HIGH COURT OF AUSTRALIA

14 August 2019

PALMER & ORS v AUSTRALIAN ELECTORAL COMMISSION & ORS
[2019] HCA 24

Today the High Court published its reasons for orders made on 7 May 2019 dismissing a challenge to a practice of the Australian Electoral Commission ("the Commission"). The Court unanimously held that the Commission could publish information about an indicative two-candidate preferred count ("the Indicative TCP Count") for a Division of the House of Representatives as soon as polls closed in that Division.

Since 1992, s 274(2A)-(2C) of the *Commonwealth Electoral Act 1918* (Cth) ("the Electoral Act") has required the scrutiny of votes in an election for each Division to include the Indicative TCP Count. It is a count of preference votes (other than first preference votes) on the ballot papers 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. The Commission's established practice is that, from the close of polls in a Division, or shortly thereafter, the Commission's website, "The Tally Room", displays the identity of the candidates in respect of whom the Indicative TCP Count will be undertaken and, in most cases, a "matched polling place projection" based on progressive results of the Indicative TCP Count.

The plaintiffs were endorsed and nominated by the United Australia Party as candidates in a Division of the House of Representatives or for the Senate in the federal election held on 18 May 2019. Prior to that election, the plaintiffs filed an application for a constitutional or other writ in the original jurisdiction of the Court seeking to challenge the practice of the first defendant, the Commission, in making public, while polls remained open in some parts of Australia, one or both of the identity of the candidates selected by the Commission for the purpose of the Indicative TCP Count in a Division and the progressive results of any of those indicative counts (collectively, "the TCP Information").

The plaintiffs submitted that publishing the TCP Information after polls closed in the relevant Division but before the polls closed in all parts of the nation is not authorised by the Electoral Act. In particular, they submitted that by publishing that information, the Commission would not be impartial or avoid the appearance of favouring one or more of the candidates. They also submitted that by publishing that information while the polls remained open in any part of the nation, the Commission "would impermissibly distort the voting system in a manner that would compromise the representative nature of a future Parliament", contrary to ss 7 and 24 of the *Constitution*.

The High Court unanimously held that the plaintiffs' contentions about the Indicative TCP Count process, which underpinned both their statutory and constitutional challenges, lacked a factual foundation. The selection of candidates for the Indicative TCP Count was not shown to be inaccurate or misleading, and publication of the TCP Information does not constitute the Commission giving any imprimatur to any particular candidate or outcome. Accordingly, s 7(3) of the Electoral Act, which provides that "[t]he Commission may do all things necessary or convenient to be done for or in connection with the performance of its functions", empowers the Commission to publish the TCP Information as soon as the polls close in the relevant Division.

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.

Please direct enquiries to Ben Wickham, Senior Executive Deputy Registrar
Telephone: (02) 6270 6893 Fax: (02) 6270 6868
Email: enquiries@hcourt.gov.au Website: www.hcourt.gov.au