

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

LOCATION : PERTH

CORAM : MAGISTRATE T DARGE

HEARD : 3 & 5 May 2022 & 2 June 2022

DELIVERED : 1 July 2022

CASE No : GCLM/1354/2021 & GCLM/1297/2021

BETWEEN : **SHIRE OF SERPENTINE JARRAHDAL**
(1st Complainant)
SHAYE LUKE MACK
(2nd Complainant)

and

ELECTORAL COMMISSIONER OF WESTERN AUSTRALIA (“WAEC”)
(Intervener)

GURDEEP SINGH
(1st Interested Party)

ROBERT COALES
(2nd Interested Party)

Representation:

Counsel:

1st Complainant : Shire of Serpentine Jarrahdale – Mr D.W. McLeod
2nd Complainant : Mr Mack – In person
Intervener : Mr D.E. Leigh
1st Interested Party : Mr R Graham
2nd Interested Party : N/A

Solicitors:

1st Complainant : McLeods
2nd Complainant : N/A
Intervener : State Solicitors Office
1st Interested Party : Vogt Graham

Legislation:

- *Evidence Act 1906*
- *Local Government Act 1995*
- *Local Government (Elections) Regulations 1997*

Cases referred to in the Judgment:

- *Bridge v Bowen* [1916] HCA 38
- *New South Wales Electoral Commission v Kempsey Shire Council* [2022] NSWSC 282
- *Kelly v Campbell* [2002] FCA 1125
- *Crouch v Ozanne* (1910) 12 CLR 539
- *Garbett v Liu* [2019] FCAFC 241

Result

Declaration that the election is invalid.

REASONS FOR DECISION

Introduction

- 1 In October 2021 a local government election was held to appoint two councillors in the North Ward of the Shire of Serpentine Jarrahdale. On the day of the election votes were tabled and the winners- Mr Coales and Mr Singh - declared.

<i>Candidate</i>	<i>Votes received</i>
Robert Francis Coales	1161
Gurdeep Singh	606
Shaye Luke Mack	432
Joel Chan Eng Wah	425
Michael Phillips	424
Jacob Curulli	292
Sukwinder Singh	183
Total valid votes	3,523

- 2 Returning councillor Robert Coales was re-elected with a clear majority. No one takes exception to his election.
- 3 It was the election of the second councillor, Mr Gurdeep (Gary) Singh that is controversial.
- 4 Election day was preceded by intrigue and controversy. Two people with a connection to Mr Singh were apprehended, charged and convicted of stealing election ballots.

5 By an invalidity complaint lodged 2 November 2021 Mr Mack disputes the result. He seeks the following orders:

“(1) he be declared as the councillor elected in place of Gurdeep Singh in the Shire of Serpentine- Jarrahdale;

(a) Gurdeep Singh not act as a member of Council;

(b) Shaye Luke Mack is to be regarded as having been elected; and notice of Shaye Luke Mack’s elections is to be published in accordance with the Regulations.

In the alternative to Order 1

(2) The election of Gurdeep Singh as councillor for North Ward of the Shire of Serpentine-Jarrahdale held on 16 October 2021 be declared invalid:

(a) The election is null and void;

(b) Any office of members filled at the election is vacant; and

(c) The court is to fix a day for holding any poll needed for a fresh election;

(d) The returning officer to prepare for, conduct and ascertain and declare the results of the fresh election.”

6 His complaint was followed on 12 November 2021 with a complaint from the Shire of Serpentine Jarrahdale.

7 Rather than complaining as an aggrieved individual the Shire merely asked the court to consider the evidence and, should it lead to such a conclusion, declare the election invalid.

8 On 7 December 2021 I ordered that the two complaints be heard together for convenience.

Legislative Background – Court of Disputed Returns

9 Division 10 of the *Local Government Act 1995* (“LGA”) deals with the validity of elections.

10 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 ...”

11 Section 4.81 provides that such a complaint is to be made to a Court of Disputed Returns (CDR) constituted by a Magistrate. That Magistrate has the power, per s 4.81(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.

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

13 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.

14 The LGA does not indicate how the CDA is to be conducted.

15 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.*

16 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 complaint.*

17 Neither the LGA nor the Regulations provide any guidance as to the factors to be taken into account when considering a declaration under Reg 84(2). Instead, we must turn to the common law. 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.

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

19 The decision of Isaacs J in ***Bridge v Bowen*** [1916] HCA 38 (at 623-624) 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.*

20 These principles suggest three types of inquiry and their consequences:

- a) A defect striking at the entire election leading to “no election at all”.
- b) A defect comprising an official irregularity leading to a void election unless the person shows the election result would not have been affected by it;
- c) An individual breach which is unlikely to have affected the election as an entirety and therefore no result is required.

21 The Intervenor suggests that this may be a defect strike at the whole election – a systemic defect. In those circumstances, if proven, the election result must be overturned.

22 In other circumstances where the defect is not systemic it must have the power to affect the votes to justify intervention.

