IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M247 of 2015

BETWEEN

ANTHONY JOHN MURPHY

Plaintiff

and

ELECTORAL COMMISSIONER

First Defendant

and

COMMONWEALTH OF AUSTRALIA

Second Defendant

PLAINTIFF'S ANNOTATED SUBMISSIONS

Date of Document: 11 April 2016

Filed on behalf of the Plaintiff by:

KING & WOOD MALLESONS
Level 50 Bourke Place
600 Bourke Street
Melbourne Vic 3000

DX 101 Melbourne
Tel: +61 3 9643 4000
Fax: +61 3 9643 5999
Ref: Ben Kiely / Alina Leikin
Email: ben.kiely@au.kwm.com
alina.leikin@au.kwm.com

I INTERNET PUBLICATION

1. These submissions are in a form suitable for publication on the Internet.

II ISSUES

2. The issues are identified in the questions stated in the Amended Special Case.

III SECTION 78B NOTICES

3. The plaintiff has served notices under s 78B of the *Judiciary Act 1903* (Cth).

IV NO JUDGMENTS BELOW

4. This proceeding is brought in the original jurisdiction of the Court.

V MATERIAL FACTS

10 5. The facts are set out in the Amended Special Case.

VI ARGUMENT

Introduction

6. The central issue is whether the Commonwealth Parliament can, consistently with ss 7 and 24 of the Constitution, suspend the processing of claims for enrolment and transfers of enrolments of persons otherwise eligible to enrol to vote in a particular Division and State in federal elections from seven days after the issue of the writs for the election until after polling day. The Court in *Rowe v Electoral Commissioner*[1] (***Rowe***) held that the Parliament could not do so from zero days (for enrolments) and three days (for transfers) after the issue of the writs. The Court should now hold that the Parliament
20 cannot do so from seven days after the issue of the writs.

7. The outcome for which the plaintiff contends was anticipated by some members of the Court in *Rowe*. While there was no challenge in *Rowe* to the seven-day period that operated prior to the 2006 amendments, Gummow and Bell JJ cautioned against assuming that this period was constitutional and noted that "[i]t may be that developments in technology and availability of resources will support the closure of the rolls at a date closer to election day."[2] In a similar vein, Professor Barak has said: "if a technological breakthrough following the enactment of the limiting statute enables the advancement of its purpose at the same level of intensity but with a lesser limitation of the right, the legislator should take advantage of the advancement. A statute may
30 otherwise lose its constitutionality, since it is no longer necessary."[3]

8. That a law, which disenfranchises, disqualifies or excludes from voting a person who is otherwise entitled to vote, may cease to have a substantial reason due to a change in constitutional facts is an inevitable consequence of proportionality reasoning. Such reasoning, with such inevitable consequence, has long been deployed in Australia in the context of purposive legislative powers, the application of which depends on facts: "and as those facts change so may [their] actual operation as a power enabling the legislature

---

[1] (2010) 243 CLR 1.
[2] Ibid at 53-54 [140]-[141] (Gummow and Bell JJ).
[3] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012) at 331.

to make a particular law".[4] The Constitution is not blind to changes in facts of constitutional significance.[5] That is a manifestation of the enduring maxim *cessante ratione cessat lex*.[6] A "limitation on the right in question is maintained throughout the law's life", and it follows that "[t]he justification for limiting a constitutional right should be continuous rather than momentary".[7] The agreed facts show that, as a result of developments in technology and the availability of new resources, there is now no substantial reason for suspending enrolments or transfers of enrolments from the seventh day after the date of the writ for a federal election.

Legislative scheme

Entitlement to enrol and to vote

9. The *Commonwealth Electoral Act 1918* (Cth) (**Act**) provides a "statutory franchise"[8] conditioned upon enrolment to vote. Subject to specified exceptions, all Australian adults (and certain non-citizens) are entitled to enrolment.[9] Subject to further specified exceptions, all enrolled persons are entitled to vote.[10] A person's entitlement to enrolment is carried into effect either by a form of direct enrolment,[11] or by that person making a claim for enrolment, conformably with s 101, by which "[e]nrolment of qualified persons is encouraged".[12]

10. There is required to be a Roll for each Division and the Division Rolls for a State or Territory together form the required Roll for that State or Territory.[13] Names may be added to the Rolls pursuant to direct enrolment or claims for enrolment or transfer.[14] Upon receipt of a claim for enrolment or transfer, the Electoral Commissioner must, without delay, either enter the person's name on the Roll and notify the person or, if the claim is not in order, notify the person that the claim has been rejected.[15] The Electoral Commissioner may make any inquiries necessary before processing a claim.[16] Any officer who receives a claim for enrolment or transfer must do everything necessary on his or her part to secure the enrolment of the claimant in pursuance of the claim.[17]

11. The Act provides for the "close of the Rolls" on the seventh day after the date of the writ for an election.[18] Separately, although by reference to that date, the Act defines a "suspension period" starting at 8pm on the day of the close of the Rolls and ending on the close of the poll.[19] A claim for enrolment or transfer of enrolment received during

---

[4] *Andrews v Howell* (1941) 65 CLR 255 at 278 (Dixon J).
[5] See *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 36; *Sue v Hill* (1999) 199 CLR 462.
[6] When the reason for a law ceases, the law itself ceases. See, eg, *PGA v The Queen* (2012) 245 CLR 355.
[7] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012) at 331.
[8] *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 278 (Brennan, Deane and Dawson JJ).
[9] Section 93(1) of the Act.
[10] Section 93(2) of the Act.
[11] Sections 103A and 103B of the Act.
[12] *Rowe* (2010) 243 CLR 1 at 51 [130] (Gummow and Bell JJ).
[13] Sections 81 and 82 of the Act.
[14] Section 98 of the Act.
[15] Section 102(1) of the Act.
[16] Section 102(2) of the Act.
[17] Section 103(1) of the Act.
[18] Sections 152(1)(a) and 155 of the Act.
[19] Section 102(4)(a) of the Act.

the suspension period "must not be considered until after the end of the suspension period."[20] The effect of the suspension period is replicated in relation to other types of claims for enrolment (**mirror provisions**).[21]

The Roll and the certified lists

12. Section 208(1) requires the Electoral Commissioner to arrange for the preparation of a certified list of voters for each Division and a copy of the certified list must be delivered to each polling place before the start of voting.[22] A copy of the certified list for each Division is also to be delivered to each House of Representatives candidate for that Division as soon as practicable after the close of the Rolls, and a copy of the certified list for the relevant Division or Divisions is to be delivered to members of the House of Representatives and to Senators as soon as practicable after the election.[23] A certified list, while reflective of the Rolls, is not determinative of a person's entitlement to vote. That entitlement is conditioned on enrolment and the electoral Rolls in force at the time of the election are conclusive evidence of the right of a person to vote.[24]

13. The Act separately defines the certified list of voters and the Roll in s 4 and makes provision for discrepancies between the certified list and the Roll. If a person's name cannot be found on the certified list on polling day, the person may cast a "provisional vote", which is then scrutinised and either counted or not counted.[25] The Electoral Commissioner may alter the Roll at any time in certain circumstances where a mistake has been made.[26] Any error or omission in any Roll or certified list can be remedied or rectified by proclamation specifying the matter dealt with, and providing for the course to be followed, and such course shall be valid and sufficient.[27] During the suspension period, a person's name may be removed from the Roll pursuant to a notice of transfer of enrolment.[28] There is also a postal exception in respect of the suspension period in s 102(5), and provision in s 110 for the Electoral Commissioner to alter the Rolls upon receiving information under ss 108 and 109.

