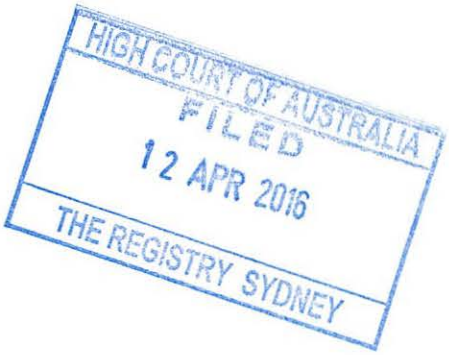
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S77 OF 2016**

BETWEEN: **ROBERT JOHN DAY**
Plaintiff

AND: **AUSTRALIAN ELECTORAL OFFICER FOR THE STATE OF SOUTH AUSTRALIA**
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

SUBMISSIONS OF THE SECOND DEFENDANT



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PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2. These are stated at the commencement of part VI of these submissions.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) was given by the plaintiff on 31 March 2016. No further notice is necessary.

PART IV FACTS

4. The facts are to be set out in the Application Book to be filed on 19 April 2016 (subject to possible issues of relevance).

PART V LEGISLATIVE PROVISIONS

5. See attachment.

PART VI ARGUMENT

6. The issues that arise and the argument the Commonwealth seeks to advance in respect of each are as follows:

7. *The overall effect of the amendments:* The key provisions in the *Commonwealth Electoral Act 1918* (Cth) ('**Electoral Act**') as amended by the *Commonwealth Electoral Amendment Act 2016* (Cth) ('**Amending Act**') ('**Amended Act**') are ss 272(2), 269(1)(b), 239(2) and 210(1)(f)(ii). Subject to the savings provision in s 269(1)(b), to vote above the line at least 6 squares must be numbered sequentially. The effect of so voting is that the elector has chosen the candidates in the list of her or his first preference (which are set out immediately below the line) in the order in which they appear, followed by the candidates of her or his second preference in order, then the third, up to the number of the elector's choices. This is not a "party list system"; it replaces the previous system, in which groups (whether parties or otherwise) lodged an ordered list which was not disclosed on the ballot paper, and in which an elector who wanted to know what a group vote meant would have to search out the poster and/or pamphlet required to be displayed in each voting place that set out the order.

8. *"More than one method of voting", Argument A* (paras 5 and 10 of the Application[1]): The provisions of the Amended Act so identified are elements of a system constituting a single "method" within the meaning of s 9 of the Constitution. The plaintiff has misread those provisions and has failed to appreciate that the "method" to which s 9 refers is the electoral system as a whole, which continues to operate uniformly among the States.

9. *"Directly chosen", Argument B* (paras 6 and 10 of the Application): these grounds, and the submissions made in support of them are misconceived and should be abandoned. They are based upon a misreading of the key provisions, and especially s 272(2).

10. *"Party logos" – a further aspect of Argument B* (para 7 of the Application): no constitutional difficulty arises from the provisions of the Amended Act dealing

[1] "**Application**" is used in these submissions to refer to the application for an order to Show Cause filed 22 March 2016. "**PS**" refers to the plaintiff's submissions dated 5 April 2016.

with party logos, which facilitate voter choice rather than impeding it, recognising that the party political system has come to be an important practical source of guidance in the choice of representatives.

11. *"Directly proportional representation", Argument C* (paras 8 and 10 of the Application): the Amended Act does not compromise any "principle" of proportionate representation and the argument is based, in part, on a misreading of s 24 of the Constitution. The requirement that candidates be "directly chosen by the people" in s 7 of the Constitution can be met by a number of systems including the first-past-the-post system that prevailed until 1919.

12. *"A free and informed vote", Argument D* (paras 9 and 10 of the Application): the plaintiff's argument depends upon the unsubstantiated assertion that "most electors will not distribute preferences past 6 when voting above the line". In any event, that some voters may exercise a choice not to complete the entire ballot does not result in them being "disenfranchised".

13. *"Alternative ground" Argument E and that part of Argument D dealing with Schedule 1, Form E of the Amended Act* (paras 9 and 10 of the Application): There is nothing misleading or confusing in a voter being told in Form E that they "may vote" one of two ways, which are then described in a manner that accurately summarises the effect of ss 239(1) and 239(2). Those words do not purport to be a complete statement of the statute, including its rules on formality.

Representative government

14. It is settled that representative government is given effect only to the extent that the text and structure of the Constitution establish it, and that the relevant question is, "what do the terms and structure of the Constitution prohibit, authorise or require?".[2] The plaintiff's case (particularly his frequent appeal to broad "principles" or asserted features of representative government[3]) finds no support in text or structure, and the disparate and radical propositions that lie at its heart are inconsistent with authority.

15. Section 51(xxxvi) of the Constitution confers upon the Parliament power to make laws with respect to: "matters in respect of which this Constitution makes provision until the Parliament otherwise provides". One of these "matters" is found in s 10 of the Constitution: the subject matter of elections of Senators for each State. The fact that ss 10 and 51 are each expressed to be "subject to this Constitution" also requires attention to the requirements of s 9, including the requirement that any such laws prescribing the "method of choosing Senators" be "uniform for all the States" (see further below in the context of Argument A).[4]

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2 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 566-567 (The Court); *McGinty v Western Australia* (1996) 186 CLR 140 (***McGinty***) at 168 per Brennan J, 182-183 per Dawson J, 231 per McHugh J, 284-285 per Gummow J.

3 See eg PS [IV.2], [A.11], [C.1], [C.3], [C.11], [E.1].

4 To the extent it matters, the plaintiff is wrong (PS [A.8]) to assert that those provisions confer a "purposive" power, or that a test of proportionality applies to the determination of whether a law is within that head of power: *Mulholland v AEC* (2004) 220 CLR 181 (***Mulholland***) at 238-239 [159] per Gummow and Hayne JJ and 295 [327] per Callinan J (cf 267 [251] per Kirby J and *Langer v Commonwealth* (1996) 186 CLR 302 (***Langer***) at 324-325 per Dawson J).

