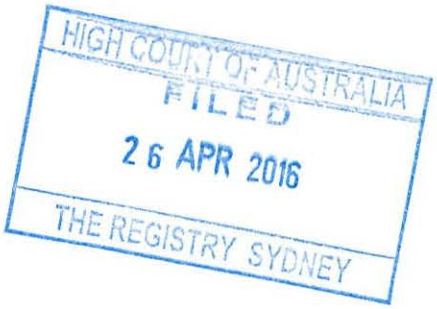
IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M247 OF 2015**

BETWEEN: **ANTHONY JOHN MURPHY**
Plaintiff

AND: **ELECTORAL COMMISSIONER**
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

ANNOTATED 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. The issues are identified in the questions stated in the Amended Special Case.

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

3. The second defendant (the **Commonwealth**) considers that no further notice need be given under s 78B of the *Judiciary Act 1903* (Cth).

PART IV FACTS

4. The material facts are set out in the Special Case Book.

PART V LEGISLATIVE PROVISIONS

5. The applicable provisions are those identified by the plaintiff, as supplemented by the provisions in the Commonwealth's annexed bundle of legislation.

PART VI ARGUMENT

Introduction

6. The plaintiff's case is constructed upon a series of narrowing or limiting propositions, the acceptance of which would lead to an erroneous assessment of the scope of the Commonwealth Parliament's power and responsibility to design an electoral system giving effect to a system of representative government based upon "direct choice". In essence, the plaintiff's case is that the Constitution does not permit Parliament any real discretion on the role and manner of operation (and, in particular, the closing) of an electoral roll. That case should not be accepted, for the following reasons.

7. *First*, the plaintiff does not have standing: see paragraphs [14]-[16] below.

8. *Second*, the Commonwealth Parliament must provide the conditions to enable "the people" to exercise their constitutional functions. Without an electoral system, the people cannot directly choose the members of the House of Representatives and Senators as ss 7 and 24 require them to do: see paragraphs [17]-[20] below.

9. *Third*, the plaintiff largely overlooks, and fails to give proper recognition and effect to, the long history of Parliaments providing for an electoral roll and its closure sufficiently early to allow for all steps in the electoral process to be carried out in an orderly, efficient and coherent fashion: see paragraphs [21]-[31] below.

10. *Fourth*, the plaintiff's analysis of the key provisions of the *Commonwealth Electoral Act 1918* (Cth) (the **Act**) which explain the purpose of the roll (and its closing) within the larger process of the election is overly narrow and confined. The roll is not simply used to identify those persons entitled to vote on polling day; it has a range of functions and purposes that place it at the very centre of the electoral system created by Parliament: see paragraphs [32]-[59] and [66]-[82] below.

11. *Fifth*, and following from the preceding two points, the plaintiff's attempt to confine the purposes of the roll (and its closing) to only one out of the larger group of purposes identified by the Commonwealth in its Amended Defence does not give sufficient weight to the text, context, and history of the Act. Further, to the extent the plaintiff alleges that the singular purpose he identifies (namely, "permitting the AEC time to prepare certified lists of voters": PS [42]) is the only purpose that the Constitution recognises for a roll or its closure, such a cramped view of the Constitution should be rejected: see paragraphs [66]-[82] below.

12. *Sixth*, howsoever the permissible purposes are identified, the proposition that any closure of the roll before polling day effects a "disqualification" or a "distortion", which is impermissible absent a substantial reason, and that the Commonwealth bears the burden of establishing such a reason, should be rejected: see paragraphs [58]-[65] and [83]-[87] below.

13. *Seventh*, the larger attempt at proportionality analysis by the plaintiff urging invalidity must in any event be rejected, including the inappropriate transference of *McCloy* proportionality to the very different circumstances of the present case.[1] The Court should not assess the validity of the impugned provisions in the same way it assesses the validity of laws said to be contrary to the implied freedom of political communication. The impugned provisions are for a substantial reason. The suspension period facilitates the smooth and efficient conduct of elections, including the prompt declaration of successful candidates. The suspension period also provides an incentive for persons to enrol and thus enhances the franchise by encouraging people to enrol with sufficient time for the AEC to process their enrolment claim; without the suspension period, it is likely that some people who would otherwise enrol before the suspension period will not do so (or, at the very least, will not do so within sufficient time for the AEC to process their enrolment claim): see paragraphs [88]-[105] below.

