are sections 8 and 13 –

> **8 Meaning of compatible with human rights**
>
> An act, decision or statutory provision is ***compatible with human rights*** if the act, decision or provision –
>
> (a) does not limit a human right; or
>
> (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.
>
> **13 Human rights may be limited**
>
> (1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.
>
> (2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant –
>
> (a) the nature of the human right;
>
> (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
>
> (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
>
> (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
>
> (e) the importance of the purpose of the limitation;

(f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;

(g) the balance between the matters mentioned in paragraphs (e) and (f).

[289] I find that s 58(2) applies to the decision to conduct the election including by way of in-person voting. The ECQ had to apply the law. It did not have the option of conducting the election by postal ballot because the SCRC had not applied for such a ballot under s 45AA of the LGEA. Nor had the Minister directed a postal ballot under s 200E of the LGEA. Thus, the election had to be conducted in a way that allowed ordinary votes under section of the LGEA.

[290] The other three acts or decisions were not mandated by law. The next step then is to consider the limits they placed on human rights.

[291] I proceed on the basis that an act or decision will "limit" a human right if it places limitations or restrictions on, or interferes with, the human rights of a person.

[292] I proceed on the basis that it is not necessary for an identifiable individual to be affected in order for a human right to be engaged so as to trigger the obligations imposed on public entities by s 58(1). A *potential* effect on the rights of a class of persons is sufficient.

[293] Implicit in the applicant's arguments is a suggestion that the cancellation of mobile polling booth voting and visitor elector voting and the issues around postal and telephone voting limited persons' rights to take part in public life. The right to take part in public life is, as the Attorney-General submitted, key to building and sustaining a robust democracy.

[294] I am prepared to proceed on the basis that the right of some persons to participate in public life *might* have been affected or limited by the decision to cancel mobile polling booths and elector visitor voting (although I do not, on the evidence, find that as a fact).

[295] I am also prepared to proceed on the basis that the right of some persons to participate in public life *might* have been affected or limited by issues around postal and telephone voting (although I do not, on the evidence, find that as a fact).

[296] I now turn to s 13 considerations. Plainly, the decision to cancel mobile polling booth voting and visitor elector voting was intended to protect the physical, and perhaps mental, health of voters and ECQ staff during the pandemic (s 13(2)(b)). Any consequential limit on human rights was, in my view, reasonable and justifiable and tempered by the availability of other options.

[297] In my view, the decision to cancel promoted an important proper purpose (s 13(2)(e)) and the limit went no further than necessary, especially given that alternative voting options were provided. Indeed, at least arguably, not to cancel and to force voters and ECQ staff into close proximity would have impinged upon human dignity.

[298] As to issues with postal votes, I infer that any limit was unintentional. It is unreasonable to expect the ECQ to have used any other mode of delivery of postal ballots than the mode adopted (that is, via Australian Post) (see s 13(2)(d)). And any resulting limit was, in my view, reasonable in the circumstances (s 13(1)).

[299] Similarly, with respect to the capacity to handle the demand for telephone voting, I infer that any limit was unintentional. It would not have been reasonable, indeed it would have been impossible, to staff the phone lines beyond their capacity (s 13(2)(d)).

[300] Overall, I consider that, in its various acts and decisions, the ECQ struck a reasonable balance between the right to take part in public life and the allocation of its resources in a reasonable way.

[301] In summary, I conclude that even if the acts or decisions of the ECQ limited for some the right to take part in public life, its acts or decisions were compatible with human rights, subject to reasonable limits.

Other matters

[302] The CHO and the SCRC are public entities under s 9 HR Act. I did not find that either acted unlawfully.

[303] However, Mr Innes' allegations against the CHO, taken at their highest, allege a breach of the human right to take part in public life by not "guarantee[ing] the free expression of the will of the electors" (in encouraging voters not to tarry at polling booths). As I have mentioned, in my view, such an allegation is based on a wholly unreasonable interpretation of the statements made by the CHO about voting. On no reasonable view of her statements could it be said that human rights were limited.

[304] As to Mr Innes' claims against Mr Jamieson, for the most part, they concern his conduct in a private capacity, as a mayoral candidate. His conduct in his private capacity is not caught by s 58 or s 59 (see s 58(4)).

[305] Even if some of Mr Innes' complaints about Mr Jamieson might be more accurately characterised as complaints about his conduct as Mayor (and therefore within the piggybacking provisions – see s 9(1)(d) of the HR Act)), as above, in my view, Mr Innes' complaints about Mr Jamieson were unfounded. It cannot be said that his conduct limited human rights.

[306] I have not overlooked that Mr Innes, and the respondents, are entitled to the right to a fair trial according to law, under s 31 of the HR Act and independently of it.

[307] In this matter, I have borne in mind the duty the Court owes to Mr Innes as a self-represented litigant. Consistently with my appreciation of that duty, I took a generous approach to his arguments so as to ensure his access to justice.

[308] I note for completeness the very recent decision of *Attorney-General for the State of Queensland v Sri & Ors* [2020] QSC 246, in which Applegarth J considered that the right to public assembly under the HR Act was relevant to his decision whether to

grant an injunction to restrain an unlawful protest. My approach in this matter to HR Act issues was guided by his Honour's.

Conclusion and final orders

[309] Mr Innes has not persuaded me that it would be just and equitable to make any of the orders he seeks. He has not persuaded me that there is any ground for believing that the SCRC election result does not represent the free and deliberate choice of electors. It is not otherwise invalid.

[310] His application is dismissed.

[311] I will give Mr Innes an opportunity to make submissions as to costs (as per paragraph [12] above).