16. Taken together, those provisions confer upon the Commonwealth Parliament "extensive powers"[5] with respect to the Senate electoral process. Unless any relevant limitation on that legislative power is engaged in the current matter, it plainly supports each of the provisions of Amending Act.

17. The constraints on that legislative power are few: the limited entrenchment of representative government in the Constitution was confined to the "bare" or "irreducible" minimum requirements for that governmental system[6] and was largely directed to answering the perceived needs of the federal structure.[7] As soon as one moves away from that "irreducible" core, particular care is required before accepting any suggestion that the sparse constitutional prescription of certain elements of representative government should be elevated to some form of "broad restraint upon legislative development of the federal system of government".[8]

18. Consistent with those propositions, it has been said that it is within the legislative competence of Parliament to choose to provide for matters such as: compulsory or voluntary voting;[9] proportional or first-past-the-post voting systems (or variants of those systems, or entirely different voting systems);[10] the "voting above the line" system (cf the plaintiff's suggestion that the Amending Act is novel in that regard at PS [IV.2]);[11] the election of an unopposed candidate;[12] the election of a candidate on "final preferences" in a preferential voting system;[13] the election of a person in such a system to whom the majority of voters have refused to give their first preference vote;[14] and voting as a single electorate in each State, or by locality within a State.[15]

19. All of those possibilities lie within the spectrum of forms of representative government that may be enacted under the broad legislative mandate conferred by ss 9, 10 and 51(xxxvi). They are all on the permissible "side of the line"

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5 *Mulholland* at 231-232 [140], [141] per Gummow and Hayne JJ. See also *Smith v Oldham* (1912) 15 CLR 355 at 358 per Griffith CJ, 360 per Barton J and 362 per Isaacs J and *Rowe v Electoral Commissioner* (2010) 243 CLR 1 (***Rowe***) at 22, [29] per French CJ, 49-50 [124]-[125] per Gummow and Bell JJ, 69-71 and 121 [386] per Kiefel J (in dissent in the result).

6 *Mulholland* at 206 [63] per McHugh J; Murray Gleeson (2001), The Shape of Representative Democracy, *Monash University Law Review* 27(1) (***Gleeson Article***) p 7.

7 *McGinty* at 275-277 per Gummow J.

8 *Mulholland* at 237 [156] per Gummow and Hayne JJ.

9 *Judd v McKeon* (1926) 38 CLR 380 (***McKeon***) at 383 per Knox CJ, Gavan Duffy and Starke JJ, 385-386 per Isaacs J.

10 See *Mullholland* at 189-190 [10] per Gleeson CJ, 207 [64] per McHugh J and 236-237 [154] per Gummow and Hayne JJ and *McGinty* at 283 per Gummow J. See also the other possibilities identified by S Issacharoff et al "The Law of Democracy: Legal Structure of the Political Process" (1998) Foundation Press, Chapter 11.

11 *McKenzie v Commonwealth* (1984) 57 ALR 747 (***McKenzie***) at 749-750 per Gibbs CJ; *Abbotto v Australian Election Commission* (1997) 144 ALR 352 (***Abbotto***) at 355-356 per Dawson J; *McClure v Australian Electoral Commission* (1999) 163 ALR 734 (***McClure***) at 741-742 [29]-[33] per Hayne J and *Mullholland* at 215-217 [83]-[87] per McHugh J and 237 [155] per Gummow and Hayne JJ and see also 297 [333] per Callinan J and 302 [350] per Heydon J.

12 *Langer* at 333 per Toohey and Gaudron J; *Mulholland* at 207 [64] McHugh J.

13 *Langer* at 320 per Dawson J, 333 per Toohey and Gaudron J and 341 per McHugh J; *Mulholland* at 207 [64] per McHugh J.

14 *Langer* at 341 per McHugh J.

15 See, in the context of s 24, *McGinty* at 239 per McHugh J and note that the first paragraph of s 7 requires voting "as one electorate" until Parliament "otherwise provides".

referred to by Gummow, Kirby and Crennan JJ in *Roach* at 198 [80].[16]

"Directly chosen by the people"

20. This puts in proper context the plaintiff's reliance upon the words "directly chosen by the people" in s 7.[17] Putting to one side the issues of the franchise and political communication,[18] those words encapsulate essentially three requirements: **First**, that senators will not be chosen by the legislatures of the States or by some form of electoral college. **Secondly**, that the process of choice of senators will be by popular election. **Thirdly**, that the relevant rules for elections must preserve a full and free choice between the competing candidates for election.[19] Save for the requirement in s 9 that it be uniform for all the States, no particular method of choosing is specified in the Constitution. The ballot is not an end in itself and all that the Constitution requires is a method that leaves voters free to make a choice amongst the alternatives presented.[20] It is notable in that regard that at the time of Federation the colonial electoral systems were marked by considerable diversity: first past the post; optional preferential voting; and the appointment of members to upper houses by the Crown.[21]

21. Apart from Crown appointments, the choice of any of those methods for choosing senators involves an issue that is "chiefly political" and a matter for Parliament. Indeed, as Gleeson CJ observed writing extra-curially, the question of whether "a first-past-the-post system of voting [is] more or less democratic than a system of preferential voting" or whether "the current system of electing senators [is] more or less democratic than the previous system" are not questions to which the law supplies an answer.[22] Those observations apply with even greater force when one descends further into the minutiae of what formulae one should use within those various systems, which is the issue sought to be agitated in Arguments C and D (paras 8 and 9 of the Application - see further below). There are contested views as to those matters and the short answer to all that the plaintiff says in that regard is that, under the Constitution, Parliament has been entrusted with their resolution.