The plaintiff has no standing

14. The plaintiff has no standing. He has already, quite properly, fulfilled his duty to be on the roll. Like the plaintiff in *Kuczborski*,[2] he does not say that he proposes to act in a way that will engage the impugned provisions (by, for example, seeking to transfer his enrolment during the suspension period). Just as the plaintiff in *Kuczborski* had "no more interest than anyone else in clarifying what the law is",[3] the plaintiff's interest is no different from every other elector who proposes to vote in the future, or indeed from any other member of the public (elector or not) who is represented in Parliament.

15. Should the Court decide that the plaintiff has standing the result would be the obliteration of any real standing requirement in constitutional cases. Contrary to well established principle,[4] a person could challenge the validity of a law in circumstances where the Court's determination would not establish an immediate right, duty or liability. Because questions of standing and "matter" intersect,[5] such an outcome would be at odds with the Court's jurisprudence on the requirement for a "matter".

16. The plaintiff's standing argument is not improved by the fact he claims prohibition (PS [16]-[19]). The "matter" requirement cannot be avoided by simply including a claim for a writ of prohibition in a prayer for relief. Moreover, prohibition is not properly invoked here. Among other things, there is no relevant exercise of judicial or quasi-judicial power on the part of the Commissioner to which the writ of prohibition is (or could be) directed.[6] More generally, there is or will be no act by the Commissioner to prohibit; rather the plaintiff's complaint seems to be that the Commissioner will fail to act. The Court should

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1 *McCloy v New South Wales* (2015) 89 ALJR 857 (***McCloy***) at 862-3 [2] (French CJ, Kiefel, Bell, Keane JJ)

2 *Kuczborski v Queensland* (2014) 254 CLR 51 (***Kuczborski***) at 87-8 [99] (Hayne J).

3 (2014) 254 CLR 51 at 106 [176] (Crennan, Kiefel, Gageler and Keane JJ).

4 See eg *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 68 [154] (Gummow, Crennan and Bell JJ); *Kuczborski* (2014) 254 CLR 51 at 87 [98] (Hayne J).

5 *Kuczborski* (2014) 254 CLR 51 at 60-1 [5] (French CJ), 87 [98] (Hayne J).

6 See *R v Wright; Ex parte Waterside Workers' Federation of Australia* (1955) 93 CLR 528 at 541-2 (The Court), and Creyke, McMillan and Smyth, *Control of Government Action* (4th ed, 2015) at 1095.

reject the plaintiff's attempt to circumvent the standing requirements for the primary relief that he seeks.

The broad power and duty of Parliament with respect to the electoral system

17. The issues in this case ultimately turn upon whether any relevant constraints upon Commonwealth legislative power can be discerned from the provisions of the Constitution that give effect to the institution of representative government.

18. Representative government is given effect only to the extent that the text and structure of the Constitution establish it.[7] Representative government is a term that is descriptive of a "whole spectrum" of political institutions, "each differing in countless respects yet answering to that generic description".[8] The most that can be said is that that spectrum of institutions and arrangements has, as a unifying characteristic, the placing of ultimate controlling power with the people, to be exercised by representatives of the people elected periodically in free elections to a legislative chamber or chambers.[9]

19. The Convention Debates reveal that the framers were acutely aware of those difficulties of definition.[10] That is the deeper significance of the recurrent phrase "until the Parliament otherwise provides".[11] Those words (together with the fact that the constitutional prescription of a form of representative government is as spare as it is[12]) may be seen to reflect a deliberate design, ensuring considerable latitude to the legislature in choosing from amongst the many possible permutations of representative government, including in respect of the electoral system.[13] The limited entrenchment of very few elements of representative government in the Constitution was thus deliberately confined to the "bare" or "irreducible" minimum requirements for that governmental system[14] and was largely directed to answering the perceived needs of the federal structure.[15]

20. The plaintiff's submissions must be assessed against this constitutional background, including that the Constitution conferred on Parliament a wide discretion to design a system giving effect to the requirement that representatives be "directly chosen by the people". That fact has consequences, described below, for the standard by which the validity of laws such as the impugned provisions are to be assessed. As French CJ observed in *Rowe*, because "Parliament has a considerable discretion as to the means

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7 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 566-7 (The Court); *McGinty v Western Australia* (1996) 186 CLR 140 (***McGinty***) at 168 (Brennan J), 182-3 (Dawson J), 231 (McHugh J), 284-5 (Gummow J).