Standing

14. The plaintiff is enrolled to vote for the Division of Wills in the State of Victoria and it is in that Division that he intends to vote for his representative and senators at the next federal election (**SCB 90 [7], [10]**).

---

[20] Section 102(4) of the Act.

[21] Sections 94A(4) relating to enrolment from outside Australia, 95(4) relating to spouses, de facto partners and children of eligible overseas electors, 96(4) relating to itinerant electors, 103A(5) relating to automatic transfer, 103B(5) relating to automatic enrolment and 118(5) relating to determination of objections and removal of electors' names from the Roll.

[22] Sections 208(1) and 208(3) of the Act.

[23] Section 90B(1) of the Act. This information may be provided electronically: s 90.

[24] Sections 93(2) and 221(3) of the Act.

[25] Sections 235, 266(1)(c) and 266(3) of the Act and Sch 3. Under section 266(1)(b) postal votes received up until 13 days after the close of the poll are submitted for preliminary scrutiny.

[26] Section 105(1)-(3) of the Act.

[27] Section 285(1) of the Act.

[28] Section 102(6) of the Act although in practice the removal power has not been exercised during the suspension period (SCB 121 [124])

15. One answer to the standing challenge is that the Commonwealth has put in issue the validity of the entire Act,[29] thereby contending that all of the plaintiff's rights, duties and liabilities under the Act — including, among other things, his statutory entitlement to be enrolled and to vote — are contingent upon the validity of the impugned provisions. Federal jurisdiction may, of course, "be attracted by the defence raised to the applicant's claim for relief"[30] and the breadth of the Commonwealth's own Defence renders untenable its suggestion that the plaintiff, whose individual entitlement to vote is called into question by the Defence, lacks a sufficient interest in the matter.

16. Another answer to the standing challenge is that the plaintiff claims a writ of prohibition, which is a remedy that Australian courts have always permitted "strangers" to obtain.[31] It is clear that a stranger who has no "special interest"[32] (or no "relevant legal interest"[33] or no "direct and special interest"[34]) in a matter may seek and obtain a writ of prohibition,[35] save that a court in its discretion may refuse to issue it.[36]

17. As originally understood, the "prerogative" writ of prohibition issued not to vindicate damage to an individual suitor but because "the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed."[37] In more contemporary parlance, the availability of the "constitutional writ" of prohibition is an aspect of the rule of law which underpins the Constitution. Given the constitutional place of prohibition in s 75(v), there is no proper basis for constraining the circumstances in which it may issue beyond those limits imposed at common law.[38]

18. The discretion to refuse prohibition should not be exercised against the plaintiff. First, there is an "immediate right, duty or liability to be established by the determination of the Court",[39] namely the obligations of the Electoral Commissioner under the Act, such that this proceeding is not "divorced from any attempt to administer [the] law".[40] Second, for the Electoral Commissioner to give effect to the impugned provisions would be to cause detriment to those who would seek to enrol or change their enrolment during the suspension period.[41] Third, the public interest is better served by establishing

---

[29] Defence of the Second Defendant to the Amended Statement of Claim at [34] (**SCB 73-74**).
[30] *Felton v Mulligan* (1971) 124 CLR 367 at 373; see also at 382, 388, 403, 408.
[31] See, eg, *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 263 [40]; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 599-600 [2], 611 [44], 627 [95], 652-653 [162], 669-670 [211]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 101-105 [43]-[49].
[32] *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 44; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 424 [116] (certiorari); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 652-653 [162] (Kirby J), 670 [211] (Callinan J).
[33] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 104-105 [48] (Gaudron and Gummow JJ). See also *R v Graziers' Association of New South Wales; Ex parte Australian Workers' Union* (1956) 96 CLR 317 at 327; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 627 [95] (Gummow J).
[34] *R v Watson; Ex parte Australian Workers' Union* (1972) 128 CLR 77 at 88 (Walsh J); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 611 [44] (Gaudron J).
[35] See *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 413-414 [89]-[90] (certiorari).
[36] See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 105 [49] (Gaudron and Gummow JJ).
[37] *Worthington v Jeffries* (1875) LR 10 CP 379 at 382 (Brett J).
[38] See *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 465 [262] (Hayne J).
[39] *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).
[40] Ibid at 266 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).
[41] See *R v Alley; Ex parte New South Wales Plumbers and Gas Fitters Employees' Union* (1981) 153 CLR 376 at 394.

that an officer of the Commonwealth is about to exceed his or her jurisdiction "where jurisdiction depends on constitutional competence".[42] Fourth, the "plaintiff's interest in the action is sufficient to assure that 'concrete adverseness which sharpens the presentation of issues' falling for determination".[43] Fifth, "the plaintiff has shown so distinctive an interest that his action to enforce the defendant's public duty is likely to avoid a multiplicity of actions".[44] Sixth, it is plainly more convenient to determine the validity of the impugned provisions now, before an election, rather than challenge it after an election takes place (which he is entitled to do, for the reasons at paragraph [20] below). The inconvenience of such a course no doubt informed the view that the courts lack the power, in the context of s 57 of the Constitution, to unwind an election.[45]

19. If the plaintiff has standing to seek prohibition on the basis that the impugned provisions are invalid, no separate standing is needed to seek declaratory relief. The plaintiff's controversy would "acquire[] a permanent, larger, and general dimension": the Court's reasoning on invalidity "would be of binding force in subsequent adjudications of other disputes" such that there would be "very great utility in granting declaratory relief" not least to "vindicate the rule of law under the Constitution".[46]

20. Alternatively, the plaintiff has a sufficient interest to obtain declaratory relief. First, as a "person who was qualified to vote" under s 355 of Pt XXII of the Act, the plaintiff would have standing to challenge the validity of any election or return in the Court of Disputed Returns after the election takes place. There is no reason to construe Pt XXII to exclude a challenge of the present kind. That the Act contemplates and recognises a person in the plaintiff's position having an interest in challenging the validity of any election after the fact (including on constitutional grounds[47]) demonstrates that the plaintiff has a sufficient interest in the validity of elections under the Act.

21. Second, the plaintiff alleges that the constitutional principle which emerges from ss 7 and 24 and which ultimately sustains this Court's decisions in *Roach v Electoral Commissioner*[48] (***Roach***) and *Rowe* is one which is concerned not only with individual interests in disenfranchisement or a "right to vote", but also with the systemic distortion of the character of the popular choice that the Constitution mandates. If the plaintiff makes good that allegation, then he will on any view be directly affected. Questions of standing therefore converge and depend on the merits of the plaintiff's claim, which must therefore be determined.[49]

---

[42] R *v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 201-202, 204 (Barwick CJ); *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 414 [90] (McHugh J).
[43] *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 75 (Brennan J).
[44] Ibid.
[45] *Victoria v Commonwealth* (1975) 134 CLR 81 at 120 (Barwick CJ), 157 (Gibbs J), 178 (Stephen J), 183-184 (Mason J).
[46] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 355 [87]; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 69 [158] (Gummow, Crennan and Bell JJ).
[47] See *Sue v Hill* (1999) 199 CLR 462 at 478 [19] (Gleeson CJ, Gummow and Hayne JJ).
[48] (2007) 233 CLR 162.
[49] See *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 302 (Gibbs J); *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 532-533, 546, 552; *Kuczborski v Queensland* (2014) 254 CLR 51 at 62 [7].