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16 *Roach v Electoral Commissioner* (2007) 233 CLR 162 (***Roach***). The extent of the possible (and permissible) variation, created by various combinations of those elements, is illustrated by regard to comparative examples of the nature considered by Gleeson CJ in *Mulholland* at 189-190 [10] and by Stephen J in *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1 (***McKinlay***) at 56-57.See also, for an overview of the various forms of electoral systems used internationally, Matt Golder 'Democratic Electoral Systems around the world, 1946–2000' (2015) 24 *Electoral Studies* 103; Nils-Christian Bormann and Matt Golder 'Democratic Electoral Systems around the world, 1946–2011' (2013) 32(2) *Electoral Studies* 360.

17 PS [IV.2], [A.11], Argument B, [C.9], [D.11], [E.5].

18 Each of which may be seen to be aspects of the irreducible minimum requirements of representative government for which the Constitution provides: see again *Mulholland* at 206 [63] per McHugh J and see *Roach* at 198 [81], 198-199 [83] per Gummow, Kirby and Crennan JJ.

19 See eg *Mulholland* at 191-192 [18] per Gleeson CJ, 236 [153] per Gummow and Hayne JJ and *Langer* at 316, 317 per Brennan J, 333 per Toohey and Gaudron J, 341 per McHugh J.

20 *McKeon* at 383 per Knox CJ, Gavan Duffy and Starke JJ; *Kean v Kerby* (1920) 27 CLR 499 at 459 per Isaacs J; *Langer* at 316 per Brennan J; *Rowe* at 49 [124], 49-50 [125].

21 See ss 34 and 41 *Electoral Act of 1880* (NSW); s 4 *New Constitution Act of 1853* (NSW); ss 73, 75 and 78A-F *Elections Act of 1885* (Qld); s 20 *Constitution Act of 1867* (Qld); ss 126(iii)(a), 133 and 134 *The Electoral Code 1896* (SA); s 102, 113 and 115 *The Electoral Act 1896* (Tas); ss 253, 254 and 264 *The Constitution Act Amendment Act 1890* (Vic); ss 104, 111 and 116 *The Electoral Act 1899* (WA). See, as to the relevance of those matters, *Roach* at 188-189 [53] per Gummow, Crennan and Kirby JJ.

22 Gleeson Article, p9.

The Amended Act and its historical context

22. To appreciate better what is involved in the plaintiff's case, it is necessary to note the history of Commonwealth electoral law concerning the Senate (set out in more detail in the history to be included in the Application Book). In broad terms, that proceeded as follows: a first-past-the-post system (**1902 to 1919**); a preferential block majority system with optional/partial preferential voting (**1919 to 1934**); a preferential block majority system with mandatory full preferential voting (**1934 to 1948**); a proportional representation system with mandatory full preferential voting (**1948 to 1984**); and a proportional representation system with above-the-line and group ticket voting options (**1984 to 2016**).

23. The new system introduced by the Amending Act involves further variation (although not in a way that represents a marked departure from the system that has been in place since 1948). It relevantly differs from that which existed immediately before in the following respects:

24. *Above-the-line voting:* The former system involved a distribution of preferences as determined by the voting ticket(s) lodged by the relevant group of candidates, or an incumbent independent, the nature of which could be ascertained by inspecting the poster and/or pamphlet displayed in each voting place setting out the ticket, but not by looking at the ballot paper.[23] It has been replaced by an optional preferential system, directed by each voter, which is transparent on the face of the ballot. Under that new system, a group of candidates will automatically get a square above the line: s 210(1)(f)(ii). To vote above the line, a voter is to number at least 6 above-the-line squares sequentially: s 239(2). However, in recognition of 32 years of the instruction to voters being that for an above the line vote, only one square should be numbered, a savings provision will treat as formal any vote that numbers at least 1 square: s 269(1)(b).[24] An above-the-line vote for a group is, by s 272(2), to be a preferential vote for each of the candidates in that group, in the order in which they appear below the line. For example, if a voter preferences 6 squares above-the-line, and each group has 4 candidates, the voter is taken to have expressed 24 preferences, from top to bottom within each group, and between groups in the order chosen by the voter. The degree of transparency to the voter is high, especially compared to the system it replaced.

25. *Below-the-line voting:* The former system involved mandatory full preferential voting, with a savings provision. [25] It is replaced by a system that allows great voter choice as to the number of squares to be numbered sequentially below the line. As with the former system, all candidates are listed below the line, with ungrouped candidates together on the far right end of the ballot paper. To vote below the line, which the Act continues to treat as the principal voting option, a voter is required to number at least 12 squares sequentially: s 239(1). A savings provision treats as formal any vote which numbers at least 6 squares

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23 Former s 216, repealed by Schedule 1 item 11 of the Amending Act. Indeed, by reason of the provision formerly made in ss 211 and 211A for the registration of up to three voting tickets, it was possible that a voter could not know in advance how their preferences would be distributed (see in that regard ss 272(2) and 272(3)).

24 Revised Explanatory Memorandum for the Commonwealth Electoral Amendment Bill 2016, p 8.

25 Former ss 239, 268(1)(b) and 270, repealed respectively by Schedule 1 items 19 and 20, 21A and 26 of the Amending Act.

sequentially: s 268A(1)(b).

26. The Amended Act also now allows a registered party to register a logo with the Australian Electoral Commission (subject to requirements such as prohibitions on offensive logos, etc): s 126(2)(ba). In each election the party can request that its logo be printed on a Senate or House ballot paper to identify the party and the candidates whom it endorses: s 214A.

27. That historical context reveals the extraordinary nature of the plaintiff's claims: taken together and to their logical conclusions, those claims allege the invalidity of the Senate voting system for every year of Federation except perhaps for a brief period of constitutional compatibility between 1934 and 1948. Further, Arguments A, B and C, if correct, apply equally to the Senate voting system in force at the 2010 and 2013 elections and logically imply that none of the current Senators have been validly elected. Such extreme outcomes are highly unlikely, not least because the validity of the system in place since 1984 has been expressly or impliedly affirmed in at least three decisions of single justices of the Court (*McKenzie*, *Abbotto* and *McClure)* and in the obiter observations of members of the Court in *Mulholland* (affirming the correctness of *McKenzie*).

