IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY No. B19 of 2019

BETWEEN: CLIVE FREDERICK PALMER

First Plaintiff

JAMES WILLIAM MCDONALD

Second Plaintiff

ROBERT JAMES FORSTER

Third Plaintiff

DANIEL ISAAC HODGSON

Fourth Plaintiff

and

AUSTRALIAN ELECTORAL COMMISSION

First Defendant

ELECTORAL COMMISSIONER

Second Defendant

AUSTRALIAN ELECTORAL OFFICER FOR QUEENSLAND

Third Defendant

AUSTRALIAN ELECTORAL OFFICER FOR NEW SOUTH WALES

Fourth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR VICTORIA

Fifth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR TASMANIA

Sixth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR THE AUSTRALIAN CAPITAL TERRITORY

Seventh Defendant

AUSTRALIAN ELECTORAL OFFICER FOR THE NORTHERN TERRITORY

Eighth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR SOUTH AUSTRALIA

Ninth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR WESTERN AUSTRALIA

Tenth Defendant

PLAINTIFFS' WRITTEN SUBMISSIONS

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Part I: PUBLICATION ON THE INTERNET

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

Part II: CONCISE STATEMENT OF THE ISSUES

2. Whether the exercise by any or all of the defendants of their powers under the *Commonwealth Electoral Act 1918* (Cth) (**Electoral Act**), whether pursuant to s. 7(3) or otherwise, is constrained by:

   (a) a statutory limitation preventing the publication or release by the defendants to a nationwide audience, at a time when the polls remain open in any part of the nation, of the identity of the two candidates selected by the Commission for each Electoral Division (**Division**) under s 274(2A) or of the results of the indicative two-candidate-preferred (**TCP**) count for each Division undertaken pursuant to that provision; or

   (b) a constitutional limitation to similar effect by reason of the mandate for direct and popular choice contained in ss 7 and 24 of the Constitution?

Part III: NOTICES UNDER SECTION 78B OF THE *JUDICIARY ACT 1903*

3. Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) was given on 2 April 2019, AB 24. The plaintiffs consider that no further notice is necessary.

Part IV: RELEVANT FACTS

4. ***The indicative TCP count:*** Section 274(2A) of the Electoral Act obliges the Australia Electoral Officer for each State or Territory to give a written direction to relevant returning officers in each Division "to conduct a count of preference votes (other than first preference votes) on the ballot papers that, in the opinion of the Australian Electoral Officer, will best provide an indication of the candidate most likely to be elected for the Division" (**Indicative TCP Count**). The returning officers must count the preference votes in accordance with the direction: s 274(2B), (2C); Statement of Agreed Facts dated 10 April 2019 (**AF**) [10]-[12], AB 31.

5. The Commission follows an established practice for carrying out and making publicly available the results of the Indicative TCP Count in each Division: AF [13], AB 32, That practice relevantly includes the following:

   (a) After nominations close but prior to the second week before polling day, the Commission selects two candidates in each Division (**TCP candidates**) for the

purposes of the Indicative TCP Count: AF [13a]-[13d], AB 32.

(b) The identity of the TCP candidates is entered into the Commission's Election Management System (**EMS**) and a written direction under s 274(2A), containing the names of the TCP candidates and other information regarding the Indicative TCP Count, is placed in a sealed envelope: AF [13e], AB 32.

(c) The Commission makes the identity of the TCP candidates available to approved participants taking part in a media "dress rehearsal" on the Thursday before the election day, subject to those approved participants signing a Deed Poll which obliges them to maintain the confidentiality of the TCP information until polls close on election day: AF [13g], AB 33.

(d) At each polling place in every Division, upon the close of polling (at 6:00pm on polling day), the Assistant Returning Officer must open the sealed envelope containing the names of the two TCP candidates and announce those names to everyone present: AF [14a], AB 33.

(e) Polling officials at each polling place sort the ballot papers into first-preference piles for each of the candidates in the Division, and, following the completion of the count of first preferences, the ballot papers for the two TCP candidates for that Division are removed to a secure area: AF [14b]-[14c], AB 33.

(f) The ballot papers for the remaining candidates are notionally allocated to whichever of the two identified TCP candidates for whom a higher preference has been expressed on the ballot paper: AF [14d], AB 33.

(g) The result of the Indicative TCP Count for each polling place is telephoned to the Divisional Returning Officer for the Division, who enters it into the Commission's EMS: AF [14e]-[14f], AB 33.

(h) The Commission's EMS updates a webpage on the Commission's website entitled "The Tally Room" (**Tally Room**) with the results of the Indicative TCP Count from each polling place, with the consequence that the Tally Room is progressively updated with the Indicative TCP Count for each Division as the information becomes available from each polling place: AF [14g], AB 34.

(i) Where the Commission considers that it may have incorrectly selected one or both of the TCP candidates for the Indicative TCP Count, the TCP results can be "masked" from public view on the Tally Room (**TCP exception**) to avoid any

"incorrect consideration of the eventual winner": AF [14h], AB 34.

(j) A decision to apply a TCP exception can only be taken if the Australian Electoral Officer for the relevant State or Territory, the Assistant Commissioner Elections and the National Election Manager have reached agreement that a TCP exception should be applied: AF [14j], AB 34.

(k) A TCP exception does not stop the counting and entry of TCP results using the identified TCP candidates: AF [14k], AB 34.

