HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

Matter No S77/2016

ROBERT JOHN DAY — PLAINTIFF

AND

AUSTRALIAN ELECTORAL OFFICER FOR THE STATE OF SOUTH AUSTRALIA & ANOR — DEFENDANTS

Matter No S109/2016

PETER JAMES MADDEN & ORS — PLAINTIFFS

AND

AUSTRALIAN ELECTORAL OFFICER FOR THE STATE OF TASMANIA & ORS — DEFENDANTS

Day v Australian Electoral Officer for the State of South Australia
Madden v Australian Electoral Officer for the State of Tasmania
[2016] HCA 20
13 May 2016
S77/2016 & S109/2016

ORDER

Matter No S77/2016

1. Application dismissed.

2. The plaintiff pay the second defendant's costs of the application.

Matter No S109/2016

1. Application dismissed.

2. The plaintiffs pay the eighth defendant's costs of the application.

Representation

P E King with F C Brohier for the plaintiff in S77/2016 (instructed by McKells Solicitors)

P E King for the plaintiffs in S109/2016 (instructed by McKells Solicitors)

Submitting appearance for the first defendant in S77/2016

Submitting appearance for the first to seventh defendants in S109/2016

N J Williams SC with N J Owens and C L Lenehan for the second defendant in S77/2016 and the eighth defendant in S109/2016 (instructed by Australian Government Solicitor)

CATCHWORDS

Day v Australian Electoral Officer for the State of South Australia
Madden v Australian Electoral Officer for the State of Tasmania

Constitutional law – Election of Senators – Validity of provisions of *Commonwealth Electoral Act* 1918 (Cth) as amended by *Commonwealth Electoral Amendment Act* 2016 (Cth) – Whether provisions for voting above or below dividing line on ballot paper prescribed more than one method of choosing Senators contrary to s 9 of Constitution – Whether indicating vote for party or group above dividing line contrary to requirement in s 7 of Constitution that Senators be "directly chosen by the people" – Whether prescription of "Droop quota" resulted in effective disenfranchisement – Whether instructions on ballot paper infringed implied freedom of political communication or system of representative government.

Words and phrases – "above the line", "ballot paper", "below the line", "directly chosen by the people", "dividing line", "Droop quota", "free and informed vote", "group voting ticket", "method of choosing senators", "preferential voting".

Constitution, ss 7, 9 and 24.
Commonwealth Electoral Act 1918 (Cth), ss 4(1), 123, 124, 126, 168, 169, 209(1), 210, 214, 214A, 239, 268, 268A, 269, 272 and 273.

FRENCH CJ, KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ.

Introduction

1 Two applications have been brought in the original jurisdiction of the Court challenging the validity of provisions of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act") as amended by the *Commonwealth Electoral Amendment Act* 2016 (Cth) ("the Amendment Act"). The challenged provisions concern the new form of the Senate ballot paper and the process for marking it. The new process requires an elector to number sequentially at least six squares above the dividing line on the ballot paper. A group of candidates may be granted a square above the line on request. Where a group of candidates has so requested, the name of the political party that endorsed them and the party logo will appear adjacent to the square above the line. 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 also requires electors who wish to vote below the dividing line to number at least 12 candidates in the order of their preference.

2 The plaintiff in application S77 of 2016 is a Senator for the State of South Australia. The first plaintiff in application S109 of 2016 is a candidate for the next Senate election in Tasmania. Each of the remaining six plaintiffs in that application is an elector for one of the States or Territories other than South Australia and Tasmania.

3 The plaintiffs rely principally upon ss 7 and 9 of the Constitution. Section 7 of the Constitution provides that the Senate "shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate." Section 9 provides that the Parliament of the Commonwealth may make laws "prescribing the method of choosing senators, but so that the method shall be uniform for all the States." It also provides that "[s]ubject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State."

4 The plaintiffs seek declarations and writs of mandamus and prohibition directed to the Australian Electoral Officers for the States and Territories and to the Commonwealth. They contend that the new form of ballot paper and the

alternative means for marking it above and below a dividing line constitute a prescription of more than one method of choosing Senators, contrary to s 9 of the Constitution. They separately contend that by allowing electors to indicate a vote for a party or group designated above the line on the ballot paper, the Act departs from the requirement in s 7 that Senators will be "directly chosen by the people". The basis for that argument is that a vote above the line is a vote for the relevant group or party as an intermediary and not a direct choice of named candidates. They further argue 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 infringes a principle of proportional representation and effectively disenfranchises some electors. The plaintiffs also submit that the ballot form now prescribed misleads electors about their voting options and thereby infringes the implied freedom of political communication. The impugned sections of the Act are also said, in a general way, to have detracted from the franchise for no substantial reason and to be invalid on that account.

5 For the reasons that follow, those submissions should not be accepted. The applications should be dismissed with costs. It is useful to refer briefly to the legislative history of voting processes for the Senate which preceded the challenged amendments.

A brief history of Senate voting processes

6 The recent amendments to the Act form the latest episode in an historical evolution of the voting methods and procedures for Senate elections since Federation. The *Commonwealth Electoral Act* 1902 (Cth) ("the 1902 Act") provided for a "first past the post" system for the election of Senators. Each elector had a number of votes equal to the number of vacancies and marked a cross in the square opposite the name of the candidates for whom they voted[1]. The candidates with the greatest number of votes were elected to the available vacancies[2]. That system was replicated in the Act when enacted in 1918[3].

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1 1902 Act, s 150.

2 1902 Act, s 161.

