IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S77 of 2016

BETWEEN:

Robert John Day
Plaintiff

AND

10 **Australian Electoral Officer for the State of South Australia**
First Defendant

Commonwealth of Australia
Second Defendant

PLAINTIFF'S SUBMISSIONS IN REPLY

20 **Part I:** This reply is in a form suitable for publication on the Internet.

Part II: Reply to Second Defendant's Submissions dated 12 April 2016 (**DS**).

1. The DS at Application Book (**AB**) pages 50 to 104 should be rejected. The DS attach materials [at AB 69 to 99] but these omit significant relevant statutory material[1].
2. **DS [6]-[28]:** ***Context:*** The introductory Submissions of the Defendant as to '*context*' (e.g. DS [20] and [27]-AB 55 and 57) do not refer, or explain, the object of the 2016 enactment which is to disenfranchise that 25% of electors electing minor parties and independents in the last Senate elections in the next election (refer AB 6 par 9(iv)), and makes no reference to the real purpose of the 2016 Act, best described by Professor Tribe as '*a temporary majority entrenching itself by cleverly manipulating the system*
30 *through which the voters, in theory, can register their dissatisfaction by choosing new leadership'* and, in this case, doing so by a law that has the potential of '*immunising the current leadership from successful attack*'[2]. That manipulation is described in the Parliamentary Report at AB 301 (10).
3. Professor Tribe's observations were referred to with approval by Gummow and Hayne JJ in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [157] and [159]. A recent example of such a law being struck down after a general election was called is *Rowe v Electoral Commissioner* (2010) 243 CLR 1. *Vardon v O'Loughlin* (1907) 5 CLR 201 is an early Senate example. No election has been called in the present case; a

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[1] In the material at DS 68 to 99, the displaced law, ss 4 and the new Form E are omitted.
[2] *American Constitutional Law* 2nd Ed [1988] at ss 13-18.

Filed on behalf of the Plaintiff
Lawyer for the Plaintiff: Peter Brian McKell
McKell's Solicitors
Address for service: Suite 802, 135 Macquarie Street
SYDNEY NSW 2000
Tel: 02 9241 5022
Fax: 02 9251 4327
Email: mckells@tpg.com.au

Senate election is not required, assuming it is called with the general election for the House of Representatives, until 17 January 2017 and, separately from the House, after that time: see the uncontradicted evidence of Senator Day (AB page 10 at [4]). Proposing to the public, as it appears the Commonwealth has done several times since 22 February 2016, to call a double dissolution election is a false start and is of no legal or constitutional consequence.

4. Here, for the first time, the ballot paper (Form E) provides for voting by the party list method above the line, newly defined as the '*dividing line*'. That method distributes a voter's preference vote between parties not individuals. Influencing that method's use are new eye-catching logos, available only to parties. Exhaustion of the preference vote above the line, with a disenfranchising consequence, is influenced by a misleading instruction to mark '*at least 6*' squares, suggesting that the 6 squares marked represent those to be elected, which is false because the 6 parties then form a college from which the successful candidates are chosen by the Act, not the electors. There is no statement that the elector has the right to vote for all candidates, maximizing its effect. Plumping the vote is authorized, by a '*Just Vote 1 Above the Line*' campaign. The instruction to mark '*at least 6*' squares above, bears no relation to the equally prominent instruction to mark '*at least 12*' squares below, the line.
5. Generally DS on key issues disregard the express words of the *Commonwealth Electoral Act 1918* (**Electoral Act**) offending the seminal principle laid down by the High Court in relation to statutory interpretation, namely to start with the text of the statute[3]. For example, no reference is made to the words '*dividing line*' or '*party*' or '*registered political party*' in ss. 4 or s. 239(2). DS at [24] treat s. 239(2) as if the word '*party*' is not there.

A: cf DS [29]-[34]: 'THE UNIFORM METHOD OF CHOOSING SENATORS' (s. 9)

1. The Defendant's Submissions (DS [29]) put in issue the Plaintiff's construction of s. 9 of the Constitution, yet argue the new Act does not provide for more than one method of voting.
2. Both arguments should be rejected, for the reasons that follow. The Defendant's construction of s. 9 is contrary to authority, and the natural and ordinary meaning of the provision. It also disregards political reality – the argument that it is not different to what went before is demonstrably wrong, as Table A Part 1 (AB 39-42 and agreed at AB 125-130) and Part 2 (AB 43 and 144) demonstrate.
3. In *Langer v Commonwealth* (1996) 186 CLR 302 at 313 to 315 Brennan CJ described the method of choosing candidates under Constitution s. 9 as the method of voting '*governed by the Act*' as follows: '*The method of voting prescribed by this section can be described*

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[3] *Wilson v Anderson* [2002] 213 CLR 401 per Gleeson CJ at [8]; *Lacey v Attorney-General [Qld]* [2011] 242 CLR 573 at [43]-[44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

as full preferential voting. To cast an effective vote, a voter must indicate an order of preference as among all the candidates whose names appear on the ballot paper.' Thus content is given to s. 9.