23 Defining the actual test to apply to determine whether the defect struck at the entire election can be difficult. Mr Mack suggested that I should ask the question

“How much fraud is acceptable?” to which the answer would be “None”. Whilst enticing from the moral point of view such a test would confuse the role that the WAEC and the police have to punish breaches and offences respectively with the Courts role simply to determine whether an election needs to be re-held.

- 24 Counsel for Mr Singh leant heavily on the idea that the second test in ***Bridge v Bowen*** requires a degree of mathematical certainty such that the result would have been different. Reliance is placed on the decision in ***Crouch v Ozanne*** (1910) 12 CLR 539 where O’Connor J at 541 stated:

“...it is not sufficient to show that they (irregularities) took place, but it also must be shown that their taking place was likely to have affected the result of the election, and that, because of their having taken place, it is just that the candidate should be declared not to be duly elected.”

- 25 This decision was cited with approval by Madgwick J in ***Kelly v Campbell*** [2002] FCA 1125 but against a legislative backdrop which included the phrase that the election result was “likely to be affected” by the irregularity. His Honour noted that O’Connor J had declined to intervene on the basis of “mere supposition or conjecture”

- 26 The Full Bench of the Federal Court in ***Garbett v Liu*** [2019] FCAFC 241 at [46] considered that phrase:

Once again the word “likely” or the phrase “likely to” must be construed. On one view, the democratic process can be seen as better vindicated (where there is no bribery or undue influence) by not declaring a candidate not duly elected or by not declaring an election void unless the court is satisfied that it is probable, that is more probable than not, that the result of the election was affected. Setting aside the apparent will of the majority is no light matter. However, as will be seen, that appropriate caution may be seen to be well vindicated by a less definite or stringent requirement, especially in the light of the impossibilities of proof of the effects or consequences of some illegal practices. This is especially so if what is considered to be a “real chance” is informed by the recognition of the need for deep respect for the franchise, the electoral process, and the role of the AEC.

- 27 In my view the nature of the inquiry being conducted requires a balance between the need to respect the electoral process and a practical understanding of the effect of the defect. If the defect clouds the whole election, then a lesser degree of mathematical precision is required to find there was no election at all. If the defect is clearly and easily confined, then the likely result is more important.
- 28 Even though it was a case dealing with the breach of a statutory regulation, the decision of Justice Beech-Jones in *New South Wales Electoral Commission v Kempsey Shire Council* [2022] NSWSC 282 provides some guidance on this point. In considering whether there was a “threshold of materiality” to be overcome before an election was overturned due to the breach he said:

“The threshold is certainly above the mere existence of a bare possibility and below more likely than not that a different result would have ensued.”

Applicability of the Rules of Evidence

- 29 A question raised during the course of the hearing was the extent to which a court of disputed returns is bound by the Rules of Evidence. Counsel for the Electoral Commissioner referred me to subdivision 4 of Part 9 of the *Local Government Act* dealing with evidence in legal proceedings.
- 30 Section 9.30 stresses that the subdivision applies to any legal proceedings. Section 9.32 states that a subdivision “*is in addition to the Evidence Act 1906 and not in place of it*”.
- 31 The phrase “*legal proceeding*” is defined in section 3 of the *Evidence Act* as including any “*action, trial, inquiry, cause, or matter, whether criminal or civil, in which evidence is or may be given, and includes an arbitration*”.

- 32 The counsel for Mr Singh suggested that the inquiry should be conducted in the manner of a Tribunal hearing with the rules of evidence relaxed. This was consistent with the view of counsel for the Shire who suggested that the court should be guided by the rules of evidence and apply them so far as necessary but otherwise deal with evidence on the basis of weight.
- 33 In my view the nature of the inquiry is to gather materials and determine whether those materials lead to a conclusion that action must be taken in relation to the election. Such a task would be rendered impossible by the strict application of the rules of evidence.
- 34 Instead, I should receive the evidence and make a determination as to the appropriate weight to be given to it being cautious not to give undue credence to unsupported statements.

The Evidence

- 35 Numerous witnesses provided Form32A Witness Statements and gave evidence at the hearing. The parties were able to confer and produce a Statement of Agreed Facts. Whilst I have made some comments and given a summary of the facts below this is not intended to supplant the Agreed Facts, which I have attached to these reasons.
- 36 Essentially there were a series of events which formed the background to the complaint:
- (1) The WAEC delivered postal voting packages to Australia Post which were registered on 21 September 2021.
 - (2) Australia Post then began the task of delivering those packages to the voters.
 - (3) On 29 September 2021 two individuals Ved Tewari and Amandeep Rosha were arrested and later pled guilty to stealing ballots.

- (4) Replacement voting packages were sent out to some electors prior to election date.
- (5) After the election the WAEC commissioned investigators Gold Security to interview various electors and provide a report.
- (6) Mr Mack conducted a door knock in his area to interview electors and compile a report on those who had not received their voting package.

37 It is the totality of these events that go to the central question of whether this was an election at all.

38 As said, the intervener has suggested that the evidence may lead to a conclusion that the electoral fraud was so systemic that it goes beyond the mere exercise of counting numbers of votes to determine whether as a matter of fact the result was likely to have been affected by the fraud. If the character of the fraud is pervasive it goes beyond the specific.