3 Act, ss 123 and 135(7).

7 The Act was amended in 1919[4] to provide for the first time for preferential voting for Senate elections. Each elector was required to express preferences for twice the number of candidates to be elected plus one[5]. Candidates would be excluded and their preferences distributed until one candidate achieved an absolute majority of unexhausted ballots[6]. That candidate would win the first seat. The further preferences of the first successful candidate's vote would be distributed among the remaining candidates followed by a count for the second vacancy. Candidates would be excluded and preferences distributed until a second candidate achieved an absolute majority of the unexhausted ballots. That candidate would win the second seat. The distribution of preferences would continue until sufficient successful candidates were identified to fill all vacancies.

8 A procedure under which candidates could be grouped on a Senate ballot paper was introduced into the Act in 1922[7]. Grouped candidates were given priority over ungrouped candidates in the printing of ballot papers[8]. Candidates within groups were arranged in alphabetical order and the ordering of the groups was alphabetical[9]. The groups were identified on the ballot paper not by party names but by letters depending upon their position on the ballot paper, thus A for the first group and B for the second group and so on[10].

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4 *Commonwealth Electoral Act* 1919 (Cth) ("the 1919 Act").

5 Act, s 123(a) as inserted by the 1919 Act, s 7.

6 Act, s 135 as inserted by the 1919 Act, s 9.

7 *Commonwealth Electoral Act* 1922 (Cth) ("the 1922 Act").

8 Act, s 105A(a) as inserted by the 1922 Act, s 11.

9 Act, s 105A(b) and (c) as inserted by the 1922 Act, s 11.

10 Act, s 105A(d) as inserted by the 1922 Act, s 11.

9 Compulsory voting was introduced in 1924[11]. A further amendment in 1934 required electors to express sequential preferences for all candidates on a Senate ballot paper[12]. The counting rules remained the same. In 1940, the Act was again amended so that a group of candidates could choose the order in which the names of candidates within the group were listed on the ballot paper[13]. The ordering of the groups on the ballot paper was done by ballot rather than alphabetically[14]. Ungrouped candidates were ordered by ballot[15]. Candidates were grouped in columns for the first time[16].

10 Proportional representation was introduced in 1948[17]. Full preferential voting was retained. To be elected a candidate had to receive a specified proportion (or quota) of the total number of formal votes. That quota was calculated by dividing the total number of formal votes by one more than the number of candidates and adding one. In a half-Senate election for six vacancies, the required quota would be one-seventh of the total number of votes plus one[18]. This is known as the "Droop quota"[19]. Each elector had a single vote, which would be transferable in accordance with the elector's preferences. If a candidate were elected and had more votes than the quota then a surplus vote would

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11 *Commonwealth Electoral Act* 1924 (Cth).

12 *Commonwealth Electoral Act* 1934 (Cth), s 8 amending s 123 of the Act.

13 Act, s 72B as inserted by the *Commonwealth Electoral Act* 1940 (Cth) ("the 1940 Act"), s 7.

14 Act, s 105A(c) as inserted by the 1940 Act, s 17.

15 Act, s 105A(e) as inserted by the 1940 Act, s 17.

16 1940 Act, s 26 replacing Form E in the Schedule to the Act.

17 *Commonwealth Electoral Act* 1948 (Cth) ("the 1948 Act").

18 Act, s 135(5)(b) and (c) as inserted by the 1948 Act, s 3.

19 Named after London barrister and mathematician HR Droop, who first proposed the quota in 1868. See Tideman, "The Single Transferable Vote", (1995) 9 *The Journal of Economic Perspectives* 27 at 30.

transfer to the elector's next preferred candidate still alive in the count. Unlike the previous system, it would not be transferred as a whole vote but at a fractional "transfer value"[20]. An excluded candidate would have his or her votes distributed in accordance with preferences[21]. In the Second Reading Speech for the 1948 amendments Dr HV Evatt said[22]:

> "The great defect, from the representation aspect, of both the old 'first past the post' and the more recently used 'block majority' system is that at an election, generally all seats in a State are won by candidates of the one party, leaving a minority of between 40 to 50 per cent of the electors without any representation at all in the Senate."

11 Registration of political parties, the printing of their names on ballot papers, group voting tickets and the division of the ballot paper by a line allowing the option of above the line voting for political parties or groups and below the line voting for individual candidates were introduced in 1983[23]. Under that system an elector could mark a square designated by reference to a particular political party or group above the line and thereby cast a vote for all candidates according to preferences for that election set out on a group voting ticket lodged with the Australian Electoral Commission and displayed at the polling booth on a poster[24]. The operation of these provisions as they existed immediately prior to the 2016 amendments is explained later in these reasons.

12 The Joint Select Committee on Electoral Reform in 1983 recommended the adoption of the group ticket voting option because of the high rate of

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20 Act, s 135(5)(e)-(g) as inserted by the 1948 Act, s 3.

21 Act, s 135(5)(i) as inserted by the 1948 Act, s 3.

22 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 April 1948 at 965.

23 *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth) ("the 1983 Act"), which commenced on 21 February 1984.

24 Act, s 107A as inserted by the 1983 Act, s 82. An option to provide a pamphlet of group voting tickets was later provided by s 216 of the Act as amended by the *Electoral and Referendum Amendment Act (No 1)* 2001 (Cth), s 36.

unintentional error, resulting in informality, brought about by requiring electors to express preferences for all candidates on a Senate ballot paper[25]. The rules for below the line votes for individual candidates were also amended to allow for a limited number of sequencing errors by the elector without the vote being treated as informal[26]. Although ballot papers were divided by a line and provided for group voting above that line and individual voting below it, neither of the terms "above the line" or "below the line" featured prominently in the Act prior to the 2016 amendments[27].