8 *Attorney-General (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 (***McKinlay***) at 57 (Stephen J).

9 *McGinty* (1996) 186 CLR 140 at 273 (Gummow J) (see also his Honour's reference to Mill at 272); *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 200 (McHugh J) (referring to Professor Birch's seminal work, *Representative and Responsible Government* (1969) University of Toronto Press at 17). See also Chief Justice Murray Gleeson, 'The Shape of Representative Democracy' (2001) 27(1) *Monash University Law Review* 1 at 3 (**Gleeson CJ Article**).

10 See eg *Official Report of the National Australasian Convention Debates* (Adelaide), (1897) at 672-4; *Official Report of the Debates of the Australasian Federal Convention* (Melbourne), Third Session (1898) at 2445-6.

11 See eg ss 7, 10, 22, 24, 29, 30, 31, 34, 39, 46, 47, and 48 (and note the head of power in s 51(xxxvi)).

12 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 (***Rowe***) at 70 [200] (Hayne J, in dissent in the result).

13 *McGinty* (1996) 186 CLR 140 at 184 (Dawson J), 269 and 280-2 (Gummow J); *Langer v The Commonwealth* (1996) 186 CLR 302 (***Langer***) at 343 (McHugh J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 (***Mulholland***) at 188 [6] (Gleeson CJ); 207 [64] (McHugh J), 236-7 [154] (Gummow and Hayne JJ); *Rowe* (2010) 243 CLR 1 at 22 [29] (French CJ), 49-50 [125] (Gummow and Bell JJ) and 121 [386] (Kiefel J, in dissent in the result).

14 *Mulholland* (2004) 220 CLR 181 at 206 [63] (McHugh J); Gleeson CJ Article at 7.

15 *McGinty* (1996) 186 CLR 140 at 275-7 (Gummow J).

which it chooses to regulate elections... [i]t is not for this Court to hold such a law invalid on the basis of some finely calibrated weighing of detriment and benefit."[16]

The function of the roll in historical perspective

21. The scheme established under the Act must be understood against the historical background of the development of the electoral roll and its purposes.

22. The registration and listing of qualified electors on an electoral roll as a condition of the exercise of the right to vote was introduced in England and Wales by the *Representation of the People Act 1832*. Until this time, a person wishing to vote appeared at the poll, tendered his vote, and swore an oath that he had the requisite qualification.

Enrolment has always been a condition of the right to vote in federal elections

23. The electoral laws of the Australian colonies replicated important elements of the British system. At the time of Federation, the electoral laws of each of the Australian colonies conditioned the right to vote upon enrolment on the relevant electoral roll.[17]

24. From 1902, enrolment and voting for federal elections were regulated under the *Commonwealth Electoral Act 1902* (Cth) (**1902 Electoral Act**) and the *Commonwealth Franchise Act 1902* (Cth) (**1902 Franchise Act**). Section 31 of the 1902 Electoral Act relevantly provided that all persons qualified to vote at an election for the Senate or House of Representatives shall be qualified and entitled to have their names placed upon the electoral roll for the Division in which they live. Section 3 of the 1902 Franchise Act provided that, subject to certain exceptions, persons whose names were on the electoral roll for any Division shall be entitled to vote at the election of Members of the Senate and the House of Representatives.

25. Until 1911, enrolment and voting were voluntary. The obligation on qualified persons to enrol was introduced by s 8 of the *Commonwealth Electoral Act 1911* (Cth). The obligation to vote was introduced by s 2 of the *Commonwealth Electoral Act 1924* (Cth).

Electoral rolls have always served a number of purposes in the electoral system

26. Since the 1902 Electoral Act, the roll has been used for a number of purposes within the electoral system in addition to determining eligibility to vote, including (by reference to the 1902 Electoral Act):

    26.1. to determine whether a candidate has sufficient support to be nominated (s 99);

    26.2. to determine the distribution of electoral divisions (ss 15-16);

    26.3. to be available for public inspection for the purpose of objections (s 54); and

    26.4. to identify persons permitted to cast a vote before polling day (s 109 in relation to postal votes).

27. The Commonwealth electoral roll has been used for joint roll arrangements since 1905 (*Commonwealth Electoral Act 1905* (Cth)), and to determine persons with an obligation to vote since the introduction of compulsory voting in 1924.

