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' REPLY

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Part I: PUBLICATION ON THE INTERNET

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

Part II: REPLY

2. In the submissions filed by the Attorney-General for the Commonwealth (**CWS**), much is said as to the scope of Commonwealth legislative power: eg, CWS [6]-[10], [34]. This distracts attention from the critical, and narrow, question which arises for determination.

Section 274(2A) does not authorise publication of the TCP information

3. ***Re CWS [19], [20.2], [23]:*** There is nothing in the terms, context or purpose of s 274(2A) to suggest that Parliament intended this sub-section to authorise or require the Commission to publish the TCP information to the public: CWS [20.2]. The provision authorises the Commission to "conduct a count", in a particular manner, of preference votes. Publication of the identities of the two candidates selected by the Commission for the count or the results of the count are not necessary to "conduct a count".

4. To the extent that the count authorised by s 274(2A) produces an "indication", the sub-section is silent as to what is to be done with that indication. Section 274(2A) does not itself authorise the Commission to publish the "indication" to the public. Contrary to the Commonwealth's assertion, s 274(2A) does not contain the verb "indicate": CWS [19]. In the context of that provision, "indication" is used as a noun relevantly meaning a piece of information that "suggests" or "point[s] out" [1] something, not to "make known" that information. Further, in context, the piece of information is to be ascertained by those conducting the count, not by members of the public.

5. Having regard to the Act's designation of the Commission as the body empowered to declare the result of the election in each Division,[2] a contextual and purposive interpretation consistent with the terms of s 274(2A) is that the "indication" produced by the provision was intended by Parliament to assist the Commission in identifying the candidate elected in each Division and declaring the election result in each Division as soon as possible. The effect is to enable the public to "know the result of the election" earlier than in the 1990 election,[3] thereby addressing the relevant mischief. In any event, nothing in s 274(2A) regulates the *timing* of any publication of the TCP information.

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[1] *Shorter Oxford English Dictionary on Historical Principles* (5th ed) 'indication' (def 1); *Macquarie Dictionary* (7th ed) 'indication' (def 1).
[2] Section 284 of the Act.
[3] 1990 JSCEM Report at [4.1].

The Commission must exercise its powers and fulfill its duties impartially

6. ***Re CWS [26]:*** The subject matter, scope and purpose of the provisions of the Act on which the plaintiffs rely evince a legislative intention that the Commission is to exercise its powers and fulfill its duties impartially: plaintiffs' written submissions (**PWS**) [22]. That the word "impartial" does not appear in the text of the Act does not negate the plain intention of Parliament. Specific provisions prescribing how independence or impartiality is to be achieved in particular circumstances only aid in further illustrating Parliament's general intention.

7. ***Re CWS [27]:*** The requirements that administrative decision-makers exercise their powers "reasonably, in good faith, without bias and not for purposes extraneous to the Act" do not point against the existence of an intention on the part of Parliament that the Commission act impartially. Whether by the operation of general requirements of administrative law or pursuant to the intention of Parliament as expressed in the Act, the Commission must exercise its powers and fulfill its duties impartially: any failure to do so would be extraneous and foreign to, and unauthorised by, the Act: see PWS [21]-[29].

8. ***Re CWS [30], [30.1]:*** The established practice of the Commission is to pre-select, prior to polling day, the two candidates in each Division that "in the opinion of the Australian Electoral Officer" are the "most likely to be elected for the Division": s 274(2A), AF [13] AB 32. The publication of the TCP information, including the identity of the candidates pre-selected by the Commission, thus inherently favours, or appears to favour, the candidates selected by the Commission and their parties over others.

9. ***Re CWS [30.2]:*** The submission that the "publication of the TCP Information has not been shown to be anything but an accurate reflection of electoral choices *in almost all cases*" (CWS [30], emphasis added) is a concession that the TCP information is not, or may not be, an accurate reflection of electoral choices in at least *some* cases.

10. ***Re CWS [30.3]:*** The Commission does more than make public the results of the Indicative TCP Count pursuant to the performance of its duties under s 274(2A) – it makes public a speculation on its own part as to the candidates most likely to be elected in each Division, and does so while polls remain open in parts of the nation. The submission that the Commission follows a "transparent" process in the selection of candidates for the Indicative TCP Count obfuscates the reality that, in order to form its opinion, the Commission relies on undisclosed sources (AF [13biii] AB 32) each of which is given an undisclosed weight by the Commission in the application of an undisclosed, and potentially arbitrary, methodology: AF [13b] AB 32. As to the sources

that have been disclosed, none provides an accurate prediction as to the identity of the candidates most likely to be elected in each Division: AF [13b] AB 32, PWS [35].