13 The 1983 amendments also changed the ways in which transfer values were calculated and assigned for Senate candidates with a surplus. Under the new method, if a candidate achieved an above-quota surplus, all of that candidate's ballot papers, not only the surplus, would be transferred to other candidates at a fractional value[28]. In proposing and explaining that change the Joint Select Committee on Electoral Reform observed in September 1983 that the earlier transfer system provided for a transfer only of a candidate's surplus ballot papers, which might be an unrepresentative sample of their actual ballot papers. The Committee also observed that for candidates who achieved a surplus following the distribution of preferences their first preference votes could not be included in a subsequent transfer[29]. The new system was consistent with the Committee's recommendations[30].

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25 Joint Select Committee on Electoral Reform, *First Report*, (1983) at 62 [3.23].

26 Act, s 133B(1) as inserted by the 1983 Act, s 103.

27 Section 273A of the Act, prior to the Amendment Act, concerned how the Divisional Returning Officer was to deal with informal "wholly above-the-line ballot papers". It defined that term as a ballot paper that has one or more ticks, crosses or other marks above the dividing line and no marks below the dividing line: Act, s 273A(10). No other mention was made of "above the line" voting.

28 Act, s 135(5)-(28) as inserted by the 1983 Act, s 105(f).

29 Joint Select Committee on Electoral Reform, *First Report*, (1983) at 57-58 [3.11].

30 Joint Select Committee on Electoral Reform, *First Report*, (1983) at 65 [3.34].

14 In 1987, the Act was further amended to allow for incumbent and ungrouped Senators to lodge individual voting tickets setting out preferences for all candidates[31]. It entitled any such Senator who lodged a ticket to have a square above the line. Non-incumbent ungrouped candidates remained unable to have above the line squares or to lodge voting tickets[32].

Registered political parties and party designations

15 The form of the ballot paper before and after the Amendment Act must be understood in the light of the continuing provisions for the registration of political parties and the process by which party designations are recognised on the ballot paper. The relevant provisions have not been materially altered by the Amendment Act.

16 Part XI of the Act provides for the registration of "eligible political parties". Section 124 provides that "[s]ubject to this Part, an eligible political party may be registered under this Part for the purposes of this Act." The term "Political party" is defined in s 4(1) of the Act as:

> "an organization the object or activity, or one of the objects or activities, of which is the promotion of the election to the Senate or to the House of Representatives of a candidate or candidates endorsed by it."

An "eligible political party" is defined in s 123(1) as a political party that:

> "(a) either:
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> (i) is a Parliamentary party; or
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> (ii) has at least 500 members; and
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> (b) is established on the basis of a written constitution (however described) that sets out the aims of the party."

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31 *Commonwealth Electoral Amendment Act* 1987 (Cth) ("the 1987 Act").

32 Act, s 211A as inserted by the 1987 Act, s 26.

The term "Parliamentary party" is also defined in s 123(1) as "a political party at least one member of which is a member of the Parliament of the Commonwealth." Applications for registration of a political party are made to the Electoral Commission[33], which maintains a Register of Political Parties[34].

17 The Act provides for the grouping of candidate names on Senate ballot papers pursuant to requests made under s 168. Section 168(1) provides that:

> "Two or more candidates for election to the Senate may make a joint request:
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> (a) that their names be grouped in the ballot papers; or
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> (b) that their names be grouped in the ballot papers in a specified order."

In printing ballot papers for a Senate election the names of candidates who made requests under s 168(1) shall be printed in groups on the ballot paper in accordance with their requests and before the names of candidates who have not made such requests[35]. The ordering of the groups is determined by the Australian Electoral Officer under a ballot process[36].

18 Section 169(1) provides for a request by the registered officer of a registered political party that the name or registered abbreviation of the name of that party be printed on the ballot papers for an election adjacent to the name of a candidate who has been endorsed by that party[37]. Section 214 provides for the printing of political party names on the ballot papers.

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33 Act, s 126.

34 Act, s 125.

35 Act, s 210(1)(a).

36 Act, s 213.

37 "Registered abbreviation" is defined in s 210A(1). In relation to the name of a registered political party it means the abbreviation (if any) of the name of the party entered in the Register of Political Parties.

19 The provisions for registration of political parties and their limitation to parties of at least 500 members were held in *Mulholland v Australian Electoral Commission*[38] not to infringe the requirements of ss 7 and 24 of the Constitution that Senators and Members of the House of Representatives be "directly chosen by the people". Gleeson CJ observed of the rules for the printing of ballot papers[39]:

> "Here, the rules in question preserve a full and free choice between the competing candidates for election. The electors are presented with a true choice. The available alternatives between candidates are set out on the ballot paper. The process of choice by electors is not impeded or impaired."

McHugh J in the same case pointed to the extent to which the Constitution leaves it to the Parliament to determine the matter of electoral systems, including specification of particular voting methods such as preferential or proportional voting or first past the post voting[40]. In a similar vein, Gummow and Hayne JJ observed that care is called for in elevating a "direct choice" principle to a broad restraint upon legislative development of the federal system of representative government[41].

20 Those general observations weigh against the plaintiffs' arguments in this case.

Group ticket voting

21 Section 169(4), as it stood before the Amendment Act, provided that where a request had been made under s 169(1) for the printing of a political party name or registered abbreviation of a party name on the ballot papers, and where the candidates proposed to have a group voting ticket registered, they could further request that the name of the registered political party that endorsed the

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38 (2004) 220 CLR 181; [2004] HCA 41.

39 (2004) 220 CLR 181 at 192 [18].

40 (2004) 220 CLR 181 at 207 [64].

41 (2004) 220 CLR 181 at 237 [156].

candidates be printed on the ballot papers adjacent to the square printed in relation to the group above the dividing line.