39 Counsel for Mr Singh understandably suggests that the dispute should be considered on a more mathematical basis. If despite the fraud, Mr Mack could not have beaten Mr Singh then the result should be left alone.

The Theft – Electors

40 It is necessary to briefly examine the available evidence regarding the theft to determine whether this is a case of a systemic defect or whether there exists a level of uncertainty.

Sarah Wilson

41 It was approximately midday on 29 September 2021 when witness Sarah Wilson observed the postman delivering mail to her letterbox. Approximately 30 minutes later she observed two people – a male and a female – walking down the path towards her home.

42 It is not in dispute that these two people were Ms Rosha and Mr Tewari. She thought the male was unusual as he was wearing a medical face mask which was not required by Covid protocols at the time. She observed that they were both holding bags and carrying flyers relevant to Garry Singh's campaign.

43 She observed that Ms Rosha removed mail from her letterbox and handed it to Mr Tewari. She raced out and confronted the pair. Eventually her husband Jack Wilson became involved, and a citizen's arrest was enacted.

44 Ms Wilson's evidence was admitted by consent.

The Police Reports

45 So also, was the Detected Incident's Report from the WA Police relating to the incident. Ms Rosha and Mr Tewari were spoken to separately by police. Ms Rosha denied being in possession of shopping bags delivering election material. She restated the innocent explanation, said to have been given to Ms Wilson, that whilst attempting to put brochures into the mailbox wind had caught them and the other mail in the letterbox and blown it away. In the course of trying to put the mail back into the box they were confronted by Ms Wilson.

46 Police were able to find both shopping bags which contained ballot papers and brochures. Ms Rosha stated that Mr Singh was her ex-partner and that she hated him. She denied stealing ballots.

47 The other police information submitted by consent was the prosecution notice of Mr Tewari. Mr Tewari was charged with possession of stolen or unlawfully obtained property and made admissions to stealing the ballot papers with the intention of destroying it.

48 Both Mr Tewari and Ms Rosha denied stealing the voting packages to assist Mr Singh's campaign. They both pled guilty to the material fact that their purpose was to damage his campaign.

Mr Holden

- 49 Mr Holden is an elector. His evidence, admitted by consent, was that he and his wife never received a ballot paper. He made various calls to find out why they had not received it and was unsatisfied with the explanations.
- 50 On the election day they attempted to vote but were informed that a vote had already been received.

Mr Singh

- 51 Mr Singh maintained that he had nothing to do with the theft of the ballots.
- 52 At this point it is worth noting that neither Mr Mack nor any other party suggests that Mr Singh instructed Ms Rosha and Mr Tewari to steal the voting materials. Yet the relationship between the parties is relevant.
- 53 During cross-examination of Mr Singh the Intervenor put to him that Mr Tewari had been his effective campaign manager for his previous attempts at being elected in Serpentine Jarrahdale. In 2017 Mr Singh thanked him for his efforts as his "Marketing Manager". Prior to the 2021 arrest he had been thanked by Mr Singh in a Facebook post. The extent of the assistance is not mentioned.
- 54 The inference sought to be drawn from this evidence is that it would be surprising behaviour from Mr Tewari, a dedicated assistant, to decide that he would move to damage Mr Singh's chances by stealing and destroying ballots. Mr Singh could not explain Mr Tewari's behaviour.
- 55 In that regard it is noted that Mr Singh and Ms Rosha were separated. She spent some time living in India but otherwise lived with him when she was in Australia. Further, her business of running a childcare service was still recorded at his premises. He maintained that she had not operated that business for some time.
- 56 It is difficult to take too much from ASIC records which are only as good as the determination of the business owner to update them.

Mr Mack – The Survey

- 57 Mr Mack challenged that idea that the theft was an isolated incident only capable of having a limited effect on the election result. After learning of the stolen ballots, he contacted the WAEC asking that they invalidate Mr Singh's nomination. When told that they could not do this he embarked on his own investigation.
- 58 Mr Mack had not received his own postal vote package by 8 October 2021 and was told by a neighbour that they had likewise not received their package. On 9 and 10 October 2021 he conducted a door knock of over 350 houses in the streets surrounding his house.
- 59 He was able to converse with 120 electors of which 45% indicated they had not received their postal vote packages. He expressed these concerns to the Returning Officer and the WAEC on the day prior to the election.
- 60 It is understandable that the police did not attempt to investigate this matter further. Their responses to Mr Mack were to the effect that they could only investigate where there were further allegations of theft, supported by evidence, against Mr Tewari or Ms Rosha.
- 61 In the absence of direct evidence an invalidity complaint is the best option for a concerned member of the electorate.

The Election - Witnesses

- 62 Extensive evidence was given at the trial by those involved in operating the election. Most of that evidence was instructive but uncontentious.

Kenneth William Parker

63 Kenneth William Parker is the Manager, Governance and Strategy at the Shire of Serpentine Jarrahdale who was responsible for liaising with the WAEC on matters relating to elections including the election of 2021. The Shire engaged WAEC to operate this election.

64 He was kept informed of the theft and the potential implications of it for the election. He considered that the Returning Officer and the WAEC were the proper entities to be dealing with these allegations. After the election he wrote to the WAEC and the Minister for Local Government to raise lingering concerns.