28. It is convenient then to turn to those specific grounds.

Argument A - paras 5, 10 of the Application – more than one "method of choosing senators"

29. This argument misconceives the nature of the single method prescribed by the Amended Act. Section 272(2) sets out the consequences of an above the line vote, being that the voter has chosen the identified group in the order in which its members appear below the line. There is but one method, within which voters exercise a choice as to how many candidates they wish to vote for.

30. The argument also fails at a fundamental point of construction: the meaning of the term "method" in s 9 of the Constitution. As Quick and Garran observe, the method extends to the "whole process of the election, including the mode of nomination, the form of writs and ballot papers, the mode of voting, the mode of counting votes..."[26] (notably, as an example of a Commonwealth law prescribing the mode of voting, the authors referred expressly to the possibility of an electoral system involving the option to vote in two quite distinct ways).[27] Consistently with those observations, the introduction of the word "method" was explained during the Convention Debates as allowing Parliament to "prescribe something which more nearly approached to a system" (emphasis added).[28]

31. It is the system prescribed by the Parliament that is required to be "uniform". As elsewhere in the Constitution, that requirement for "uniformity" requires a comparison: here, between the electoral systems that apply to the election of

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26 *The Annotated Constitution of the Australian Commonwealth* Melville and Mullen (1901) (**Quick and Garran**) pp 425-426.

27 "[W]hether 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..." (the latter alternative is sometimes referred to as "cumulative voting" – see S Issacharoff et al ", op cit, pp 722-748).

28 Official Report of the Debates of the Australasian Federal Convention (Melbourne), Third Session (1898) pp 2446 (Mr Barton).

senators in each State.[29] The plaintiff approaches that required comparison at the wrong level: see PS [A.2] p2-3.

32. The plaintiff's narrow construction of s 9 (PS [A.2]-[A.4]) should be rejected for at least three further reasons. **First**, a number of the colonial voting methodologies equally presented voters with options as to the mode by which they exercised their choice.[30] There is nothing to suggest that that was the perceived mischief to which s 9 was directed. Rather, as is the case elsewhere in the Constitution,[31] the plain object of s 9 was national unity through uniformity in the electoral system as a whole.

33. **Secondly**, it would follow from the plaintiff's argument that Parliament is precluded from enacting savings provisions of the kind considered in *Langer* (see similarly now ss 268(1)(b), 268A and 269 of the Amended Act and note PS [A.6]). If the plaintiff is correct, such provisions must equally infringe s 9 because they allow for the variation in the manner in which a person expresses their electoral choice identified by Toohey and Gaudron JJ in *Langer* at 331-332 (see also the worked examples given by Dawson J at 321-322, observing that it was clear that "the Act allows more than one method of casting a formal vote"). Yet no member of the Court suggested that that feature resulted in invalidity.[32] Indeed, as Gummow J at 347 observed, such provisions operate in aid of the principle that the ballot, "being a means of protecting the franchise, should not be made an instrument to defeat it". Section 9 was not intended to constrain the power of Parliament to enact such beneficial measures.[33]

34. **Thirdly**, as submitted above, the "above/below the line" voting scheme has been said to be permissible in a number of authorities of this Court, indeed in respect of a more opaque system than the present one: see again *McKenzie*, *Abbotto*, *McClure* and *Mulholland*. No-one thought to argue s 9 was offended in those cases.

Argument B, paras 6 and 10 of the Application – "Directly chosen"

35. The Amended Act does not provide for voters to vote for parties or groups in a manner contrary to the requirement for "direct choice". The plaintiff misunderstands what the Amended Act actually does. Above-the-line voting under that enactment merely enables voters to choose *candidates by reference to a group* to which they belong. This is clear from s 272(2), which provides for an above-the line vote to be a preferential vote for the candidates within the groups which the voter has preferenced. Above-the-line voting is thus no more than a facility to assist voters in their choice of candidates. A voter who does not wish to use the facility is able to vote by allocation of preferences to candidates

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29 See eg in the context of s 117, *Street v Queensland Bar Association* (1989) 168 CLR 461 at 506 per Brennan J.

30 See ss 73 and 78C of the *Elections Act of 1885* (Qld) and s 102(3) of *The Electoral Act 1896* (Tas).

31 See eg, identifying that as the notion animating the inclusion of Ch IV of the Constitution, *Betfair v Western Australia* (2008) 234 CLR 418 at 455 [23] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ.

32 Dawson J dissented, but only on the issue of whether the then provisions in s 329A of the Electoral Act had the effect of keeping from voters information as to an alternative means of casting a formal vote: at 326.

33 And the absurdities could be multiplied: for example, is Parliament precluded from making special provision for sight-impaired voters or other voters with particular needs? (see Part XVB of the Amended Act).

below the line.

36. In those circumstances, it remains the case that the voter is presented with a "true choice" – the available candidates are set out on the ballot paper and the process of choice by electors amongst those candidates is not impeded or impaired.[34] No more is required by s 7. That some, perhaps many voters will choose to express their preference by reference to groups rather than voting below the line merely reinforces the efficacy, as a means of ascertaining the popular will, of a system that permits them to do so (cf PS [B.8]). In any event, the position was substantially similar at the time *Mulholland* was decided[35] and the new system will, if anything, make below the line voting easier and thus a more attractive option.

37. No constitutional issue arises from the manner in which Parliament has sought to accommodate the fact that Australian representative government has come to be characterised by the significant influence of "national political parties, which operate across the federal divide and at federal, State, Territory and local government levels".[36] Indeed, following the substitution of the current form of s 15 of the Constitution in 1977, there is a clear textual link between the choice referred to in s 7 and the political party system.[37]

38. In the current system of compulsory voting, party affiliation has come to assume particular importance to the electoral choices to be made by many people. That is because, when people are compelled to vote on a State-based franchise with a large number of candidates, many electors will be choosing among candidates who in the main are unlikely to be known to them; and the party political system has come to be the main "practical source" of guidance in such choice.[38] The communication of that guidance is enhanced by the facility provided by the above the line voting system.

