

DAY v AUSTRALIAN ELECTORAL OFFICER FOR THE STATE OF SOUTH AUSTRALIA & ANOR (S77/2016);
MADDEN & ORS v AUSTRALIAN ELECTORAL OFFICER FOR THE STATE OF TASMANIA & ORS (S109/2016)

Dates proceedings commenced: 22 March 2016 and 14 April 2016

Date referred to Full Court: 15 April 2016

On 22 March 2016 certain amendments (“the Amendments”) to the *Commonwealth Electoral Act 1918* (Cth) (“the CEA”) were effected by the *Commonwealth Electoral Amendment Act 2016* (Cth) (“the Amendment Act”).

The Amendments include changes to the ballot paper used in each State or Territory in the election of Senators (“the Ballot Paper”) and the way in which electors are required to mark the Ballot Paper when they vote. The prescribed form for the Ballot Paper is Form E in Schedule 1 to the CEA.

Following the Amendments, the Ballot Paper will continue to contain a line that separates the names of political parties and groups of candidates, printed at the top of the sheet, from the names of all individual candidates, printed below the line.

Prior to the Amendments, voters were required to mark the Ballot Paper in one of two ways. The first was to choose only one political party or group above the line by writing a “1” (a tick or a cross also being acceptable) against their choice. The alternative was to number sequentially every name below the line, indicating the voter’s preference for the individual candidates.

Following the amendment of both Form E and s 239 of the CEA the two options, as to be printed on the instructions on the Ballot Paper, will be as follows. The first is to number at least six of the political parties or groups above the line in the order of the voter’s choice. The alternative is to number individual candidates below the line in accordance with the voter’s choice, by numbering as few as 12 names (instead of all of them). In relation to the first option, s 269 of the CEA provides that a ballot paper will not be informal if fewer than six of the parties or groups are numbered, including if only one party or group is marked with a “1” (or a tick or a cross).

Prior to the Amendments, a vote for a party or group above the line on the Ballot Paper could lead to a distribution of preferences by that party or group in a manner as described in a poster or a pamphlet displayed at the place of voting. Section 272 of the CEA now provides however that a vote above the line for a party or group is taken to be a vote for the candidates of that party or group as if the voter had numbered his or her preferences in the order in which the candidates’ names are listed below the line.

On 22 March 2016 Mr Robert Day, a Senator for South Australia, filed an application for an order to show cause with this Court, seeking declarations that:

- the CEA (as amended) ss 4(1), 239, 269, 272 and Form E in Part 1 of Schedule 1 are invalid; and
- the Amendment Act Schedule 1, Parts 1 (items 1 to 42A) and 3 (items 89 and 92 to 94) are invalid.

Mr Day seeks relief including an order restraining the defendants (being the Commonwealth and the Australian Electoral Officer for South Australia) from issuing ballot papers for the next Senate election in the form of Form E as it stands following the Amendments.

An application for an order to show cause was also filed by Mr Peter Madden and six others. Each of those plaintiffs is an elector enrolled to vote in the election of Senators for a State or Territory of Australia. The grounds of their application and the relief sought in it are substantially identical to those contained in Mr Day's application. The defendants are the Commonwealth and the Australian Electoral Officer of each State and Territory other than South Australia.

A Notice of a Constitutional Matter has been filed in each proceeding. At the time of writing, no Attorney-General had given notice of intending to intervene in the proceedings.

On 15 April 2016 Chief Justice French referred both applications to the Full Court for hearing. The Chief Justice also ordered that the submissions filed in respect of the *Day* proceeding stand as submissions filed for the purposes of the *Madden & Ors* proceeding.

The grounds on which the plaintiffs claim relief include:

- Contrary to Commonwealth Constitution s 9 and the constitutional guarantee of representative government Form E in the challenged provisions prescribes more than one method of choosing of Senators uniform for all the States, more particularly an optional first past the post / preferential party list method above the line and a part compulsory preferential candidate list method below the line.
- Contrary to Constitution s 7 and the constitutional guarantee of representative government the challenged provisions authorise voting on Form E and under s 239(2) CEA as amended for "*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*" and not for a Senator directly chosen by the people of the State or Territory voting as one electorate.
- Contrary to Constitution s 7 and the constitutional guarantee of representative government items 89 and 92 to 94 of Part 3 of Schedule 1 to the Amendment Act provide for the use of party logos limited to two in Form E above the line thereby disadvantaging and/or discriminating against independent candidates and minor parties and disenfranchising voters for independents and minor parties.