HIGH COURT OF AUSTRALIA

13 May 2016

DAY v AUSTRALIAN ELECTORAL OFFICER FOR THE STATE OF SOUTH AUSTRALIA & ANOR; MADDEN & ORS v AUSTRALIAN ELECTORAL OFFICER FOR THE STATE OF TASMANIA & ORS

[2016] HCA 20

Today the High Court unanimously upheld amendments to the *Commonwealth Electoral Act* 1918 (Cth) ("the Act") concerning the new form of the Senate ballot paper and the process for marking it.

The Act provides for voting either above or below the dividing line on the Senate ballot paper. Under the new process, electors who wish to vote above the dividing line are required to number at least six squares sequentially. On request, a group of candidates may be granted a square above the line next to which, if they choose, will appear the name of the political party that endorsed them and its logo. The numbering of squares above the line indicates the elector's preference for the candidates in the first numbered group or party in the order in which they appear below the dividing line, followed by the candidates of the second numbered group or party and so on up to the number of the elector's choices. The new process requires electors who vote below the dividing line to number at least twelve candidates in order of preference.

Two applications were brought in the original jurisdiction of the High Court challenging the amendments. The plaintiff in the first application is a Senator for the State of South Australia. The first plaintiff in the second application is a candidate for the next Senate election in Tasmania. Each of the remaining plaintiffs in the second application is an elector for one of the States or Territories other than South Australia and Tasmania.

The plaintiffs contended, first, that the new form of the ballot paper and the alternative means for marking it above and below the line prescribed more than one method of choosing senators contrary to s 9 of the Constitution. Secondly, that by allowing electors to indicate a vote for a party or group designated above the line on the ballot paper the Act departed from the requirement in s 7 of the Constitution that senators be "directly chosen by the people". Thirdly, that the interaction of those provisions with the prescription of a quota of votes upon which a candidate will be taken to have been elected infringed a principle of "directly proportional representation" and effectively disenfranchised some electors. Fourthly, that the form of the ballot paper misled electors about their voting options and thereby infringed the implied freedom of political communication. Finally, the amendments were said to impair, in a general way, the implied freedom of political communication and the system of representative government provided for in the Constitution.

The High Court unanimously dismissed both applications. The High Court held that the term "method" in s 9 of the Constitution is to be construed broadly, allowing for more than one way of indicating choice within a single uniform electoral system. The High Court further held that a vote above the line was a direct vote for individual candidates consistent with s 7 of the Constitution. Finally, there was no disenfranchisement in the legal effect of the voting process and there was no infringement of the implied freedom of political communication or the system of representative government.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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