(l) Where a change of TCP candidates is required, the new candidate is recorded in the Commission's EMS before the exception is lifted: AF [14n], AB 34.

(m) Changes to TCP candidates can only occur from the Sunday after polling day, following consultation between the relevant Australian Electoral Officer and the Assistant Commissioner Elections: AF [14o], AB 34.

6. ***Events relating to the 2013 federal election:*** The first plaintiff stood as a candidate for the Palmer United Party in the Division of Fairfax in Queensland in the federal election held on 7 September 2013: AF [15], AB 35.

7. Prior to polling day, the Commission made a determination under s 274(2A) that the two TCP candidates in Fairfax were the candidates for the Liberal National Party (**LNP**) and the Australian Labor Party (**ALP**), respectively: AF [16], AB 35.

8. After the close of polls in Fairfax at 6pm Australian Eastern Standard Time (**AEST**) on 7 September 2013, the Commission made available to the public, by release to the Tally Room, the identity of the two TCP candidates for that Division, being the LNP candidate and the ALP candidate: AF [17], [18], AB 35.

9. Following the count of first preference votes, the Tally Room displayed that the two leading candidates, on an actual rather than indicative basis, for Fairfax were the LNP candidate and the first plaintiff: AF [20]. As the progressive results became available from each polling place in Fairfax, however, the Tally Room continued, until late on 7 September 2013, to identify the two leading candidates, on a two-candidate preferred basis, as being the LNP candidate and the ALP candidate: AF [21], AB 35.

10. The polls remained open in Western Australia until 8pm AEST, in Christmas Island until 9pm AEST, and in Cocos (Keeling) Islands until 9.30pm AEST. Electors in these jurisdictions continued to cast their votes at a time when the Commission was publishing

in the Tally Room the Indicative TCP Count for Fairfax identifying the TCP candidates as the LNP candidate and the ALP candidate: AF [23]-[24], AB 36.

11. Late on 7 September 2013, the Commission formed a view that the count indicated that the first plaintiff was one of the two leading candidates in Fairfax, and a TCP exception was then applied: AF [22], AB 35.

12. On 8 September 2013, the Divisional Returning Officer for Fairfax commenced, and on the following day completed, a fresh scrutiny of ordinary votes: AF [25], AB 36.

13. On 23 September 2013, the Commission commenced a full distribution of preferences for Fairfax. This concluded on 1 October 2013, resulting in the first plaintiff being identified as the successful candidate by a margin of seven votes: AF [26], AB 36.

14. On 3 October 2013, the Commission commenced a recount of all votes cast in Fairfax. On 1 November 2013, the Commission formally declared that the first plaintiff had been elected as the member for Fairfax: AF [27], AB 36.

15. In the 2013 federal election, there was one Division other than Fairfax, namely Indi, in which the candidate elected was not one of the two candidates selected by the Commission for the Indicative TCP Count. In Indi, the TCP candidates were the candidates for the Liberal Party and the ALP, while the elected candidate was an independent: AF [28], AB 36.

16. ***The 2019 federal election:*** Each of the plaintiffs has been endorsed by the United Australia Party (**UAP**) as a candidate in either the House of Representatives or the Senate for the purpose of the 2019 federal election: AF [3]-[4], AB 30. After the closing of the polls in each polling place, the defendants, or one or more of them, intend:

    (a) to conduct, at each polling place, an Indicative TCP Count for the relevant Division in accordance with the practice set out at paragraphs 13 and 14 of the AF: AF [36a], AB 38;

    (b) to release to the public, via the Tally Room, the identity of the two candidates identified by the Commission for the Indicative TCP Count in that Division, and the progressive results of that Indicative TCP Count, in accordance with the practice set out at paragraphs 13 and 14 of the AF, AB 32, while polls remain open in some parts of the nation: AF [36b], [36d], AB 38;

    (c) to maintain a "real-time" media feed to media organisations and interested third parties of progressive election results data, including the Indicative TCP Count for

each Division, updated every 90 seconds on election night: AF [36c], AB 38.

Part V: PLAINTIFFS' ARGUMENT

Ground one: statutory limitation

17. The purpose of sub-ss 274(2A), (2B) and (2C) of the Electoral Act is to assist in the speedier identification, on election night, of the party or parties likely to command a majority in the House of Representatives and thus to form government.[1]

18. No provision in the Electoral Act requires the Commission to publish, immediately or at any specified time, the identity of the two candidates selected by it for the purpose of the Indicative TCP Count or the results of that count.

19. By s 7(3), the Commission has power to do all things necessary or convenient to be done for or in connection with the performance of its functions, which include promoting public awareness of election and ballot matters (s 7(1)(c)) and publishing material on matters that relate to the Commission's functions (s 7(1)(f)).

20. However, a statutory discretion or power, such as s 7(3), although expressed in broad terms, must be understood with regard to the subject matter, scope and purpose of the statute and must be exercised in accordance with any applicable law, including the Constitution itself.[2] The conferral by statute of a discretion or power upon an officer is constrained by the constitutional restrictions upon the legislative power, with the result that a particular exercise of the discretion or power may be *ultra vires*, while the legislation conferring the discretion or power otherwise remains effective insofar as it remains susceptible of exercise in accordance with the constitutional restriction upon legislative power.[3]

21. The Electoral Act, read together with relevant provisions of the *Public Service Act 1999* (Cth) (**Public Service Act**), evinces a legislative intention, or contains an implication to the effect, that, in the discharge of their functions under the Electoral Act, the

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[1] Sub-sections 274(2A) and (2B) were inserted into the Electoral Act by the *Electoral and Referendum Act 1992* (Cth) (Act No 219 of 1992), s 26. The purpose is evident from the Joint Standing Committee on Electoral Matters (**JSCEM**), *1990 Federal Election* (December 1990) at [4.1]-[4.21]; JSCEM, *Ready or Not: Refining the Process for Election '93 – Report on the Conduct of the 1990 Federal Election, Part II and Preparations for the Next Federal Election* (December 1992) at [4.3.7], [4.3.13]; Senate, *Hansard*, 15 October 1992, p 1904.