22. Third, it is not to the point that other electors may have the same interest as the plaintiff.[50] That an injury is widely shared by a concrete class of persons (electors) does not make it abstract and indefinite[51] in the sense that it is a "mere intellectual or emotional concern".[52] The proposition that standing is denied merely because more rather than fewer people are affected is singularly unattractive, especially given the foundational importance of the constitutional franchise, and its inherent vulnerability to legislative impairment. Candidates and electors alike[53] have a sufficient material interest in ensuring that elections are carried out in accordance with constitutionally valid statutory provisions. At a minimum, the plaintiff has a material interest in ensuring the election carried out in his Division and State is in accordance with valid provisions.

Applicable principles

23. The relevant constitutional limitation upon the legislative power to make laws with respect to elections for each house of Parliament and the qualification of electors[54] is derived from the constitutional imperative of choice by the people within the electoral structure prescribed by the Constitution,[55] and was established in *Roach*[56] and *Rowe*:[57] A law which "has the practical operation of effecting a legislative disqualification from what otherwise is the popular choice mandated by the *Constitution*" is invalid unless the disqualification is "for a substantial reason". It will be for a substantial reason only if it is "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government".[58]

Disqualification, disenfranchisement and exclusion

24. A legislative disenfranchisement, in the constitutionally suspect sense of an exclusion from exercising the franchise, might be effected by a law which does not directly deny to any class of person the legal entitlement to enrol and to vote but which, by erecting practical impediments to the exercise of that entitlement, impairs or burdens the entitlement to vote. This is a consequence of a law's constitutional validity depending not only on its legal but also its practical operation.[59] Thus, in *Rowe*, it was held that machinery legislation, providing for the deferral of consideration of claims for enrolment and transfer of enrolment made at certain times, had the suspect practical operation because the "interrelation … between the requirements for enrolment and those for

---

[50] Compare *A-G (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 26 (Barwick CJ), 76 (Murphy J).
[51] See *Federal Election Commission v Akins*, 524 US 11 (1998); *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ).
[52] *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 at 530 (Gibbs J).
[53] See *McDonald v Cain* [1952] VLR 411.
[54] Section 51(xxxvi) read with ss 8, 10, 30 and 31 of the Constitution.
[55] Especially ss 7 and 24 of the Constitution.
[56] (2007) 233 CLR 162.
[57] (2010) 243 CLR 1.
[58] *Rowe* (2010) 243 CLR 1 at 20 [25], 38-39 [78] (French CJ), 58-59 [160]–[161] (Gummow and Bell JJ), 120-121 [384] (Crennan J); *Roach* (2007) 233 CLR 162 at 182 [24] (Gleeson CJ), 199 [85] (Gummow, Kirby and Crennan JJ).
[59] *Rowe* (2010) 243 CLR 1 at 56-57 [151] (Gummow and Bell JJ), referring to *Ha v New South Wales* (1997) 189 CLR 465 at 498 and *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 121 [197].

voting entitlement is such that failure to comply with the former denies the exercise of the latter by persons otherwise enfranchised."[60]

25. Whether there is a practical impediment is to be measured against the legal entitlement to vote that is embraced within the constitutional mandate of popular choice. It is not to be measured solely by reference to the scope of the opportunity to exercise the entitlement that is from time to time afforded by statutory law. This principle is of some present significance because the provisions considered in *Rowe* were amending provisions which did detract from statutory opportunities, existing prior to 2006, to exercise the entitlement to vote. While detracting from existing statutory opportunities may be sufficient to give rise to a suspect exclusion from voting,[61] it is not necessary, because it would be erroneous to equate existing statutory developments with the constitutional "baseline of validity".[62] Legislative development of the franchise may inform, but cannot control, what is required by the constitutional mandate of popular choice.

26. Any effective burden on the constitutional mandate of popular choice (such as a requirement to enrol in a particular manner or at a particular time, or even to vote in a particular manner or at a particular time) is constitutionally suspect and will be invalid unless justified by reference to a permissible substantial reason. The extent of the burden will inform the extent of justification required, but there should be no narrow approach to what constitutes an effective burden.[63] That is because of the significance of popular choice to the scheme for representative and responsible government mandated by the Constitution, and because of the inherent vulnerability of that choice to what is recognised to be "a considerable measure of legislative freedom" attending the power to make laws with respect to elections and elector qualifications.[64] Many burdens may be justifiable, but they must ultimately serve "the end of making elections as expressive of the popular choice as practical considerations properly permit".[65]

Distortion

27. It is important to emphasise, partly because of the challenge to the plaintiff's standing and partly because it informs the inquiry into whether the impugned provisions are justified, that the cases explain the constitutional limitation upon legislative disqualification or disenfranchisement as an incident of a systemic limitation on legislative power.[66] Legislative disqualification or disenfranchisement not only excludes the particular individuals caught. It alters the character and distribution of "the people" who are able to cast votes in fulfilment of the constitutional mandate of popular choice, and thereby alters the nature of the popular choice itself. In that way, "[t]he vote of every elector is a matter of concern to the whole Commonwealth".[67] Even individuals who are not themselves excluded are directly affected by the distortions, occasioned by legislative

---

[60] *Rowe* (2010) 243 CLR 1 at [154] (Gummow and Bell JJ). See also at [24] (French CJ), [381] (Crennan J).
[61] *Rowe* (2010) 243 CLR 1 at [25], [78] (French CJ).
[62] Ibid at [25] (French CJ).
[63] *Unions NSW v New South Wales* (2013) 252 CLR 530 at 555 [40], 574 [119]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 548 [33] (French CJ), 558 [61] (Hayne J), 569-570 [106]-[107] (Crennan, Kiefel and Bell JJ), 578 [145].
[64] *Rowe* (2010) 243 CLR 1 at 49-50 [125] (Gummow and Bell JJ).
[65] Ibid at 57 [154] (Gummow and Bell JJ).
[66] *Roach* (2007) 233 CLR 162 at 199 [86]; *Rowe* (2010) 243 CLR 1 at 127 [407]-[408] (Kiefel J).
[67] *Smith v Oldham* (1912) 15 CLR 355 at 362 (Isaacs J); *Rowe* (2010) 243 CLR 1 at 12 [1], 22 [28] (French CJ).

disqualification or disenfranchisement, to the nature and distribution of "the people" who vote. Those distortions, in themselves, can engage the constitutional limitation on power (and inform the inquiry into justification and proportionality).

