

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

PLAINTIFFS' OUTLINE OF ORAL ARGUMENT

Alexander Law
1/169 Given Terrace
Paddington QLD 4064

Telephone: (07) 3369 0766

Fax: (07) 3369 0966

Email: sam@alaw.com.au

Ref: Sam Iskander



10

20

30

Part I: PUBLICATION ON THE INTERNET

1. This outline of oral argument is in a form suitable for publication on the internet.

Part II: OUTLINE OF PROPOSITIONS TO BE ADVANCED ORALLY

2. No provision in the Electoral Act authorises or requires the Commission to publish or publicly to release, at a time when polls are still open, the identity of the two candidates selected by the Commission for the Indicative TCP Count, the results of that count or any projections based on that count: [18] of Plaintiffs' Further Amended Written Submissions filed 2.05.19 (PWS).
3. Nothing in the terms or purpose of s 274(2A) suggests that Parliament intended this subsection to authorise or require the Commission to publish the TCP information to the public: [3]-[5] of Plaintiff's Reply filed on 2.05.19 (Reply). The use of the word "indication" does not do so. Nor does the context.
10
4. Section 7(3) provides the Commission with the power to do all things necessary or convenient for or in connection with the performance of its functions: PWS [19]. It must be understood with regard to the subject matter, scope and purpose of the Electoral Act: PWS [20]. It is neither necessary nor convenient to do that which undermines, or creates the appearance of undermining, the Commission's impartiality.
5. The Electoral Act, read with the relevant provisions of the Public Services Act, evinces a legislative intention that the Commission will act impartially in the discharge of its functions and will not favour or create the appearance of favouring one candidate or party over others: PWS [22]-[23]. Independence is essential to the character of the functions required to be performed by the Commission: PWS [24].
20
6. Prior to the enactment of s 274(2A), the JSCEM identified that disclosure of the Indicative TCP Count could raise concerns regarding the Commission "getting it wrong" and being seen to imply its "imprimatur" to the TCP candidates: PWS [25]-[26]. The JSCEM accepted that the Commission would "keep confidential the identity of the two candidates" until "after the close of votes": PWS [27] (JBA 6, tab 45, pp 2430-2431).
7. Any disclosure by the Commission, while polls remain open in parts of the nation, of an Australian Electoral Officer's "opinion" as to the identity of the TCP candidates selected so as to "best provide an indication of the candidate most likely to be elected" for each Division is extraneous to, and not authorised by, the Electoral Act: PWS [28]-[29].
30
8. Sections 7 and 24 of the Constitution operate as a constraint on the discretion of the Commission under s 7(3), or otherwise, such that publishing the identity of the TCP

candidates while polls remain open is not a valid exercise of power: PWS [30]-[31].

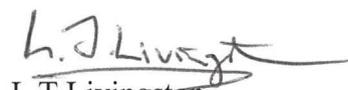
9. Sections 7 and 24 are burdened by the impugned conduct in four distinct ways.
10. *First*, the constitutional mandate in ss 7 and 24 necessitates that electors exercise a “true choice”, a “full and free choice”, a “direct, free, informed and genuine choice”, a “real choice” and an “informed choice”: *Mulholland* (2004) 220 CLR 181 at 191 [18] (Gleeson CJ), 206 [62], 211 [73] (McHugh J), 236 [154] (Gummow and Hayne JJ), 257-8 [223] (Kirby J). The exercise of the franchise must be “unimpaired”: PWS [34]; *Rowe* (2010) 243 CLR 1 at 50 [126] (Gummow and Bell JJ). Disclosure by the Commission of the TCP information while polls remain open in some Divisions has the capacity to preclude electors in those Divisions from exercising a free, informed, genuine and unimpaired choice: PWS [35].
11. The TCP information is capable of misleading electors. The Commission’s practice in selecting the TCP candidates is not transparent and relies on undisclosed sources: Reply [10]. To the extent that potential sources are disclosed, they are unreliable, speculative or subjective: PWS [35], Reply [10]. The Commission’s selection of candidates is capable of being, and has been, inaccurate: PWS [36], Reply [9]. The results of the Indicative TCP Count, or any projection based on it, may be unrepresentative: PWS [37]. The “TCP exception” policy is not effective in remedying these flaws: PWS [36].
12. Notwithstanding the above, the TCP information is presented to electors as commanding the endorsement of the Commission: PWS [38].
13. The Court has before it sufficient primary facts to support the conclusion that, as with any registered political party which is fielding candidates nationally and has conducted a national advertising campaign, the publication or release of the TCP information while polls remain open has the capacity to affect, and to mislead, electors in choosing to vote for, or against, UAP candidates: PWS [4]-[16], [25]-[27], [35]-[44], [52], Reply [13].
14. The Commission acknowledges that the public release of the TCP information is capable of influencing electors by being “seen to be giving any public endorsement to the perceived popularity of ... candidates contesting the election”: PWS [39], AB 44.27-30.
15. The Commission’s position as an impartial overseer of national elections suggests that its “opinion” (see s 274(2A)) is likely to be given greater weight by electors than that of other individuals or institutions offering opinions on election day: PWS [38].
16. At the time when the first plaintiff was endorsed as a candidate for the UAP in the House of Representatives, the defendants conceded that publication of the TCP

information in relation to the Division for which the first plaintiff was endorsed was capable of affecting electoral choices of voters in other Divisions: PWS [40].

17. Recent peer-reviewed and published research supports the proposition that voters who are yet to cast their ballot may be influenced by election results elsewhere or by the publication of exit polls while voting booths remain open, including by results or polls indicating the performance of political parties: PWS [41].
18. The influence of party endorsement on voter choices is reflected in legislative and constitutional provisions. Endorsement of a candidate by a party may be taken into account by voters in deciding how highly to preference that candidate: PWS [42].
- 10 19. The UAP has conducted a national, high-profile advertising campaign. It has endorsed a candidate for every Division in the House of Representatives and for the Senate in each State and Territory: PWS [44]. The publication or release of the TCP information while polls remain open in some Divisions has the capacity to affect, and to mislead, electors in those Divisions in choosing to vote for, or against, UAP candidates.
20. *Secondly*, publication of the selection of the TCP candidates, or the “imprimatur” in favour of particular candidates, is inconsistent with a legislative intention that the Commission perform its functions impartially. That legislative intention is a stable and enduring aspect of the system of government established by ss 7 and 24: PWS [46]-[48].
- 20 21. *Thirdly*, the publication or release of the TCP information while polls remain open in some Divisions disadvantages electors in those Divisions, such that the rights of electors to “an equal share” in “political power” are impaired: PWS [49]-[50].
22. *Fourthly*, the selection of the TCP candidates favours incumbent or major party candidates over new, independent or minor party candidates, creating a substantively unfair “playing field” in favour of certain political actors: PWS [51]-[52].
23. There is no substantial reason or legitimate end which requires publication of the TCP information at 6pm, rather than 9:30pm, AEST on election night. The relief sought will not substantially affect “promptitude, certainty and finality” in the conclusion of the electoral process, nor place any significant administrative, financial or other resource burden on the Commission: PWS [54]-[59].

30 Dated: 6 May 2019


D F Jackson QC
Tel: (02) 9151 2009
jacksonqc@newchambers.com.au


L T Livingston
Tel: (02) 9151 2065
livingston@newchambers.com.au


S J Chordia
Tel: (02) 9151 2088
chordia@newchambers.com.au