

**JURISDICTION** : MAGISTRATES COURT OF WESTERN AUSTRALIA (COURT OF DISPUTED RETURNS)

**LOCATION** : PERTH

**CORAM** : MAGISTRATE DARGE

**HEARD** : 23 and 24 October 2024

**DELIVERED** : 11 February 2025

**CASE No** : FRE/GEN/922/2023  
FRE/GEN/930/2023

**BETWEEN** : **MARIJA VUJCIC**  
(1<sup>st</sup> Complainant)

**GREATER FREMANTLE COMMUNITY and  
BUSINESS ASSOCIATION INC**  
(2<sup>nd</sup> Complainant)

and

**ELECTORAL COMMISSION OF WESTERN  
AUSTRALIA**  
(1<sup>st</sup> Interested Party)

**JEMIMA WILLIAMSON-WONG**  
(2<sup>nd</sup> Interested Party)

**Representation:**

*Counsel:*

**1st Complainant** : MR G Cridland  
**2nd Complainant** : Mr T Houweling  
**1st Interested Party** : Mr M Olds/ Ms H Cowie  
**2nd Interested Party** : In Person

*Solicitors:*

**1st Complainant** : Mr G Cridland  
**2nd Complainant** : Cornerstone Legal  
**1st Interested Party** : State Solicitors Office  
**2nd Interested Party** : Self

## **Legislation**

- *Local Government Act 1995*
- *Local Government (Elections) Regulations 1997*

## **Cases referred to in the Judgment**

- *Bridge v Bowen* [1916] HCA 38
- *Chanter v Blackwood* [1904] HCA 2; 1 CLR 39.
- *NSW Electoral Commissioner v Kempsey Shire Council (No. 2)* [2022] NSWSC 282
- *Woodward v. Sarsons* (1875) L.R. 10 C.P. 733
- *Caltabiano v Electoral Commission of Queensland* (No 2) [2010] 2 QdR 1
- *Bourne v Murphy* [1996] NSWCA 59
- *Featherston v Tully* (2002) 194 ALR 703:

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# **REASONS FOR DECISION**

## **Introduction**

- 1 Every two years the City of Fremantle (“the City”) conducts local government elections.
- 2 The elections occur in the third week of October and the successful candidates are elected for four-year terms. The elections result in the replacement of approximately half the council, thereby maintaining a balance between incumbents and new (or re-elected) councillors.
- 3 The City is composed of four electoral wards.
- 4 This case concerns two - the Coastal Ward and the Central Ward.
- 5 By a notice (Ex. 5) issued pursuant to s4 and s64 of the *Local Government Act* the City declared that an election would take place on Saturday 21 October 2023.
- 6 As with many local authorities, the City engaged the WA Electoral Commission (“the Commission”) to conduct the election. It was to be by postal voting using a preferential system.
- 7 Leading up to the election the Commission made a terrible mistake.
- 8 Every voter in the Coastal Ward received an electoral package which contained ballots and information for the candidates in the Central Ward and vice versa.
- 9 The City and the Commission became aware of the error and steps were taken by the Commission and other parties to fix the problem.
- 10 The accepted solution was to re-issue the ballots and send them to the correct electors.
- 11 A single candidate could be elected in each Ward.

- 12 In the Coastal Ward there were four candidates. Ms Williamson-Wong was declared the winner on the day of the election. Another candidate, Ms Vujcic, seeks that the election be re-held claiming that the results are not safe.
- 13 The two other unsuccessful candidates in the Coastal Ward have not sought to be heard in the proceedings.
- 14 There were only two candidates in the Central Ward -Mr Steven Pynt and Mr Geoffrey Graham. Mr Graham was declared elected on the day.
- 15 Whilst the unsuccessful candidate in the Central Ward does not dispute the result, the Greater Fremantle Community and Business Association Inc. (“the Association”) asks that the election be re-held in the Central Ward for the same reasons.

### **The Agreed Facts**

- 16 The parties lodged a Memorandum of Agreed Facts and Disputed Facts.
- 17 It is fair to say most of the proposed facts were not agreed.
- 18 There is no dispute that the election was called in accordance with the Local Government Act and the ballots were sent out to the eligible voters in each of the two electorates.
- 19 Those ballots were swapped due to what has been described by the Commission as a “coding error”.
- 20 Crisis meetings were held by the Commission once the problem became apparent.
- 21 New ballots were sent out the electors.
- 22 The election proceeded on 21 October 2023 and the results were announced.

## The Arguments

### The Statement of Claim/Continuing Arguments

- 23 In order to get a clear understanding of the issues in dispute the Complainants in each case were ordered to lodge a Statement of General Procedure Claim.
- 24 Statements of Claim were lodged by both Complainants and largely contain similar arguments.
- 25 At the Hearing the Complainants honed their arguments. Though the descriptors varied, both counsel essentially suggested that the error by the Commission created an unfixable election date. Counsel Mr Cridland stated that the election was “...*absolutely ruined, utterly and irrecoverable and the efforts to recover it simply made it worse.*”
- 26 The suggested disenfranchisement took various forms.
- 27 **Reduced Time to Vote.** Regional or remote voters including those overseas and those who had non-standard mailing addresses may not have got the second ballot in time to return it.
- 28 The fact that there were school holidays, a public holiday and the Voice Referendum during this time presented a challenge in informing and engaging voters and the timing of the re-issued ballots made that situation worse.
- 29 **Tally Confusion.** The mix up was compounded when the Commission posted an inaccurate tally of votes on its website.
- 30 **Pure Confusion.** The Complainants suggest that the issue of an incorrect ballot paper followed up by corrected ballot papers had both the potential and actual effect of confusing voters.
- 31 The result of this confusion was that a significant number of electors may have:

- a) Not been aware of the significance of the second ballot paper and chosen not to return it believing that they had already rendered a legal vote;
  - b) Not appreciated that the candidates on the second ballot paper were the correct candidates for their electorate;
  - c) Simply failed to vote over the confusion.
- 32 A substantial part of the confusion argument was centred around the alleged inadequacy of the steps taken by the Commission to inform the electorate of the error and ensure that it was remedied.
- 33 This included suggestions that the second ballot paper, which was designed to include a single page leaflet explaining the consequences of the error and the steps necessary for an elector to register their vote, was inadequate as it may have been omitted from some packages and was written in only in one language, English.

### **Legislative Background – Court of Disputed Returns**

- 34 Division 10 of the *Local Government Act 1995* (“LGA”) deals with the validity of elections.
- 35 Pursuant to s 4.80 a person who is dissatisfied with the result of an election or with the way in which an election was conducted may make an invalidity complaint, which, per s 4.80(2) is
- “A complaint that an election is invalid, or that another person should be declared elected ...”*
- 36 Section 4.81 provides that such a complaint is to be made to a Court of Disputed Returns (“CDR”) constituted by a Magistrate.
- 37 That Magistrate has the power, per s4.81(3), to declare an election invalid resulting in the election being null and void, all elected members’ offices held vacant and for a fresh poll to be conducted.



38 There is no appeal from a decision of a CDR, per s 4.82.

39 An election is not to be declared invalid simply because an error has occurred in the lead-up to the polling day. Pursuant to s 4.83:

**4.83. Validity of election**

*An election is not invalid because of—*

- (a) a failure to do something in connection with the election within the time, or for the period or before the date allowed or required under this Act, so long as the failure does not affect the result of the election; or*
- (b) an irregularity or defect in the appointment or authorisation of an Electoral officer; or*
- (c) a formal omission, irregularity or defect in a document, declaration, publication or other thing that a person has made, issued or done in good faith.*

40 The thrust of 4.83 is that the Magistrate is to look at the question of the validity of the election with a wide view – mere procedural errors are not sufficient to void the election unless their effect was substantive.