28. Senators must be chosen "for each State" by "the people *of* the State" (s 7). Members of the House of Representatives must be chosen by "the people *of* the Commonwealth" (s 24) and the Constitution requires, at least, that each State be a separate electorate for that purpose and otherwise contemplates that members may be chosen "*for*" legislatively prescribed "divisions in each State", which divisions "shall not be formed out of parts of different States" (s 29). The choice that is mandated by ss 7 and 24 is therefore a choice that must be exercised by electors in respect of representatives for the respective States *of* which they are the people (a connection usually maintained by residence in the State[68]) and, in the case of s 24, for the respective divisions *of* which they are the people (again, a connection usually maintained by residence in the division). The geographical considerations (*where* a person is entitled to be enrolled and to vote) that inhere in ss 7, 24 and 29 (and which are also reflected in the referendum mechanism in s 128) are a defining characteristic of the choice that is constitutionally required. A purpose of the constitutionally prescribed federal structure is to ensure that the people are represented by a member of the House of Representatives and Senators who are elected in their State or Division, and who are in turn accountable (via elections) to the geographical category of persons (eg residents[69]) whom they represent. Legislation which has the practical effect of requiring or enabling electors to exercise their entitlement to vote on polling day otherwise than in respect of representatives for the State or Division with which they have their constitutional connection distorts the mandate for popular choice and is, for that reason, constitutionally suspect and in need of justification. The vice in distortions of this kind is not a merely mathematical inequality of voting power occasioned by individuals voting where they ought not to vote;[70] it is the alteration of the character of the overall choice that is constitutionally required, and the production of a voting outcome on polling day that reflects a choice of a character that deviates from that prescribed by the Constitution. The Constitution requires elections to be "as expressive of the popular choice as practical considerations properly permit".[71]

Justification

29. The test for justifying a burden on the constitutional mandate bears an apparent "affinity to what is called the second question in *Lange*".[72] A majority of the Court reformulated that question in *McCloy v New South Wales* (***McCloy***), but what has not changed is that the Commonwealth bears the onus of demonstrating that the impugned provisions are

---

[68] See, eg, the colonial legislation continued at Federation by s 30 of the Constitution, summarised in Quick and Garran, *Commentaries on the Constitution of the Commonwealth of Australia* (1901) at 469-470. See also s 31 of the *Commonwealth Electoral Act 1902* (Cth).

[69] See s 99 of the Act.

[70] Cf *A-G (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1995) 186 CLR 140.

[71] *Rowe* (2010) 243 CLR 1 at 57 [154] (Gummow and Bell JJ).

[72] *Roach* (2007) 233 CLR 162 at 199 [86] (Gummow, Kirby and Crennan JJ).

justified. Once a burden upon a constitutional freedom is identified "[i]t is, then, incumbent upon [the governmental party] to justify that burden".[73]

Burden

30. The practical effect of the impugned provisions (save for s 118(5)) is of the same character as the provisions struck down in *Rowe*. Subject to questions of justification, the issues in this case are on all fours with *Rowe*.

31. Sections 94A(4), 95(4), 96(4), 102(4), and 103B(5) have the practical effect of preventing a person otherwise entitled to vote from enrolling during the period between the close of the rolls and polling day, with the substantive result that the person is excluded from voting on polling day. The suspension period may be anywhere between 26 and 51 days.[74]

32. Sections 102(4) and 103A(5) have the practical effect of excluding a person otherwise entitled and obliged to enrol and vote in a particular State or Division from transferring their enrolment, so as to vote in that State or Division, during the period between the close of the rolls and polling day. The substantive consequence under the Act is that the person will be ineligible to vote in that State or Division on polling day and eligible to vote in some different State or Division. This consequence is both a disqualification of that person in the sense described in *Rowe* and a distortion of the popular choice mandated by the Constitution.

33. Section 118(5) has the practical effect of preventing the Commissioner from removing from an electoral roll, pursuant to the determination of an objection, a name that ought not to be on that electoral roll. The substantive consequence is to distort the popular choice from that which is constitutionally mandated.

34. The agreed facts identify the magnitude of the practical burden that the impugned provisions impose upon the constitutional mandate of popular choice. At each of the 2004, 2007, 2010 and 2013 elections, a large number of enrolment claims — ranging from 143,636 in 2007 to 228,585 in 2013 — were lodged during the suspension period and therefore not processed (**SCB 116-117 [113] (Table 13)**). A substantial proportion of these enrolment claims were new enrolments, in respect of which the suspension period operated to disenfranchise entirely the claimants: up to **52,694** claims at the last election and up to **60,597** in 2004 (**SCB 120 [117] (Table 15)**). A further substantial proportion of the claims were for transfers of enrolment to a different State or a different Subdivision within the State: up to a **further 56,671** claims at the last election, and up to a **further 95,591** claims in 2010 (**SCB 120 [117] (Table 15)**).[75]

35. These agreed figures represent the *lower bound* of the number of persons effectively disenfranchised by the suspension period, because it is likely that there are additional persons who do not make an enrolment claim during the suspension period because of the suspension period. Archival snapshots of the AEC's website during the suspension

---

[73] (2015) 89 ALJR 857 at 866 [24] (French CJ, Kiefel, Bell and Keane JJ).

[74] **SCB 101-103 [49]**.

[75] These figures are derived by adding the "Inter-State transfers" to the "Intra-State transfers", which does not count the "Intra-Division transfers" or "Enrolment updates (no change of address)".

period for the 2007, 2010 and 2013 elections show that people were told that it was too late to enrol (**SCB 121 [125], 200-205**), and it may be inferred that people visiting that website may have been discouraged from trying to do so. At any given time in recent years, there have been in excess of 1 million persons eligible to be enrolled but not enrolled (**SCB 93 [18] (Table 1), 94 [20] (Table 2)**). Further, significant numbers of people in Victoria, New South Wales and Queensland enrolled for State elections after the close of rolls (**SCB 128 [150] (Table 17), [166]-[167], [182] (Table 21)**).[76]

Justification

The legitimate end of the impugned provisions

36. In any formulation of the applicable test, the first step is to identify the object or purpose of the impugned provisions by applying "ordinary processes of statutory construction",[77] that is, from the text, context and history of the relevant legislation.[78]

37. The Commonwealth's Defence lays out eight objects or purposes of the impugned provisions (**SCB 53-57 [24(c)]**). They are: (i) enabling disputes about the Rolls and entitlements to vote to be determined in advance of an election; (ii) enabling the production of a certified list of voters for each Division and any approved list of voters to be used in the conduct of elections; (iii) incentivising persons entitled to be enrolled to enrol; (iv) enhancing the accuracy of the Rolls on an on-going and continuous basis so that the Rolls can be used for redistribution purposes, for determining whether a candidate can be nominated or a party registered, for provision to persons and organisations and as electoral rolls in the States and Territories; (v) providing an "additional and sufficient grace period" following the issue of the writs for an election to enable persons to enrol or transfer enrolment; (vi) providing the Electoral Commissioner with adequate time "to secure the enrolment of the claimant" if the initial claim is not in order; (vii) ensuring persons entitled to be enrolled can participate in and receive the range of rights, benefits and responsibilities conferred upon electors in relation to an election; and (viii) ensuring that there is "one class" of electors for the whole electoral process.

38. If this list of purposes for the impugned provisions were to be accepted, the prediction of Judge Hough of the United States Court of Appeals for the Second Circuit will have been borne out, that "[l]awyers will increasingly deal with statutes whose constitutional support bears no sincere relation to the legislative and popular purposes sought to be attained".[79] The list invites a "counterintuitive judicial gloss" apt to diminish "the accessibility of the law to the public and the accountability of Parliament to the electorate".[80] Statutory purpose "is not something which exists outside the statute"; it "resides in its text and structure" and is ascertained by "rules of construction" including

---

[76] These figures demonstrate the point, also recorded in **SCB 95 [22]**, that a "significant catalyst for people to enrol or update their enrolment is the calling of an election".

[77] *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [50] (French CJ, Hayne Crennan, Kiefel and Bell JJ).