22 The concept of a "group voting ticket" was explained in s 211 and provision made for it in ss 211, 211A and 216, each of which has been repealed by the Amendment Act. Candidates grouped pursuant to a request under s 168 could lodge a written statement with the Australian Electoral Officer that they wished electors to indicate their preferences in relation to all the candidates in the election in up to three alternative orders of preference specified in their statement[42]. Those orders would give preferences to the candidates lodging the statement before any other candidate. Where a group of candidates had at least one group voting ticket registered for the purposes of that election, a square was required to be printed on the ballot papers for use in the election above the names of those candidates (ie, above the dividing line)[43]. An ungrouped candidate, who was a sitting Senator, could also lodge with the Australian Electoral Officer a written statement of up to three orders of preference (an "individual voting ticket")[44]. Section 216, prior to the Amendment Act, provided for the display at polling booths of either or both of a poster showing the tickets and a pamphlet showing the tickets. It also prescribed the layout of the posters and pamphlets.

23 The system for group ticket voting above the line was held valid by Gibbs CJ in *McKenzie v The Commonwealth*[45]. The plaintiff in that case was a candidate for election as a Senator for the State of Queensland. He sought a declaration that the provisions of the Act authorising the use of a ballot paper providing for above the line group ticket voting were invalid. Gibbs CJ observed[46]:

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42 Act, s 211(1) and (2) prior to repeal by the Amendment Act.

43 Act, s 211(5) prior to repeal by the Amendment Act.

44 Act, s 211A(1) and (2) prior to repeal by the Amendment Act.

45 (1984) 59 ALJR 190; 57 ALR 747; [1984] HCA 75.

46 (1984) 59 ALJR 190 at 191; 57 ALR 747 at 749.

> "[I]t is not right to say that the Constitution forbids the use of a system which enables the elector to vote for the individual candidates by reference to a group or ticket."

The Chief Justice went on to observe that political parties existed long before the Constitution was adopted and that there was no reason to imply an inhibition on the use of a method of voting which recognised political realities provided that the Constitution itself did not contain any indication that such a method was forbidden[47]. He also rejected an argument that the provisions offended general principles of justice by discriminating against candidates who were not members of established parties or groups. The Chief Justice quoted the words of Stephen J in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*[48]:

> "[I]t is not for this Court to intervene so long as what is enacted is consistent with the existence of representative democracy as the chosen mode of government and is within the power conferred by s 51(xxxvi) [of the Constitution]."

Gibbs CJ concluded that[49]:

> "[I]t cannot be said that any disadvantage caused by the [impugned provisions] to candidates who are not members of parties or groups so offends democratic principles as to render the sections beyond the power of the Parliament to enact."

24 Similar challenges have been rejected by single Justices of the Court in *Abbotto v Australian Electoral Commission*[50], *McClure v Australian Electoral*

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47 See also discussion of the party political system in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 196 [29] per Gleeson CJ, 213-214 [78] per McHugh J, 237 [155] per Gummow and Hayne JJ.

48 (1975) 135 CLR 1 at 57-58; [1975] HCA 53 quoted in (1984) 59 ALJR 190 at 191; 57 ALR 747 at 749.

49 (1984) 59 ALJR 190 at 191; 57 ALR 747 at 749.

50 (1997) 71 ALJR 675; 144 ALR 352; [1997] HCA 18.

Commission[51] and *Ditchburn v Australian Electoral Officer (Qld)*[52]. In the latter case it was unsuccessfully contended that above the line voting for a group ticket was contrary to the requirement that members of the Senate be "directly chosen" by the people[53].

The pre-amendment Senate ballot paper

25 Section 209(1) provides that "[b]allot papers to be used in a Senate election shall be in Form E in Schedule 1." Prior to the Amendment Act Form E appeared as set out in Annexure 1 to these reasons. It comprised two parts divided by a thick black line. Each of the squares above the line was designated with the name of a registered political party or the word "Independent". An elector could cast a vote by ticking one of those squares to indicate "the voting ticket you wish to adopt as your vote". That is to say, the elector adopted the preferential voting sequence of that particular party or independent as his or her own voting preference without having to fill out any further squares. The squares below the line set out the name of each candidate and the registered political party to which that candidate belonged or the term "Independent" if there were no relevant registered political party. Independent candidates were located under the heading "Ungrouped" on the right of the ballot paper.

26 Section 239(1) provided, before the Amendment Act, that an elector should mark his or her vote on the Senate ballot paper by:

> "(a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference; and
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> (b) writing the numbers 2, 3, 4 (and so on, as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them."

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51 (1999) 73 ALJR 1086; 163 ALR 734; [1999] HCA 31.

52 (1999) 165 ALR 147; [1999] HCA 40.

53 (1999) 165 ALR 147 at 148 [3], 149-150 [5].

Alternatively, an elector could vote according to a group voting ticket. Section 239(2) provided that a vote could be marked on a ballot paper by writing the number 1 in a square (if any) printed on the ballot paper where a group of candidates or an individual candidate (as the case may be) had lodged a statement of a group or individual voting ticket. The vote would then be taken as a vote for all candidates in the order set out in the relevant group or individual voting ticket[54]. The provisions giving effect to group ticket voting were repealed by the Amendment Act.

Amendments affecting the form and marking of the Senate ballot paper

27 The Amendment Act amended the form of the Senate ballot paper to the new Form E appearing in Annexure 2 to these reasons. Like its predecessor, it comprises two parts separated by a thick black dividing line. As noted above, s 169(1) provides that the registered officer of a registered political party may request that its name or registered abbreviated name be printed on the ballot paper adjacent to the name of a candidate endorsed by that party. Section 214(1) provides for the printing of the registered party name or abbreviation on the ballot paper adjacent to the candidate's name. The amended s 169(4) provides that where such a request is made in respect of candidates at a Senate election and the candidates have asked to be grouped in the ballot paper under s 168, a further request may be made for the name of the registered political party that endorsed the candidates to be printed on the ballot paper adjacent to the square printed above the line in relation to the group. Section 214(2)(d) provides for the registered name of the party to be printed on the ballot paper adjacent to that square. Section 126 of the Act as amended provides for an application for registration of a political party to optionally include a logo of the party to be entered into the Register[55]. The Act as amended also provides, by s 214A, for the printing of a party logo adjacent to the name of the party on the ballot paper[56].