39. That is the view that has been taken in the decisions of this Court, dealing with the earlier analogous provisions of the Electoral Act that have been in place since 1984. The point made by Gibbs CJ in *McKenzie* (at 749) was that there is no reason to imply an inhibition on the use of a method of voting which recognises the "political realities" of the party political structure, provided that the Constitution does not contain any indication that such a method is forbidden. As his Honour correctly concluded, there is no such indication.

40. His Honour's reasoning was adopted or followed by Dawson J in *Abbotto* and by Hayne J in *McClure*. It was also expressly or impliedly approved by a number of members of the Court in *Mulholland*.[39] The plaintiff has advanced no

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34 *Mulholland* at 191-192 [18] per Gleeson CJ.

35 See eg at 216 [84] per McHugh J and 231 [137] per Gummow and Hayne JJ. As McHugh J went on to note at 217 [87], on one view that created 'two classes of candidates for Senate elections by offering a voting method to one class... that is approximately twenty times more popular than that offered to the other... [y]et the constitutionality of this voting method has been consistently upheld since *McKenzie*'.

36 *Unions NSW v NSW* (2013) 252 CLR 530 (***Unions NSW***) at 550 [24] per French CJ, Hayne, Crennan, Kiefel and Bell JJ

37 *Langer* at 332 per Toohey and Gaudron JJ.

38 *Mulholland* at 196 [29] per Gleeson CJ and see also at 213-214 [78] per McHugh J, 237 [155] per Gummow and Hayne JJ and at 302-303 [351] per Heydon J.

39 See at 215-217 [83]-[87] per McHugh J, 296 [331] per Callinan J (seemingly accepting as correct a concession made by the appellant) and 302 [350] per Heydon J.

coherent reason why it should not now be followed. It fits comfortably within the principles identified above and necessitates the rejection of this ground of the plaintiff's claim. The suggestion that it is distinguishable (PS [B.10]) is wrong.

A further aspect of Argument B, para 7 of the Application – party logos

41. This ground is the subject of two sentences in PS [B.6], which fail to articulate the argument with any precision. To the extent it is pressed, it cannot be accepted in light of the matters just identified in respect of paras 6 and 10 of the Application: that is, the repeated recognition by the Court that political parties are a reality of the Australian political system and that the Commonwealth electoral system can accommodate them through certain forms of differential treatment (including as between parties that meet registration requirements and those that do not).[40] In particular, the identification of parties on ballot papers has long been a feature of Australian electoral systems.[41] It facilitates voter choice, rather than impeding it.

42. The identification of parties by logos is an additional means by which the Parliament enables voters to identify parties on the ballot paper. It is particularly useful where parties have similar names and discourages attempts to confuse voters through the use of similar names. To the extent that independent candidates are treated differently from registered parties – the former cannot have logos – there is a substantial and constitutionally compatible reason for that differential treatment. The rationale, which is obvious on the face of the Act and also evident from the extrinsic material, is the easy identification by voters (including the illiterate and non-English speaking voters) of parties and by extension, the candidates whom those parties endorse.[42] The avoidance of confusion as to those matters (particularly in the context of complex ballot papers with political parties with similar names) is the legislative object that was expressly identified during the proceedings of the Joint Standing Committee that considered the Bill that led to the Amending Act[43] and in the explanatory memorandum.[44]

43. If (see the fleeting reference in PS [6]), the plaintiff's claim is put on the basis that the differential treatment of independent candidates impairs the making of the "direct choice" required by s 7, the complete answer is given by all members of the Court in *Mulholland*.[45] If the plaintiff also seeks to found this aspect of his case upon the implied freedom of political communication, that could only

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40 See again *McKenzie* at 749-750 per Gibbs CJ; *Mulholland* at 192 [20] per Gleeson CJ, 213-214 [78] per McHugh J, 240 [164] per Gummow and Hayne JJ and at 299 [341], 302-303 [351] per Heydon J.

41 *Mulholland* at 213-214 [78] per McHugh J.

42 See *Mulholland* at 200-201 [41] per Gleeson CJ, 211-214 [74]-[78] per McHugh J and 296-297 [332] per Callinan J.

43 Joint Standing Committee on Electoral Matters *"Advisory Report on the Commonwealth Electoral Amendment Bill 2016"* at 26-27 ([3.36]-[3.40] and [3.45]) and 39 ([4.19]-[4.20])

44 Revised Explanatory Memorandum to the Commonwealth Electoral Amendment Bill 2016, pp 2 and 3.

45 At 194-195 [26] per Gleeson CJ, 214 [80] per McHugh J, 239-240 [163] per Gummow and Hayne JJ, 271-273 [262]-[267] per Kirby J, 295-297 [326]-[333] per Callinan J and 300 [344] and 301-302 [348]-[351] per Heydon J. Note also the laws arguably imposing an even more significant burden upon non-party candidates in *American Party of Texas v White* (1974) 415 US 767 and the discussion in *Mulholland* at 192-193 [21] per Gleeson CJ and at 240-241 [165], [166] and 242 [169] per Gummow and Hayne JJ (observing that the laws in *White* were 'of the same genus" as those upheld in *Mulholland*). See also, for a more recent US example (where similar laws were also upheld), *Navarro v Neal*, 716 F 3d 425 (7th Cir, 2013).

involve a claim of a right to compel the Commonwealth executive to make available a particular "means" or medium of communication. A similar claim was rejected as a threshold matter by a majority of this Court in *Mulholland*,[46] and the same result applies here. The implied freedom, not being concerned with the personal rights of individuals, does not confer upon a person a "positive" right to have their views disseminated by another person or entity,[47] let alone via the ballot paper which plays its distinctive role in the electoral system.

Argument C, para [8] of the Application– "Directly proportional representation"

A requirement of proportionate representation?

44. For the reasons given above, the fundamental premise of the plaintiff's argument in relation to this ground (i.e., that "proportionate representation" in the Senate is an essential part of the system of representative government prescribed by the Constitution: see PS [C.1]-[C.4]) is without foundation.