Kathy Gecan

65 Kathy Gecan was the Returning Officer for the election. Her role was essentially to run the election on the day. She was aware of the stolen voting packages and the re-issue of the packages. She was a point of contact for electors concerned about missing packages or concerns about the electoral process. She received correspondence from Mr Mack regarding the door knock results and forwarded his spreadsheet to Ms Foppoli.

Louise Mary Foppoli

66 Louise Mary Foppoli was the Returning Liaison Officer for the 2021 elections responsible for the point of contact between Ms Gecan and the WAEC. She was aware of the theft of ballots and the efforts to fix that problem. She was also aware of Mr Macks survey and cross checked his results against the ballots received.

67 The day after the election she carried out a more thorough examination of the disputed ballots.

68 Ms Foppoli confirmed that based on her analysis there was a marked difference between the documents including in the use of a full name on one document and a more decorative signature representing the surname on another.

69 Questions were asked during the trial as to whether I or the other parties wished to conduct their own analysis. In my view my own examination of the original documents would do no more than Ms Foppoli's analysis. Taken at its highest it is evidence of fraud by impersonation. At its lowest it is a disturbing curiosity.

Courtney Barron

70 Courtney Barron is the Deputy Electoral Commissioner for WA. The WAEC commissioned a report from Gold Security to investigate electoral offences per s 4.26 of the LGA. Her Form 32A Witness Statement attaches a series of statements from electors interviewed by Gold. These statements corroborate the concerns of Ms Foppoli.

Analysis

71 I have considered the evidence of all the witnesses who provided Statements and those who gave evidence. In my view nothing turns on the credit of those witnesses.

72 For the reasons set out below I do not think it would be appropriate for the complaint to be dismissed.

73 Given that finding there are two possible results suggested by Mr Mack. One is that he is elected in place of Mr Singh and the other is that the election is held again. The other interested parties suggest the latter result, if the case is proved.

Replacing Mr Singh with Mr Mack

74 I have difficulty with this proposition.

75 Firstly, although there has been valid contention that Mr Singh received more votes than he was entitled due to the fraud, it is not suggested that he was the

mastermind behind the fraud. If, like a footrace, one party is disqualified then it would be easier to make a substitution. Here it is merely suggested that he was the beneficiary of the plan of others.

76 Further, whilst there was daylight between Mr Coales and Mr Singh the difference between Mr Singh and Mr Mack and the other candidates was considerably less. Mr Mah or Mr Phillips might have a genuine claim to be appointed in place of Mr Singh where the number of votes has been tampered with.

77 To simply appoint Mr Mack as the successful candidate would not be an appropriate result.

Calling a Fresh Election

78 It is no small matter to interfere with an election. The cost to run the previous election was in the order of \$30,000. The WAEC in their correspondence to the Shire warned of “electoral fatigue” if the process was to be begun again.

79 In my view having looked at these documents and heard the testimony, the evidence goes so far as to suggest that there was an inconsistency which may or may not have been the result of deliberate impersonation.

80 Having conducted the inquiry I am of the view that the election should be held again. I do this for the reasons set out below.

81 I consider that the first limb of *Brown v Bowen* has been engaged. This was a defect that struck directly at the heart of the right of the electorate to place their votes.

82 I look at some of the factors that have influenced my decision below.

The Nature of the Breach

83 In my view it is necessary to look at the type of alleged breach. Electoral defects come in many forms. This was not a technical breach of a regulation. Here it was

a dedicated if amateurish criminal attempt to alter the election. A plan to remove as many ballot papers as possible from mailboxes and submit them could alter the result, to favour one candidate or another.

Who did the plan benefit?

84 On the face of it, it is difficult to accept that the plan was intended to damage Mr Singh's electoral chances. Despite the vague comments Ms Rosha apparently made before and after the incident, that she felt him to be an unsuitable candidate, there is no logic to the alleged plan.

85 If one was attempting to steal voting packages to influence an election, then the method would be not to destroy those votes but to ensure that they were submitted to elect a different candidate. Stealing the voting packages would only have damaged Mr Singh's chances if the parties at those premises were all committed to voting for him.

86 Neither Mr Tewari nor Ms Rosha gave evidence at the hearing. Without their input (perhaps even with it) it is difficult to reach a definitive conclusion as to the reason behind the theft.

87 In my view there is as reliable a possibility that Ms Rosha and Mr Tewari engaged in the plan to steal voting slips to assist Mr Singh as it is that they did so to damage his chances.

88 Therefore, the evidence clearly supports a finding that Ms Rosha and Mr Tewari engaged in a fraudulent scheme to influence the result of the North Ward election.

The Number of Stolen ballots

89 Ms Rosha and Mr Tewari were arrested for the theft of 40 votes. If I could be confident that their scheme was limited to those votes and only to those votes, then despite the severity of the fraud it would not be proper to overturn the

election. If it was obviously a small and contained incident, then the votes could not have been significantly affected.

90 Counsel for Mr Singh pointed to the numerical difference between the votes cast for Mr Singh and those cast for Mr Mack to suggest that the result would still have been a win for Mr Singh. That remains a possibility.