41 The LGA does not indicate how the CDR is to be conducted.

42 That is not, of itself, unique. Though the *Magistrates Court (Civil Proceedings) Act 2004* and *Magistrates Court (Civil Proceedings) Rules 2005* contain specific procedures for the management of General Procedure Claims and Minor Case Claims there are many actions that do not have formal procedures, such as claims under the *Dividing Fences Act 1961*, *Criminal and Found Property Disposal Act 2006* and the *Residential Tenancies Act 1987* to name a few.

43 What makes the CDR unique is that the only procedural hints point to an inquiry where the Magistrate is an inquisitor rather than merely a passive observer.

44 Part 15 of the *Local Government (Elections) Regulations 1997* does provide guidance to the court in relation to the formalities of invalidity complaints. A Magistrate is empowered per Reg. 84(2) to issue a summons requiring any of the following:

- a) *The Returning Officer;*
- b) *Any person who has been declared elected at the election;*
- c) *Any other person whose attendance the Magistrate considers to be appropriate;*

*to attend before the court on a day and time set out in the summons.*

45 This suggests that the Magistrate may convene a hearing and summons relevant parties along to explain what happened and determine whether to intervene in the result.

46 This is supported by Reg 84(3) which states “*On the parties appearing or, if any of them does not appear, on it being shown that the summons was duly served on him or her, the Court may inquire into and adjudicate on the matter of the invalidity complaint and, for that purpose, may exercise any of the powers of the Magistrates Court in its civil jurisdiction.*”

47 In reality these matters are dealt with in a more traditional manner. The Court gathers the Complainants and any interested parties together and programming orders are made for the orderly handling of the dispute. In this case the material produced to the Court by way of Form 32A – Statements of Intended Evidence of a Witness.

48 Per Reg. 85 the declarations which can be made by the CDR are:

- a) *The election was invalid;*
- b) *A person ought to be elected in place of another person who has been declared by the Returning Officer;*
- c) *A declaration determining the term of office of a councillor to be a term that is longer or shorter than the term determined by the Returning Officer;*
- d) *A declaration rejecting the invalidity complain.*

49 No suggestion that an individual candidate should be removed or have their term shortened was advanced.

50 Therefore, the only options open on the available facts are declarations that:

- a) the election was invalid; or
- b) rejecting the complaint.

51 Neither the LGA nor the Regulations provide any guidance as to the factors to be taken into account when considering a declaration under Reg 85(2).

52 Instead, we must turn to the common law for guidance. This is, in itself, problematic as there are very few authorities on local government elections and the chief authorities are over a hundred years old. There is no standard text on election disputes.

53 Further, some States have similar process to WA to convene a CDR and yet others, such as New South Wales, have no such procedures. In that State a Supreme Court justice may review the decision. Some of the statutes in other States have provisions specifying the formal requirements of the application.

54 Some common law guidance is to be found in the authorities cited by the parties.

55 Per **Woodward v. Sarsons** (1875) L.R. 10 C.P. 733 at [743] sets out guiding themes.

*“We are of opinion that the true statement is that an election is to be declared void by the common law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i.e. that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as, by polling stations being demolished, or not opened, or by other of the means of voting according to law not being supplied or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes or false declaration of numbers by a returning officer, or by other such acts or mishaps. And we think the same result should follow if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from*

*electing the candidate they preferred. But, if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament.”*

56 This was cited with approval by Justice Griffiths in ***Chanter v Blackwood [1904] HCA 2; 1 CLR 39.***

57 The decision of Isaacs J in ***Bridge v Bowen [1916] HCA 38*** (at 623-624) summarises ***Woodward v Sarsons*** and outlines six points applicable to invalidity complaints:

- (1) *The election of an officer – in other words, his selection by the constituency – may be attacked only for a defect which affects him.*
- (2) *If the defect strikes at the entire election, either because there was no real election at all or because some official irregularity has occurred, he is affected because his title is claimed through it, and he must meet the defect if he can.*
- (3) *If there has been no real election, his selection so-called is necessarily void.*
- (4) *If there has been any official irregularity in the conduct of the election, where the law requires absolute and strict adherence or where the irregularity is so great as to depart substantially from a directory enactment, his selection so-called is void unless he can show the result could not have been affected by it.*
- (5) *Where the defect complained of does not strike at the election as an entirety, but is confined to some breach of law in individual instances, then he is not necessarily affected, and is not affected at all unless he or his majority is shown to be connected with the defect.*
- (6) *If the law does not provide any means of so affecting him he is not affected, and, as his selection cannot be regarded as unduly made, it must rest where it is.*

58 The initial question is one of onus. This has been the subject of intense judicial consideration in other jurisdictions. The LGA does not specify obligations of the interested parties, including the City, the Complainants and the Commission, to “prove” a case to the Court.

59 In *Caltabiano v Electoral Commission of Queensland* (No 2) [2010] 2 Qd R 1 at [188-189] (references included)

*[188] The Act is silent as to onus of proof and the authorities have not necessarily spoken with one voice on the question. However, the way in which the jurisdiction is enlivened points to where the onus lies. Section 130 of the Act sets out the requirements for an application to the Court of Disputed Returns. Section 130(2)(a) provides that the application must “set out the facts relied on to dispute the election”. The 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. As Ambrose J said in *Tanti v Davies* (No 3) [1996] 2 Qd.R. 602:*

*“Prima facie in the absence of any evidence to the contrary, one ought assume the regularity of the electoral process.”*

*[189] In *Blundell v Vardon* [1907] HCA 75 Barton J, sitting as the Court of Disputed Returns, said:*

*“The position of a petitioner applying to the Court of Disputed returns may be thus described. It is on him to prove the allegations of the petition so far as they are not admitted.”*

60 Yet, in *Bridge v Bowen* Isaacs suggests that in the case of “great irregularity” it is for the successful candidate to show that the result could not have been affected by the irregularity.

61 In *Bourne v Murphy* [1996] NSWCA 59 the New South Wales Court of Appeal suggested that this reversal of onus would only occur where the result of the inquiry was that the Court had concluded that the irregularity was “so great as to depart” from the statutory requirement. Evidentiary onuses need to be satisfied for the Court to be satisfied of the level of irregularity.

62 In *NSW Electoral Commissioner v Kempsey Shire Council (No. 2)* [2022] NSWSC 282 Justice Beech-Jones referred to a “*threshold of materiality which must be met before it could be said that the denial of the franchise to certain voters ... invalidated the elections...*”

63 In the circumstances, I consider that there is an evidentiary burden to be met by the Complainants before any onus could be said to shift to other parties, such as the elected candidates or the Commission.

64 This case however requires a more nuanced consideration of the relevance of an “official irregularity”.

65 The question of what constitutes an “official irregularity” is also vexed. Two possibilities exist. Firstly, that the phrase refers to a breach of an official regulation and the second is that the procedural steps leading to a fair election were out of keeping with the expected process.

66 In *Carroll v Electoral Commission of Queensland (No. 1)* [2001] 1 Qd R 117 at [12]

*12“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.”*

67 In the circumstances, I consider that my role is to look at the error and determine the effect of it absent of a specific ruling as to whether it is in breach of the LGA or its subsidiary legislation.