45. The plaintiff's reference to what was said by Sir Harrison Moore at PS [C.2] is revealing:[48] Sir Harrison was not there speaking of a "principle" of proportionate representation of the kind the plaintiff suggests. He was rather speaking of the power conferred by s 7 upon the Parliament to alter the number of senators for each State, and the express textual limitation on that power requiring "equal representation" of "the several Original States". That has at least two important consequences for this aspect of the claim (which the plaintiff appears to have overlooked): **First**, as McHugh J observed in *McGinty* at 237, the equal representation constraint means that "the Senate vote of an elector in Tasmania is ten times more valuable than the Senate vote of an elector in Victoria". As his Honour also observed, a proposal for "proportional" instead of equal representation made by New South Wales was rejected during the Convention debates.[49] **Secondly**, the exercise of that legislative power in 1984 to increase the number Senators produced what has been described as a "major influence on the alignment of political power", favouring independents and minor parties.[50] The fact that the Constitution expressly provides for such "disproportion" and radical variation belies any suggestion that there is to be discovered within the constitutional text and structure some form of rigid proportionate representation "principle", let alone one that is said by the plaintiff to apply with a degree of mathematical precision.[51] None of that is altered by s 24 of the Constitution

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46 See at 223-225 [107]-[112] per McHugh J, 245-249 [180]-[192] per Gummow and Hayne JJ, 298 [337] per Callinan J and 303-304 [354] per Heydon J (cf Gleeson CJ at 195-196 [28] and Kirby J at 267-268 [252]-[255]).

47 *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 327 per Brennan J; *Lange* at 560 (The Court); *McClure* 740-741 [28] per Hayne J; *Unions NSW* at 554 [36] per French CJ, Hayne, Crennan, Kiefel and Bell JJ and at 571-572 [109]-[110] per Keane J; Nor, for similar reasons, could it require that individuals be permitted to enter upon a particular parcel of land owned by another person for the purposes of making such a communication (see *Levy v Victoria* (1997) 189 CLR 579 at 622 per McHugh J) or to "build and assert" political power by making large political donations (*McCloy v New South Wales* (2015) 89 ALJR 857 at 867 [28]-[30] per French CJ, Kiefel, Bell and Keane JJ and at 914 [318] per Gordon J).

48 Seemingly a reference to the second edition of *Constitution of the Commonwealth of Australia* Melbourne CF Maxwell (G Partridge and Co) (1910) p 111.

49 Attracting only five votes: see Official Report of the National Australasian Convention Debates (Adelaide), (1897) p 668.

50 Gleeson Article pp 6-7.

51 Gleeson Article p 7.

(contra PS [C.2]).

46. In any event, it is wrong to speak of "proportionate representation" as if it were a concept capable only of being effectuated by a fixed set of specific requirements. Different electoral systems, all of which may be described as providing for "proportionate representation", may nonetheless differ markedly. For example, while it is a common feature of systems providing for "proportional representation" within a multi-member electorate that a quota (i.e., the number of votes required to elect a candidate) be determined, there are a range of different methods by which that may be done.[52] Each of those methods has features which may be argued to be advantageous as compared to the others.

47. The selection of one over another falls within the range of discretion afforded to Parliament under the Constitution. It is a notable aspect of the plaintiff's argument that the basic framework of the system of representative government found in the Constitution is said to mandate something as specific as the selection of one only of the various available methods. Such a confined view of Parliament's legislative power cannot sit with the text of s 9 of the Constitution (read with 10 and 51(xxxvi)). The power to prescribe the method includes the regulation of "... the mode of counting votes".[53] The plaintiff says that that ambulatory power in fact is to be understood as conferring no legislative discretion at all as to the mode of counting.

Hare quota is not mandated by the Constitution

48. The Court would, for those reasons, reject the implicit suggestion in the plaintiff's submissions that it should "constitutionalise" the Hare quota, which (if implemented) would mean that a candidate in a half-Senate election would be elected if they obtained 1/6th of the total number of formal votes. The corollary of the plaintiff's submission is that the Commonwealth Senate electoral system is invalid since it applies the "Droop quota" (which, in a half-Senate election, is 1/7th of the total number of formal votes plus 1[54]).

49. The following points should be noted in that regard. **First**, the Hare quota has been utilised in Australia in a single polity, over a relatively limited period of time, more than 100 years ago: in Tasmania from 1896-1902.[55] In 1907, Tasmania rejected the Hare quota in favour of the "Droop quota"—the quota that continues to be applied in s 273(8) of the Amended Act.[56]

50. **Secondly**, on each subsequent occasion in which another State or Territory has enacted proportional representation for a legislative chamber based on a single transferable vote, it has adopted the Droop quota.[57] The Hare quota is

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52 Some of the more well-known methods, from highest to lowest, are (where V=total votes and N=number of seats), the Hare quota (V/N), the Droop quota ((V/(N+1))+1), the Hagenbach-Bischoff quota (V/(N+1)), and the Imperiali quota (V/(N+2)). See eg Richard Couto (ed), *Political and Civic Leadership: A Reference Handbook* (2010, Sage), p 281.

53 Quick & Garran p 426.

54 Amended Act, s 273(8).

55 *Electoral Act 1896* (Tas), s 115(II), as repealed by the *Electoral Act 1901* (Tas).

56 *Electoral Act 1907* (Tas), s 130 and Sch 4.

57 New South Wales used the Droop quota when it first provided for a directly elected Legislative Council: Sch 1 to the *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978* (NSW), inserting cll 1 and 7 of the 6th Schedule to the *Constitution Act 1902* (NSW). An earlier single transferable vote system, from 1919 to 1926, was also based on the Droop quota: reg 10 of the Regulations under the *Parliamentary Elections (Amendment) Act 1918* (NSW), Government

thus long obsolete in Australia.