91 Having said that the real question here is one of uncertainty.

92 Of course, there are infinitely more unknowables than known facts. How many ballots in total did the thieves steal? How many did they retain? Who did they vote for, if anyone, on the ballots? How many were returned?

93 If I was able to provide a specific answer to those questions then I could consider whether the fraud had been contained to a specific number of votes and, further, whether those votes would have affected the election.

94 On 13 October 2021 there was approximately 29% of the total postal votes received in one day. Rather than being a random event it is suggested I infer that it represented a thief completing stolen ballot papers and returning them all in one tranche.

95 It is in the face of the unknowable that I have considerable disquiet.

The Allocation of Votes Theory

96 The Intervenor laid out a somewhat complicated theory regarding the allocation of votes. By comparison with the 2017 election, it was clear that Mr Singh gained more votes in the current election through paired voting – the ability to nominate two parties on the voting slip as there were two positions to be filled.

97 Had a fraudster intended to promote Mr Singh then the singular vote for him might have raised eyebrows. However, hiding those votes with another candidate would attract less attention.

- 98 Counsel for the Intervener demonstrated that Mr Coales and Mr Singh were diametrically opposed when it came to voting on issues. Therefore, it would be unlikely that a person wishing to vote for two candidates would vote for these opponents. It is therefore curious that there are a number of votes recorded jointly for both men.
- 99 The justification for this plan is that Mr Coales was likely to be elected in any event therefore he was not strictly speaking a competitor to Mr Singh. However, if there were votes recorded for Mr Coales and Mr Singh then there was no chance of a rival to Mr Singh also securing a vote. Strangely the single largest number of votes submitted in the election were jointly for Mr Singh and Mr Coales – 264 as opposed to 33 in the 2017 election.
- 100 Is this a compelling theory? It may be. It is hard to tell. But it does raise the already considerable level of doubt about the level of interference in the election.

The Mack Survey

- 101 Mr Mack is not a statistician and his survey did not reach a level of precision which might have been required in adversarial proceedings. However, I consider it should be given weight as it seems impartial. Mr Mack was merely asking whether ballots had been received and the results are generally supported by the Gold Security report.
- 102 There were various inferences which Mr Mack suggested I should draw from the survey which go to the question of whether the fraud was wide ranging or confined to 40 ballots.
- 103 Firstly, the door knock occurred in an area near to where Mr Mack resides and where he is popular. Therefore, anyone wishing to damage his chances would steal and alter the voting packages in his area as they would not likely be taking away votes already intended to be placed for Mr Singh.

- 104 Secondly, of the 120 voters Mr Mack identified as not having received their voting packages some 46 were recorded as having voted by the date of the election. Source enrolment documents for 42 of those 46 votes indicated that over 30 had signatures on them that did not match the voting declaration certificates.
- 105 The inspection of source documents and comparison to voting declaration certificates was conducted by Ms Foppoli and confirmed by Gold Security. It was not the subject of expert handwriting analysis and did not need to be.
- 106 Mr Mack identified Mr Colin Robert Rushby as a person who had not received his voting package. Mr Rushby has provided a statement to Gold Security which confirms that his actual signature is on the enrolment application but the signature on the voting slip is not his. This alone suggests that the level of impersonation was more widespread than the police action may have suggested.
- 107 Finally, Mr Mack produced a diagram marked with a highlighter demonstrating where:
- a) he conducted his survey;
 - b) Mr Tewari and Ms Rosha were seen stealing ballots;
 - c) Mr Holden resided.
- 108 The effect of this diagram was to show that the problem of the missing ballots was widespread across the electorate.
- 109 The area where Ms Rosha and Mr Tewari were found stealing votes was some distance from where Mr Mack conducted his survey. This was also a distance from Mr Holden.
- 110 This raised the question of whether the pair were able to conduct a comprehensive sweep of the electorate in a time consistent with the delivery of the ballots. Further, would these thieves, having been apprehended on 29

September, been bold or reckless enough to continue their plan of stealing and returning votes (or destroying stolen votes).

111 The logistical issues present some interesting arguments and raise many questions. Was this an endeavour by two rogue operators or were there other people involved in stealing ballots?

112 Ultimately, I am swayed by:

- a) The seriousness of the fraud;
- b) The uncertainty of the extent of that fraud;
- c) The degree to which the election may have been affected;

to take the serious step of declaring the election void.

A Final Point

113 Mr Singh produced newspaper articles said to have linked him to the theft of the ballots or at least raised the perception that he was involved. He has argued that re-holding the election would severely disadvantage him as he would have to work hard to override the stigma of the theft and the reportage of it.

114 I have taken that into consideration. However, whilst that is an unfortunate challenge for Mr Singh it is not a reason to refuse a fresh election. Though Mr Singh has not been accused of directing Mr Tewari or Ms Rosha the unfortunate fact is that if he is, through no fault of his own, “damned by association” it is not the fault of any other party and they should not share in that load.