68 With respect to the various interpretations I prefer the summary provided by Justice Bleeby in the South Australian Supreme Court decision of *Featherston v Tully (2002)* 194 ALR 703:

*[147] It is now possible to identify from the cases to which reference has been made the principles which they appear to represent ...*

*(1) The only ground on which an election may be declared invalid at common law is by virtue of one of the two limbs referred to in *Woodward v Sarsons*, namely that there is no real election at all, or that the election was not really conducted under the requirements of the Electoral Act 1985.*

*(2) Under the first limb of *Woodward v Sarsons*, the election will be declared void only if it can be shown that the electors did not in fact have a fair and*

*free opportunity of electing the candidate which the majority might prefer, such as where a majority of electors are prevented from recording their votes effectively by general corruption, general intimidation, want of available machinery for voting, by fraudulent counting of votes or false declaration of numbers, or "other such acts or mishaps": Woodward v Sarsons (above) at 743–4.*

*(3) By way of alternative to the first limb of Woodward v Sarsons, the election may be declared void if a majority of electors may have been prevented from voting for one of the reasons mentioned in para (2): Woodward v Sarsons (above) at 744; Bridge v Bowen (above) at 618.*

*(4) In determining whether electors may have been prevented from voting by official errors under the first limb, if the error was a departure from a rigid mandatory enactment so that the vote could not be counted, there is a prevention. If the departure is only from a rule which requires substantial and not strict compliance, there is no relevant prevention from voting: Woodward v Sarsons (above) at 746; Bridge v Bowen (above) at 618.*

*(5) It is clear ... that breach of a provision of the Electoral Act by a candidate which is not specified in the Act as requiring a declaration that the election is void or which is not sufficient in itself to justify an order at common law, will not be sufficient to declare an election void, unless the Act requires that result. It will not do so where the Act merely specifies some other penalty for the breach. ...*

*(6) The second limb of Woodward v Sarsons allows an election to be declared void if it is not really conducted under the Electoral Act at all. That will depend on whether the departure from the Act is so great that the court can be satisfied that the election was not an election under the existing law.*

*(7) An election will not be held void by reason of transgressions of the Act without a corrupt motive by the returning officer or his staff where the court is satisfied that the election was an election really and in substance conducted under the Electoral Act, and that the result of the election was not, and could not have been, affected by those transgressions: West Division of the Borough of Islington (1901) 17 TLR 210 at 125.*

*(8) If the transgression by electoral officials was such that the election was not really conducted under existing laws, or that it is open to reasonable doubt whether the transgressions may not have affected the result, and it is uncertain whether the candidate has been really elected by the majority of persons voting in accordance with the Electoral Act, then the election may be declared void: West Division of the Borough of Islington (above) at 125.*

*(9) The burden of proof that a violation of the electoral law did not and could not affect the result rests on the respondent: West Division of the Borough of Islington (above) at 130.*

69 In this hearing there was no suggestion that the candidates or the Commission had any corrupt motive. Nor was it alleged that a specific provision of the LGA was breached.

## **Witnesses**

70 A large number of witnesses were called to the Hearing.

71 These witnesses could be divided into three types:

- (1) Employees of the Commission with direct responsibility or oversight for the Fremantle election;
- (2) Candidates in the election;
- (3) Interested electors.

72 The purpose of calling the witnesses from the Commission was to explain its role in managing the election.

73 This included the preparation for the election and the provision of the ballots to Australia Post. The witnesses then provided detail as to the discovery of the error and the steps taken to fix the problem.

74 During the hearing there was considerable time spent with a view to scrutinizing the Commission's failures in making the initial error and assessing the response to the mistake. Criticism was directed at the Commission's witnesses over the vague explanation of the cause of the mistake and the similarly vague explanation of the error provided in materials sent to the public.

75 My response to that criticism of the initial failure was that it did not really assist in resolving the ultimate question. Whilst the Commission and the State Government no doubt scrutinised this error in great detail, with a view to preventing its recurrence, investigating the error is not part of the determination of whether the election was unsafe and should be re-held.



76 This cuts both ways.

77 The Commission could have done a less than adequate job trying to fix up the mistake, yet the election itself remained safe. Alternatively, the Commission could have acted perfectly reasonably and professionally in remedying the error and yet the overall result is that the election process was damaged irretrievably.

78 Hence, in these reasons no time is spent determining whether the response from the Commission was “good” or “bad” only what the overall effect of the error had on the electoral process. This includes determining the effect of the response on the electorate.

### **Commission Witnesses**

79 There were four witnesses called from the Commission.

80 Essentially, they represented different levels of engagement and reporting from:

- a) The Director of Election Operations WA - Shani Raylene Wood.
- b) The Returning Officer Liaison Officer - Vernon Lesley McKay.
- c) The Returning Officer - Elizabeth Houlton.
- d) The Manager of Election Events - Phillip Stanley Richards.

### **Shani Raylene Wood**

81 She appointed Ms Houlton as the returning officer for the City of Fremantle elections.

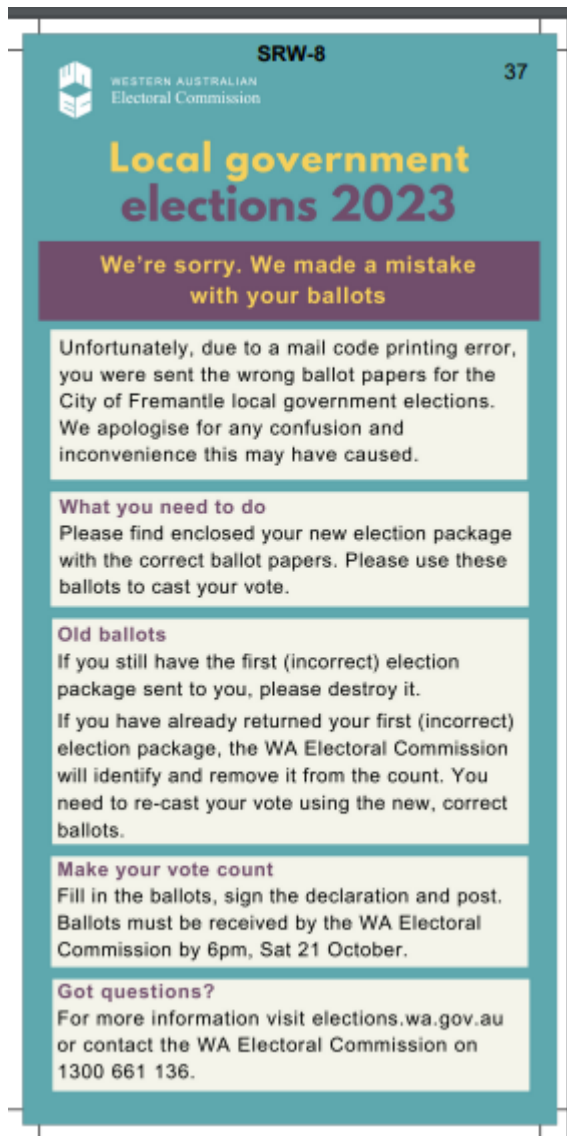
82 On 27 September 2023 Mr Richards informed her of the ballot paper error.

83 The Commission operates with a Crisis Communications Plan (“CCP”) which was followed to resolve the issue as quickly as possible. A meeting was held on 27 September 2023 which included Mr Richards and Mr McKay the Returning Officer Liaison Officer.

84 As a result of this crisis meeting the following were undertaken:

- (1) A quarantine area was created at the processing centre for the Central and Coastal Ward ballot papers.
- (2) Additional ballot papers were organised to be printed immediately.
- (3) The new ballot envelopes were printed in a different colour from the incorrect papers to allow voters to distinguish between them.
- (4) A leaflet was placed in the envelope advising of the error and providing information as to how to record a correct vote.
- (5) Messages were sent to three sets of stakeholders - the candidates for the election, the City of Fremantle Council and the electors who had been affected by the ballot paper error.
- (6) a message for electors was placed on the Commission website which was updated on 4 October 2023.
- (7) The Electoral Commissioner gave an interview on 6PR radio.