[2] *Wotton v Queensland* (2012) 246 CLR 1 at 9-10 [9]-[10] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 613-614 (Brennan J).

[3] *Wotton* at 13-14 [21]-[23].

Commission and its officers will act impartially and will not favour, or create an appearance of favouring, one party or candidate over another party or candidate.

22. The following provisions of the Electoral Act are pertinent:

(a) Section 6, which provides that the Commission shall consist of a Chairperson, the Electoral Commissioner and one other person; the Chairperson shall be an eligible Judge nominated by the Chief Justice of the Federal Court; and a person shall not be appointed as the non-judicial appointee unless he or she is the holder of an office of Agency Head, within the meaning of the Public Service Act, or an office of equivalent status.

(b) Section 11, which provides that a Commissioner or an Acting Commissioner must disclose the nature of any direct or indirect pecuniary interest in a matter before the Commission.

(c) Sections 18, 19 and 20 which establish, respectively, the offices of the Electoral Commissioner, the Deputy Electoral Commissioner and the Australian Electoral Officers for each of the States.

(d) Section 25(3), which provides that the Governor-General must terminate the appointment of the Electoral Commissioner for any failure, without reasonable excuse, to comply with the obligations under s 11 of the Electoral Act or s 29 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (the duty to disclose interests).

(e) Section 29(2), which provides that, for the purposes of the Public Service Act, the Electoral Commissioner and the Australian Public Service (**APS**) employees assisting the Electoral Commissioner together constitute a Statutory Agency and the Electoral Commissioner is the Head of that Statutory Agency.

(f) Section 36, which provides that no candidate shall be appointed an officer of the Commission, and an officer who becomes a candidate shall thereby vacate his or her office.

(g) Sections 66, 73, 102, 110, 118, 120, 126, 132A to 134, 136 to 138A, 172, 185C, 287L, 298C, 298F and 298H, which confer decision-making functions upon the Commission concerning the redistribution of Electoral Divisions, enrolments to vote and objections thereto, the registration and deregistration of political parties, the rejection of nominations of candidates, the cancellation of the registration of

general postal voters, the registration of political campaigners and the determination of claims for electoral funding; each of these functions requires impartiality, and the appearance of impartiality, on the part of the Commission.

(h) Sections 182 to 243, 273 to 282, which confer polling, vote counting and recounting functions upon the Commission with respect to elections for the Senate and for the House of Representatives; again, each of these requires impartiality, and the appearance of impartiality, on the part of the Commission.

(i) Sections 315A, 316, 321F to 321H and 384A, which confer upon the Commission powers with respect to debt recovery, the carrying out of investigations and the conduct of civil penalty proceedings, each of which requires independence, and the appearance of independence, on the part of the Commission.

(j) Section 202A, which provides that officers and employees of the Commission shall not begin the performance of duties in relation to an election unless they have signed an undertaking in the approved form; the current form includes an undertaking "[n]ot to attempt to influence the vote of another person".[4]

(k) Section 325, which provides that an officer who "does any act or thing with the intention of influencing the vote of another person" commits an offence punishable by imprisonment for up to 6 months or a fine of up to 10 penalty units.

(l) Section 327, which provides that upon penalty of imprisonment for up to 6 months or a fine of up to 10 penalty units, a person "shall not hinder or interfere with the free exercise or performance, by any other person, of any political right or duty that is relevant to an election under this Act".

23. The following provisions of the Public Service Act are relevant:

(a) section 10, which sets out certain "APS Values", including that the APS "is professional, objective" (s 10(1)) and "apolitical" (s 10(5));

(b) section 12, which provides that an "Agency Head", which includes the Electoral Commissioner,[5] must "uphold and promote" the APS Values;

(c) section 13, which sets out the "APS Code of Conduct", which includes that an APS employee must "take reasonable steps to avoid any conflict of interest (real or

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[4] *Approved Form for the purposes of an Undertaking to be Made by Australian Electoral Commission (AEC) Officers and Employees*, signed by the Electoral Commissioner (Mr Tom Rogers) on 9.1.19 at p 3.

[5] Public Service Act, s 7; Electoral Act, s 29(2).

apparent) in connection with the employee's APS employment" (s 13(7)(a)); must not "improperly use … the employee's duties, status, power or authority … to gain, or seek to gain, a benefit or an advantage for … any other person … or to cause, or seek to cause, detriment to … any other person" (s 13(10)); and must at all times behave in a way that upholds the APS Values (s 13(11)(a)); and

(d) section 14, which provides that Agency Heads are bound, in the same way, by the Code of Conduct.