28 The terms "above the line" and "below the line" are now defined in s 4(1) of the Act. Thus, a square is printed "above the line" on a ballot paper if printed in accordance with s 210(1)(f)(ii) and "below the line" if printed in accordance

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54 Act, s 272.

55 Act, s 126(2)(ba).

56 Act, s 214A(2).

with s 210(1)(f)(i). Section 210(1)(f), introduced by the Amendment Act, provides:

> "except as otherwise provided by the regulations:
>
> (i) a square must be printed opposite the name of each candidate; and
>
> (ii) for candidates who made a request under section 168 that their names be grouped in the ballot papers for the election—a square must be printed above the dividing line and above the squares printed opposite those names."

29 The term "dividing line" is defined as "the line on a ballot paper that separates the voting method described in subsection 239(1) from the voting method described in subsection 239(2)."[57] Subsections (1) and (2) of s 239 now provide:

> "*Voting below the line*
>
> (1) Subject to subsection (2), a person must mark his or her vote on the ballot paper in a Senate election by:
>
> (a) writing at least the numbers 1 to 12 in the squares printed on the ballot paper below the line (with the number 1 being given to the candidate for whom the person votes as his or her first preference, and the numbers 2, 3, 4 and so on to at least the number 12 being given to other candidates so as to indicate the order of the person's preference for them); or
>
> (b) if there are 12 or fewer squares printed on the ballot paper below the line—numbering the squares consecutively from the number 1 (in order of preference as described in paragraph (a)).

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57 Act, s 4(1). Prior to the Amendment Act, a nearly identical definition appeared in s 273A(10), the sole difference being that the subsection referred to "the ballot paper" as opposed to "a ballot paper".

Voting above the line

(2) A vote may be marked on a ballot paper by:

(a) writing at least the numbers 1 to 6 in the squares (if any) printed on the ballot paper above the line (with the number 1 being given to the party or group for whom the person votes as his or her first preference, and the numbers 2, 3, 4, 5 and 6 being given to other parties or groups so as to indicate the order of the person's preference for them); or

(b) if there are 6 or fewer squares printed on the ballot paper above the line—numbering the squares consecutively from the number 1 (in order of preference as described in paragraph (a))."

30 The use of the term "voting method" in the definition of "dividing line" was said by the plaintiffs to indicate that the Act prescribed two methods of choosing Senators, contrary to s 9 of the Constitution. That argument can be dismissed immediately. The construction of the constitutional term "method", and its application, is not determined by the use of that word in the Act.

31 Section 272, prior to the Amendment Act, provided for Senate ballot papers marked above the line to be taken to have been marked according to group voting tickets. The new s 272 applies if one or more numbers are written in the squares printed on the ballot paper above the line in relation to groups of candidates (each group being a "preferenced group"). Under s 272(2) the ballot paper is then taken to have been marked as if:

"(a) each candidate in a preferenced group was given a different number starting from 1; and

(b) candidates in a preferenced group were numbered consecutively starting with the candidate whose name on the ballot paper is at the top of the group to the candidate whose name is at the bottom; and

(c) the order in which candidates in different preferenced groups are numbered is worked out by reference to the order in which the groups were numbered on the ballot paper, starting with the group marked 1; and

(d) when all the candidates in a preferenced group have been numbered, the candidate whose name is at the top of the next preferenced group is given the next consecutive number."

The effect of a number written in a square printed on the ballot paper above the line is a vote for the group of candidates appearing below the line in the order in which they appear, in accordance with the group's position in the elector's order of preferences, above the line.

Formal and informal ballot papers

32 Section 268 provides for the circumstances in which ballot papers will be treated as informal. Prior to the Amendment Act, s 268(1)(b) provided that a vote for the Senate would be treated as informal if the ballot paper had no vote indicated on it, or it did not indicate the elector's first preference for one candidate and the order of his or her preference for all the remaining candidates. The new par (b) provides for a ballot paper to be treated as informal if:

> "subject to sections 268A and 269, in a Senate election, it has no vote indicated on it, or it does not indicate the voter's first preference for 1 candidate and then consecutively number at least 11 other candidates in the order of his or her preference".

33 The new s 268A provides for formal votes below the line. Section 268A(1) is a vote saving provision. It provides that a ballot paper in a Senate election is not informal under s 268(1)(b) if:

> "(a) the voter has marked the ballot paper in accordance with paragraph 239(1)(b); or
>
> (b) if there are more than 6 squares printed on the ballot paper below the line—the voter has consecutively numbered any of those squares from 1 to 6 (whether or not the voter has also included one or more higher numbers in those squares)."

34 As noted earlier, s 239(2) provides that a vote above the line is effected by writing in at least the numbers 1 to 6 in the party or group squares (if any) appearing there. If there are fewer than six squares then all squares should be marked. Section 269(1), like s 268A(1), is a vote saving provision. It provides that a ballot paper is not informal under s 268(1)(b) if the elector has marked it in accordance with s 239(2) or has marked the number 1 or the number 1 and one or

more of the higher numbers in squares printed on the ballot paper above the line. This means that a formal above the line vote can be cast by marking just one of the squares with the number 1.