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16 *Rowe* (2010) 243 CLR 1 at 22 [29] (French CJ).

17 *Rowe* (2010) 243 CLR 1 at 17 [16] (French CJ).

Electoral rolls for federal elections have always closed before polling day

28. At the time of Federation, each State had provisions that closed off the electoral roll to new enrolments or transfers at some point before polling day, although the precise date on which the rolls became closed varied significantly from State to State.[18]

29. At the federal level, between 1902 and 1983, the rolls closed on the day the writs for an election were issued.[19] From at least the 1930s, however, there was an executive practice of announcing the election some days before the Governor-General was asked to dissolve Parliament and issue writs for the election of the members of the House of Representatives.[20] This provided a grace period, the length of which was a matter of executive discretion, for persons wishing to enrol or transfer enrolment to do so prior to the issue of the writs.[21]

30. In 1983, the cut-off point for consideration of claims for enrolment or transfer of enrolment was extended beyond the date of the issue of the writs to the date of close of the rolls, which was fixed as seven days after the issue of the writs.

31. In 2006 the Act was amended to provide that a claim for enrolment received between 8pm on the date of the issue of the writs for an election and ending at the close of polling for that election must not be considered until after the close of polling for the election. Claims for transfer could be made within three working days of the issue of the writs.[22] Following *Rowe*, where these amendments were found to be invalid, Parliament amended the text of the Act to formally restore the seven day grace period.

***Commonwealth Electoral Act* – current provisions**

32. The concept of the roll is a cornerstone of the Act. Nowhere is this seen more clearly than in s 4(1), where an "elector" is defined to mean "any person whose name appears on a roll as an elector". Thus, the status of an elector is tied to the statutory concept of the roll. Section 4(1) defines the roll as "an electoral roll under this Act".

a) The Roll

33. Part VI of the Act deals with electoral rolls. Section 81(1) provides that there shall be a roll of the electors for each State and for each Territory. By s 82, there shall be a roll for each Division and a separate roll for each Subdivision.[23] The Subdivision rolls for a Division form the roll for that Division, and all the Division rolls for a State or Territory form the roll for that State or Territory: ss 82(3)-82(4).

34. The form of the rolls is governed by s 83, which provides (subject to two exceptions not presently relevant) that the rolls may be in the prescribed form and shall set out the surname, Christian or given names and place of living of each elector and such further particulars as are prescribed. At present, there is no prescribed form.

35. Section 111 also permits the use of computerised records in relation to the roll.

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18 *Rowe* (2010) 243 CLR 1 at 17 [16] (including footnote 46) (French CJ).

19 SC at [12] (SCB 90).

20 SC at [13] (SCB 91). See also *Rowe* (2010) 243 CLR 1 at 31 [59] (French CJ).

21 SC at [13] (SCB 91). See also Table 1A at SC [16] (SCB 91-2).

22 *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth).

23 Electoral Divisions are governed by Part IV of the Act. There is currently no Division that is divided into Subdivisions (SC at [17] (SCB 93)). As a result, references in the Act to a Subdivision are read as references to the relevant Division in accordance with s 4(4) of the Act.

b) Claims for Enrolment

36. Entitlement to enrolment is governed by s 93(1). Pursuant to s 98(1), names may be added to the rolls pursuant to claims for enrolment or transfer of enrolment or claims for age 16 enrolment. The form of the claim and other requirements for the making of a claim are set out in ss 98(2)-98(5).

37. For three classes of persons (persons outside Australia, persons having an entitlement to be placed on the roll by virtue of a relationship with an overseas elector, and itinerant electors), the Act provides for a mechanism to apply to the Commissioner for enrolment: ss 94A, 95 and 96. The plaintiff challenges the validity of ss 94A(4), 95(4) and 96(4), each of which provides that, if the person's application is received during the suspension period,[24] the Commissioner must not add the applicant's name to the roll until after the close of the poll.

38. By s 101(1), and subject to certain exceptions, every person who is entitled to be enrolled for a Subdivision (whether by way of enrolment or transfer) and whose name is not on the roll is obliged to make a claim with the Commissioner. Pursuant to s 101(4), a person who is not on the roll for any Subdivision within 21 days from the date of entitlement is guilty of an offence.[25] If an enrolled person changes address within a Subdivision, s 101(5) requires that person to give written notice of the new address to the Commissioner. A person who fails to comply with subsection (1), (4) or (5) is guilty of an offence: s 101(6). Where a person sends or delivers a claim for enrolment (including for a transfer), proceedings shall not be instituted against that person for any offence against ss 101(1) or 101(4) committed before the claim was so sent or delivered: s 101(7).