24. The notion of independence, as essential to the character of the functions required of the Commission under the Electoral Act, was recognised by Crennan J in *Rowe v Electoral Commissioner*.[6] Her Honour there described the Commission as "the independent body charged with maintaining the Electoral Rolls". This reflects a wider constitutional scheme which facilitates and protects the development of "a politically neutral public service".[7]

25. A report of the JSCEM which led to the enactment of s 247(2A) indicated that the Parliament was motivated by "serious concerns" to ensure that the publication or public release of the Indicative TCP Count would not undermine the impartiality of the Commission by creating an appearance that the Commission was giving its *imprimatur* to the two selected TCP candidates:[8]

> The Committee has serious concerns about the AEC's original plans for identifying the two candidates who were to receive the provisional distribution of preferences on polling night. There were two aspects of the concern: the possibility of the AEC getting it wrong and jeopardising an early result on election night *and the effect on the electoral system of two candidates appearing to be the "two most likely" in the judgment of the AEC.* [emphasis added]

26. The JSCEM elaborated upon these concerns as follows:[9]

> At the time of the first public hearing some members expressed grave reservations about the AEC selecting the "two most likely" candidates in each seat, and publishing this information. *The choice of the two candidates to receive the distributed preferences could be seen to imply the AEC's imprimatur for these candidates – which would be inconsistent with the AEC's impartiality.* [emphasis added]

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[6] (2010) 243 CLR 1 at 119-120 [382] (Crennan J).

[7] *Re Lambie* (2018) 92 ALJR 285, 351 ALR 559 at [26] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[8] JSCEM, *Conduct of the 1990 Federal Election, Part II and Preparations for the Next Federal Election – Interim Report – Counting the Vote on Election Night* (November 1992) (**JSCEM November 1992 Report**) at [2.3.1].

[9] JSCEM November 1992 Report at [2.3.5] (footnotes omitted).

27. The JSCEM was of the view that the concerns could be addressed by maintaining the confidentiality of the identity of the two selected candidates:[10]

> *The AEC has responded to these reservations by agreeing to adopt procedures which would keep confidential the identity of the two candidates to receive preferences in the polling night count.* It follows from this that selection of the two candidates cannot be automatically and absolutely based on the previous election, although this will be the usual basis of the decision. A sealed envelope containing the names of the two candidates, will be made available to the Officer in Charge of the Polling Booth, *to be opened after the close of votes* and in view of the scrutineers.
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> It will be necessary to make the information available to representatives of the media who are producing computer programs for the election night broadcast. This would be on a confidential basis. [emphasis added]

28. Having regard to the subject matter, scope and purpose of the above provisions, an exercise by the Commission of the power under s 7(3), or otherwise, such that, at a time when the polls in some parts of the nation remain open, the Commission is publicly announcing its "opinion" as to the identity of the two candidates to whom preferences must be distributed so as to "best provide an indication of the candidate most likely to be elected"[11] for each Division in the eastern States is extraneous or foreign to, and is not authorised by, the Electoral Act.

29. That conclusion is reinforced by the circumstances that (i) the Electoral Act is silent as to when that information is to be published, and (ii) the extrinsic materials manifest a legislative intention that this information be kept confidential until the close of polling, reflecting an appreciation that the early disclosure of such information may, either or both, unduly affect electors' voting decisions or endanger the appearance of impartiality on the part of the Commission.

Ground two: constitutional limitation

30. In *Rowe*, Gummow and Bell JJ,[12] agreeing with Crennan J,[13] noted that, by 1901, the phrase "chosen by the people" in ss 7 and 24 of the Constitution had come to signify "the share of individual citizens in political power by the means of a democratic franchise". In *Roach v Electoral Commissioner*,[14] the joint reasons observed that voting in elections for the Parliament "lies at the very heart of the system of government for which the Constitution provides". Sections 7 and 24 implement a requirement that the electoral system as a whole provides for ultimate control by periodic popular election,

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[10] JSCEM November 1992 Report at [2.3.6]-[2.3.7] (footnotes omitted), see also at [5.1.2]-[5.1.3].
[11] Electoral Act, s 274(2A).
[12] *Rowe* at [121].
[13] *Rowe* at [347].
[14] (2007) 233 CLR 162 at 198 [81] (Gummow, Kirby and Crennan JJ).

and the voting system must not be impermissibly distorted so as to fail to meet that requirement.[15] In *Murphy v Electoral Commissioner,*[16] Gageler J confirmed that the judiciary's role under ss 7 and 24 is to safeguard against the introduction of restrictions on the franchise which would unjustifiably compromise the representative nature of a future Parliament.

31. Sections 7 and 24 operate to constrain the discretion of the Commission under s 7(3) of the Electoral Act, or otherwise, with the effect that publishing or making publicly available the identity of the TCP candidates or the results of the Indicative TCP Count while the polls remain open in any part of the nation is not a constitutionally valid exercise of power.[17] Any such publication or public release would impermissibly distort the voting system in a manner that would compromise the representative nature of a future Parliament. The practical effect would be to place a burden upon the constitutional mandate for direct and popular choice contained in ss 7 and 24 of the Constitution. A burden of this kind is not justified by a "substantial reason" and is not "reasonably appropriate and adapted" or "proportionate" to the achievement of a legitimate end, consistent with the maintenance of the constitutionally prescribed system of representative government.[18]

32. Four distinct, but closely related, aspects of the constitutionally mandated system of representative government established by ss 7 and 24 would be burdened by the Commission publishing or making publicly available the TCP information, including the identity of the TCP candidates and the results of the Indicative TCP Count, while polls remain open in some parts of the nation.