The scrutiny

35 Section 273 of the Act provides for the scrutiny, or counting, of votes in Senate elections. No amendments relevant to the present case were made to the section by the Amendment Act[58]. Section 273(8) and following are the key provisions setting out the process for the counting of votes.

36 Section 273(8) provides for the calculation of the "Droop quota" discussed above. Any candidate who receives a number of first preference votes equal to or greater than the quota will be elected immediately. The number of votes of each elected candidate in excess of the quota (the "surplus") is then transferred at a proportionate rate (the "transfer value") in accordance with preferences[59]. As surplus votes are transferred, more candidates may reach the quota and be elected. However, if none of the remaining candidates reach the quota, the candidate with the lowest number of votes is excluded from the count and his or her votes are distributed based on preferences[60]. If a candidate obtains a quota following this process, his or her surplus votes will be transferred at the transfer value to the remaining candidates[61] and the process of transfer, exclusion and distribution continues until all vacancies are filled. If at any stage the number of

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58 Items 29 and 30 of Sched 1 to the Amendment Act made adjustments to the procedures followed by the Divisional and Assistant Returning Officer after the receipt of the ballot papers and provided for the use of containers rather than parcels to transmit ballot papers. The method for the calculation of the quota, the transfer value and the determination of which candidates are to be elected remain the same as before the amendments.

59 Act, s 273(9).

60 Act, s 273(13).

61 Act, s 273(14).

continuing candidates is equal to the number of remaining vacancies, those candidates are elected[62].

The plaintiffs' arguments

37 The plaintiffs' arguments may be summarised as follows:

A. The option of "optional first past the post/preferential" voting for parties above the line and "compulsory preferential" voting for candidates below the line, for which the Act now provides, constitutes more than one method of choosing Senators and is contrary to the requirement in s 9 of the Constitution that there be only one method.

B. The option of above the line voting for one or more registered parties or groups contravenes the requirement in s 7 of the Constitution that Senators for each State be "directly chosen by the people".

C. The changes to the form of ballot paper and the provisions for marking it above the line, read with s 273(8) of the Act, infringe a constitutional requirement of "directly proportional representation" in the Senate.

D. The new form of ballot paper and the instructions on it are likely to mislead or deceive electors in relation to the casting of votes and thereby to hinder or interfere with their exercise of a right to a free and informed vote. It describes only two ways of voting and suppresses disclosure of other ways of voting which are formal.

E. The new form of ballot paper mandates an uninformed choice by electors, preventing the free flow of information and hence impairing the implied freedom of political communication and the system of representative government.

Arguments A, B and C sought to challenge features of the system that have existed since at least 1983. Argument D is directed at the form of the ballot paper. Argument E is a "catch all" submission. None of the above arguments has any merit and each can be dealt with briefly.

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62 Act, s 273(18).

Argument A: The method of choosing Senators

38 The first argument advanced by the plaintiffs involved the following propositions:

1. Section 9 of the Constitution refers to one method of choosing Senators which shall be uniform for all the States.

2. There are two methods prescribed pursuant to the Act as amended. One is an above the line "party list method", the other is a below the line "candidate list method".

3. The characterisation of the two voting processes as two methods is supported by the new definition of "dividing line", which appears in s 4(1) of the Act, as a line which "separates the voting method described in subsection 239(1) from the voting method described in subsection 239(2)." That argument has been rejected earlier in these reasons[63].

4. The Act as amended authorises a first past the post vote for a registered political party listed above the line on the ballot paper because it treats as formal a vote for just one of those parties.

5. The difference in voting methods is substantial, not just formal.

39 The term "method of choosing senators" appearing in s 9 of the Constitution entered the constitutional drafting process at the Melbourne Convention in March 1898 at the suggestion of the Convention's Drafting Committee. Clause 10 of the draft, which later became s 9 of the Constitution, had provided up to that time for the Parliament of the Commonwealth to make laws prescribing "the times, the places, and a uniform manner of choosing the senators" and for the Parliament of each State, subject to such laws, similarly to "determine the time, place, and manner of choosing the senators for that State."

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63 At [30].

The amendment appearing on the draft, in the hand of Robert Garran, substituted what became the language of s 9 of the Constitution[64].

40 The use of the term "method" instead of "manner" was suggested by Alfred Deakin at the Adelaide Convention in April 1897. As a result of interventions by Isaac Isaacs and Edmund Barton, Deakin was concerned that the word "manner" might not be wide enough to cover an alteration in the system of voting if so desired. He said[65]:

> "If 'manner' relates rather to the conduct of an election and the general provisions made for taking votes, is it wide enough to cover also, and to a certainty, a variety of systems of voting which might perhaps be indicated by the word 'method'? Would it not be desirable to take care that those States which think fit to adopt a system of proportional voting for the representation of minorities shall have power to do so, and that the Parliament of the Federal Commonwealth shall also be able to adopt such a system if it thinks desirable?"

The debate was inconclusive but it was the change of wording suggested by Deakin which was subsequently effected through the Drafting Committee in the dying days of the Melbourne Convention in 1898.

41 Against that background it is not surprising that Quick and Garran observed in their Annotated Constitution[66]:

> "[T]he power to prescribe the method of choosing senators extends to the regulation of the whole process of election, including the mode of nomination, the form of writs and ballot papers, the mode of voting, the mode of counting votes, &c. The section would thus enable the State Parliaments provisionally, and the Federal Parliament ultimately, to

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64 Williams, *The Australian Constitution: A Documentary History*, (2005) at 1012-1013 and see commentary at 802.

65 *Official Report of the National Australasian Convention Debates*, (Adelaide), 15 April 1897 at 673.

66 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 426.