[78] *McCloy* (2015) 89 ALJR 857 at 884 [132] (Gageler J), 915 [320] (Gordon J); *Monis v The Queen* (2013) 249 CLR 92 at 205 [317]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 552 [41] (French CJ), 59 [148] (Gageler J).

[79] Charles Merrill Hough, 'Covert Legislation and the Constitution' (1917) 30 *Harvard Law Review* 801 at 801.

[80] Cf *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 349 [42] (French CJ).

"appropriate reference to extrinsic materials".[81] The Commonwealth's list of purposes, advanced in a forensic context, bears little relationship to the text and structure of the Act, as appropriately informed by the statement of a single purpose in the Explanatory Memorandum accompanying the Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Bill 2010 (Cth), which amended or replaced the impugned provisions: "The aim of providing a cut-off date for the close of the Rolls is to ensure that, for practical purposes, a certified list of eligible voters can be prepared in advance of the election. This is particularly important from a logistical perspective as voting is compulsory in federal elections."[82]

10 39. This explanation is manifested in the text of the Act and its precursors. The operation and purpose of the impugned provisions are closely linked to the closing of the rolls in s 155. That closure itself, however, serves very limited purposes; as a matter of practice, the Electoral Commissioner uses the date as the date after which he arranges for the preparation of a list of voters under s 208 (**SCB 105 [59]**).

40. The asserted purposes, other than that set out in (ii) at paragraph [37] above, are unsupported by the statutory text. Preventing persons from enrolling or updating their enrolment is an arbitrary or capricious means of achieving those asserted purposes. This incongruity demonstrates that these purposes are not truly the ends sought by the impugned provisions.[83] Nothing suggests that the suspension period incentivises people
20 to enter objections as early as possible, and suspending the ability to deal with those objections conflicts with any purpose of having on-going and continuously accurate Rolls (purposes (i) and (iv)). It is incongruous to prohibit the AEC from processing enrolment applications during the suspension period in order to permit it time to process and inquire into irregular applications (purpose (vi)). It is incongruous for the Act to provide that a person must enrol and to make it an offence not to enrol, but then to deny people the opportunity to do so (purpose (iii)), and it is a misconception to describe that denial as an "additional and sufficient" grace period (purpose (v)). The incentive to enrol is achieved by making it an offence not to enrol or transfer an enrolment as required by s 101. It is superfluous and outside the proper purpose of an electoral regime
30 then to disenfranchise a person who seeks to enrol at a later time.[84] The incongruity is laid bare when it is noticed that proceedings shall not be instituted against a person for failing to enrol or transfer the enrolment if, before those proceedings are instituted, the person sends or delivers a claim for enrolment or transfer (s 101(7)). This demonstrates the "primary character" of the offence provision as "an incentive" or "encourage[ment]" to enrol.[85] Finally, while a person who is not enrolled cannot enjoy or bear the rights, benefits and obligations of persons who are enrolled, it is incongruous to prevent access to those benefits and obligations by preventing a person from enrolling or transferring their enrolment and voting accordingly, or (if the time has already passed for obtaining a particular benefit, for example, the nomination of a candidate under s 166) adding to the

---

[81] *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [44].
[82] Explanatory Memorandum accompanying the Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Bill 2010 (Cth) at 5 [12].
[83] *McCloy* (2015) 89 ALJR 857 at 884 [132] (Gageler J).
[84] In a statutory context, see *Miller v Miller* (2011) 242 CLR 446.
[85] *Rowe* (2010) 243 CLR 1 at 28-29 [51] (French CJ), 51 [130] (Gummow and Bell JJ).

loss by stripping the person of the ability to enrol and vote (see purposes (iv), (vii) and (viii)).

41. These additional purposes implicitly assume that the suspension period exists in order that the lists of voters which are certified under s 208 of the Act may be prepared as a conclusive repository of those who are entitled to vote. The provisions in the Act which permit a person's vote to be counted notwithstanding he or she does not appear on the certified list demonstrate that assumption to be false. These provisions and the other exceptions, which are referred to at paragraph [13] above, do not reinforce a rule that the certified list is an end in itself. Rather, the exceptions recognise that the certified list only exists as a means to achieve that ultimate end of securing freedom of choice to the electors (and the ability to exercise that choice) up to, and on, the polling day.[86]

42. The upshot is that there is no basis for attributing to the Parliament any of the asserted purposes, other than the end of permitting the AEC time to prepare certified lists of voters (in substance, the second purpose advanced in the Defence). Proportionality cannot be approached "simply by what may *appear* to have been legislative purpose".[87] Insofar as the suspension period may have side-effects of the kind proffered as purposes or ends of the impugned provisions, the Commonwealth "confuse[s] the *effect* [of a provision] … with the overall *purpose*"[88] for it.

43. While a purpose of enabling the production of a non-conclusive certified list of voters for each Division and any approved list of voters to be used in the conduct of elections might be attributed to the Parliament, and while that purpose would be a legitimate end, in the sense that it is compatible with facilitating the exercise of the constitutional franchise, this is not an end that is served by the impugned provisions. As explained below, those provisions are not rationally connected to that end. The absence of a rational connection to this end demonstrates that, at bottom, the only end served by the suspension period is to disenfranchise, disqualify or exclude individuals from voting in the Division and State in which they reside. Alternatively, if the impugned provisions do serve this legitimate end, the disenfranchisement, disqualification or exclusion which they effect cannot be justified.

Rationality

44. The impugned provisions do not have a "rational connection"[89] to the purpose of facilitating the production of certified lists and approved lists. The Electoral Commissioner may produce the certified lists and approved lists as required by the Act in its current form without having to suspend the enrolment of others, as the events following this Court's decision in *Rowe* illustrate (**SCB 122-123 [126]-[131]**). And the time period chosen by the legislature (seven days from the date of the writ) is unrelated, and incapable of being seen to be related, to the actual time needed to prepare the lists to

---

[86] *Smith v Oldham* (1912) 15 CLR 355 at 358, quoted in *Rowe* (2010) 243 CLR 1 at 27 [47] (French CJ).

[87] (2010) 243 CLR 1 at 61 [166] (Gummow and Bell JJ); *Monis v The Queen* (2013) 249 CLR 92 at 147 [125] (Hayne J); *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473 ("true object"), 474 ("immediate purpose").

[88] *McCloy* (2015) 89 ALJR 857 at 869 [40].

[89] Ibid at 862-863 [2], 875-876 [80] (French CJ, Kiefel, Bell and Keane JJ).

be employed up to and on the polling date, which, under the current legislative regime, may be between 26 and 51 days after the beginning of the suspension period.

Necessity

45. A law which burdens a constitutional freedom will be disproportionate if there is an "obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom".[90] There are two such alternatives to the impugned provisions.