33. *First*, electors in Divisions where polls remain open while TCP information is being published or made publicly available may be hindered from exercising their right (and duty[19]) to vote without being unduly influenced, or misled, by the publication of the Commission's "opinion"[20] as to the two candidates most likely to win in other Divisions or the Indicative TCP Results reflecting that opinion.

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[15] *Roach* at 187-188 [49] (Gummow, Kirby and Crennan JJ).
[16] (2016) 261 CLR 28 at 71 [96], 73 [107]; see also, *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 237-238 [157]-[158] (Gummow and Hayne JJ).
[17] See *Wotton* at 9-10 [9]-[10], 13-14 [21]-[23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
[18] See *Murphy* at 48-50 [28]-[33] (French CJ and Bell J), 60-62 [60]-[65] (Kiefel J), 67-68 [84]-[87] (Gageler J), 94-96 [205]-[210] (Keane J), 104-105 [238]-[240], 106-107 [244] (Nettle J), 121-122 [291]-[294], 124 [306] (Gordon J); *Rowe* at 19-21 [23]-[25], 38-39 [78] (French CJ), 56-57 [151]-[161] (Gummow and Bell JJ), 118 [374], 120-121 [384] (Crennan J); *Roach* at 174-175 [7]-[8] (Gleeson CJ), 198-199 [83]-[85] (Gummow, Kirby and Crennan JJ).
[19] Electoral Act, s 245(1).
[20] Electoral Act, s 274(2A).

34. In *Mulholland*, the Court described the constitutional mandate as necessitating a "true choice", or a "full and free choice", between competing candidates for election;[21] "a direct, free, informed and genuine choice by the people";[22] a "free election";[23] "a real choice";[24] and an "informed choice" based upon "an opportunity to gain an appreciation of the available alternatives".[25] In *Rowe*, Gummow and Bell JJ emphasised that the ballot is "a method adopted in order to guard the franchise against external influences, and the end aimed at is the free election of a representative by a majority of those entitled to vote"[26] and that "the importance of maintaining unimpaired the exercise of the franchise need hardly be stated".[27]

35. Disclosure by the Commission of TCP information while electors are still to vote in some Divisions has a very real capacity to preclude those electors from exercising the free, informed, genuine and unimpaired choice contemplated by ss 7 and 24. The Commission's "opinion" as to the two most likely candidates to be elected in a Division is, as was recognised by the JSCEM, open to "the possibility of the [Commission] getting it wrong".[28] The selection of candidates is primarily based on "the results of the previous election" (AF [13a]), AB 32, which is an unreliable indicator of future electoral performance. While the Commission does rely on certain additional sources of information, contrary to the JSCEM's recommendation that it use "relevant objective data",[29] the Commission bases its selection on information that is subjective and speculative, including the "local knowledge" of the Divisional Returning Officer, and the views of psephologists, major betting markets and political parties: AF [13b], AB 32.

36. The Commission has attempted to deal with the inherent fallibility of its TCP candidate selection process by adopting a "TCP exception" policy: AF [14h]-[14q], AB 34-35. The Commission's policy is, however, ineffective in countering the effect on electors of the publication or public release of the identities of TCP candidates incorrectly selected. The application of a TCP exception first requires identification of a potential error by the relevant Australian Electoral Officer: AF [14i], AB 34. Such identification may not be

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[21] *Mulholland* at 191 [18] (Gleeson CJ); *Day v Australian Electoral Officer for the State of South Australia* (2016) 261 CLR 1 at 12 [19].
[22] *Mulholland* at 206 [62], 211 [73] (McHugh J); *Roach* at 199 [86] (Gummow, Kirby and Crennan JJ).
[23] *Mulholland* at 236 [154] (Gummow and Hayne JJ).
[24] *Mulholland* at 257-258 [223] (Kirby J)
[25] *Mulholland* at 191-192 [18] (Gleeson CJ), 300 [344] (Heydon J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560, referring to *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 187 (Dawson J).
[26] *Rowe* at 49 [124], quoting *Kean v Kerby* (1920) 27 CLR 449 at 459 (Isaacs J).
[27] *Rowe* at 50 [126], referring to *Snowdon v Dondas* (1996) 188 CLR 48 at 71.
[28] JSCEM November 1992 Report at [2.3.1].
[29] JSCEM November 1992 Report at [5.1.2].

possible until a significant time after the identity of the TCP candidates selected by the Commission have been made publicly available or published to the Tally Room: AF [21], AB 35. It may only be possible *after* the full distribution of preferences is almost complete: AF [14m]. Even then, a "TCP exception" may only be applied following agreement between multiple officers of the Commission: AF [14j], AB 34, extending further the period of time during which electors will be casting votes while incorrect information is being published by the Commission. Finally, a correction of the Commission's error by way of the selection of a new TCP candidate is not capable of being made until the Sunday *after* the day of the election: AF [14o], AB 34. The significant practical and administrative hurdles that must be overcome before a TCP exception can be applied and a TCP correction made means that, for a significant period, polls may be open for voting while incorrect or misleading TCP information continues to be published or made available by the Commission, such as occurred in the 2013 federal election: AF [23]-[24], AB 36.