4. DS (at [32] AB 58) describe the Plaintiff's submission as to the construction of Constitution s. 9, which adopts this dictum, as '*narrow*'. Instead, DS at [31] (AB 57-58) submit that the term '*method*' in Constitution s. 9 '*extends to the whole process of the election*' and that (at [31]) '*It is the system prescribed by the Parliament that is required to be 'uniform'*, and focusing at the correct '*level*' upon '*electoral systems*'. This may be described as the 'broad' construction.

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5. First, the broad construction is contrary to the narrow construction accepted by the Commonwealth in support of its summary dismissal application of the *Show Cause Application* brought on 24 March 2016 (cf. AB 25 at [4]). A three week values inversion is unexplained. Most inexplicably, DS nowhere addresses the Plaintiff's case that the 2016 enactment itself clearly describes two new different methods of voting (cf. AB 26 at [7]). Second, accepting that the mischief to which s. 9 is directed is to standardize elections generally, this would permit different 'modes of voting' such as separate methods of voting for women, men and indigenous people. Intuitively, if that was ever constitutional, it would not be today: *Rowe* at [18]-[22] per French CJ.

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6. As to authority, in *Judd v McKeon* (1926) 38 CLR 380 the Court was required to rule on the validity of provisions for the compulsory preferential method of voting on the ground it conflicted with the word '*choosing*' in s. 9. It was argued that the words '*method of choosing'* required consent, rendering the compulsory provision (now section 245) invalid. This was resoundingly rejected by Knox CJ, Gavan Duffy and Starke JJ at page 383.
7. It is clear that the Justices saw that the '*method of choosing'* in s. 9 is a reference to the method of voting just described, and not to the overall electoral system itself with all its infrastructure and paraphernalia, nor the '*whole process of the election*'. These passages have been cited frequently since, most notably by Brennan CJ in *Langer,* above, at page

30 316.

8. To the same effect is the judgment of McHugh J in *Mullholland* at [48], and Gummow and Hayne JJ in *Mulholland* at [142], who referred to *Re Australian Electoral Commission; Ex parte Kelly* (2003) 77 ALJR 1307 at 1309. Also see French CJ who distinguished the question of the method of choosing in s. 9 from other provisions for the franchise in *Rowe* at [7]; and likewise per Gummow and Bell JJ in *Rowe* at [109] and to the same effect per Hayne J diss. at [200]. The Plaintiff will hand up a schedule of references.
9. Nor do the considerations referred to at DS [32]-[34] (AB 58) have any relevance. If anything, they point in the opposite direction contended for by the Defendant. The fact that

the colonial parliaments had different '*options as to the mode*' of voting, eg for women, men and indigenous persons, is not against the Plaintiff's argument, but for it: see Zines 6th edn at 554.

10. Second, until the 2016 law, as cases such as *Langer* remarkably demonstrate, the savings provisions were simply that – now they permit a third method of voting (first past the post). Third, as Dawson J explained in *Abbotto v Australian Electoral Commission* (1997) 144 ALR 352, the new ballot line provision after 1983 permitted a simplified method of voting below the line, not a new method of voting as between parties[4].

10 **B: cf DS [35]-[43]: 'DIRECTLY CHOSEN'**(s. 7)

1. DS [35] (AB 58) argue that the 2016 law does not, in its application, impair s. 7 of the Constitution in its requirement that the Senate of South Australia is comprised of Senators '*directly chosen by the people voting as one electorate*', because the 2016 enactment '*merely enables voters to choose candidates by reference to a group to which they belong*'.
2. DS at [35] to [43] (AB 58-61), it is submitted, mischaracterizes the 2016 enactment, gives a meaning to the cited words in s. 7 which renders them valueless as a constitutional protection of the system of representative and responsible government of the Commonwealth, and impermissibly devalues the full and free exercise of the right to an
20 informed vote.
3. The features of the new electoral system in this case which mean that it cannot be said that those elected are '*directly chosen by the people*' are the party mechanism inserted above the line voting with distribution of preferences between parties not candidates or groups of candidates, and the form of the ballot paper including the eye-catching party logos making above the line voting preferable to almost all voters in an optional preferential ballot.
4. The words '*directly chosen*' in s. 7 direct attention to the requirement that there must be a '*direct choice*', which may be and is in this case impaired by the form of the ballot paper: see per Gleeson CJ in *Mulholland* at [28]. In *Mulholland* at [71] McHugh J cited with
30 approval Doherty J's description of political parties in *Figuera v Canada [AG]*. The *Electoral Act* now requires voters who vote above the line to vote between parties so described rather than between individuals for '*Senators...directly chosen*', as required by s. 7.