39. When the Commissioner receives a claim under s 101, s 102(1)(b)(i) requires the Commissioner to enter the claimant's name and other particulars on the roll for the Subdivision "without delay". Importantly, however, the Commissioner's obligation only arises if the claim is in order and if the Commissioner is satisfied of the claimant's entitlement to be enrolled: s 102(1)(b). Other steps must then be taken by the Commissioner.[26] Pursuant to s 103, it is an offence for any officer who receives a claim for enrolment or transfer of enrolment to fail (without just excuse) to do everything necessary to secure the claimant's enrolment. The plaintiff challenges the validity of s 102(4), which provides that the Commissioner must not consider a claim received during the suspension period until after the end of the suspension period.

40. The Commissioner is also empowered (in specified circumstances) to update or transfer a person's enrolment where the person has not made a claim under s 98 or given notice under s 101(5), and to enrol an unenrolled person (ss 103A and 103B). The plaintiff challenges the validity of ss 103A(5) and 103B(5), which provide that the Commissioner must not take proposed action (to update or transfer enrolment, or enter the person's name on the roll) within the suspension period.

41. Section 114 governs the making of objections to enrolment. Electors may make objections (ss 114(1)-(1B)), and the Commissioner must make objections in certain

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24 It is a curiosity of the Act that although the term "suspension period" is defined and used in s 102(4), the term is not used in ss 94A(4), 95(4), 96(4), 103A(5), 103B(5) and 118.

25 Unless he or she proves that the non-enrolment is not in consequence of his or her failure to send or deliver to the Commissioner a duly completed claim: s 101(4). Subsection (4) is also subject to subsection (5A) (which deals with Norfolk Islanders).

26 Including notifying the claimant of enrolment and deleting the claimant's name from the roll for the other Subdivision if the claim is for transfer: see ss 102(1)(b)(ii) and (iii).

circumstances (ss 114(2) and (4)). Objections are dealt with by the process set out in ss 116-118. A time-frame for the determination of objections is imposed on the Commissioner by s 118(1). However, pursuant to s 118(5), the Commissioner must not remove an elector's name from the roll (as a consequence of the determination of an objection) during the suspension period.[27] The plaintiff challenges the validity of s 118(5).

42. Part X of the Act provides for review of certain decisions made under the Act, including various decisions to refuse a claim for enrolment, or to dismiss an objection or remove a person's name from the roll as a result of an objection. These processes of review are real and significant. They take time to implement.

c) Elections

43. An election commences by the issue of election writs (ss 12, 32 and 33 of the Constitution and Pt XIII of the Act). By s 152(1), the writs issued for the election of Senators for States, Senators for Territories or Members of the House of Representatives shall fix the date for: (a) the close of the rolls; (b) the nomination; (c) the polling; and (d) the return of the writ. The date fixed for the close of the rolls is the seventh day after the date of the writ: s 155.

44. Part XIV provides for the nomination of candidates for the Senate and the House of Representatives. The concept of "elector" is central to the ability to nominate and be nominated: s 163. Nominations of candidates who are neither endorsed by a registered political party nor Senators or Members immediately prior to Parliament's dissolution must be signed by not less than 100 electors entitled to vote at the election for which the candidate is nominated (s 166(1)(b)(i)). The date fixed for the nomination of candidates must generally be between 10 and 27 days after the date of the writ: s 156.

45. Part XVI deals with polling. The date fixed for polling is to be between 23 and 31 days after the date of nomination: s 157. Arrangements for polling include the provision of "all necessary certified lists of voters and approved lists of voters": s 203(1)(b).

46. Certified lists (as defined in s 4) mean those lists prepared and certified under s 208(1). That provision provides that the Commissioner must arrange for the preparation of a list of voters for each Division and must certify the list. By subsection (2), the list "must include" the name of each person who: (a) is on the roll for the Division; and (b) will be at least 18 years old on polling day; and (c) is not covered by subsection 93(8AA) (sentences of imprisonment). The Commissioner is obliged by s 208(3) to arrange for the delivery of a copy of the relevant certified list to the presiding officer at each polling place "before the start of voting". A similar obligation exists under s 208(4) with respect to delivery at pre-poll ordinary voting places.