85 The explanatory leaflet (“the Leaflet”) appeared as follows:



86 A subsequent Witness Statement was introduced to deal with a comparison of the turnout rates for the election and comparing it to the other electorates in Fremantle and around the state.

87 The four Wards in Fremantle contained between 6000 and 6600 electors. The lowest turnout rate in the 2023 election was 30.56% in the Central Ward, approximately 5% lower than the East Ward and North Ward. However Coastal Ward at 40.95% had the highest voter turnout. This figure was higher than any suburban Ward in Western Australia. Generally speaking, the percentage turnout in the Perth metropolitan area is lower than that in the rural areas.

- 88 In cross-examination Ms Wood was taken through each of the steps that the Commission took to alert electors to the issue.
- 89 It was put to her that the Commission ought to have halted the election. She confirmed that there was no genuine consideration given to try to stop the election from continuing as the Commission had concluded that the proposed steps of communication and reissue of the ballots would be sufficient rectification of the error. This was principally as these processes were occurring soon after the issue of the original ballots.
- 90 Criticism was raised over the decision to advertise the error in the local newspaper and not in the West Australian and to use the Commission website, described by counsel as “*not well visited*”, as a notification of the error.
- 91 Further, it was suggested to her that sending out the same ballot envelopes or be it containing black or blue writing was not sufficient notice of the difference between the ballots. It was suggested that some electors may have been confused and thrown away the additional ballot.
- 92 Whilst Ms Wood did not dismiss voter confusion as a possibility, she referenced the overall messaging to suggest that the likelihood of widespread confusion leading to non-voting was minimal.
- 93 Additionally, it was put to Ms Wood that the how to vote pamphlet included with the original ballots contained translation of the information into multiple languages however the Leaflet explaining the error was only in English. Ms Wood accepted this was correct.
- 94 In further cross-examination Ms Wood was asked about the time available to electors to submit the correct ballots. There was a public holiday on 2 October 2023 which added another day of delay.
- 95 However, Ms Wood pointed out that the reprint of the ballot paper occurred on 29 September 2023, and they were lodged with Australia Post for service by

priority mail that same day. Whilst she accepted that there was a week less in the election she believed that three weeks was sufficient for people to receive their votes, consider who they wish to vote for and return the ballot.

96 In re-examination Ms Wood was asked to clarify the blue/black differences in the envelopes. She clarified that it was simply so that any envelopes received in the wrong colour could be quarantined and not counted in the election. She felt they were sufficiently different to assist voters.

### **Vernon Leslie McKay**

97 As the Returning Officer Liaison Officer, he was engaged to “supervise and provide support, training and assistance” to Returning Officers during the course of an election.

98 On 27 September 2024 he became aware of the error in the initial ballots. He engaged in correspondence soon after with the City of Fremantle. This correspondence, he clarified in his Witness Statement, was to do with replacement packages, which are used for ordinary purposes where electors report that their ballots have been damaged or missing.

99 In cross examination he clarified that his was a communication role. He kept the Returning Officer in the loop as to higher level discussions about the error and the method of fixing the error.

100 He did not have a role in the actual decision making.

### **Phillip Richards**

101 Mr Richards has worked for the Commission for over 41 years. His current role is the Manager of Election Events.

102 He submitted two Form 32A - Statements of Intended Evidence of a Witness.

103 The first Statement of Mr Richards contains some 102 paragraphs dealing in very specific detail with the conduct of the election. This includes:

- a) The appointment of the Commission by the City to conduct the election;
- b) The process of gathering the enrolments;
- c) The process of determining voting entitlements from the rolls;
- d) The production of mail out lists for distribution of ballots;
- e) The engagement of Mail Houses for the distribution of the packages;
- f) The preparation of the election packages;
- g) The QA process for checking ballots;
- h) The lodging of the ballots with Australia Post;
- i) The processing of returned ballots;
- j) The determination of election results.

104 None of these processes were, of themselves, controversial.

105 He became aware of the error on 27 September 2023 and immediately manually checked the records to confirm that there had been a transposition error. The coding recorded Central Ward as “Ward 02” and Coastal Ward as “Ward 03” when the opposite was correct.

106 His evidence supplements that of Ms Wood however he goes into detail regarding the statistics surrounding the returned election packages. He points out that there was, for a period of 5 days in October, an error in the daily total featuring on the Commission website. This was due to the cumulative total being added rather than a daily total. This error was detected and fixed.

107 He states that incorrect election packages were returned by 922 Central Ward electors and 616 Coastal Ward electors. These were quarantined and not counted in the final election result. Six of the Coastal Ward packages would have been rejected as they were unsigned and 2 of the Coastal Ward packages would have been returned for the same reason.

- 108 Perhaps more importantly of those 922 Central Ward electors 669 eventually returned correct election packages and 243 did not return the packages. In the Coastal Ward of the 616 electors, 463 returned correct election packages and 142 did not.
- 109 In cross-examination Mr Richards was taken to documents marked PSR 22 and 23 outlining the postal quantities for the two electorates. The mailing statements recorded the number of packages sent to electors. The quantities are separated by postage costs. Most are barcoded direct however approximately 110 in the Central Ward and 430 in the Coastal Ward belonged to the other categories.
- 110 This included those described as “other states” of which there was 7 in central and 5 in coastal and unbarcoded residue of 59 in Central and 249 in Coastal. These were described as addresses without a unique identifier which would include habitation addresses, lot numbers or RMB addresses.
- 111 The significance of these unbarcoded addresses in relation to postage time was not explored. All mail was sent by priority post to the electors.

### **Elizabeth Houlton**

- 112 She was the Returning Officer for the Fremantle election.
- 113 Her Form 32A Witness Statement referred to the procedures involved in training local government staff to issue replacement electoral packages that is, on an individual basis rather than the bulk reissue which occurred in this election.
- 114 In fact, she had been on pre-arranged leave which coincided with the error being discovered and the packages reissued. She was aware of the problem through a telephone call whilst she was on leave.
- 115 She was asked in cross examination whether in carrying out her role of declaring the election she considered whether it ought not to be declared. Her response was that upon returning from her leave she formed the view that the process of

informing the electors of the incorrect ballot had been completed and that there was nothing to suggest to her that the election had not been run correctly.

116 Specifically, she believed that there was no suggestion of disenfranchisement of the electors.

### **Evidence of Electors**

117 The Complainants called a number of witnesses who appeared in their capacity as electors.

118 The theme of their evidence was the same. The error in the electoral process caused confusion or difficulty recording their vote.

119 The Commission produced voter information from its records to confirm eligibility to vote and the receipt of votes.

120 In two cases, those of Mr Ross and Ms Megroz, the problem was one of time. Being overseas voters, they felt that the error had deprived them of the ability to render their vote in time.

121 Of course, these witnesses all represent the Complainant's position. None of the interested parties decided to call any witnesses who wished to express to the Court that they had learnt of the error in the ballots and nevertheless recorded their vote without difficulty.

122 Below I summarise the evidence of each witness as contained in their Form 32A – Statement of Intended Evidence of a Witness and the impression of their evidence after cross-examination.

### **Shirley Baker**

123 Ms Baker gave evidence that;

- a) She is a registered voter in the Coastal Ward. She intended to vote in the election.



- b) She received the first ballot papers and did not return them.
- c) She received the second round of ballot papers in the second week of October.
- d) She did not receive the Leaflet explaining the error.
- e) She did not have time to do a postal vote and had to go into the city of Fremantle to do an in person vote on the last day of voting.