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[4] The Defendant's reliance at DS [27] (AB 57) on *McKenzie v Commonwealth (1984)* 57 ALR 747, *Abbotto* and *McClure v Australian Electoral Commission* (1999) 163 ALR 734 do not assist it: apart from being cases before single justices in which the Plaintiff was not legally represented, the present issues raised by new methods of voting did not arise; *Mulholland* did not raise the present question.

5. Upon analysis the *'facility'* referred to at DS [35] (AB 56) is not a direct choice – but a form of indirect choice by an electoral college where votes are distributed not by electors but by the Act's mechanism under ss. 272(1)(a) and (2). These party and group candidates are chosen not by the voter but selected by means of the party nomination form (Form CC) and a *'joint request'* under section 168, not available to the public, as to which order of election arm twisting by party power brokers not answerable to anyone has significant input.
6. DS at [39] (AB 59), focus on the decision of Gibbs CJ in *McKenzie* at 749. However on proper analysis the decision is against the Defendants or is distinguishable.

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C: cf DS [44]-[50]: 'PROPORTIONATE REPRESENTATION' [ss. 7, 24;128]

1. Again DS at [44] to [55] (AB 61-64) fail to grapple with the words *'the people ...voting ...as one electorate'* in s. 7, and *'in proportion'* in the related s. 24, and *'proportionate representation'* in s. 128.
2. It is inconsistent with a system of representative government that a particular group of electors is treated differently than another group, and the exercise of their right to vote devalued compared to other Australians. The express 'concession' at DS [24] (AB 56) that the new s. 272(2) was only enacted because of 32 years of history of electors voting one only above the line, far from making the exercise of the right to vote an informed one,
20 undermines the case advanced in DS that history is irrelevant.
3. The worked example (AB 62 and 142) is unrealistic as it ascribes 58,000 first preference votes to the fifth candidate elected, something which is virtually impossible in a poll of 420,000 voters. In any event, experience demonstrates that major party lower order candidates receive many fewer first preference votes than most other candidates.
4. The aim of the 2016 enactment is to allow the major parties by a clever manipulation of the system to prevent minor parties being elected to the Senate (see Table A Part 1 AB 39-42 and 125-129, Tables B and C AB 44-46 and 130-133 and Table A Part 2 AB 43 and 143-144). It ought not be necessary for election to the Senate to be a member of a major party (e.g. Liberals/ Nationals; ALP/Greens). The misleading exhaustion provision in the
30 ballot paper compounds the disenfranchisement.

D: cf DS [56]-[63]: MISLEADING INSTRUCTIONS TO VOTERS [the implied freedom].

1. Form E burdens the implied freedom inter alia by concealing the first past the post method.
2. DS at [58] and [61] (AB 65) submit history tells us nothing as to how voters will vote under the new system, yet DS at [24] (AB 56) rely on that history to explain the new party vote distributive mechanism in *Electoral Act* s. 272(2). The terms, operation or effect of the 2016 enactment in Form E conceals key elements of the right to vote and misleads the

voters: *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 567. No good reason for it is established, other than to render small parties and independents obsolete. That does not make the legislation appropriate or adapted to the system of representative and responsible government.

Dated: 26 April 2016

On behalf of Peter King

Peter E King

10 Telephone 02 9232 4671: Email pking@qsc.com.au

Christopher Brohier

Telephone 08 8223 7900: Email fcbrohier@elizabethmews.com.au

Counsel for the Plaintiff

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SCHEDULE OF AUTHORITIES REFERRED TO IN THE SUBMISSIONS

1. *Rowe v Electoral Commissioner* (2010) 243 CLR 1.
2. *Vardon v O'Loughlin* (1907) 5 CLR 201.
3. *Roach v Electoral Commissioner* (2007) 233 CLR 162.
4. *McKenzie v Commonwealth* (1984) 59 ALJR 190 at [8].
5. *Langer v Australian Electoral Commission* (1996) 186 CLR 302 at 313 to 315.
6. *Abbotto v Australian Electoral Commission* (1997) 144 ALR 352.
7. *Judd v McKeon* (1926) 38 CLR 380.
8. *Australian Broadcasting Commission* (1997) 189 CLR 520 at 567.
9. *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [157] and [159].
10. *Re Australian Electoral Commission; Ex parte Kelly* (2003) 77 ALJR 1307 at 1309.
11. *Wilson v Anderson* (2002) 213 CLR 401 at [8].
12. *Lacey v Attorney-General [Qld]* (2011) 242 CLR 573 at [43]-[44].
13. *McGinty v Western Australia* (1986) 186 CLR 140.