46. **First alternative:** The first alternative is to permit enrolment up to and including on polling day. This alternative would burden the freedom less because it would permit people to enrol or update their enrolments, and therefore to vote in their correct Division and State, in circumstances where the impugned provisions would stop them from doing so. This alternative is "obvious and compelling". It has not been plucked from "a universe of hypothetical laws".[91] It was recommended by both the AEC and the JSCEM in 2010 (**SCB 123-124 [132]-[133]**), and it has been adopted and operationalised, in slightly different ways, in New South Wales and Victoria (**SCB 125-133 [135]-[175]**), and in other jurisdictions (**SCB 135-136 [192]-[194]**). In *Betfair Pty Ltd v Western Australia* (***Betfair***), the Court relied upon Tasmanian legislation as an alternative in assessing whether the Western Australian scheme was "reasonably necessary".[92]

47. As demonstrated in New South Wales and Victoria, this first alternative is also "reasonably practicable". It would still achieve the legitimate ends of permitting lists to be produced in time for the election. The Electoral Commissioner could simply produce the certified list under s 208 at the same time he produces it now, while continuing to process enrolment applications afterwards. That certified list could also be used for pre-poll date voting.[93] Details of many subsequently processed enrolment applications could then, for example, be put on a supplementary certified list prepared closer to polling day. That occurred after this Court's decision in *Rowe* (**SCB 111 [86], 122-123 [128]-[130]**). Later processed details could be added to the "Notebook Roll" which is currently updated and maintained after the close of the rolls period (**SCB 106 [63]-[65]**). Voters on that Notebook Roll would have to cast a provisional vote (**SCB 106 [64]**), but that would not require much if any additional effort on the part of the Electoral Commissioner. First, it is not demonstrated that there would be any large increase in the number of provisional votes cast and scrutinised. Indeed, in 2013 under existing arrangements, some 202,246 provisional votes were cast and scrutinised against the Roll and, of them, more than 100,000 were not counted for the Senate and more than 150,000 were not counted for the House of Representatives (**SCB 110 [79] (Table 8)**). The "most common reason" for rejecting one of these votes was that "the person was not enrolled correctly" (**SCB 111 [81]**). Some or many of the voters who would be enfranchised under this first alternative are already casting provisional votes at polling places and having their votes scrutinised. Second, under the joint roll arrangements with

---

[90] Ibid at 863-863 [2], 872 [58] (French CJ, Kiefel, Bell and Keane JJ).

[91] *Williams v Commonwealth* (2012) 248 CLR 156 at 192 [36] (French CJ). See also Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012) at 449.

[92] (2008) 234 CLR 418 at 479 [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[93] See Part XVA of the Act.

the States, the AEC already continues to process joint enrolment applications for the States during the suspension period (**SCB 125-126 [139]**). Third, the experience in New South Wales and Victoria shows that any additional costs are low (**SCB 129-130 [158], 132 [169]**). This alternative would also permit the AEC time to review enrolment applications. The qualifications for enrolment in s 93 are limited, and it takes the Electoral Commissioner on average only 4.5 minutes to process paper forms and 2 minutes to process online applications (**SCB 98 [35]**).

48. The qualifications "obvious and compelling" and "reasonably practicable" are important reminders that courts must not "exceed their constitutional competence by substituting their own legislative judgments for those of parliaments."[94] While these qualifications express the inter-branch sensitivities inherent in judicial review of legislation, they can serve only as a standard of judgment and not as a body of rigid rules. Judgment is called for at every stage of the proportionality analysis.[95]

49. A putative alternative is not denied the character of being "reasonably practicable" merely because it might require the commitment of additional resources or financing.[96] For example, the outcome in *Rowe* added cost to the 2010 federal election, and it may be inferred that anything less than a complete ban in *Betfair* would have occasioned some additional cost. It would lead courts to stray beyond the judicial function to delve so deeply into the details of hypothetical alternatives. Precisely how to operationalise a statutory regime is a matter for the Parliament and the Executive. What is asked of the courts is for them to exercise judgment. To exclude an alternative merely because it might result in some increased expenditure is to elevate form over substance.

50. To require parties challenging the validity of a law which burdens a constitutional freedom to delve into such a granular analysis is potentially to convert the courts into a law reform committee.[97] The particularity called for must be attentive to (1) the importance of the constitutional freedom which has been limited; (2) the burden of justification which lies with the governmental party; and (3) the limited power of a non-governmental litigant to produce evidence about a hypothetical provision compared to the greater power of a governmental party to contradict that evidence.[98] The AEC and the JSCEM have both recommended permitting enrolments up to and including the day of the election, and the examples of New South Wales and Victoria demonstrate that this alternative can be operationalised. Any insufficiency of the evidence should weigh against the Commonwealth as the party which must justify the impugned laws.[99]

51. That more staff would need to be hired to process applications is possible, but whether this is so (and how many more staff if so) would "depend[] on the extent and patterns of

---

[94] *McCloy* (2015) 89 ALJR 857 at 872 [58], 915-916 [328]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 550 [36].
[95] See *McCloy* (2015) 89 ALJR 857 at 913 [309]–[311] (Gordon J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 197 [32] (Gleeson CJ).
[96] *Contra* Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012) at 324.
[97] See *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633 (Mason J).
[98] To adopt and adapt *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970]. See also *R v Blakely; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54 at 73 (Latham CJ); Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012) at 449.
[99] See *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559 at 601 (Gibbs J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 239 (McHugh J) (***ACTV***).

enrolment activities up to the close of polling" (**SCB 124 [134(a)]**). But, against that, the enrolments and transfers, previously suspended, would not have to be processed after the election. Additional computer equipment would be required for additional staff (if any) to use (**SCB 124 [134(b)]**). While "additional declaration vote issuing officers would be required at most polling places", this is little more than speculation because "it is not possible to precisely estimate in advance of polling day how many additional officers would be required at any particular polling place to deal with the increased number of declaration votes cast" (**SCB 124 [134(c)]**). Given that hundreds of thousands of declaration votes are already made each federal election, and that at the 2013 federal election "the most common reason for rejecting declaration votes was that the person was not enrolled correctly" (**SCB 110-111 [79], [81]**), it is not obvious that this alternative would result in more declaration votes being made or more declaration votes (of those which would have been made in any event) being scrutinised. If more declaration votes are made "there is a potential risk of delays at polling places if there are insufficient officers available at any particular point in time to handle declaration votes" (**SCB 125 [134(d)]**). But of course, any additional staff referred to in **SCB 124 [134(a)]** would, it may be inferred, reduce the potential risk of delays. Ultimately, these reservations are all so speculative that they cannot rule out this alternative as an appropriate comparator.

52. It has also been said that a hypothetical measure "must be as capable of fulfilling that purpose as the means employed by the impugned provision, 'quantitatively, qualitatively, and probability-wise'."[100] Again, this qualification should not be misunderstood as requiring a fine-toothed comparison between the hypothetical and actual laws as if the courts were parliamentary committees. Identity of effect (save for the less restrictive effect on the constitutional freedom) cannot be the constitutional benchmark. The regimes which were considered as appropriate alternatives to complete bans in *ACTV*[101] and *Betfair*[102] could not otherwise have been so considered; of necessity, anything less than a complete ban could not achieve the ends of the ban to the same degree.

53. The Commonwealth's Defence questions how this alternative could interact with the existing provisions of the Act (**SCB 58-61 [24(g)]**), but this fundamentally misses the point. That the Electoral Commissioner has in the past, and consistently with the Act, adopted administrative measures which could be co-opted to operationalise this alternative is an important indication that the alternative is reasonably practicable. But there is no requirement, in principle or authority, that the alternative must be capable of implementation without the legislature taking any steps to enact, amend or repeal legislation. As Nettle J observed in *McCloy*, there is no reason why the Act in that case could not be amended.[103]

---

[100] *Tajjour v New South Wales* (2014) 254 CLR 508 at 571 [114] (Crennan, Kiefel and Bell JJ); *McCloy* (2015) 89 ALJR 857 at 915 [328] (Gordon J); *Rowe* (2010) 243 CLR 1 at 134 [438] (Kiefel J).

