

Form 22 Election petition

(rule 30.01)

IN THE HIGH COURT OF AUSTRALIA No. of 2010
HOBART REGISTRY

BETWEEN: John Bernard Hawkins
Petitioner
And
Erich Abetz
Respondent

10 **ELECTION PETITION**

This petition concerns the election to the Senate of six Tasmanian Senators held on Saturday 21st August 2010.

RETURN OF WRIT

The writ for the election was returned on 10th September 2010.

ENTITLEMENT TO FILE THIS PETITION

The petitioner is entitled to file this petition because I am a person qualified to vote pursuant to s93 of the Commonwealth Electoral Act 1918 and enrolled for the electorate of Lyons.

20 The petitioner resides in the State of Tasmania at 'Bentley' Mole Creek Road, Chudleigh 7304 and cast a vote in the Senate election on 21st August 2010.

STATEMENT OF FACTS

1. I, John Bernard Hawkins of 'Bentley' Mole Creek Road, Chudleigh Tasmania 7304 hereby Petition the High Court sitting as the Court of Disputed Returns under the Commonwealth Electoral Act 1918 (Cth) for an order that Erich Abetz, who has been declared elected to the Australian Senate as a Senator for Tasmania was incapable of being elected as a result of s44(i) of the Constitution. By reason of the fact that Erich Abetz, was ineligible for election on the grounds that although he is a naturalized Australian citizen, he was, and is, a subject or citizen or
30 entitled to the rights or privileges of a subject or citizen of a foreign power and was therefore under acknowledgement of allegiance to a foreign person within the meaning of s44(i) of the Constitution. The Australian Electoral Commissioner received the Writ on Monday 19th July 2010. The dates specified in the Writ for the purpose of the Election were: For the close of Rolls Thursday 22nd July 2010; for Nominations 12 noon Thursday 29th July 2010; for taking the Poll 21st August 2010; for the Return of the Writ on or before Wednesday 27th October 2010.

2. The Respondent's nomination was accepted by the Australian Electoral Office in Hobart by the Australian Electoral Officer for Tasmania Sandra Riordan.
3. On Thursday 29th July 2010 at or shortly after 12 noon the hour of nomination as defined s175 of the Act, Sandra Riordan attended at the place of nomination for the Senate Election for Tasmania and there publicly produced all the nomination papers received by her and declared the names and residences of all candidates nominated pursuant to s176 of the Act which included that of Eric Abetz.
- 10 4. The poll was held on 21st August.
5. On 10th September 2010 Sandra Riordan declared Senator Abetz elected to the Senate for Tasmania for a further six years from July 2011.
6. The petitioner is a person qualified to vote pursuant to s93 of the Commonwealth Electoral Act 1918.
7. The Respondent was born Erich Abetz in Stuttgart, Germany on 25th January 1958 a citizen of The Federal Republic of Germany. He migrated to Australia, the youngest of five siblings, with his parents arriving on 22nd March 1961 on the 'Castel Felice' in Melbourne.
- 20 8. He was issued with a German passport on 22nd July 1971 in Melbourne, number C1674055; nationality German; his German passport was not handed in when he became an Australian Citizen.
9. On 3rd December 1974 at Hobart the Respondent became a naturalized Australian pursuant to Div. 3 of Pt III of the Nationality and Citizenship Act 1948 (Cth).
10. A Commonwealth Government official wrote to the German embassy in Canberra in 1974 advising that one Erich Abetz born January 25 1958 certificate of Citizenship No AC(G)102404 as of 3rd December 1974 became an Australian Citizen adding that Mr Abetz's German passport was not collected.
- 30 11. The Respondent first stood for the Senate as a Liberal Candidate numbered three on the ticket in the federal Election held on 13th March 1993. He was not elected.
12. The Tasmanian Liberal Senator, Brian Roper Archer, resigned from the Senate on 31st January 1994. Three weeks later Erich Abetz was elected to fill a casual Vacancy in the Senate at a joint sitting of the Tasmanian Parliament on 22 February 1994. The Hansard record does not provide the specific information to match all of the requirements of either the Australian Electoral Act nor the several sections of the Australian Constitution. The Tasmanian Parliament no longer has the paper records including his declaration supporting the Liberal Party's
40 nomination of Mr Abetz to fill the casual vacancy.