47. An approved list (as defined in s 4) means a list in electronic form that contains the same information as the most recently prepared certified list, and has been relevantly approved by the Commissioner. There is no obligation under the Act on the Commissioner to prepare an approved list – the Commissioner "may" do so: s 208A(1). However, if the Commissioner forms the view that an approved list should be available to use in connection with voting, the Commissioner (under s 208A(2)) must arrange for it to be made available to the relevant officer in time for that use.

48. The entitlement to vote is governed by s 93(2). Pursuant to that sub-section, and subject to certain exceptions not relevant here, an elector whose "name is on the roll for a

[27] The term "suspension period" is not used in s 118(5) (see footnote 24 above).

Division" is entitled to vote at elections of Members of the Senate for the State that includes that Division and elections of Members of the House of Representatives for that Division. Thus, entitlement to vote is tied to the presence of an elector's name on the roll. By s 245(1), it is the duty of every elector to vote at each election.

49. Pre-poll voting by electors (and persons who are provisionally enrolled) is permitted under Part XVA of the Act, and can occur by way of a pre-poll ordinary vote or a pre-poll declaration vote. Pre-poll voting is a means of allowing electors who would be unable to vote on polling day for one of the reasons identified in Sch 2 (s 200A) a reasonable opportunity to vote. An elector cannot vote by pre-poll ordinary vote if their name is not on the certified list or an approved list for the elector's Division (s 200DG(1)(b)). If an elector applies for a pre-poll vote and is not entitled to vote by pre-poll ordinary vote, they may vote by pre-poll declaration vote: s 200DS. Postal voting is permitted under Part XV of the Act.

50. An elector is only entitled to vote for the election of a member for the Division of the House of Representatives for which he or she is enrolled (s 221(2)), and for the Senate election for the State or Territory for which the person is enrolled (s 221(1)). In conducting the polling, s 221(3) provides that (for the purposes of s 221 and subject to two exceptions)[28] the electoral rolls in force at the time of the election "are conclusive evidence" of the right of each person enrolled on the rolls to vote as an elector.

51. Immediately after a ballot paper has been handed to a person whose name is on the certified list or approved list, the relevant officer must either place a mark against the person's name (in the case of a certified list) or make an electronic record of that fact (in the case of an approved list): s 232(1).

52. Where a person claims to vote but their name cannot be found on a certified list or approved list, they may cast a provisional vote (s 235), which must undergo a process of preliminary scrutiny to determine whether it is admissible to the count: Sch 3. (See further SC at [77]-[85], SCB 109-11.)

53. Part XIX provides for the return of writs. The writs must be returned within 100 days of their issue: s 159.

d) Other Uses of the Roll

54. Part IV of the Act provides for each State and Territory to be "distributed into Electoral Divisions" (s 56), with one member of the House of Representatives to be chosen for each Division: s 57. There is a complex procedure for redistributions of the Divisions in a State or Territory in ss 59-78, one of the triggers for which is an assessment (required to be done each month) of the extent to which the number of electors enrolled in each Division differs from the average enrolment: see ss 58, 59(2)(b) and 59(10). The central issue in a redistribution is the number of electors likely to be enrolled in the various proposed Divisions at a defined "projection time": ss 63A, 66(3)(a) and 73(4)(a). Section 76 provides for a mini-redistribution to occur after the issue of the writs for an election if the number of Divisions in a State is different from the number of members to which the State is entitled (under s 24 of the Constitution).

55. The roll is important to ensure that electoral divisions are not drawn in such a way as to bring into question whether members of the House of Representatives and the Senate have been "directly chosen by the people". Although the High Court has held that a

[28] The exceptions are: a person whose name has been placed on a roll because of a claim made under s 100 and who will be under 18 on polling day, and a person subject to a term of imprisonment covered by s 93(8AA).

requirement of equality of voting power cannot be implied from ss 7 and 24,[29] some members of the High Court have suggested that it may be conceivable that variations between the number of people in electoral divisions could be so grossly disproportionate as to raise a question whether an election held with such divisions produced a Parliament composed of members "directly chosen by the people".[30] An up-to-date roll is crucial in ensuring this risk is never realised.