37. Even where the selection of TCP candidates by the Commission ultimately proves not to be incorrect, the indicative TCP count itself may be under-inclusive and not representative of the true position in the relevant Division. The Indicative TCP Count is unlikely to include pre-poll, absentee and postal ballots in respect of the relevant Division.[30] Accordingly, it is capable of misleading electors, including electors yet to vote, as to the likely result of the election in Divisions in respect of which TCP information has been publicly released.

38. Despite these inherent flaws, the TCP information is presented to electors as commanding the endorsement of the Commission, including by publication on the Commission's website: AF [14g], AB 34. Widespread reliance on the TCP information is encouraged by its extensive distribution, facilitated by "real-time" electronic release and pre-planned third-party media broadcast, even while polls remain open in some parts of the nation: AF [13g]-[13h], [36c], AB 33, 38. In *Smith v Oldham,*[31] Isaacs J observed that "[e]ven when nothing is conveyed but advice or opinion, the identity of the person proferring it … might for various reasons affect its value and weight in the minds of the electors." As submitted in paragraphs [21]-[29] above, the Commission's position as an independent and impartial body statutorily empowered to conduct and oversee national elections suggests that its opinion is likely to be given a value and weight by electors which is greater than that which might be accorded to other individuals or institutions

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[30] Orr, *The Law of Politics: Elections, Parties and Money in Australia* (2nd ed, 2019, Federation Press) 197.
[31] (1912) 15 CLR 355 at 363 (Isaacs J); see also at 358 (Griffith CJ).

offering opinions or advice on election day, including pollsters or party officials.

39. The Commission acknowledges that the publication or public release of the TCP information, including incorrect or unreliable TCP information, is capable of influencing electors in their voting choices. The Commission's internal "Two Candidate Preferred Policy" records that TCP counts for inappropriate candidates can lead to "incorrect consideration of the eventual winner": AF [14h], AB 34. The Commission ensures that the identity of the selected TCP candidates for each Division is kept confidential until the close of the polls in that Division: AF [13e], [13g], [14a], AB 32-33. The need for confidentiality would not arise if the TCP information were neutral in its effect upon electoral choices.

40. The defendants concede that, in some circumstances, the publication of the TCP information is capable of affecting the electoral choices of electors outside the Division to which the TCP information specifically relates: AF [37], AB 38. That reflects the national character of party political activity. However, the capacity of the TCP information to affect the electoral choices of electors who are yet to vote is not limited to circumstances where the TCP information relates directly to the Division in which a candidate of the "notoriety" of the first plaintiff has been nominated.

41. Recent peer-reviewed and published research carried out in France (AF Annexure A, AB 41), the United States (AF Annexure B, AB 75) and Denmark (AF Annexure C, AB 75) supports the proposition that voters who are yet to cast their ballot may be influenced by election results elsewhere in the nation or by the publication of exit polls while voting booths remain open: AF [39], AB 39. The empirical research reveals that voters are influenced by results indicating the performance of political parties, such that voters are more likely to intend "to vote for the party if the poll showed increased electoral support for the party" (AF Annexure C, p 338, AB 83). The proposition has resonance in the Australian context: at least one State parliament has enacted a statutory prohibition on the public dissemination of the results of exit polls carried out at an election day voting centre "during the hours of voting".[32]

42. In *Mulholland,*[33] Gleeson CJ observed that in a system of compulsory voting, "party affiliation is of particular importance" and that when people vote "many of them depend heavily on the guidance of others; and the party political system is the main practical source of such guidance." Similarly, McHugh J reflected upon the "influence on voters'

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[32] *Electoral Act 2002* (Vic), s 155.
[33] *Mulholland* at 192 [29].

choices within the Australian system of representative government" of "organised political parties".[34] In *Unions NSW v New South Wales,*[35] Gageler J noted that the "alignment of candidates for election to political parties has been a feature of the experience of representative and responsible government in Australia from the 1890s to the present". The significance of this structural reality, for the practical operation of the system of representative government established by ss 7 and 24, is reflected in the printing of party affiliations on ballot papers,[36] which was introduced to "assist voters in casting their vote in accordance with their intentions",[37] and the 1977 amendment of s 15 of the Constitution to provide that party endorsement is relevant to filling casual vacancies in the Senate.[38] It is common ground that the endorsement of a candidate by a national political party is a matter that may be taken into account by voters in deciding whether to give a first or later preference vote to that candidate: AF [32], AB 37.

43. The centrality of political parties to the system of representative government established by ss 7 and 24, as it operates in practice, together with the empirically observed influence of party electoral performance on voting intentions, indicates that there is, at least, a real prospect that an elector who is yet to vote at a time when the TCP information is published by the Commission would be unduly influenced by that information. That is particularly so in circumstances where the TCP information purports to be an indication of the electoral performance of candidates who are endorsed by the same registered parties who have endorsed candidates in the elector's Division.

44. Having regard to the national character of the high-profile advertising campaign conducted by the UAP in the months preceding the 2019 federal election, the UAP is one such well-recognised political party. In the 2019 federal election, the UAP has endorsed or intends to endorse a candidate for the House of Representatives in every Division and for the Senate in each State and Territory: AF [30], AB 36. The UAP has, since October 2018, conducted a nationwide media advertising campaign across print, television, radio, billboard, internet and telephonic mediums and featuring the first plaintiff (AF [31]. AB 37), who is of significant "notoriety": AF [37], AB 38. The name and logo of the UAP will be printed, on the ballot paper, adjacent to the name of each endorsed UAP candidate in each Division in the House of Representatives, and for each State and Territory in the Senate: AF [30], AB 36.