[101] (1992) 177 CLR 106 at 238-239 (McHugh J).

[102] (2008) 234 CLR 418 at 479 [110].

[103] (2015) 89 ALJR 857 at 906 [261]. If the Parliament has been dissolved by the time this Court pronounces orders, s 285 permits the Governor General by proclamation to specify a course to deal with any delay, error or mission in the printing, preparation, issue, transmission or return of any rolls or lists.

54. **Second alternative:** The second alternative is for Parliament to stipulate a suspension period which is calculated not working forwards from the date of the issue of the writs but working backwards from the date of the election. This alternative would burden the freedom less because it would permit people to enrol or update their enrolments, and therefore to vote in their correct Division or State, for a longer period than under the impugned provisions. This alternative is "obvious and compelling". The regime for elections in Queensland is an example (**SCB 133-135 [176]-[185]**). People can enrol for Queensland state elections until 6pm on the day before the election.

55. This alternative is reasonably practicable. It will be open to the Parliament to stipulate whatever time is considered necessary to achieve the impugned provisions' current legitimate end — so long as that timeframe is calculated, as it should be, from the time of the election. Put another way, counting forwards from the time of the issuing of the writs is arbitrary or capricious given that (i) the time between the issue of the writs and polling day varies from 26 to 51 days (**SCB 101-103 [49]**), (ii) there is currently considerable time between the printing of the rolls and polling day itself (**SCB 105 [59]-[60]**), (iii) processing applications takes between 2 and 4.5 minutes on average per application and (iv) there is an existing capacity to use an electronic Notebook Roll to update, on an ongoing and continuous basis, entitlements to vote. The Notebook Roll is electronic and "comprises enrolment records on the AEC's electoral system" (**SCB 106 [64]-[65]**). The AEC already amends the Notebook Roll during the suspension period, insofar as the Act as currently drafted permits it to do so (**SCB 106 [63]-[64]**).

56. The Commonwealth complains that the plaintiff "has not identified what he contends is the minimum period necessary for the Electoral Commissioner to carry out those tasks which are necessary for conducting the election" (**SCB 63 [24(h)(i)]**). But that calls for a degree of granularity which is beyond a litigant's expertise to know, and which is beyond that which is necessary for this Court to determine. There is no constitutional principle that requires familiar concepts of "reasonable time" and the like to be reduced to a single numerical figure. It is for the Parliament to determine the minimum period necessary, and this Court may determine its validity in a proper case.

57. The Commonwealth pleads against both alternatives that each would disrupt pre-polling, redistributions, nominations and party registrations, and ultimately establish two classes of voters. The last point can be dealt with in short order, because the impugned provisions *already* establish two classes of people: those who are entitled to and can vote in the Division or State where they reside and those who are entitled to vote but cannot enrol and therefore cannot vote in the Division or State in which they reside. It is the existing segregation of classes of the people into voters and non-voters which is the more injurious and repugnant to the constitutional mandate.

58. In any event, the Commonwealth misconstrues the Act when it claims that it provides for and embraces "a single closed class of electors … defined for all stages of the election process" (**SCB 63 [24(g)(vii)]**). It does no such thing. There is no "single closed class of electors" — there are provisions in the Act which permits the Rolls to be

amended after the certified lists are produced, and the Roll for an election can be amended during the preliminary scrutiny of declaration votes (s 105(4)).[104]

59. Insofar as the other objections about pre-polling, redistributions, nominations and party registrations depend on the interaction between the plaintiff's alternatives and the Act as currently in force, the answer is that there is no reason why the Parliament cannot amend the Act better to fit whatever alternative is ultimately adopted with the entire fabric of the Act. It is consistency with the Constitution, not consistency with the Act, which is the benchmark. And insofar as pre-polling, nominations and registrations can be regarded as a form of benefit conferred by the Act, it is permissible to make those benefits contingent upon enrolment. But that is no reason – none at all – for multiplying the disadvantage by denying individuals enrolment or transfer and thus a vote in the State or Division where they reside. There is no factual foundation to suggest that New South Wales, Queensland or Victoria have encountered any problems of the kind speculated at by the Commonwealth.

Balancing

60. The above alternatives are useful tools for demonstrating that the burden upon the constitutional franchise is undue at the third step, "not only by reference to the extent of the effect on the freedom, but also having regard to the public importance of the purpose sought to be achieved." There is not "an 'adequate congruence between the benefits gained by the law's policy and the harm it may cause'".[105]

61. Professor Barak explained one analytical approach thus: "on the first scale – that of 'fulfilling the proper purpose' – we place the marginal social importance of the benefits gained by rejecting the possible alternative and adopting the [impugned] law, while on the scale of 'harming the constitutional right' we place the marginal social importance of preventing the harm caused to the constitutional right from rejecting the possible alternative and adopting the [impugned] law."[106] The impugned provisions effectively burden the constitutional freedom for a significant number of people in order to pursue ends which could be achieved without disenfranchising people by adopting one of the alternatives above. The marginal benefit of adopting one of the alternatives far outweighs the marginal cost (if any) of doing so. It can appropriately be said of the impugned provisions, therefore, that they are disproportionate or excessive.

62. The electoral regimes in place in New South Wales, Queensland and Victoria illustrate that the impugned provisions strike an unjustifiable, and therefore constitutionally impermissible, balance. In Victoria, 29,272 and 37,662 votes were counted as a result of allowing people to enrol and vote on election day (**SCB 128 [150] (Table 17)**). The "costs of enhancing and implementing provisional enrolment and voting for the Victorian State election in 2014" were $46,728 for IT developments/enhancements and $58,945 for staffing costs (**SCB 129-130 [158]**) which is about $2.80 per additional vote. In New South Wales, 20,960 additional votes were counted in 2011 and 41,978 additional votes were counted in 2015 (**SCB 131 [166]-[167]**). The NSWEC "does not

[104] See the other exceptions set out in paragraph [13] above.
[105] *McCloy* (2015) 89 ALJR 857 at 876 [86]–[87] (French CJ, Kiefel, Bell and Keane JJ).
[106] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012) at 353.

separately cost particular voting channels", but the cost per vote and cost per elector did not appreciably increase with the advent, for the 2011 election, of same day enrolment (**SCB 132 [169]**). In Queensland, there were 64,618 enrolment transactions after the cut-off day for electoral rolls in 2011 and 69,678 enrolment transactions in 2015 (**SCB 133 [180]-[181]**). Given that none of the electoral commissions in these States actively promotes same day enrolment (or day-before enrolment, in Queensland) (**SCB 127 [149], 131-132 [168], 134 [183]**), it cannot be inferred that these figures have been inflated by people deliberately leaving their enrolment to the last minute. In any event, the late enrolments and transfers would, at some stage, have to be processed at a cost.

10 63. In balancing the effect on the constitutional mandate and the legitimate ends said to be pursued by the impugned provisions, it is imperative to calibrate the analysis to "the degree of risk to the system of representative and responsible government established by the Constitution that arises from the nature and extent of the restriction" on the freedom.[107] The risk posed to that system by any legislative exclusion from enrolment or transfer and thus voting in the person's State or Division, is severe. Ours is a "constitutional system in which the accountability of the legislature and the executive to electors constitutes the ordinary constitutional means of preventing misuse of the exercise of legislative and executive power".[108] Nowhere does this find better expression than in ss 7 and 24, and also in ss 128 and 57,[109] which leave it to the people voting in the
20 correct geographical location to determine issues of the highest constitutional importance. To require people to vote in a place in which they no longer reside is to disrupt proper lines of representation and accountability in a federation; to exclude people from voting frustrates these principles of representation and accountability. The "bedrock"[110] importance of the franchise to the maintenance of the constitutional system invites a high degree of scrutiny to be applied to measures which would impair or distort it. The impugned provisions are, on this measure, unjustified.