56. Section 84 authorises the Commonwealth and the States and Territories to make joint roll arrangements. Pursuant to s 84 and under those arrangements, the AEC manages and maintains the roll for State and Territory electoral purposes.[31]

10 57. Members of the public have a right to inspect a copy of the rolls: s 90A. Moreover, under s 90B, the Commissioner must provide information in relation to the rolls and the certified lists of voters[32] to particular people and organisations. A table under s 90B(1) specifies matters including the person or organisation to whom the information must be given, the information to be given, and the circumstances in which it is to be given. Importantly, item 1 of the table provides that "as soon as practicable after the close of the rolls" candidates in House of Representatives elections must receive a copy of the certified list of voters for their Division. Persons who receive information from the roll must not use the information except for "permitted purposes": s 91A(1).

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Rowe and the applicable test for validity

58. There is an important difference between *Rowe* and the present case. In *Rowe*, the plaintiffs challenged legislation that amended the Act by effectively removing the statutory grace period for new enrolments and shortening the grace period for transfers. As already discussed, the seven day grace period had been in place as a matter of statutory law since 1983, and for at least 50 years prior to that had existed as a matter of executive practice. It is a matter of significance to the reasoning of each of French CJ, Crennan J and Kiefel J that the amending legislation challenged in *Rowe* sought to restrict an
30 opportunity for enrolment that had existed for many years under the pre-existing statutory regime.[33] As French CJ observed, "the law removes a legally sanctioned opportunity for enrolment".[34]

59. Here, the plaintiff does not challenge a *change* to the long-standing statutory grace period, but challenges the established position under the Act. This is a marked difference to the challenge in *Rowe*, in which the plaintiffs said there was "no recognisable defect with the seven day period".[35] *Rowe* must be read against this background.

Split in the majority judgments

40 60. The majority judgments in *Rowe* reveal differences in the approach to the test for validity to be applied.

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29 *McKinlay* (1975) 135 CLR 1; *McGinty* (1996) 186 CLR 140.

30 *McKinlay* (1975) 135 CLR 1 at 36-37, 39 (McTiernan and Jacobs JJ), 57 (Stephens J), 61 (Mason J) (see also at 69-70 (Murphy J, in dissent); *McGinty* (1996) 186 CLR 140 at 219, 222-3 (Gaudron J, in dissent).

31 SC [104] (SCB 114).

32 The certified list is discussed in paragraph [46].

33 *Rowe* (2010) 243 CLR 1 at 20-1 [25], 38-9 [78] (French CJ), 104 [318], 119-20 [382] (Crennan J), 146 [484]
50 (Kiefel J).

34 *Rowe* (2010) 243 CLR 1 at 20-1 [25].

35 *Rowe* (2010) 243 CLR 1 at 5 (Mr Merkel QC). That all parties accepted the constitutional validity of the regime existing prior to the 2006 amending Act was noted by Hayne J at 66 [190].

61. Chief Justice French applied the following test of constitutional validity: where a law has an adverse legal or practical effect upon the exercise of the entitlement to vote (the "detriment"), it will be invalid if the detriment is disproportionate to the benefit (where "benefit" means a contribution to the fulfilment of the constitutional mandate of direct choice by the people).[36] In addressing the application of the test, his Honour emphasised that it is not for the Court to engage in a "finely calibrated" process of weighing detriment and benefit, or to hold a law beyond power because the Court considers there exists a better way to achieve the desired end.[37]

62. In joint reasons, Gummow and Bell JJ adopted the following two stage analysis, based on the plurality reasons in *Roach*:[38]

62.1. The threshold question is whether, *at the time when the choice is to be made by the people*, persons otherwise eligible to choose (and wishing to do so) are effectively disqualified;

62.2. If yes to (1), is the disqualification for a "substantial reason", in that it is reasonably appropriate and adapted to serve any such end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government?

63. Justice Crennan also adopted an approach based on the plurality in *Roach*, asking whether the impugned provisions operated to disentitle or exclude otherwise eligible persons from voting, and (if so) whether the justification for the impugned provisions constituted a "substantial reason".[39]

Commonwealth's position on the test for validity

64. The Commonwealth does not challenge the result in *Rowe* on the scheme there in issue. It accepts that the test for validity as stated by the *Roach* plurality[40] (and applied by three members of the majority in *Rowe*)[41] applies to cases of disqualification. However, precisely what is meant by disqualification calls for further enquiry on the different scheme in this case. Applying that test, the relevant question is whether the disqualification is for a substantial reason. The Commonwealth does not accept that the *Roach* test applies to the further category relied upon by the plaintiff, namely provisions said to distort the integrity of the electoral system. Reconciling *Rowe* with the Commonwealth's ultimate argument here is addressed at [83]-[85] below.