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[34] *Mulholland* at 214 [78].
[35] (2019) 363 ALR 1, 93 ALJR 166, [2019] HCA 1 at [87].
[36] Electoral Act, ss 214 and 214A.
[37] JSCEM report into the September 1983 election, quoted in *Mulholland* at 214 [78] (McHugh J).
[38] See *Unions NSW* at [87] (Gageler J).

45. In circumstances where: (i) the Commission's selection of the TCP candidates is inherently fallible; (ii) the Commission's procedure to counteract the fallibility of its selection process is broadly ineffective if polls are still open; (iii) the Indicative TCP Count may be an unreliable indicator of election results; (iv) the identity of the TCP candidates and the results of the Indicative TCP Count are made available to the public in a manner which commands the endorsement of the Commission; (v) arrangements for maintaining the confidentiality of the identity of TCP candidates are lifted before all polls are closed; and (vi) the TCP information is capable of influencing electoral choices, including by affecting electors' perception of the performance of political parties with a national identity; it cannot be said that electors in parts of the nation where polls remain open while the TCP information is being released by the Commission are, by casting their vote, exercising the free, informed, genuine and unimpaired choice contemplated by ss 7 and 24 of the Constitution.

46. *Secondly,* as submitted above at paragraphs [21]-[29], the subject matter, scope and purpose of the Electoral Act evince a legislative intention that the Commission and its officers will act independently and impartially and will not favour, or create the appearance of favouring, one party or candidate over another party or candidate. The legislative intent embodied in the Electoral Act is a "stable and enduring" aspect of the system of direct and popular choice established by ss 7 and 24 and thus informs the content of the requirement of those provisions.[39]

47. As the JSCEM recognised in its November 1992 Report, the publication of the Commission's opinion as to the two candidates most likely to be elected for a Division,[40] may be "seen to imply the [Commission]'s *imprimatur* for these candidates – which would be inconsistent with the [Commission]'s impartiality".[41] The JSCEM recommended that this concern could be dealt with by the maintenance of the confidentiality of the identity of the selected candidates "until the close of poll".[42] While the JSCEM's recommendation has been subsequently interpreted by the Commission narrowly to mean "until the close of poll" in each Division to which the TCP information relates, that narrow interpretation cannot save the Commission from the appearance of partiality while polls remain open elsewhere in the nation.

48. The publication or release of the Commission's TCP selection or "imprimatur" in favour

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[39] See *Murphy* at 69 [91]-[92] (Gageler J).
[40] Electoral Act, s 274(2A).
[41] JSCEM November 1992 Report at [2.3.5].
[42] JSCEM November 1992 Report at [5.1.2].

of particular candidates is capable of compromising the Commission's independence and impartiality, or the appearance thereof. This burdens a stable and enduring aspect of the system of direct and popular choice mandated by ss 7 and 24 and informed by the Parliament's intention in enacting s 274(2A) of the Electoral Act.

49. *Thirdly,* as Gageler J emphasised in *Murphy*, ss 7 and 24 advance the principle that "the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power".[43] A similar point was made in several of the judgments in *McCloy.*[44] Electors in Divisions where polls remain open ought not to be subject to any disadvantage, compared with electors in other States and Territories, in the free exercise of the franchise; such that freedom to vote, without impairment or undue influence, is nationally consistent and equally available to all electors irrespective of their State or Territory of residence.

50. If the submissions at paragraphs [33]-[45] are accepted, then it follows that electors in Divisions where polls remain open while the TCP information is published by the Commission will or may be disadvantaged in the exercise of their franchise or subject to impairment or undue influence which prevents them from exercising a share in political power equal to that exercised by other electors in the nation.

51. *Fourthly*, the system of direct and popular choice under ss 7 and 24 contemplates that minor parties and independent candidates will compete for votes on a substantively fair or "level playing field" – including without unfair advantage being given to the major parties. In *Murphy,* Gageler J observed that ss 7 and 24 are informed by the nature of the system of representative government in Australia, which includes that "electors are able to vote freely so that 'neither the incumbent government nor any other group can determine the electoral result by means other than indications of how they will act if returned to power'".[45] Unjustified discrimination against a candidate or a party, if sufficiently serious, is capable of contravening the requirements of ss 7 and 24.[46]

52. In the selection of the TCP candidates, the Commission places primary importance on "the results from the previous election": AF [13a], AB 32. Accordingly, the Commission's TCP selection is likely to favour incumbent and major party candidates

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[43] *Murphy* at 68 [87], quoting Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902), p 329.
[44] *McCloy v New South Wales* (2015) 257 CLR 178 at 202 [27]-[28] (French CJ, Kiefel, Bell ad Keane JJ), 226 [110] (Gageler J), 258 [219] (Nettle J).
[45] *Murphy* at 70 [94] (Gageler J), quoting Australia, *Final Report of the Constitutional Commission* (1988), vol 1, p 127 [4.12].
[46] *Mulholland* at 217 [86] (McHugh J).

over new, independent or minor party candidates. That inherent partiality towards incumbent and major party candidates is illustrated by the events of the 2013 election. In respect of both the Divisions of Fairfax and of Indi, the Commission selected for the Indicative TCP Count two TCP candidates exclusively from the major parties: AF [16], [28], AB 35, 36. In both cases, the TCP candidate selection proved to be incorrect and a minor party or independent candidate was ultimately elected: AF [27], [28], AB 36.