64. The risk to the constitutional system is no less severe because it is an offence for an eligible person not to enrol or transfer their enrolment. The offence provision does not brand the failure as "serious offending".[111] That is made clear by s 101(7), which
30 prohibits proceedings being instituted against an alleged offender if he or she sends or delivers a claim for enrolment or transfer beforehand. It cannot be said, and the Parliament by s 101(7) has not said, that a person who fails to enrol has engaged in "such a form of civic irresponsibility that it is appropriate for Parliament to mark such behaviour as anti-social and to direct ... [a] symbolic separation [from the body politic] in the form of loss of a fundamental political right."[112] A wrongdoer is not a constitutional outlaw, and the constitutional questions raised in this proceeding cannot be avoided by noticing that it is an offence not to enrol or transfer an enrolment. To do so would be to treat exclusion from voting in the person's Division and State as an

---

[107] *McCloy* (2015) 89 ALJR 857 at 887 [150] (Gageler J). See also at 899 [222] (Nettle J).
[108] Ibid at 883 [122] (Gageler J).
[109] *Victoria v Commonwealth* (1975) 134 CLR 81 at 125 (Barwick CJ), 169-170 (Stephen J).
[110] *Roach* (2007) 233 CLR 162 at 198 [82] (Gummow, Kirby and Crennan JJ).
[111] Ibid at 176 [12] (Gleeson CJ).
[112] Ibid at 176-177 [12] (Gleeson CJ).

additional punishment for failing to enrol, which is in truth no justification at all.[113] And it would be inconsistent with *Roach*, in that serving a sentence of imprisonment, without more, is an insufficient reason for excluding a person from voting.

65. Nor is the risk made any less severe by sweeping assertions that the existing "grace period" is "ample" and "sufficient" for people to enrol or update their enrolments. The metric by which amplitude and sufficiency are to be assessed is unexplained. The seven-day limit reflects nothing more than "what is considered by the legislature to be an untimely application"[114] for enrolment or update of enrolment, factually insensitive to the flexible methods available to conduct an election and the time needed to do so, and disclosing a lack of appreciation of the centrality of the franchise to our constitutional system. As it is with any attempt to impose time limits on accessing the courts under s 75(v), so must it be *a fortiori* with access to the vote that "[i]t is no answer to say that some unfairness [in drawing a line] is to be expected and must be tolerated."[115]

Severance

66. The Commonwealth denies that the suspension period is severable from the Act and contends that if the plaintiff succeeds then the entire Act is invalid.[116] The plaintiff does not need to establish the severability of the impugned provisions to succeed in the proceeding. If the plaintiff demonstrates the invalidity of those provisions which he challenges, then he is entitled to relief. Questions of severance inform, at most, whether any wider declaratory relief ought to be granted. Inseverability does not, of course, save an invalid provision from invalidity; it renders other provisions also invalid. Relatedly, questions of severance arise only in relation to provisions that are invalid and cannot inform (especially by way of *in terrorem* argument) the court's prior assessment of validity.

67. Whether the impugned provisions are severable is a question of construction. The Act is presumed to be "a valid enactment to the extent to which it is not in excess of … power".[117] The specific question, therefore, is whether the Act manifests a contrary intention that it is "to operate fully and completely according to its terms, or not at all".[118] Such a contrary intention "is not a legislative aspiration that the enactment is to operate fully in the terms in which it is expressed, but a 'positive indication [which] appears in the enactment that the legislature intended it to have either a full and complete operation or none at all'".[119]

68. The Act provides for: establishment of the AEC and the appointment of electoral officers and staff (Pt II); representation of the Territories in the Parliament (Pt III); distribution and redistribution of States into electoral divisions (Pt IV); registration of political parties (Pt XI) and election funding and financial disclosure (Pt XX); and disputed elections (Pt XXII). It is not apparent why, contrary to the statutory presumption, the Act should have an all-or-nothing operation.

---

[113] Ibid at 176 [10] (Gleeson CJ).
[114] *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 672 [59].
[115] Ibid at 672 [58].
[116] Defence of the Second Defendant to the Amended Statement of Claim at [34] (**SCB 73-74**).
[117] Section 15A of the *Acts Interpretation Act 1901* (Cth).
[118] *Pidoto v Victoria* (1943) 68 CLR 87 at 108 (Latham CJ); *Victoria v Commonwealth* (1996) 187 CLR 416 at 502.
[119] *Tajjour v New South Wales* (2014) 254 CLR 508 at 585 [169] (Gageler J).

69. Even those Parts of the Act dealing with electoral rolls, enrolment, and polling do not disclose the contrary intention. Contrary to the Commonwealth's Defence at [34] (**SCB 73**), the provision for the close of the rolls (as distinct from the impugned suspension period) has work to do in facilitating the preparation of certified lists pursuant to s 208.[120] Entitlement to vote is determined not by the certified list but by enrolment, so that the certified list is "subject to" the Roll, as recognised in "provisional voting" under s 235. To strike down the suspension period would have the consequence that the Roll would be required, during that period, to be updated "without delay" in accordance with s 102(1); it would not prevent the preparation and use of the certified lists, nor would it prevent the scrutiny of provisional votes against the Roll. The true practical consequence is that some or many provisional votes that are, under the current regime, scrutinised and rejected will be scrutinised and counted.

70. A further reason in favour of severability is the constitutional requirement of choice by the people, which must constrain the legislative power of the Commonwealth to repeal the Act without providing alternative machinery for the exercise of the constitutionally mandated choice. Parliament should be taken to have intended that the Act be given as ample an operation as possible in giving effect to the constitutional mandate, not that the Act have an all-or-nothing operation, consistently with the general constructional principle that a valid construction is to be preferred to an invalid construction.[121]

VII APPLICABLE PROVISIONS

71. The applicable statutory provisions are set out in Annexure A.

VIII ORDERS SOUGHT

72. The questions stated for the opinion of the Full Court should be answered (1) Yes; (2) Each of the sections is invalid; (3) No, but if so, Yes; (4) Yes; (5) The relief sought in paragraphs 1, 2 and 3 of the Amended Application for an Order to Show Cause dated 1 April 2016; (6) The second defendant.

IX ESTIMATE OF TIME

73. The plaintiff estimates that he will require a total of 3 hours for the presentation of oral argument, including reply submissions.

Date: 11 April 2016

RON MERKEL
Owen Dixon Chambers West
ronmerkel@vicbar.com.au
(P) 03 9225 6391

BRENDAN LIM
Eleven Wentworth
blim@elevenwentworth.com
(P) 02 8228 7112

CHRISTOPHER TRAN
Castan Chambers
christopher.tran@vicbar.com.au
(P) 03 9225 7458

Counsel for the plaintiff

[120] See also s 90B(1) Item 1, concerning the provision of certified lists, and s 109(2) concerning the provision to the Electoral Commissioner of prisoner information that will facilitate the preparation of the certified lists.
[121] *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [28].