51. **Thirdly**, the Commonwealth's system of proportional representation for Senate elections has used the Droop quota continuously since 1948.[58] The Senate electoral system, as enacted by the Commonwealth Parliament, has never provided for the Hare quota. The plaintiff's attack on the Droop quota impugns the validity of the Senate electoral system for the last 68 years.

52. **Fourthly**, the underlying rationale of the Droop quota is that it is fixed at a level that requires a candidate to obtain only the number of votes necessary to ensure that he or she defeats enough of the other candidates so as to win a seat. In a half-Senate election, if there are 700,000 votes, it is mathematically impossible for a candidate who receives 1/7th of the vote plus 1, being 100,001 votes, to be overtaken by 6 other candidates. Asking a candidate to achieve a quota greater than 100,001 is unnecessary. In contrast, the Hare quota requires candidates to receive more votes than they mathematically need. This results in a range of consequences that could rationally be viewed as distortions as outlined in the worked examples proposed by the Commonwealth for inclusion in the application book (annexed to these submissions for ease of reference). For example, it results in the portion of each vote that exceeds the Droop quota being "locked up" in the candidate's surplus instead of being available to be distributed in accordance with the preferences of the candidate's voters. The transfer value of surplus votes under a Hare quota is also diminished compared to the transfer value of surplus votes under a Droop quota. That point was made in the review of the operation of the new "Droop based" system conducted by the Tasmanian Committee on General Election 1909:

> Considering an election as a contest between candidates, it is clear that a candidate who obtains... the Droop quota ...has more votes than it is possible for each of the six other candidates to obtain; and therefore the first-mentioned candidate has sufficient votes to entitle him to election. Even if the Hare quota is used, any candidate who obtains a number of votes equal to the Droop quota is elected, for the reason stated in the last sentence; and a candidate who obtains the Hare quota receives an excess of votes which are not really required by him, and which are therefore wasted. Hence it is clear that, considering an election as a contest between candidates, the Droop quota is to be preferred to the Hare quota. (emphasis added)[59]

Gazette No. 235 of 3 October 1919. When Victoria introduced proportional representation for its Legislative Council, the quota was the Droop quota: s 40 of the *Constitution (Parliamentary Reform) Act 2003* (Vic), inserting s 114A of the *Electoral Act 2002* (Vic) (see in particular the definition of *quota* in s 114A(2)). When Western Australia introduced proportional representation for its Legislative Council, the quota was also the Droop quota: s 83 of the *Acts Amendment (Electoral Reform) Act 1987* (WA), inserting Sch 1 to the *Electoral Act 1907* (WA) (see in particular cl 3 of Sch 1). When South Australia introduced proportional representation for its Legislative Council, it adopted a modified form of the Droop quota: s 29(j) of the *Constitution and Electoral Acts Amendment Act 1973* (SA), inserting s 125(9)(c) of the *Electoral Act 1929* (SA). The Commonwealth enacted the Droop quota for the Australian Capital Territory Legislative Assembly upon the Territory's self-government (s 19(2) of the *Australian Capital Territory (Electoral) Act 1988* (Cth)) and the Territory subsequently enacted the Droop quota itself as part of its 'Hare-Clark' system of voting: see cl 1B of Sch 4 to the *Electoral Act 1992* (ACT).

58 *Commonwealth Electoral Act 1948* (Cth), s 3, inserting s 135(5)(b) into the Electoral Act.

59 *Report of Committee on General Election 1909*, p 4 [5].

53. The Tasmanian experience informed the1948 amendments to the Electoral Act. During the second reading debates, Dr Evatt observed that, "[i]n principle, the method proposed is the same as that used in Tasmania".[60] That is not to say that a system based upon the Hare quota would not be within the considerable range of legislative options afforded to Parliament. But it is wrong to assert that the (sparse) requirements of the Constitution as regards representative government mandate the selection of a single method of counting – particularly one that has been rarely used and long obsolete in Australia.

The "unrepresented rump" and the "springboard effect": Misconceived metaphor

54. The plaintiff's argument in relation to the "unrepresented rump" is also based on a fundamental misconception about the democratic process. The votes of electors who vote for candidates who are unsuccessful are not "afforded a nil value" (PS [C.5]). It is not the case that such a vote does not "affect the result at all" (PS [C.5]). It is simply, in the final result, not a vote for the winning candidate. The voter is not thereby "disenfranchised". In the paradigm case of a single-member electorate, for example, the representative who receives 51% of the vote is nonetheless meaningfully regarded as having been "chosen" by the electorate as a whole. The position remains the same in multi-member electorates. Self-evidently, it cannot be the case that the choice made by the people is required to be a unanimous one: see *McKinlay* at 36.

55. Similarly, the argument concerning the "springboard effect" goes no further than a contention that the Constitution mandates the Hare, rather than the Droop (or any other) quota. Arguments about the "fairness" or otherwise of the system simply reflect different opinions (about which reasonable minds may differ) about the merits of the respective methodologies.

Argument D, Paras 9, 10 of the Application - "A free and informed vote"; and Argument E - "Alternative ground"

56. *Particulars 9(i) and 9(ii) to para 9 and Argument E:* The plaintiff does not identify any coherent basis for suggesting that the instructions on Form E and the provisions of the Act it reflects "confuse" (para [9](i)) or why the "at least 6" instruction for above-the-line votes is "arbitrary and misleading" (para [9](ii)). There is nothing misleading or confusing in a voter being told that they "may vote" one of two ways, which are then described in a manner that accurately summarises the effect of ss 239(1) and (2). Those words do not purport to be a complete statement of the statute, explaining the entire effect that the Amended Act will give to a ballot paper marked in a particular way when it comes to the scrutiny.[61]

57. The suggestion that the implied freedom of political communication is somehow engaged by those matters (PS [D.1]-[D.7] and Argument E) is fanciful. If the assertion is that the plaintiff is entitled to have some other statement placed upon the ballot paper, then that fails at the same threshold identified in

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[60] Although differing slightly in its practical operation for reasons of workability and simplicity: Commonwealth, Parliamentary Debates House of Representatives, 16 April 1948, 965. See also 29 April 1948, 1295.