53. By placing emphasis on the results of previous elections in selecting the TCP candidates, and publishing or making available the identity of those TCP candidates while polls remain open in some parts of the nation, the Commission is contributing to a substantively unfair "playing field" in favour of certain political actors, including the incumbent government. The Commission's conduct reduces the incentive for electors, in parts of the country where polls remain open, to vote for minor parties or independent candidates by reason of a perception that such a vote would be "wasted". The discrimination effected by the Commission's conduct thereby burdens the system of representative government mandated by ss 7 and 24.

54. There is no "substantial reason" or "legitimate end", consistent with the maintenance of the constitutionally prescribed system of representative government, which justifies the imposition of the burdens identified above. In exercising its powers pursuant to ss 9, 31 and 51(xxxvi) of the Constitution, the Parliament did not see it necessary to confer on the Commission or its officers a specific statutory power to "publish" or to "make available" the Indicative TCP Count at any specific time, or at all. The subject matter, scope and purpose of the Electoral Act, and the extrinsic materials which explain the introduction of s 274(2A), do not disclose any substantial reason which requires or favours the publication of the indicative TCP count for any Division at or about 6pm AEST time, as opposed to at or about 9.30pm AEST, on election night.

55. Section 274(2A) was introduced into the Electoral Act to deal with "significant delays" in confirming an election result: AF [10], AB 31. The particular circumstances which precipitated its enactment involved a delay of five days in confirming the 1990 federal election result in circumstances where there was a clear majority of eight seats in favour of the Government: AF [10], AB 31. If a comparably clear majority arises in the 2019 federal election, the relief sought by the plaintiffs may, at most, delay a public confirmation by the Commission of the election result by three and a half hours. If the 2019 federal election were to yield a result in the House of Representatives which is closer than in the 1990 election, such that the Indicative TCP Counts in each Division

would not be reliable indicators of that result, the relief sought by the plaintiffs is unlikely to have any substantial effect on the timing of the public confirmation of the result of the election by the Commission. The confirmation of the election outcome in such circumstances would require the completion of a full preference count in each Division.

56. Relevantly, the relief sought by the plaintiffs would not prevent the Commission or its officers from performing their functions and duties pursuant to ss 274(2A), (2B) and (2C). The Commission and its officers would not be precluded from carrying out an Indicative TCP Count in each Division even while the publication or release of that count is restrained. Nor would the Commission be prevented from making the identities of the candidates selected for the indicative TCP count known to scrutineers in each Division after the close of polls in that Division by means other than publication to its website or disclosure through the proposed "real-time" media feed (AF [36], AB 38).

57. Moreover, there is no suggestion that the relief sought by the plaintiffs would place any significant additional administrative burden on the Commission or require substantial resources or expenditure of public funds for its implementation.[47] The Commission has in place an existing procedure by which the indicative TCP count is capable of being "masked" in the Tally Room: AF [14h], AB 34. It would be open to the Commission to utilise its existing procedure to prevent the publication or release of the TCP information until every poll in the nation has closed and to lift the "mask" immediately thereafter (see AF [14p], AB 35). It would also be open to the Commission to refrain from making available to media organisations and third parties the progressive results of the Indicative TCP Count in each Division by not engaging in any "file transfer" containing such information (AF [36d], AB 38) until such time as all polls are closed.

58. Accordingly, to prevent the Commission from publishing the identities of the TCP candidates and the results of the Indicative TCP Count until after every poll in the nation has closed would have little significant impact on the "orderliness of voting, efficiency of scrutiny, and promptitude and finality in the conclusion of the electoral process".[48]

59. There is no "substantial reason" or "legitimate end" which justifies the practical burden placed upon the constitutional mandate for direct and popular choice by the publication or release by the Commission of the identity of TCP candidates or the results of the Indicative TCP Count while polls remain open in some parts of the nation.

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[47] Cf *Murphy* at 89-90 [188] (Keane J).
[48] See *Murphy* at 64 [73] (Kiefel J), 96 [211] (Keane J), 110-111 [253]-[254], 129 [331] (Gordon J).

Part VI: ORDERS SOUGHT BY THE PLAINTIFFS

60. A writ of prohibition be issued to the defendants prohibiting them from making available to the public, or from causing or permitting to be published, the identity of the two candidates selected by the defendants for any Electoral Division for the purpose of the indicative two-candidate-preferred count under s 274(2A) of the Electoral Act, or the progressive results of any of those indicative counts, until after the close of polls in all Electoral Divisions throughout Australia, namely 9.30pm AEST on polling day.

61. Alternatively, the defendants, by themselves or their servants or agents, be restrained from making available to the public, or from causing or permitting to be published, the information referred to in paragraph 60 above until after the close of polls in all Electoral Divisions throughout Australia, namely 9.30pm AEST on polling day.

62. A declaration to the effect that the Electoral Act, whether by s 7(3) or otherwise, does not authorise the defendants to make available to the public, or to cause or to permit to be published, the information referred to in paragraph 60 above until after the close of polls in all Electoral Divisions throughout Australia, namely 9.30pm AEST on polling day.

63. The defendants are to pay the plaintiffs' costs of the proceedings.

Part VII: ORAL ARGUMENT

64. The plaintiffs estimate that approximately 2 to 2.5 hours will be required for the presentation of the plaintiffs' oral argument, including submissions in reply.

Dated: 15 April 2019

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