> prescribe the mode in which an elector should record his vote, *eg*, whether he should vote for as many candidates as there are vacancies to be filled at the election, or whether he should have the option of 'plumping' for a less number of candidates or of concentrating his vote, or whether he should mark some or all of the candidates in the order of his preference."

42 The Commonwealth argued for a broad construction of the term "method" along the lines of that set out in Quick and Garran's commentary. The Commonwealth drew attention to the reference in the quoted passage to the elector's "option of 'plumping' for a less number of candidates or of concentrating his vote". As the Commonwealth submitted, the authors there referred expressly to the possibility of an electoral system involving the option of voting in two quite distinct ways.

43 The plaintiffs contended for a narrower construction but did not say what that construction was save that the single method did not embrace the options of above the line and below the line voting offered to electors under the Act.

44 As the Commonwealth submitted, the evident purpose of s 9 was to provide for a method of choosing Senators uniform across the States. "Method" is a constitutional term to be construed broadly allowing for more than one way of indicating choice within a single uniform system. What the plaintiffs contended for is a pointlessly formal constraint on parliamentary power to legislate in respect of Senate elections which has nothing to do with the purpose of national uniformity.

45 Each of the above the line and below the line voting options is a way of casting votes for a number of candidates named on the ballot paper. A formal vote can be cast above the line by marking a square against the name of just one political party whose candidates appear below the line. Such a vote adopts as the elector's order of preference the order in which candidates appear below the line. In the case of a party with only two candidates, an example offered by the plaintiffs, an elector who numbers only that party's square above the line votes for its two candidates in the order in which they appear below the line. An elector casting a vote below the line may number as few as six named candidates and still cast a formal vote. The common effect of the different ways of completing a formal Senate ballot paper is to require the elector to choose between named candidates, but to leave the number of candidates chosen to the discretion of the elector, within the limits described. The availability of that

discretion does not involve the creation of more than one method of choosing Senators. The plaintiffs' submissions should be rejected.

Argument B: Senators "directly chosen"

46 The plaintiffs submitted that the requirement in s 7 of the Constitution that the Senators for each State be "directly chosen by the people of the State" refers to candidates elected without the intervention of any intermediary or third party. Above the line voting by marking squares designated by reference to political parties was said to offend against that requirement.

47 The plaintiffs submitted that above the line voting was not a vote for an individual "except derivatively through the operation of the Act". The vote cast was for an intermediary, being the named political party. That characterisation was said to be made clear because it was not possible to preference individual candidates in above the line voting but only parties or groups registered for that purpose.

48 The plaintiffs' characterisation should not be accepted. A vote marked above the line is as much a direct vote for individual candidates as a vote below the line. To number a square above the line identifies the candidates appearing beneath that square below the line. That much was made plain by the plaintiffs' own examples of ballot papers completed above the line. An elector is provided with a direct choice. An elector who does not wish to use the above the line facility is able to vote by allocating preferences below the line.

49 The term "directly chosen by the people" appearing in s 7 also appears in s 24 of the Constitution, which requires that the House of Representatives "shall be composed of members directly chosen by the people". The requirement of direct choice excludes indirect choice by an electoral college or some other intermediary[67]. That is not the case here.

50 The argument that above the line voting amounts to something other than a direct choice of individuals is untenable. The plaintiffs' submission must be rejected.

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67 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 21 per Barwick CJ, 44 per Gibbs J, 56 per Stephen J, 61 per Mason J.

Argument C: "Directly proportional representation" and effective disenfranchisement

51 The plaintiffs in their written submissions argued that the new form of Senate ballot paper compromised what they called the principle of "directly proportional representation" in the Senate or the "direct proportionality principle". The principle was said to be derived from s 7 of the Constitution, read with ss 24 and 128. Section 24 provides for the constitution of the House of Representatives by "members directly chosen by the people of the Commonwealth" and requires that "the number of such members shall be, as nearly as practicable, twice the number of the senators." It also requires that the number of Members of the House chosen in the several States shall be in proportion to the respective numbers of their people. The principle of proportional representation by reference to population is plainly not applicable to the Senate, where, by virtue of s 7, each State has equal representation, regardless of population.

52 The asserted "direct proportionality principle" was said to be infringed by the Act in two respects:

1. The means of calculating a quota and directing preferences under s 273 was said to result, in an ordinary half-Senate election, in one-seventh of the relevant State electorate being excluded from the count.

2. The vice attributed by the plaintiffs to s 273 was said to be compounded by what the plaintiffs described as "the optional first past the post/preferential party list method of voting above the line".

The argument was elusive. In a written outline of their oral submissions the plaintiffs summarised their propositions by saying that the operation and effect of the changes meant that those who voted for candidates of minor parties would "lose the benefit of their vote flowing down the preference chain."

53 The plaintiffs' submissions did not identify any relevant constraint on electors in the means available to them for completing a formal Senate ballot paper. The complaint seemed to be that a large proportion of electors, faced with the "eye-catching appeal [of] a party vote", would simply follow the instructions on the ballot paper for voting above the line and would therefore lose the opportunity to cast "a full and effective vote".

54 For reasons already explained, the marking of squares above the line is a vote for candidates whose names appear below the line. Electors may choose to complete all squares below the line, or at least 12 of them, and can cast a formal vote even if they complete only six. They can complete all squares above the line, or at least six of them, and can cast a formal vote by marking only one. There is no principle of "direct proportionality" to be infringed. There is no disenfranchisement in the legal effect of the voting process. The plaintiffs' argument, based upon effects adverse to the interests of so called "minor parties", was in truth an argument about the consequences of elector choices between above the line and below the line voting and in the number of squares to be marked. It should be rejected.