13. The Sykes v Cleary case (1992) HCA 60 should have alerted the Respondent, a Barrister, as President of a Political Party in the State of Tasmania nominating for a Senate seat in the Federal Parliament that he could be considered as a dual national and of the importance of procedure under the s44(i) of the Constitution.
14. Of the Respondent's four Senate nomination forms only two survive - the 1998 and 2004 - which states that his given name is Eric with no h. The form requires him to provide his given name, Erich as evidenced by his nomination for citizenship signed in his own hand.
- 10 15. Other than the application for his Australian citizenship only his birth certificate can establish that Erich is his given name.
16. A separate box may be used for the name he wishes to place on the ballot, this he signs for as Eric. Shortened names for the ballot paper are allowed, there would be no requirement for this provision if the candidate could use a shortened name as his given name.
17. A copy of the fifth nomination form for 2010 for Senator Abetz, was denied to me. I have made application via Freedom of Information.
18. The Petitioner wrote to the Clerk of the Senate, Harry Evans on 14th March 2007 for advice as to what actions were available and how to proceed, he replied on 15th March 2007:
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"When a senator is returned or appointed by a state parliament to fill a vacancy, the Senate does not conduct any check to determine that the senator is qualified. Ensuring that they are qualified is the responsibility of individual senators. In effect, the Commonwealth Electoral Act also places the responsibility for ensuring that they are qualified on individual candidates by requiring them to certify their qualification on the nomination form. The Australian Electoral Commission does not conduct any check to see that they are qualified. Any suggestion that a senator is not qualified may be determined by either:
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 - *a reference by the Senate to the High Court sitting as the Court of Disputed Returns under section 376 of the Commonwealth Electoral Act*
 - *an action by any person under section 46 of the Constitution**If you think that any senator may not be qualified, you therefore have the options of asking the Senate to consider whether it should make a reference to the Court or commencing an action under section 46. As the question of a senator's citizenship should be easily able to be resolved, perhaps the best course is simply to call upon the senator to disclose evidence of citizenship."*
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19. It was brought to the attention of the Respondent by the Petitioner in a letter 16th March 2007 that he might not be qualified to sit in the Senate pursuant to s44(i) of the Constitution. The Petitioner requested Senator Abetz to provide documentation to prove renunciation of his German citizenship, none was received.
20. The Respondent as a Senator has held the following positions regarding the law on electoral matters--The Special Minister for State (2001-2006) responsible for the Commonwealth Electoral Act, Chair of the Senate Legal and Constitutional Legislation Committee, Member of the Joint Standing Committee on Electoral Matters.
21. The Respondent has sat knowingly in the Parliament since filling a casual vacancy in 1994, being elected 1998 and 2004.
22. The German Embassy previously would not confirm the citizenship status of Senator Abetz on privacy grounds.
23. The Australian Electoral Commissions Backgrounder No 19 before it was altered for the 2010 Election stated:
*“Information for Dual/Plural Citizens
As a consequence of the recommendations of the House of representatives Standing Committee on Legal and Constitutional Affairs in relation to section 44(i) of the Constitution, the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) maintains a database on the procedures for renunciation of other citizenship in various countries. The following information on renunciation procedures is drawn from the DIMIA database and is provided to assist intending candidates who hold further citizenship(s) in addition to their Australian citizenship.
German citizenship may be renounced with the approval of the Ministry of Interior: Persons should contact the Embassy of Germany in Canberra.”*
24. The matter of the status of the Respondent to sit has been placed before the Senate on several occasions. The Presidents have refused to act, and therefore I suggest, failed to observe the Constitution.
25. The Petitioner wrote to Senator Calvert, President of the Senate on 26th March 2007 requesting him to put the matter of the Respondents qualifications regarding his citizenship and documentation before the Senate. He replied in part *“you are of course free to ask another Senator to table the documents”* as he *“did not have responsibility for Senators.”*
26. The Petitioner then wrote to Tasmanian Senator Milne (Greens) on 11th April 2007 requesting her to place the matter before the Senate. She refused.

27. The Petitioner wrote to Senator Ferguson, the incoming President of the Senate on 23rd July 2008, who also refused to Act as *“I have no power to call Senator Abetz before the Senate nor do I have any responsibility to determine whether any Senator was qualified for election.”*
28. The Petitioner finally wrote to his replacement Senator Hogg, President of the Senate, on 3rd September 2008 who similarly refused to act.
29. On 15th October 2008 I replied to President Hogg (25th September 2008 letter) in the following terms:
10 *Your response as President is clearly a refusal to act, by declining to exercise the authority vested in your office under the Constitution, which carries with it a responsibility to bring the matter to the attention of the Senate. As a result, the Senate by failing to consider the issue of qualifications in accordance with its obligations under section 44 alters the issue to one of failure to observe the Constitution rather than an investigation into the qualifications of a Senator. I shall now refer the matter to the High Court, I shall state in this referral that I am not happy when Senators are protected by their President from the people they are supposed to represent. Your dereliction of duty in this matter is such that I will ask the High Court*
20 *to call you to account for failing to act in accordance with the Constitution which you are bound, through your position as President to protect.*
30. The High Court Registry advised the Petitioner by letters dated 10th November and 18th December 2008 that such a “petition challenging the validity of any election” could only be made “within 40 days of the return of the writ” and “There is no provision for extending the time.”
31. The Respondent states in an interview reported in the Hobart *Mercury* published Friday, 30th July 2010 that he had become the President of the Tasmanian Liberal Party in 1990 and that on standing he wrote to the German Embassy in 1993 *“renouncing any lingering claims to German citizenship he might have. I renounced my German citizenship in that letter, full stop.”*
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32. In an interview published in the *Mercury*, Friday 30th July 2010 Senator Abetz said *“that when he first became an Australian Citizen in Hobart in 1974, aged 16, he was told the move automatically cancelled his previous German Citizenship. He says he also has documents to prove he took further steps to ensure his German citizenship had been completely relinquished before becoming a Senator in 1994.”* No evidence of these “further steps” for the filling of this casual vacancy
40 have been provided to the Petitioner.
33. The Respondent admits in the article that *“he did not hear anything further leaving him convinced he did not hold dual citizenship.”*