115 I will hear the parties on the form of the declaration.

IN THE MAGISTRATES COURT OF WESTERN AUSTRALIA
HELD AT PERTH

No 1297 of 2021

B E T W E E N:

SHAYE LUKE MACK Complainant

and

ELECTORAL COMMISSIONER OF WESTERN AUSTRALIA Intervener

STATEMENT OF AGREED FACTS

Date of Document:	2 May 2022
Date of Filing:	2 May 2022
Sitting Magistrate:	Magistrate Darge
Filed on behalf of:	the Intervener

Prepared by:

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1. The parties to these proceedings agree that the following facts are proven, on the balance of probabilities, by the admissible evidence that has been lodged in the form of witness statements and other documents (or will be adduced by consent at the hearing).
 2. In the event that the Court is satisfied that the facts agreed by the parties are proven on the available evidence then it will not be necessary for the parties to lead any additional evidence in relation to those facts, or make submissions arguing that the Court should find those facts at the close of the evidence.

Local government election for the Shire of Serpentine-Jarrahdale

3. The Shire of Serpentine-Jarrahdale is divided into three wards, being the North Ward, the North West Ward and the South Ward.¹
4. An ordinary local government election for the Shire of Serpentine-Jarrahdale was conducted, by postal vote, on 16 October 2021 (**Election Day**).²
5. The postal voting packages for the Election were delivered by the Western Australian Electoral Commission (WAEC) to Australia Post for distribution to electors in the Shire on 23 September 2021.³

Election of councillors in the North Ward

6. There were two vacancies in the Shire's North Ward.⁴
7. The total number of persons enrolled to vote in the North Ward was 7,020. The total voter turnout was 2,120.⁵
8. At least six postal votes cast in the North Ward had been returned by Tuesday 28 September 2021.⁶ This was the first working day after the Queen's Birthday public holiday.
9. The return of voting packages per day in the North Ward, as recorded by the date the returned packages were registered with Australia Post, were as follows:⁷

Date	Number of votes received
24 September 2021	0
28 September 2021	6
29 September 2021	0
30 September 2021	65
1 October 2021	140
4 October 2021	267

¹ See annexure EMCD1 of the affidavit of Esther Mary Choong Dyer affirmed 25 March 2022.

² Form 32A statement of Phillip Richards, [3], PSR1.

³ Extract from Australia Post Statement as at 30/09/2021.

⁴ Form 32A statement of Kenneth Parker, [4]; Form 32A statement of Phillip Richards, PSR1.

⁵ Form 32A statement of Phillip Richards, PSR1.

⁶ Form 32A statement of Courtney Barron, CJB33.

⁷ Form 32A statement of Courtney Barron, CJB33.

Date	Number of votes received
5 October 2021	16
6 October 2021	251
7 October 2021	139
8 October 2021	43
11 October 2021	128
12 October 2021	93
13 October 2021	568
14 October 2021	101
15 October 2021	58
16 October 2021	85

10. The results of the Election were determined by the first-past-the-post system.⁸
11. The candidates elected for the North Ward were Robert (Rob) Coales and Gurdeep Singh.⁹
12. Shaye Mack placed third in the vote count.¹⁰ The margin between Mr Singh and Mr Mack was 174 votes.
13. The results of the North Ward election in full, as reported by the WAEC, were as follows (in order of highest to lowest number of votes received):¹¹

Candidate	Number of votes received
Robert Francis Coales	1161
Gurdeep Singh	606
Shaye Luke Mack	432

⁸ Form 32A statement of Phillip Richards, PSR1.

⁹ Form 32A statement of Phillip Richards, PSR1.

¹⁰ Form 32A statement of Phillip Richards, PSR1.

¹¹ Form 32A statement of Phillip Richards, PSR1.

Candidate	Number of votes received
Joel Chan Eng Wah	425
Michael Christian Gordan Phillips	424
Jacob Pietro Curulli	292
Sukwhinder Singh	183

14. A detailed breakdown of each of the votes cast in the North Ward in the Election are recorded in **Attachment 1**.¹²

Theft of voting packages on 29 September 2021

15. On 29 September 2021, 46 voting packages which had been stolen from a number of letterboxes in Byford, in the North Ward of the Shire, were found in the possession of two people.¹³
16. The addresses from which the packages were stolen were on Dagostino Road, Mead Street and Verrier Loop.¹⁴
17. The electors from whom the 46 voting packages were stolen were sent replacement voting packages by the WAEC on 1 October 2021.¹⁵

Individuals apprehended with stolen packages

18. The two individuals apprehended with stolen voting packages on 29 September 2021 were a man named Ved Tewari and a woman named Amandeep Rosha.¹⁶
19. Ms Rosha has since been convicted of charges of stealing arising out of the matters described at paragraph [15] above.¹⁷
20. Ms Rosha's written sentencing submissions state that, '... Ms Rosha instructs that one of the candidates for the election was her ex-husband whom she did not believe was a suitable candidate' and that '[i]t was therefore her intention to collect the ballot papers and destroy them'.¹⁸

¹² Extract from Western Australian Electoral Commission local government count sheet.

¹³ Form 32A statement of Kenneth Parker, [15]-[16], KWP4; Form 32A statement of Sarah Wilson, [24]-[25].