[61] It can also be noted that a similar form of words was used in Form E prior to the commencement of the *Commonwealth Electoral Amendment Act 2016*. A voter did not find the rules as to formality in the previous Form E, but had to go to the Act for them.

Mulholland (see above). The argument that the plaintiff may be prevented from communicating the terms of s 239 of the Amended Act by s 329 (a provision that the plaintiff does not even challenge) is untenable as a matter of statutory construction and also incorrect.

58. The balance of this aspect of the plaintiff's claim fares no better. The plaintiff appears to rely on a hypothetical assumption that when voters are told they should number "at least 6" boxes (emphasis added), they will in fact "mark no more numbers than required by the instruction", with the consequence that "most electors [up to 97%] will not distribute preferences past 6 when voting above the line" (PS [D.8]). Those percentages relate to the former system in which voters were told to number one box above the line, or all boxes below. They found no inference how voters will choose to exercise their choices under the new system.

59. In addition, the plaintiff's argument is at odds with earlier authority. In particular, in the context of s 24, the provisions that came to be the focus of the challenge in *Langer* effectively permitted voting such that some ballot papers could be earlier exhausted than others (see at 322 and 331-332). Importantly, it was seemingly accepted that the consequence of a particular voter completing a ballot paper such that their preferences would be exhausted would be that that voter would not participate in the electoral process as fully or equally with those who expressed a preference for all candidates: at 334. Yet none of that gave rise to any constitutional difficulty (cf PS [D.10]).

60. The plaintiff's argument is also wrong as a matter of principle. Its logical consequence, if accepted, is that the Constitution requires and permits nothing other than mandatory full preferential voting. This result directly contradicts the repeated statements identified above: to the effect that Parliament has considerable latitude to enact the electoral system of its choice. That result flows directly from the constitutional text, which reveals that the intention of the framers was to entrench only selected elements of representative government, being those understood to answer the needs of the newly created federal structure. Mandatory full preferential voting is not amongst those entrenched elements. Indeed, the argument, taken to its logical conclusion, would render invalid the Senate electoral system until 1934. (It was not until then that the system provided for full preferential voting.) Indeed, the savings provision that applied under former s 270(1) at the time of the last election would, on that view, equally have resulted in an invalid electoral scheme.

61. *Particulars 9(iii) and 9(iv) to para 9:* The plaintiff has similarly not established the further factual premise underpinning this aspect of his argument. It is pleaded that the "practical operation" of the new system disenfranchises voters who vote for minor parties or independents, being approximately 25% of the electors in each State (paras 9(iii) and (iv)). The fact that approximately 25% of electors in the last election cast their first preference for one of a number of minor parties or independents says nothing as to (a) how voters will behave under the new system; (b) whether such voters will cast their second to sixth (or beyond) preferences; or (c) where such preferences will ultimately end up. There is thus no basis for the Court to make findings of the extent to which the practical effect of the new system would be the exhaustion of votes.

62. In any event, any voter who wishes to express a choice extending to a

preference between every candidate can do so by voting below the line, both under the new system and the previous one. If, and to the extent exhaustion of votes occurs, that is the result of voter choice.

Discretion issue

63. Finally, given that Arguments A, B and C equally attack the system which has been in place since 1948 in one case and 1984 in the other two cases, the relief the plaintiff seeks in paragraphs 3 (order restraining defendants from issuing ballot papers in amended Form E) and 5 (prohibition against defendants from issuing ballot papers in accordance with Amending Act) of the Application should be refused on discretionary grounds. That is because implicit in this relief is that the defendants would have to proceed in accordance with the law as it was pre-amendment and yet (if the plaintiff's arguments are correct) that law is also invalid. The Court would not make orders requiring action to be undertaken pursuant to a law which is invalid by parity of reasoning. Instead, the appropriate order on these grounds would be limited to declaratory relief. It would then be for Parliament to consider those orders and the reasons for decision and to respond appropriately to ensure a valid system was in place before the next election.

PART VII LENGTH OF ORAL ARGUMENT

64. It is estimated that 2 hours will be required for the presentation of the oral argument of the respondents.

Dated: 12 April 2016

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ANNEXED EXAMPLES (paragraph [52])

Example 1: half-Senate election using the Droop quota – 1st candidate elected:

	Droop quota system	Hare quota system
Total number of votes	420,000	420,000
1st candidate elected	Candidate A	Candidate A
1st preference votes for 1st candidate	84,000	84,000
Quota	60,001	70,000
Surplus of 1st candidate	23,999	14,000
Transfer value for preferences to continuing candidates[62]	0.2857 (23,999 ÷ 84,000)	0.1667 (14,000 ÷ 84,000)
Result:	The Hare quota gives the preferences of voters for Candidate A, upon distribution to continuing candidates, 58% of the value that they would have had if the Droop quota were used (0.1667 ÷ 0.2857).	

Example 2: half-Senate election using the Droop quota – 5th candidate elected

	Droop quota system	Hare quota system
Total number of votes	420,000	420,000
5th candidate elected	Candidate E	Candidate E
1st preference votes for 5th candidate	58,000	58,000
Other votes for 5th candidate	15,000 of Candidate F's first-preference votes (following F's exclusion)	15,000 of Candidate F's first-preference votes (following F's exclusion)
Total votes for 5th candidate	73,000	73,000
Quota	60,001	70,000
Surplus of 5th candidate	12,999	3,000
Transfer value for preferences to continuing candidates[63]	0.1781 (12,999 ÷ 73,000)	0.0411 (3,000 ÷ 73,000)
Result:	The Hare quota gives the preferences of voters for Candidate F, upon distribution from Candidate E's surplus, 23% of the value that they would have had if the Droop quota were used (0.0411 ÷ 0.1781).	

62 Ascertained pursuant to s 273(9) of the Amended Act.

63 Ascertained pursuant to ss 273(14) and (9) of the Amended Act.