IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **NO B19 OF 2019**

BETWEEN: **CLIVE FREDERICK PALMER**
First Plaintiff

JAMES WILLIAM MCDONALD
Second Plaintiff

ROBERT JAMES FORSTER
Third Plaintiff

DANIEL ISAAC HODGSON
Fourth Plaintiff

AND: **AUSTRALIAN ELECTORAL COMMISSION**
First Defendant

ELECTORAL COMMISSIONER
Second Defendant

AUSTRALIAN ELECTORAL OFFICER FOR QUEENSLAND
Third Defendant

AUSTRALIAN ELECTORAL OFFICER FOR NEW SOUTH WALES
Fourth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR VICTORIA
Fifth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR TASMANIA
Sixth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR THE AUSTRALIAN CAPITAL TERRITORY
Seventh Defendant

AUSTRALIAN ELECTORAL OFFICER FOR THE NORTHERN TERRITORY
Eighth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR SOUTH AUSTRALIA
Ninth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR WESTERN AUSTRALIA
Tenth Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth (intervening)

The Australian Government Solicitor
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PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

I. The statutory scheme

2. Part XVIII of the *Commonwealth Electoral Act 1918* (Cth) (**Act**) concerns the conduct of the scrutiny of votes. Relevantly:

   2.1. section 274(2) provides for the scrutiny of first preference votes (the results of which are published even while polls remain open in other parts of the country);

   2.2. section 274(2A) obliges the Australian Electoral Officer for each State and Territory to direct specified persons to conduct a count "that, in the opinion of the Australian Electoral Officer, will best provide an indication of the candidate most likely to be elected for the Division" (**Indicative TCP Count**).

3. The Act does not mandate how the Indicative TCP Count is to be conducted, but the Commission uses an established procedure to conduct the count (**AF [13]-[14]**; **AB 32-36**). The plaintiffs do not submit that the procedure does not comply with s 274(2A).

II. The proper construction of s 274(2A)

4. The text, purpose and legislative history of s 274(2A) demonstrate that it has a twofold operation:

   4.1. ***first***, it imposes a duty on the relevant Australian Electoral Officer (**AEO**) to form an opinion as to how a count "will best provide an indication of the candidate most likely to be elected for the Division", and to direct that that count be conducted; and

   4.2. ***second***, it requires, or at least authorises, the communication of the results of that count to the public as they come to hand.

5. As to the text, the phrase "most likely to be elected" demonstrates that the section calls for the making of a prediction. The phrase "provide an indication" contemplates publication of that prediction to the public at a time when the count is not yet complete. It would make no sense to speak of providing "an indication" of the candidate "most likely to be elected" if the count was complete. That construction is consistent with the purpose of s 274(2A), which was "to assist in the speedier identification, on election night, of the

party or parties likely to command a majority in the House of Representatives and thus to form government" (**PS [17]**, **CS [19]**, cf **PR [5]**).

6. The plaintiffs' submission that the indication called for by s 274(2A) is to be provided not to the public, but to the Commission and its officers in order to facilitate the more rapid declaration of the poll, is incorrect: ss 274(7) and (7AC), 277, 284 (cf **PR [5]**).

7. The above construction is confirmed by the relevant extrinsic materials: Second Reading Speech, Senate, 15 October 1992 (**Vol 5, Tab 39**), 1904; 1990 JSCEM Report (**Vol 6, Tab 44**) xi (Key finding 4), [4.1], [4.3], [4.5], [4.21]; 1992 JSCEM Report (**Vol 6, Tab 45**) [2.1], [2.3.1]-[2.3.6].

8. Alternatively, s 7(3) of the Act empowers the Commission to publish the results of the TCP Count, as publication is "necessary or convenient to be done for or in connection with" the performance of the Commission's functions: *Hird v CEO of the Australian Sports Anti-Doping Authority* (2015) 227 FCR 95 at 157 [210] (**Vol 2, Tab 18**).

III. Ground 1 – statutory limitation argument

9. In accordance with ordinary administrative law principles, the Commission and its officers must discharge their functions and exercise their powers under the Act impartially, meaning without bias. Applying those principles, there is no reason that a fair-minded observer might apprehend any partiality by the Commission or its officers. The plaintiffs have not identified any factor that might lead to the Commission and its officers being seen to discharge their functions under s 274(2A) other than in a neutral way: *Isbester v Knox City Council* (2015) 255 CLR 135, 146 [20]-[23], 155 [58]-[59].

10. That is the case even if (which has not been shown) publication of the identity of the TCP candidates "inherently favours" those selected, because s 274(2A) requires the AEO to make a selection between candidates in order to discharge the duty imposed by that subsection. Provided the method by which the AEOs discharge their duty is impartial, the publication of the result of that method cannot reveal any lack of impartiality.

11. The logic of the plaintiffs' argument, if accepted, would prevent the publication of the identity of the TCP candidates even after polls have closed, and even after polling day.

IV. Ground 2 – constitutional argument

12. The plaintiffs' constitutional argument should be rejected for three reasons.

13. **First**, the Court should not find that s 274(2A) imposes any burden on electoral choice. The nature of the burden alleged by the plaintiffs is unclear and put in different ways: **PS [31]**, **PS [35]**, **PR [13]**. Regardless of which formulation is ultimately adopted, the evidence does not establish a burden requiring justification. This difficulty cannot be overcome by principles regarding constitutional facts, which still require the existence of material that is sufficiently probative to justfy the finding of the constitutional fact: *Maloney v Queen* (2013) 252 CLR 168 at 299 [353] (**Vol 3, Tab 21**); *Thomas v Mowbray* (2007) 233 CLR 307, 513-514 [619], 516-517 [627], [629], 522 [639] (**Vol 5, Tab 33**). No such material exists that would support a finding of the burden alleged.

14. **Second**, the plaintiffs seek to extend the circumstances in which a law will contravene ss 7 and 24 of the Constitution well beyond those previously recognised by this Court. The Commonwealth Parliament has broad choice as to the design of the federal electoral system. Sections 7 and 24 do not operate to require a substantial reason to be shown for any law that may affect electoral choice: *Day v Australian Electoral Officer for South Australia* (2016) 261 CLR 1, 12 [19], 13-14 [23]-[24] (**Vol 2, Tab 16**). Unless an impugned measure has the effect that senators and members can no longer be said to be "directly chosen by the people", there is no contravention of ss 7 and 24.

15. The only laws this Court has ever held invalid for breaching ss 7 and 24 were laws that involved either a legal or practical exclusion from the franchise. *Roach* and *Rowe* are not authority for any wider judicial mandate. They do not support the proposition that any law that affects electoral choices is invalid unless a substantial reason for that law is shown. As such, the constitutional principle upon which the plaintiffs rely is not engaged by s 274(2A): *Murphy* (2016) 261 CLR 28, 58 [54], 71 [96], 99 [222], 106-107 [244], 121 [291] (**Vol 4, Tab 26**).

16. **Third**, if a justification for s 274(2A) is required, such a justification exists. Section 274(2A) is directed to the legitimate end of speedier identification on election night of the party or parties likely to form government.

Date: 6 May 2019

STEPHEN DONAGHUE **GIM DEL VILLAR** **SARAH ZELEZNIKOW**