124 In cross-examination she stated that she did not return the first ballot paper as it did not refer to Ms Vujcic, for whom she intended to vote. She was positive that the Leaflet was not in her second package. She cast her vote in the election.

### **Helen Campbell-Cox**

125 Ms Campbell-Cox gave evidence that:

- a) She is a registered voter in the Central Ward and intended to vote for the candidate Steven Pynt. She received the first round of ballots in October 2023 which contained Central and Coastal Ward ballots.
- b) She did not return the ballot papers.
- c) In October 2023 she received the second round of ballot papers.
- d) These also contained ballots for the Central and Coastal Wards.
- e) She was unable to clearly differentiate between the various ballots sent to her so she took photographs of the various ballots she received.
- f) She voted using the second ballot papers.

126 In cross-examination it was put to her that one the reason she received two sets of ballot papers was not due to an error by the Commission but reflected the fact that she was listed on the electoral rolls for Coastal and Central Wards.

- 127 Ms Cox acknowledges that the records produced by the Commissioner suggested dual eligibility but denied that she had dual eligibility.
- 128 She denied crossing out the word Central on one envelope and writing Coastal on it. She claimed that the writing was a fabrication and that somebody had voted in the Coastal Ward on her behalf.
- 129 She denied having voted correctly in the election in each Ward. She accepted that the photograph of the ballots next to a newspaper showed a date of 7 October 2023, two weeks prior to the election, but could not confirm whether the photograph was taken on that day.
- 130 My impression of Ms Cox’s evidence is that she was determined to present a view that she was the subject of an additional bungling by the Commission in sending her multiple incorrect ballots rather than accepting that she was (correctly or incorrectly) registered to vote in two Wards.
- 131 She then chose to double down when presented with these facts by asserting that there had been fraudulent behaviour on somebody else’s behalf in sending in her vote.
- 132 I accept the Commissions evidence that her vote was counted in the election.

### **Naomi Caceres**

- 133 Ms Caceres gave evidence that:
- (a) She was entitled to vote in the Coastal Ward.
  - (b) In October she received the first round of ballot papers and did not return them.
  - (c) In October she received the second round of ballot papers. She cannot recall an information brochure in the electoral package. She says in her statement, confusingly, that she “*did get to vote and mail my ballot*” and yet “*did not get enough time to do a postal vote that was counted*”.

- 134 In cross-examination she said that she “*didn’t return the first ballot papers because it didn’t feel right in returning it*”. In other words, she chose not to return it because she knew the ballot papers to be incorrect.
- 135 She was not certain whether South Fremantle, where she resides, is the Coastal or Central Ward.
- 136 She did not remember any Leaflet about the election mix up. She would not agree with the contention that the Leaflet was in the second ballot papers because “*it sounds like you’re trying to groom me into saying something*”.
- 137 She clarified the confusion over her statement about voting/not voting by suggesting that she did return the postal vote but felt like it was too late to be counted.
- 138 When presented with the records from the Commission suggesting that her vote was received on 13 October 2023, a week before the election she was asked whether she agreed that she had sufficient time to vote. Her response was “*not particularly*”.
- 139 In my view Ms Caceres was able to render her vote, despite confusion, a week earlier than the election.

### **Mark Woodcock**

- 140 Mr Woodcock stated that:
- a) He was a registered voter in the Central Ward.
  - b) He received the first round of ballot papers in October which was correct for Central Ward.
  - c) He voted and returned the first ballot paper.
  - d) Later in October he received the second round of ballot papers for the Central Ward. There was no information in the second package to explain that package.
  - e) He was confused and voted using the second ballot paper.

141 In cross-examination he confirmed that he was registered to vote in both the Coastal and Central Ward.

142 He returned both ballot papers when they were first received. He returned the second ballot papers for both the Coastal and Central Ward.

143 He did not believe that there was an information brochure in the second ballot packages and says that *“I think I would have recalled that, and I remember wondering why I didn’t see it when I had other people say they had it in their packages. It was a huge community conversation at the time. So everyone was talking about it, but I don’t recall seeing one in my package”*.

### **Suzanne John**

144 Ms John gave evidence that:

- a) She is a voter in the Coastal Ward and the East Ward.
- b) In October she received Central Ward ballot papers which were incorrect.
- c) In October she did not receive a second round of ballot papers. She went to the city for Fremantle for replacement ballots and was told that they would be mailed to her but did not receive them and did not vote.

145 In cross-examination Ms John indicated that she had been to the city’s offices on several occasions to question why she had not received her ballot and had been promised a replacement.

146 It was put to her that the electoral records suggest that she was not registered to vote in Fremantle at all but rather her address was listed as Cottesloe. Ms John said that whilst she had a property in Cottesloe that was rented out she did not reside there hence the Commission’s information was incorrect.

147 She denied that she had only received a voting package in Cottesloe.

148 Ms John's evidence was delivered in a colourful manner and I do not doubt that there is some confusion about her eligibility in various Wards.

149 However, I do not consider that she was affected by the error and believe that she most likely, through her contacts on local radio, picked up the issue of the incorrect ballots which spurred her to go to the city offices.

150 Whether the voting entitlement needs to be updated by reason of her living arrangements is not the same question as to whether the election was unsafe due to the Commission's error.

### **Lena Rossi**

151 Ms Rossi gave evidence that:

- a) She was registered in the Central Ward.
- b) In October she received the first round of ballot papers.
- c) She voted for her candidate and returned the first ballot papers.
- d) In October she received a second round of ballot papers.
- e) She did not vote again as she had already voted, and it was unclear that she had to vote again.

152 In cross examination it was put to her that she in fact initially received the Coastal Ward ballot and did not return it.

153 Later she received the second ballot for the Central Ward and recorded her vote correctly in that Ward.

154 She suggested that the record reflecting her vote in the Central Ward must have meant that the first ballot was correct rather than her having returned an incorrect ballot.

155 I consider that Ms Rossi was doing the best to recall what had happened, but she was mistaken in her recollection and had in fact voted correctly for a candidate in the Central Ward.

### **Dominique Mimmagh**

156 Ms Mimmagh gave evidence that:

- a) She was registered to vote in the Central Ward.
- b) In early October she received the first round of ballots for the Coastal Ward. She voted and returned the first ballot papers.
- c) Two weeks later she received the second ballot papers.
- d) It was confusing to her and there was no information provided by the Commission to explain the second package.
- e) She voted and posted it back to the Commission but it was posted in the last week of the election and probably did not reach the Commission before 21 October 2023.

157 In cross-examination she says that she definitely didn't receive the Leaflet with her second package.

158 It was put to her that her recollection was incorrect and that the voting records showed that her correct vote had been returned on 11 October 2023. Therefore she must have received the two ballots less than two weeks apart for the second ballot to have been returned 10 days before the election.

159 Ms Mimmagh was unable to comment on the Commission records.

### **John Greenwood**

160 Mr Greenwood gave evidence that:

- a) He was registered to vote in the Coastal Ward.

- b) He received the first round of ballot papers in October. He voted and returned those papers.
- c) Also in October he received a second round of ballot papers.
- d) He assumed that the second ballot papers were incorrect because he had already voted for his candidate and did not see any information in the election package explaining the extra ballot.
- e) He did not return the second ballot papers.

161 In cross-examination he was adamant that he had not seen the Leaflet in the second election package.

162 Mr Greenwood was referred to the Commission records suggesting that on 10 October 2023 he voted in the Coastal Ward. He was adamant that the vote received on that date was not the second ballot but rather the first.

163 He maintained that he did not return the second ballot even after he was shown his elector's certificate indicating that the ballot was signed on 3 October 2023.