Argument D: A free and informed vote

55 The fourth argument advanced by the plaintiffs was that the new form of the Senate ballot paper is misleading in that it "fails to inform the voter that an effective preferential vote requires voting for all candidates and to only preference six risks vote exhaustion and does not set out the full range of voting options". One of the options said not to be mentioned is that the elector need only complete one square above the line. The allegedly misleading character of the ballot paper is said to constitute a burden on the implied freedom of political communication.

56 The argument fails at its threshold. The ballot paper does not mislead. It correctly states the statutory requirements that at least six squares be marked for above the line voting (unless there are fewer than six squares in total) and at least 12 squares be marked below the line (unless there are fewer than 12 squares in total). The fact that it does not refer to provisions of the Act which count the completion of one square above the line as formal and six squares below the line as formal is hardly surprising. They are vote saving provisions. The premise of this argument is not made out.

Argument E: Representative government

57 The last argument advanced by the plaintiffs was a kind of "catch all" proposition repeating the complaint in the previous argument and the complaint of effective disenfranchisement. These complaints were gathered into a proposition that a constitutional principle of representative government, and with it the freedom of political communication, are both impaired by the Act as

amended. No point was made under this heading that has not already been rejected in relation to the plaintiffs' other arguments.

Conclusion

58 The following orders should be made. In application S77 of 2016:

1. The application is dismissed.

2. The plaintiff is to pay the second defendant's costs of the application.

In application S109 of 2016:

1. The application is dismissed.

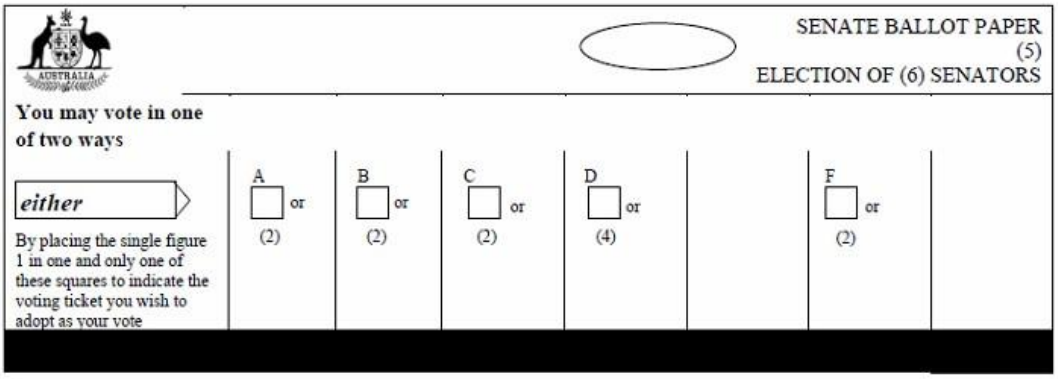
2. The plaintiffs are to pay the eighth defendant's costs of the application

Annexure 1

Schedule 1 Forms

Section 209

FORM E



	A (2)	B (2)	C (2)	D (2)	E	F (2)	Ungrouped
or By placing the numbers 1 to (7) in the order of your preference	☐ (1) (3) ☐ (1) (3)	☐ (1) (3) ☐ (1) (3) ☐ (1) (3) ☐ (1) (3)	☐ (1) (3) ☐ (1) (3) ☐ (1) (3) ☐ (1) (3)	☐ (1) (4)	☐ (1) (3) ☐ (1) (3)	☐ (1) (3) ☐ (1) (3) ☐ (1) (3)	☐ (1) (4) ☐ (1) (4)

(1) Here insert name of a candidate.
(2) Here insert name of a registered political party or composite name of registered political parties if to be printed.
(3) Here insert the name of a registered political party if to be printed.
(4) Here insert name of a registered political party or word 'Independent' if to be printed.
(5) Here insert name of State or Territory and year of election.
(6) Here insert number of vacancies.
(7) Here insert number of candidates.

Annexure 2

Forms **Schedule 1**

Section 209

FORM E

SENATE BALLOT PAPER
(5)
ELECTION OF (6)
SENATORS

You may vote in one of two ways

either

By numbering at least 6 of these boxes in the order of your choice (with number 1 as your first choice)*

(8) A (2)	(8) B (2)	(8) C (2)	(8) D (4)	E (4)	(8) F (2)	G (4)	H (4)	
☐	☐	☐	☐	☐	☐	☐	☐	

Schedule 1 Forms

[redacted]

	A (2)	B (2)	C (2)	D (2)	E (2)	F (2)	G (2)	H (2)	Ungrouped
or By numbering at least 12 of these boxes in the order of your choice (with number 1 as your first choice)**	☐ (1) (3) ☐ (1) (3)	☐ (1) (3) ☐ (1) (3) ☐ (1) (3) ☐ (1) (3)	☐ (1) (3) ☐ (1) (3) ☐ (1) (3) ☐ (1) (3)	☐ (1) (4)	☐ (1) (4) ☐ (1) (4)	☐ (1) (3) ☐ (1) (3) ☐ (1) (3)	☐ (1) (4) ☐ (1) (4)	☐ (1) (4) ☐ (1) (4)	

(1) Here insert name of a candidate.
(2) Here insert name of a registered political party or composite name of registered political parties if to be printed.
(3) Here insert the name of a registered political party if to be printed.
(4) Here insert name of a registered political party or word 'Independent' if to be printed.
(5) Here insert name of State or Territory and year of election.
(6) Here insert number of vacancies.

(8) Here insert the logo of a registered political party if to be printed.

* If the ballot paper has 6 or fewer squares above the line, replace the instruction with "By numbering these boxes in the order of your choice (with number 1 as your first choice)".

** If the ballot paper has 12 or fewer squares below the line, replace the instruction with "By numbering these boxes in the order of your choice (with number 1 as your first choice)".