¹⁴ Form 32A statement of Kenneth Parker, [15]-[16], KWP4.

¹⁵ Form 32A statement of Louise Foppoli, [10], [12].

¹⁶ Form 32A statement of Gurdeep Singh, [9], [15]; Form 32A statement of Patricia Duggin, [3]; Form 32A statement of Sarah Wilson, [4]-[5].

¹⁷ Form 32A statement of Gurdeep Singh, [9], GS2.

¹⁸ Form 32A statement of Gurdeep Singh, GS2.

21. As at the date of or around the Election, Mr Singh's address matched the address of a business name associated with Ms Rosha.¹⁹
22. As at 5 November 2021 Mr Singh and Ms Rosha were registered on the Electoral Roll at the same address.²⁰
23. Mr Tewari has also been charged in connection with the matters described at paragraph [15] above.²¹
24. Mr Tewari was an individual who assisted Mr Singh with Mr Singh's election campaign in the North Ward.²²

Mr Mack's doorknocking exercise

25. On 9 and 10 October 2021, Mr Mack doorknocked residences on his street, Dearden Road, Byford, and on surrounding streets.²³
26. Mr Mack approached 350 electors. Mr Mack was able to have conversations with 120 of those electors. Among other things, Mr Mack discussed with these electors whether they had received their postal vote packages.²⁴
27. Mr Mack recorded the information provided by electors in a spreadsheet. The spreadsheet records that of the 120 electors with whom Mr Mack had conversations, 55 advised that they had not at that time received their voting packages.²⁵
28. The 55 electors lived on Aldred Turn, Allanson Drive, Dearden Road, Halliday Road, Battams Way, Cattach Way, Huggins Road, Sheehan Way and Veterans Drive.²⁶
29. On 12 October 2021, Mr Mack sent the spreadsheet to the WAEC.²⁷

Instances of apparently mismatched signatures

30. On 14 October 2021, two of the 55 people who were recorded in Mr Mack's spreadsheet as having not received voting packages as at 9 or 10 October were shown in the WAEC system as having voted.²⁸

¹⁹ Form 32A statement of Patricia Duggin, [4]-[5].

²⁰ Form 32A statement of Kenneth Parker, [36].

²¹ Form 32A statement of Gurdeep Singh, [15].

²² Form 32A statement of Patricia Duggin, [5], [6], PMD2, PMD3; Form 32A statement of Shaye Mack, [3.4]-[3.5], Attachment 2, Attachment 5.

²³ Form 32A statement of Shaye Mack, [3.9].

²⁴ Form 32A statement of Shaye Mack, [3.9].

²⁵ Form 32A statement of Shaye Mack, [3.10], Attachment 6.

²⁶ Form 32A statement of Shaye Mack, [3.10], Attachment 6.

²⁷ Form 32A statement of Louise Foppoli, [14].

²⁸ Form 32A statement of Louise Foppoli, [15].

31. By Election Day, the WAEC system showed that 46 of the 55 individuals identified by the Mr Mack's survey as not having received voting packages as at 9 or 10 October had voted.²⁹
32. Louise Foppoli, the Returning Officer Liaison Officer for the Election, subsequently obtained photocopies of the source enrolment documents for 42 of the 46 individuals shown in the WAEC system as having voted by Election Day. Ms Foppoli compared the the signatures in the source documents to the declaration certificates that accompanied the relevant 42 of the 46 votes.³⁰
33. Ms Foppoli formed the view that there were over 30 declarations where the signature on the declarations appeared to be significantly different to the signatures on the enrolment source documents.³¹
34. Ms Foppoli advised the WA Electoral Commissioner of her assessment on 21 October 2021.³²

Forged signatures

35. On 8 November 2021, the WA Electoral Commissioner engaged a private investigation firm to carry out an investigation into potential electoral offences under the *Local Government Act 1995 (LGA)*, in exercise of the Commissioner's powers under sections 4.26 and 4.96 of the LGA.³³
36. Officers of the private investigation firm have contacted or attempted to make contact with the majority of the 55 electors who were recorded in Mr Mack's survey as having not received voting packages as at 9 or 10 October 2021.³⁴
37. Of those electors, 27 have provided signed statements to the effect that the signature on the declaration slip associated with their vote in the Election is not their signature, and that they did not cast that vote.³⁵
38. A further 4 electors confirmed to the investigators that their declarations were forged, but declined to provide statements.³⁶
39. Of the remaining 24 electors, 13 were unable to be contacted by the investigators, in 4 instances the relevant material to compare the signatures to was not available, 2 people indicated that they did not receive a package but were nevertheless able to vote, 4 people

²⁹ Form 32A statement of Louise Foppoli, [17].

³⁰ Form 32A statement of Louise Foppoli, [17]-[19].

³¹ Form 32A statement of Louise Foppoli, [19].

³² Form 32A statement of Louise Foppoli, LMF8.

³³ Form 32A statement of Courtney Barron, CJB2, CJB3.

³⁴ Affidavit of Esther Mary Choong Dyer affirmed 5 April 2022, EMCD6.

³⁵ Form 32A statement of Courtney Barron, CJB5A-CJB-31A.