164 I accept the Commissions' evidence that Mr Greenwood correctly voted in the election.

### **Grace Megroz**

165 The witness's evidence was admitted by consent without cross-examination.

- a) She is a registered voter in the Coastal Ward.
- b) She received the first round of ballot papers and did not return them because they referred to candidates who were not standing in the Coastal Ward.

- c) On 21 October 2023 she received a second round of ballot papers but did not return them because they were two days late to be posted back on time.
- d) Whilst it is not referenced in her Form 32A - Statement of Intended Evidence of a Witness, at the time of the election and as at the date of trial Ms Megroz was a resident in the United Kingdom.

166 Her evidence was introduced to show the potential for disenfranchisement of overseas voters who may have been deprived of the opportunity to vote in the election via the second ballot.

### **Craig Ross**

167 Mr Ross gave evidence that:

- a) He is a voter in the Coastal Ward.
- b) In the months of September and October 2023, and at the time of the Hearing, he was travelling and working in Bulgaria.
- c) He received the first round of ballot papers in September and did not return them.
- d) In October he received the second round of ballot papers and instructed his parents to forward the election package to him.
- e) He did not vote using the second ballot papers because of the lack of time to post them back to the Commission in time for the vote to count.

168 In cross-examination he confirmed that he was in Bulgaria from July to 28 October 2023, the week after the election. He maintained his original address and did not advise the Commission that he was out of Australia.

169 He became aware of the error in the ballots through social media.



- 170 Whilst he was away his parents would visit periodically, roughly every two weeks, to make sure the plants were watered and the apartment was in good condition. He was interested in voting in the election and also voting (or at least avoiding a fine for not voting) in the Voice Referendum.
- 171 He told his parents not to forward through the first ballot as he was aware that it was incorrect. When he was informed by his parents that the second ballot arrived he told them not to forward it to him as his experience with international express post was such that he didn't believe it would make it back in time for his vote to be counted. He believed that it would have taken 3-5 days either way for the mail to get to and from Bulgaria by the swiftest means.
- 172 In re-examination he confirmed that whilst his parents would visit the apartment generally and check the mailbox then communicate with him by email about anything they had found, he specifically asked them to keep an eye out for the election packages.

## **The Candidates**

- 173 Two candidates gave evidence at the hearing - Ms Marija Vujcic and Ms Jemima Williamson - Wong.
- 174 Both were candidates in the Coastal Ward.

## **Marija Vujcic**

- 175 Ms Vujcic gave evidence that:
- a) She was a sitting councillor in the South Ward of the City of Fremantle, with her term expiring on 21 October 2023.
  - b) She nominated as a councillor for the newly created Coastal Ward.
  - c) Her focus in regular campaigning was on face-to-face contact with the voters including extensive door knocking. During the door knocking,

after the election was announced and the ballots sent, she was told by voters of the error in the ballots.

- d) She got in contact with the returning officer Liz Houlton on 27 September 2023 and was told that the Commission was aware of it and was investigating the issue.
- e) Her first incorrect ballot arrived on 3 October 2023 and the second, correct ballot, arrived on 6 October 2023. The second package included the Leaflet referring to the error.
- f) She said that the blue and black ink used on the reply-paid envelope with both ballots was very similar featuring only a marginal difference in shade.

176 In cross-examination Ms Vujcic was taken to the email from the Commission to candidates dated 28 September 2023. She denied having received that email. When taken to a further email from the Commission allegedly sent to her Ms Vujcic was frank in saying that her focus at the time was on the personal nature of door knocking and that she may not have been across all her emails.

177 She says that she spoke to hundreds of people in her electorate after the error was discovered. She explained to them the issues with the ballot papers and told them what they needed to do if they wished to vote for her. She encouraged those people who had already thrown away their second ballot in confusion to contact the City of Fremantle to request a new ballot.

178 In relation to her suggestion that the return envelopes were easy to confuse being only distinguished by blue and black writing Ms Vujcic contention seemed to be that she put the correct vote into the incorrect envelope.

179 She was not willing to concede under cross-examination that the vote had been received and therefore was in the correct envelope when returned.

## **Jemima Williamson-Wong**

180 Ms Williamson-Wong gave evidence that:

- a) She launched her campaign for election in the Coastal Ward digitally through Instagram on 8 August 2023.
- b) On 27 September 2023 she received an email from Mr McKay from the Commission advising of the error and also observed a Commission statement forwarded by the City of Fremantle.
- c) The following day an email was received from Mr Kennedy, the Electoral Commissioner, confirming and apologising for the error and identifying the steps to be taken to remedy the problem.
- d) From 27 September 2023 to 29 September 2023, she received emails from residents advising of the problem. She responded to those emails providing information about the correct voting process.
- e) She noticed an article in the Fremantle Herald on 29 September 2023. She noted further the reportage in the Fremantle Herald on 6 October 2023 and 13 October 2023.
- f) She spoke to members of her campaign team on 28 September 2023. She took her own steps to inform the electorate of the problem.

181 The steps she took included –

Instagram: Posting Instagram videos 29 September and 2 October 2023. She posted a fresh Instagram story to encourage voting on 12 October 2023 and gave her final warning on 16 October 2023 on Instagram of the need to post ballots and otherwise drop them at the town hall to be received prior to the end of the election. A fresh story was posted on 16 October 2023 and reposted on 18 October 2023.

Radio: She appeared on Radio Fremantle on 12 October 2023 on the Fremantle Arts Show and 13 October 2023 on the Freo-Verse Show.

Door knocking: From 4 October 2023 till 19 October 2023, she door knocked through the Coastal Ward.

Pamphlet printing: On 6 October 2023 she arranged for the mass printing of her own pamphlets to each house in her electorate advising of the error.

182 In cross-examination she clarified that she visited about ten to twenty houses each day from the 4th to the 19th of October and handed out her specially prepared pamphlets. She accepted that this was not a large portion of the electorate. However, her explanatory pamphlets had already been distributed by post to roughly six thousand members of the electorate.

## **Determination**

183 Throughout the course of the hearing a number of arguments were presented as to why the election result should be set aside and the election re-held. Those arguments underwent some changes as the evidence progressed, but the central theme was that the election was irretrievably damaged by the initial error.

184 The Complainants suggest that the error was essentially unfixable but that, in event, the efforts of the Commission did not assist in saving the election.

185 I am asked to find that the effect of the error and the steps taken to fix it had the result of confusing voters such that the right of the electorate to vote for their chosen candidates was irretrievably damaged.

186 This was compounded by the reduced time to vote which limited the ability of a confused electorate to respond.

187 Further, it is suggested that the messaging from the Commission did not sufficiently inform the electorate of the problem and the steps that needed to be taken to correctly record their vote.

- 188 Finally, an error in the votes shown on the Commission website added to the confusion.
- 189 The Complainants argued the case on the basis that this fell within the first limb of *Bridge v Bowen*, that the magnitude of the error meant that there was no election at all. However, the error complained of was clearly an irregularity, within the explanation provided in *Featherston v Tully* thus I consider that the second limb applies.
- 190 There is no suggestion that the irregularity occurred where the law “requires absolute and strict adherence”. There is no particular provision of the LGA that has been breached but I accept the overall electoral process suffered a setback due to the error, the effect of which can rightly be challenged.
- 191 Counsel for the Association referred to reg 73 of the Local Government (Elections) Regulations as evidence of a power to halt elections. That Regulation certainly enables a Returning Officer to suspend a poll for a day or a week the fact that the basis of the exercise of this power, per Reg 73(1) lies in the belief *that the poll will not be able to proceed freely, safely and without interruption on election day* suggests that the Regulation is intended to apply to serious events occurring on or leading up to polling day.
- 192 Civil unrest or dangerous weather might satisfy that test. It is not, in my view, the source of a general power for the RO to assess the election process as a whole and delay the poll.
- 193 Counsel for the Complainants pressed the Commission witnesses on the question of whether the election could be suspended. The witnesses were uncertain as to whether such a power existed, the general response being that once their crisis management plan was enacted to their satisfaction no consideration was given to halting the poll.
- 194 The CDR does not, in my view, have the power to suspend a prospective election. S4.80 provides that the CDR can only be engaged by a person

dissatisfied with "the result" of the election or the way in which it "was" conducted. All are past tense. Presumably any such power lies in a superior Court.