There is a burden on the constitutionally prescribed system of representative government

11. ***Re CWS [34]:*** The plaintiffs are not limited, either in principle or by authority, to demonstrating that there has been disenfranchisement in order to establish that there is a relevant burden on the requirement of direct and popular choice in ss 7 and 24. As to the authorities relied upon by the Commonwealth: (i) a majority of the Court in *A-G (Cth) Ex rel McKinlay* observed that the notion of equality of voting is present in s 24, and that in some cases electoral inequality might be inconsistent with choice by the people;[4] (ii) in *McGinty,* five of six Justices declined to foreclose the possibility that inequality of voting could ground invalidity;[5] and (iii) *Mulholland* was not a case in which equality of voting was at issue.[6] More recent cases have emphasised that ss 7 and 24 advance the proposition that "the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power".[7] The Commonwealth has not identified any principle preventing the plaintiffs from relying on this clear line of authority. Further, although the laws invalidated in *Roach* and *Rowe* operated to exclude persons from the franchise, the basal principle relied upon was not confined to disenfranchisement: it was, and is, directed to "maintaining unimpaired the exercise of the franchise":[8] see PWS [34].

There is sufficient foundation for the finding of relevant constitutional facts

12. ***Re CWS [38]:*** In making findings of "legislative" or "constitutional" fact, particularly those concerning imponderables – like capacity to affect electoral choice – which are, by their nature, general, predictive, evaluative and not readily capable of affirmative proof, the Court must determine such facts "as best it can"[9] and may rely on any sources it considers sufficiently probative, including "its knowledge of the society of which it is a

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[4] (1975) 135 CLR 1 at 36-37 (McTiernan and Jacobs JJ), at 57 (Stephen J), at 61 (Mason J), at 75 (Murphy J).
[5] (1996) (186) CLR 140. Brennan CJ held that the relevant State law was not invalid as the provisions of the Constitution referred only to the federal Parliament, and declined to decide the position with respect to a Commonwealth law (at 174); Dawson J recognised that disproportion in voting generated by a gerrymander, for example, was a potentially significant way "in which the value of a vote may be affected" (at 185); Toohey J: "a general principle of equality of voting power is an aspect of the Australian Constitution" (at 205); Gaudron J: "a system involving significant disparity in voting value, could not, in my view, now be described as "chosen by the people" (at 222); Gummow J: "variations in the numbers of electors or people in single-member divisions could be so grossly disproportionate as to deny ultimate control by popular election" (at 286).
[6] (2004) 220 CLR 181.
[7] *Murphy* at 68 [87]; *McCloy* at 202 [27]-[28] (French CJ, Kiefel, Bell and Keane JJ), 226 [110] (Gageler J), 258 [219] (Nettle J).
[8] *Rowe* at 50 [126] (Gummow and Bell JJ).
[9] *Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 192; *Breen v Sneddon* (1961) 106 CLR 406 at 411-2; *Maloney v The Queen* (2013) 252 CLR 168 at 299 [355].

part" and by "supplementing…that knowledge [by processes] which [do] not readily lend [themselves] to the normal procedures for the reception of evidence".[10]

13. There is no practicable means, in the time available before the election, to quantify the influence that the publication or release of the TCP information, while polls remain open, may have on electoral choices: AF [38]-[39] AB 39. In the circumstances, the plaintiffs have put before the Court sufficient primary facts (PWS [4]-[16], [25]-[27], [35]-[44], [52]) to support the conclusion that, as with any registered political party which is fielding candidates nationally and has conducted a national advertising campaign, publication of the TCP information has the capacity to affect (and to mislead) electors in choosing to vote for, or against, UAP candidates.

14. ***Re CWS [39]:*** Whether or not, or how many, electors know that the TCP information contains the "opinion" or "imprimatur" of the Commission does not deny the position that the TCP information does, in fact, contain such an opinion. In any event, the Commission openly publishes on its website that it pre-selects candidates for the purposes of the count.[11]

There is no justification for the burden

15. ***RE CWS [45]:*** The discharge of the Commission's duties pursuant to ss 274(2A) or 7(3) insofar as they involve carrying out the Indicative TCP Count, as opposed to publishing or publicly releasing TCP information while polls remain open, may well be directed towards a legitimate end. The Commonwealth has failed to identify, however, any legitimate end served by the publication or public release of the TCP information *while electors are yet to vote* in some parts of the country. Nor has it identified how the relief sought by the plaintiffs – involving a delay in publication by three and a half hours – could possibly endanger the "security of the nation" or affect the "promptitude, certainty and finality in the declaration of the poll" to any significant extent (CWS [45]).

Dated: 2 May 2019

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[10] *Maloney v The Queen* (2013) 252 CLR 168 at 298 [351], 299 [353] (Gageler J); *Re Day* (2017) 340 ALR 368, 91 ALJR 262, [2017] HCA 2 at [21]-[24] (Gordon J).

[11] Australian Electoral Commission, "Counting the votes", https://www.aec.gov.au/voting/counting/, accessed on 29 April 2019.