34. The 1993 election commenced with the issuing of the writ, proroguing and dissolving of the Parliament 8th February 1993, close of rolls 15th February 1993, close of nominations 19th February 1993, polling day, 13th March 1993.
35. From the earliest day in January to the close of nominations there was a maximum of 50 days for the Respondent to write, receive an answer and make the declaration in accordance with his status under Section 44 of the Constitution.
- 10 36. The Constitution requires that when the Respondent makes the declaration that the Respondent knows he is eligible and therefore not disqualified.
37. The two nominations (1998 and 2004) when compared illustrate significant differences to essential factual information.
38. The Respondent commences in the 1998 form with his given name as Eric, his date of birth, which is the 25th of the month, the entry for the month and year are not completed, further he does not provide a place of birth and giving his date of citizenship as the 11/11/74 (Remembrance Day) which is incorrect. He ticks the box 'I am capable of being chosen and sitting as a Senator (because I am not disqualified by virtue of Section 44 of the Constitution)'.
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39. The 2004 nomination form now contains a change that provides a different declaration commitment with the words 'I am by virtue of Section 44 of the Constitution capable of being chosen or sitting as a Senator'.
40. The Respondent's fourth completed nomination form is for the election of 2004 under which he currently sits in the Parliament. The Respondent declared his given name as Eric, his occupation as Minister/Senator, this is his rank, he is in fact a Member of Parliament. No number for his citizenship is given. The number given T2078616
30 written above the box is in another hand, uninitialled, it is not the Respondent's citizenship number. The Date of citizenship is now correct but different from what was declared in 1998.
41. The Electoral enrolment forms have three similar questions:
No 1, provide a given name
No 6, are you advising a change to your name and
No 7, please give your citizenship number.
42. A perusal of these nomination forms illustrates significant variations in the Respondents particulars to validly complete a nomination form for the Australian Senate.
- 40 43. Further the 2004 nomination form would suggest that this form was altered by persons unknown after registration.

44. By reason of the fact that the Respondent was ineligible for election on the grounds that although he is a naturalized Australian citizen, he was, and is, a subject or citizen or entitled to the rights or privileges of a subject or citizen of a foreign power, and was therefore under acknowledgement of allegiance to a foreign person within the meaning of s44(i) of the Constitution.
45. As such the Respondent was incapable of being chosen as a Senator.

PRAYER FOR RELIEF

The petitioner asks the Court to make the following declarations:

- 10 46. That the Respondent was not capable of being chosen as a member of the Senate at the election held on 21st August 2010.
47. That the Respondent was not duly elected as a member of the Senate at the election held on 21st August 2010.
48. The Respondent is not entitled to remain in the Senate.

The petitioner asks the Court to make the following orders:

49. That the Australian Electoral Officer for the State of Tasmania undertake further counting and recounting of the ballot-papers cast for candidates for election for the Senate pursuant to the writ issued dated 19th July 2010 for the election of senators for the State of Tasmania for the purpose of determining the candidate entitled to be elected to the place for which Senator Abetz was returned.
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50. The Respondent pay the petitioners costs.
51. Such further or other orders as the Court thinks fit.

DATED:

(Signed by the Petitioner)

IN THE PRESENCE OF:

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	Signed by Witness	Signed by Witness

	Name of Witness	Name of Witness

	Occupation of Witness	Occupation of Witness

.....
Address of Witness

.....
Address of Witness

TO THE RESPONDENT

'Highbury House', 136 Davey Street, Hobart, Tasmania 7000

The Petitioner's address for service is:

**Will Edwards Lawyers, 56A Charles Street, Launceston, Tasmania
7025**