195 The question is whether the irregularity was so great that the majority were unable to vote for the candidate they preferred.

### **Voter confusion**

196 The central plank of the Complainant's argument is that the effect of error in the original ballots and the re-issue of fresh ballots was that the voters were confused about what they should be doing to vote.

197 The suggested natural consequence of this confusion was that a large but unspecified number of voters did not get the opportunity to vote for their choice of candidate.

198 There are several specific points which the Complainants have addressed.

199 To support an argument that the electorate was initially confused, and remained so up to the election, the Complainants produced several witnesses.

200 The witnesses comprised local concerned residents as well as the candidates. The testimony of those witnesses has been detailed in the above paragraphs.

201 The candidates also reflected on the suggestion that the electorate was confused. In summary it can be said generally that the candidates were continuing to door knock on the campaign trail and were confronted with questions about the issue of the second ballots.

202 Ms Vujcic characterised those discussions as residents confused about their rights and obligations whereas Ms Williamson-Wong saw it more as a talking point.

203 The voter witnesses called by the Complainants did express a level of confusion.

204 However, that state of mind was complicated by the fact that their Witness Statements were often able to be clearly contradicted by the evidence produced by the Commissioner.

205 Frequently those witnesses were adamant that they had not returned their voting slips when proof of a correct vote had been received. The net effect was that if they were indeed confused, they nevertheless managed to correctly record their vote.

206 Further, where the vote had not been received, as with Ms John, it was due to confusion about the electorate in which the person could vote.

207 As it happened there was no witness called who was proven to have:

- a. lodged an incorrect vote with the first ballot;
- b. been confused as to the significance of the second ballot; and
- c. failed to vote.

### **Overseas and non-specified address voters**

208 It is accepted that some of voters did not have straightforward mailing addresses. These included the unbarcoded voters. It is not clear to me, however, whether that caused any significant delays in the packages being delivered. I do not have anything to suggest that there was a failure to submit votes for those people.

209 I do accept that Ms Megroz and Mr Ross were overseas which caused issues with delivery of their ballots. Those issues could perhaps have been minimised by updated voting addresses however this is not a criticism of their actions.

210 In respect of Mr Ross he was keen to vote however his parents only visited every couple of weeks which might have caused problems with any voting given the timetable of the election. He clearly cared enough to tell his parents he would like them to forward the voting packages but not to have them redirected to him or have his parents check the mail on a more regular basis.

211 This is not a criticism of either voter. They are the type of elector who comes closest to being disenfranchised by the shortening of the time frame for the election. However, they represent the outliers of the electorate.

### **Voter Turnout**

212 What relevance is the voter turnout in this election?

213 This question is more relevant in local government elections in which voting is not compulsory.

214 It should logically follow that, if the electorate was confused and thereby failed to understand the need to resubmit their votes, the voter turnout in the election would reflect a noticeable variance from expectation.

215 The Commissioner provide detailed statistics on the turnout for the October 2023 elections, which included suburban and rural seats. The Central Ward and Coastal Ward had voter turnout figures of 30.56% and 40.95% respectively.

216 The Central Ward turnout was lower than the other Fremantle Wards though not unusually low compared to other suburban electorates. For example, it was higher than all the Joondalup and Stirling Electorates but lower than most in Melville.

217 The Coastal Ward voter turnout was, in fact, the highest of all suburban electorates in the 2023 elections.

218 No doubt there is some explanation for the high turnout, particularly in the Coastal Ward. No evidence was presented to the court to explain this level of enthusiasm. One could only speculate.

219 It could be that as a newly created Ward the residents of that area were excited to place their votes for their representative and this drove a higher turnout.



- 220 Alternatively, it could be that the error and the subsequent very public fallout from the error lead to an increased interest in the election and a greater voter turnout.
- 221 Maybe the people in these areas, even prior to the newly created Ward, were more interested in local politics. No historical data was presented to explain any such trends.
- 222 In the absence of any clear data, including post-election polling, it is impossible to come to any conclusion. Speculation is ultimately unhelpful.
- 223 All that can be said, perhaps, is that the allegations of confusion do not appear to have generated a noticeably decreased electoral turnout.

### **The Weighting of Votes**

- 224 There were a number of voters who lodged incorrect ballots and then failed to submit a correct vote with the second ballot. According to Mr Richards, leaving aside informal votes, there were 243 electors who failed to return the second ballots in the Central Ward and 142 in the Coastal Ward.
- 225 It was not suggested that these voters never received the second ballot. There votes are simply unaccounted for.
- 226 Understandably, there was no attempt by the parties to interview all voters in the two Wards to determine their preferences where the initial vote had been lodged on the first ballot but no vote submitted on the second ballot.
- 227 Such a level of detail would be excessive however I am left with an absence of information about the way those missing votes should be weighted.
- 228 If the votes are to be taken generally and allocated the same proportions as other votes received, then numerically there would be no difference in the result. Yet understanding the voting preferences is a complicated endeavour.

- 229 This is not a case where there is an alleged disenfranchisement of one group of the electors that would have placed their votes more heavily with one candidate over another. For example, in the case of *Mack v Shire of Serpentine-Jarradale*, where ballots were stolen, it was a very real concern that the thieves may well have targeted areas where Mr Mack was likely to dominate the voting.
- 230 There is no explanation for why the voters who had incorrectly voted on the first occasion did not submit a ballot when they were re-issued.
- 231 There are many possibilities:
- a) They were confused and believed that they had already voted on the first occasion and there was no need to vote on the second;
  - b) They recognised they needed to vote on the second occasion but ran short on time;
  - c) They simply couldn't be bothered going through the process of voting again.
- 232 It would be wrong to criticise the voters who submitted the first incorrect ballot. They received something which looked like an official voting slip. Some voters may be keen to examine the voting slip in great detail to determine whether it corresponded to their own Ward.
- 233 Yet to describe them as electors who were deprived of the opportunity to vote for the candidate they wanted is a vexed matter. They received envelopes which did not refer to any candidates in their area. The envelopes were for a different Ward. Nevertheless, they voted and returned those envelopes.
- 234 Self-evidently, a large number of people were either not specifically attached to a candidate or unaware of their correct Ward when returning the initial voting package.

235 All I am left with is speculation which cannot form the basis of a decision to declare an election void.

### **Mathematics**

236 Pure mathematics is not the be all and end all of electoral disputes however it is a factor expressed in *Bridge v Bowen*.

237 Here it is not immediately clear whether there are lost votes as the central argument is one of confusion leading to a failure to vote. That, as I have said above, is not really supported by the voting turnout. However, there is also the issue of the mathematics concerning the unreturned votes.

238 The position in the Central Ward was mathematically clear (1091/761 – a difference of 330) irrespective of the unreturned second ballots (243) and the unsuccessful candidate Mr Pynt did not take a role in complaining about that result.

239 In respect of the Coastal Ward (1198/1034 – a difference of 164) the position is slightly more complex than the 142 unreturned second ballots. This is by reason of the preferential voting system but unlike those cases such as *Kempsey* where significant recounts and exclusions took place, that might not have occurred had the voting error not happened, there was no suggestion here that the election problem caused one party to benefit over another.

