# Australian election outcome heads for the High Court

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Two months after the September 7 federal election, the make-up of the Australian parliament remains uncertain because of mooted legal challenges to the Senate results for the state of Western Australia.

A potential political, and even constitutional, crisis looms because the outcome is set to be determined by the High Court, the country's supreme court, which also functions as the Court of Disputed Returns.

The court has almost unlimited powers, including to call a fresh Senate election in the state or to declare any candidate elected. Its decision, which is not subject to appeal, will directly affect the Abbott government's ability to get its legislation through parliament.

Because of the wafer-thin victory margins in the state's Senate vote, an as-yet unexplained loss of 1,375 ballot papers, out of about 1.4 million votes cast, has tainted the official result declared by the Australian Electoral Commission (AEC). On Monday, AEC commissioner Ed Killesteyn said "a nagging and almost irreconcilable doubt" clouded the outcome. Legal challenges have been flagged by defeated candidates, and the AEC itself.

In the past, relatively small errors in the vote counting process would not have mattered, because the winning margins were normally clear cut. But now, for the second federal election in a row, the collapsing support for the major parties of the political establishment—Labor, the Liberal-National Coalition and the Greens—has produced a very unstable political situation.

The 2010 election resulted in the first "hung" parliament for 60 years, with neither Labor nor the Coalition holding a majority in the House of Representatives, the lower house. Now the 2013 poll has reproduced that impasse, in a different form, in the Senate, the upper house.

The Coalition won a landslide victory in the lower house thanks to the deep popular hostility toward the mounting job destruction and rising living costs produced by the minority Labor-Green government's pro-business policies. But it failed to secure a majority in the Senate, which can block legislation.

Instead, a proliferation of about 50 other parties, exploiting the political disaffection toward the establishment parties, picked up an unprecedented 25 percent of the Senate vote nationally. Preference-swapping deals between some of these groups enabled six of their candidates to take Senate seats across the country.

When the West Australian votes were first counted, the AEC calculated that the Coalition had secured three of the six Senate seats up for election, with two going to Labor and one to the Palmer United Party (PUP), formed earlier this year by mining magnate Clive Palmer as his political vehicle.

That result was disputed, however, by the Greens, and a recount ordered, after it emerged that the final two seats were determined by just 14 preference votes. During the recount, it was found that 1,375 ballots had been lost. Nevertheless, the AEC declared that the Greens and the little-known Australian Sports Party had won the two seats, at the expense of Labor and the PUP, this time by a margin of just 12.

In effect, the High Court's ruling will determine who holds the so-called balance of power in the Senate from July 1. If Labor and the Greens combine to oppose any bill, the Abbott government will need the votes of six out of eight minor party or independent Senators to pass it. Palmer's party has obtained a Senate seat in both Queensland and Tasmania, and could thus block legislation if it secured the WA spot, giving it a total of three.

Palmer, who has declared he will use his blocking power to secure concessions from the government, last month orchestrated a voting bloc with another Senator-elect, Ricky Muir of the obscure Australian Motoring Enthusiast Party. It was an obvious bid to ensure that the PUP controls the "balance of power" even if it loses the WA seat, but the deal with Muir appears to be quite shaky.

There has been speculation in the media that the High Court will order a fresh election, yet that is far from certain. The judges have never before ordered a complete Senate re-election.

Under the Commonwealth Electoral Act, the court has an extraordinary range of powers, including to declare any candidate elected, or not elected. If it orders a new poll, it can decide who can run, who can vote and when the election will be held.

These powers have no legal criteria. Instead, the judges can decide "on such grounds as the Court in its discretion thinks just and sufficient." In other words, this is a highly political arena, with the judges clearly expected to consider how to best stabilise the parliamentary order itself. In the words of two constitutional experts, a judge must "balance the pragmatic goals of stable governance and the need for finality over the more abstract questions of rights and the purity of the electoral contest."

In fact, the judges are freed from all legal rules. The Act states: "The Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not."

So sweeping are these powers that some legal scholars have cast doubt on their constitutional validity. The colonial-era Australian Constitution did not specify that the High Court was the Court of Disputed Returns. Instead, it said each house of parliament would fill that role until legislation provided otherwise. The High Court was anointed by parliament as the electoral arbiter in 1902. However, its vague non-legal powers violate the separation of powers doctrine, embodied in the Constitution, which prevents courts from being granted functions that are not classified as "judicial," that is, legal in nature.

Judges ruled that these powers were constitutional in 1998, when the court, by 4 to 3, disqualified Heather Hill, from the right-wing Pauline Hanson's One Nation party, from taking her seat in the Senate on the reactionary and nationalist ground that she had dual Australian-British citizenship and was therefore the subject of a "foreign power."

That ruling, which arose from a political destabilisation operation orchestrated by the Howard government against One Nation, was one of a series of anti-democratic judgments by the court in recent decades. In 1983, the judges similarly disqualified a Nuclear Disarmament Party senator. In 1992, the court stripped Phil Cleary, an independent, of a House of Representative seat because he was a government school teacher, which it declared was an "office of profit under the Crown."

Growing concerns are being expressed within the establishment media that a new election could open the door for more minor parties to win seats. A November 5 editorial in the *Australian* warned that a fresh election "could have far-reaching and unintended consequences," because "micro-parties" could "continue to game the system" via preference-swapping deals. The editorial reiterated the newspaper's previous calls for tougher anti-democratic measures to prevent new parties gaining ballot status.

The Abbott government, fearing the rising hostility to its agenda of ongoing job destruction and social spending slashing, is anxious to get any election out of the way well before the May budget, which will contain massive cuts. Deputy Prime Minister Warren Truss last Sunday declared that if the court orders a new election, "it needs to happen as quickly as possible."

The WA Senate debacle is another symptom of the profound political alienation, driven by ever-more glaring inequality, militarism and abrogation of basic democratic rights, which is producing a deepening crisis of the two-party system that underpins capitalist rule.