³⁶ Form 32A statement of Courtney Barron, CJB32.

indicated that they received a voting pack and voted, and in one instance there was no apparent mismatch between signatures.³⁷

Electors unable to vote

40. Geoffrey Holden and Shirley Holden, who also live in the North Ward, were unable to cast their ballots on Election Day.³⁸
41. This was due to a vote already having been recorded in the WAEC system against the Holdens' names.³⁹
42. Mr and Mrs Holden live in Byford on Partridge Bend.⁴⁰
43. On 13 October 2021, the WAEC system showed that both Mr and Mrs Holden had voted and their declarations had been processed that day.⁴¹
44. On 14 October 2021, Ms Foppoli compared the signatures on the Holdens' declarations to the signatures on their enrolment documents.⁴² Ms Foppoli formed the view that the signatures on the declarations appeared to be very different to the signatures on the Holdens' enrolment documents.⁴³

³⁷ Affidavit of Esther Mary Choong Dyer affirmed 5 April 2022, EMCD6.

³⁸ Form 32A statement of Geoffrey Holden, [7].

³⁹ Form 32A statement of Geoffrey Holden, [8].

⁴⁰ Form 32A statement of Geoffrey Holden, [1].

⁴¹ Form 32A statement of Louise Foppoli, [21]-[22].

⁴² Form 32A statement of Louise Foppoli, [23].

⁴³ Form 32A statement of Louise Foppoli, [23]; LMF-11.

Attachment 1

Shire of Serpentine-Jarrahdale North Ward Election of (2) Councillors Saturday, 16 October 2021 (2 Vacancies - 7 Candidates)						
Number of Ballot Papers Admitted to the Count <small>(from Form LG 66 - Record of Ballot Papers in Ballot Box)</small>	Informal Ballot Papers	Formal Ballot Papers	Vacancies	Number of Potential Votes	Total Number of Votes Cast	Total Number of Uncast Votes
2086	23	2063	2	4126	3523	603
						100.00%

Possible Combinations	Enter Number of Ballot Papers	Candidate 1 SINGH, Sukhwinder (Sunny)	Candidate 2 CURULLI, Jacob	Candidate 3 SINGH, Gurdeep (Gary)	Candidate 4 MACK, Shaye L	Candidate 5 CHAN, Joel	Candidate 6 COALES, Rob	Candidate 7 PHILLIPS, Michael	Number of Votes Cast	Number of Uncast Votes
1 SINGH, Sukhwinder (Sunny)	39	39							39	39
2 CURULLI, Jacob	28		28						28	28
3 SINGH, Gurdeep (Gary)	129			129					129	129
4 MACK, Shaye L	64				64				64	64
5 CHAN, Joel	63					63			63	63
6 COALES, Rob	244						244		244	244
7 PHILLIPS, Michael	36							36	36	36
1+2 SINGH & CURULLI	11	11	11						22	
1+3 SINGH & SINGH	43	43		43					86	
1+4 SINGH & MACK	13	13			13				26	
1+5 SINGH & CHAN	22	22				22			44	
1+6 SINGH & COALES	35	35					35		70	
1+7 SINGH & PHILLIPS	20	20						20	40	
2+3 CURULLI & SINGH	28		28	28					56	
2+4 CURULLI & MACK	40		40		40				80	
2+5 CURULLI & CHAN	50		50			50			100	
2+6 CURULLI & COALES	104		104				104		208	

Shire of Serpentine-Jarrahdale
 North Ward
 Election of (2) Councillors
 Saturday, 16 October 2021
 (2 Vacancies - 7 Candidates)

Number of Ballot Papers Admitted to the Count <small>(from Form LG 68 - Record of Ballot Papers in Ballot Box)</small>	Informal Ballot Papers	Formal Ballot Papers	Vacancies	Number of Potential Votes	Total Number of Votes Cast	Total Number of Uncast Votes	Ballot Papers Counted
2086	23	2063	2	4126	3523	603	100.00%

Possible Combinations	Enter Number of Ballot Papers	Candidate 1 SINGH, Sukhwinder (Sunny)	Candidate 2 CURULLI, Jacob	Candidate 3 SINGH, Gurdeep (Gary)	Candidate 4 MACK, Shaye L	Candidate 5 CHAN, Joel	Candidate 6 COALES, Rob	Candidate 7 PHILLIPS, Michael	Number of Votes Cast	Number of Uncast Votes
2+7	31	31						31	62	
3+4	22			22	22				44	
3+5	59			59		59			118	
3+6	264			264			264		528	
3+7	61			61				61	122	
4+5	62				62	62			124	
4+6	191				191		191		382	
4+7	40				40			40	80	
5+6	128					128			256	
5+7	41					41		41	82	
6+7	195						195	195	390	
Totals	2063	183	292	606	432	425	1161	424	3523	603

% Valid Votes	5.19%	8.29%	17.20%	12.26%	12.06%	32.95%	12.04%	100.00%
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Formal Ballot Papers	2063
Informal Ballot Papers	23
Total Ballot Papers	2086

Legend:
 = To be entered in this spreadsheet
 = To be entered into EIMS/WA Portal