### **The miscommunication and the further communication**

240 The Commission accepted the scope of the error. Everybody in the electorate received wrong voting slips. However, there was a series of arguments put forward as to why the election result should stand.

241 There is no shying away from the enormity of the error the likes of which Mr Richards had not seen in his 41 years of service to the Commission. The Commission was forced to enact its Crisis Management Plan to deal with the

problem. If the question was simply whether the error was sizeable then it would be easily answered. However, the arguments are far more nuanced.

242 Firstly, the enormity of the error is a double-edged sword.

243 Whilst it created a crisis and deserves close scrutiny it affected everybody in the electorates, not just some select group. It is not a case, for example, where ballots featuring incorrect candidates were sent to only a section of the electorate and not remedied, nor is it a case where an incorrect candidate was put into the ballot in a certain Ward drawing some voter attention away from the legal candidates.

244 The most that can be said is that the size of the error demanded an equally sizeable response. The following are the steps that the Commission took to remedy the defect.

### **The Re-issue:**

245 It is not in dispute that the second ballots, with correct information, were sent out promptly after the error was determined. The Complainants argued that while the ballots were sent out soon after the error was discovered there was still valuable time lost in responding to the ballot in time to make their vote count.

246 Considerable time at the hearing was spent trying to nail down the precise times and dates that electors could have or should have received their fresh ballots. This was made a little more complicated by the existence of school holidays and a public holiday. That time varied however I am satisfied that the ballots were able to be sent out and likely to be received fairly swiftly after the error was discovered.

247 The ballot return records produced by Mr Richards showed a healthy return of votes beginning very early in October. There was no rush to the finish line.

248 The witnesses may have differed, but the tallies of votes received confirm that not only were the ballots being received but they were being returned in large numbers.

- 249 It is possible that the short delay may have affected a few voters, including those in regions or overseas, but I am not satisfied that the shortening of the election period, unfortunate as it was, was likely to have a marked effect on the return of ballots.
- 250 The turnout figure suggested that it did not.

**Further Ballot Information:**

- 251 The Commission maintained that the Leaflet was included in the new ballots explaining the error. Criticism was directed at the Commission over the fact that the cause of the error was not explained however I do not accept that it was necessary to go into detail about the embarrassing error but rather to communicate the issue and inform voters of what they should be doing to re-submit their ballot.
- 252 The Leaflet apologised and said that there was an error. To my mind that was enough. It then went on to explain what should be done to render a correct vote.
- 253 I accept that there were different colours of ink on the return envelopes so as not to confuse the voters as to which should be returned. Though there is not much difference between blue and black I do not accept that this was likely to have caused widespread confusion. It is not clear to me why a recipient of a second ballot would choose to intermingle the contents with the first ballot and mistakenly submit an invalid vote.
- 254 Had such confusion existed then it would follow that there would be a level of informal votes which was out of the ordinary.
- 255 No such high level of informal votes existed.
- 256 Further, whilst I accept that some recipients of the second ballot may have failed to observe the Leaflet explaining the error I am not led to a conclusion that there was a second major flaw in the mailout of the ballots which saw the explanatory document not included.

- 257 In this regard I do not accept the evidence of the witnesses who said that they did not see the Leaflet and were thus adamant it was not in there. Given that some of those same witnesses were mistaken about re-submitting a correct ballot I have to assume that they may have forgotten seeing the Leaflet.
- 258 Similarly, I accept the Commission's suggestion that the document was printed in one language, English, so that it could be got out to the electorate as soon as possible. The multi-language materials are clearly prepared over some time and are generic in explaining voting procedures.
- 259 To have attempted to produce a document in multiple languages would have delayed the sending out of the second ballots.
- 260 Finally, there was no information presented in the Hearing to suggest that there was some large number of voters in either electorate who were unable to comprehend their English language.

### **Online Information:**

- 261 The Commission put information regarding the error on their website and materials were supplied to the City of Fremantle to put on their own website. I accept the criticism from the Complainants that both websites are likely to have a niche audience.
- 262 Doing this alone may not have been sufficient notice to the electorate of the problem.
- 263 In relation to the tally error on the Commission website I consider that this was of little moment. It no doubt raised ire and led those who visit the site and keep an active watch on local politics to even further reduce their confidence in the Commission.
- 264 However, it is unlikely the average voter would be watching the count close enough to prevent them from voting. It does not follow that the Commission website was so niche as to prove an ineffective means of notifying voters of the

original error and yet be a factor in making the election unsafe through the incorrect tally.

**Other Media:**

265 The Electoral Commissioner went on 6PR radio soon after the error was discovered. There was some debate at the hearing as to whether this was a direct result of numerous people ringing the radio station with complaints.

266 Once again, I am not able to answer this question without further information but it seems to present as an argument for both the Complainants and interested parties. If indeed there were numerous people ringing the radio station, then that suggests a wider level of confusion and complaint.

267 However, the fact that the Commissioner went on that radio station to explain what was happening would most likely have meant that complaining listeners would get the information they needed to understand what had happened and what they needed to do to register a correct vote.

268 Ms Williamson-Wong produced several video updates for Instagram. She also, at her own cost, arranged for the printing of some 6000 leaflets for the Coastal Ward providing information for electors urging them to vote.

269 Finally, Mr Ross indicated that he was able to keep abreast of the scandal whilst in Bulgaria.

270 Clearly social media ran hot with information as did the Fremantle Herald newspaper. The newspaper provided its readership with information about the problem such that the reach of the issue was extended. Social media is perhaps more prone to producing argument rather than reliable information. Yet the reality was that the reach of social media extended to voters in the election.

271 The information programme from the Commission and other parties was not perfect. Nevertheless, it was seemingly available to those who either:

- (a) Checked their mailbox regularly;
- (b) Listened to 6PR radio;
- (c) Went onto websites such as the Commission or the City of Fremantle;
- (d) Accepted visits from doorknocking candidates;
- (e) Read the Fremantle Herald;
- (f) Followed Ms Williamson-Wong on her Instagram page;
- (g) Followed the saga on Facebook or other social media;

to get an insight into what had occurred and what was required to fix the incorrect ballots.

## **Conclusion**

272 The error of the Commission in swapping ballots was momentous. Mr Richards, who was very experienced in elections, had not seen anything like it in his 41 years of electoral service.

273 Just as momentous was the amount of effort and attention paid to alerting voters of the problem. Some of these efforts were roundly criticized but I consider it important that:

- a) The replacement ballots were prepared and sent out promptly;
- b) They were delivered progressively by priority post;
- c) The reduction in time to vote was not serious – from a few days to a week;
- d) The Commission provided messaging through various means – some grassroots such as radio and others highbrow like the Commission website;



e) The re-issued ballot package was not perfect but it represented a quick response to the problem;

f) The candidates were active in informing voters of the need to record their vote;

g) Local press and social media seems to have been a source of information;

274 No doubt there was some voters who were affected by the error and unable to participate in the election.

275 However, I am not satisfied that those numbers were likely to be significant. It is impossible to now go back in time and predict the election result if the error had not occurred.

276 But neither is it likely that the error could have led to an alternate result. The only mathematical evidence presented suggests that a certain number of electors who returned the first ballot did not return the second. This may have led to an argument that the confusion created a failed election however there is no explanation for the actions of these voters and the results do not suggest a likely different result.

277 Election errors and irregularities are a feature of life. Each is regrettable. This is regrettable and embarrassing. But I am not satisfied that the electorate was disenfranchised or the result of the error was so great that there was no election at all.

278 For all these reasons I would dismiss the complaints.

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Magistrate Darge