65. The question of who bears the burden of establishing that any disqualification effected by the impugned provisions is not for a substantial reason has not yet been authoritatively determined. The Commonwealth says that any burden properly lies with the plaintiff,[42] although on the facts of this case it does not matter because there is clearly a substantial reason.

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36 *Rowe* (2010) 243 CLR 1 at 12 [2], 20-1 [25].
37 *Rowe* (2010) 243 CLR 1 at 22 [29].
38 *Rowe* (2010) 243 CLR 1 at 58-9 [160] (emphasis in original) and 59 [161].
39 *Rowe* (2010) 243 CLR 1 at 119 [376], [381], 120-1 [384].
40 *Roach v Electoral Commissioner* (2007) 233 CLR 162 (***Roach***) at 199 [85] (Gummow, Kirby and Crennan JJ).
41 *Rowe* (2010) 243 CLR 1 at 59 [161] (Gummow and Bell JJ), 119 [381], 120-1 [384] (Crennan J).
42 See *Rowe* (2010) 243 CLR 1 at 88-9 [262]-[264] (Hayne J), 146-7 [484]-[485] (Kiefel J).

Purpose of the impugned provisions

66. The plaintiff's approach to the identification of the legitimate purposes of the impugned provisions is unduly narrow, and fails to give sufficient, if any, weight to the Act's text beyond the individual impugned provisions, its overall structure, context, or history. All of those matters are relevant to the proper identification of the legitimate purpose of a law, as part of the application of the "ordinary processes of statutory construction".[43]

67. It is not possible to disentangle the purpose of the impugned provisions from the purpose of the roll itself, and the "pivotal" role that it plays in Australia's electoral system.[44] The plaintiff appears to regard the roll as nothing more than a clerical or organisational tool, operating independently of the remainder of the electoral system, and the impugned provisions as a non-essential feature of a roll. In fact, the roll represents a fundamental choice by Parliament as to the nature of the electoral system it has designed, and the impugned provisions are central to the very definition of the roll.

68. The fundamental choice made by Parliament as to the nature of the federal electoral system to which the roll gives effect is the idea that a person's qualification as an elector is to be determined, not by reference to criteria such as those found in s 93 of the Act (for example), but by reference to the singular and straightforward criterion of enrolment.[45] That is a choice informed by historical considerations and experience.[46] To speak, therefore, as the plaintiff does, of a person who is not enrolled as being "otherwise entitled to vote"[47] risks eliding two distinct concepts; viz., the entitlement to be enrolled and the entitlement to vote. "Enrolment is not merely evidence of an elector's qualification to vote; enrolment is itself a qualification to vote".[48]

69. The significance of enrolment as the sole source of an entitlement to vote, and the advancement of the legislative policy for which the Commonwealth contends,[49] is reinforced by s 361. Section 361 provides that while the Court of Disputed Returns "may inquire into the identity of persons, and whether their votes were improperly admitted or rejected, assuming the roll to be correct, ... the Court shall not inquire into the correctness of any roll". It follows that "it is to be expected that there will be no perfect correspondence" between persons qualified to vote, and persons satisfying the criteria for enrolment.[50] It also follows that the place and time to challenge the roll lies other than in the Court of Disputed Returns after polling day. Any such challenge should be able to be brought and heard early through the means described at paragraphs [41]-[42] above.

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43 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Monis v The Queen* (2013) 249 CLR 92 at 147 [125] (Hayne J), at 205 [317] (Crennan, Kiefel and Bell JJ); *Tajjour v New South Wales* (2014) 254 CLR 508 (***Tajjour***) at 552 [41] (French CJ), 579 [148] (Gageler J); *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 62 [134] (Hayne J).

44 *Muldowney v Australian Electoral Commission* (1993) 178 CLR 34 (***Muldowney***) at 39 (Brennan ACJ).

45 See *Rowe* (2010) 243 CLR 1 at 15 [12] (French CJ); *Muldowney* (1993) 178 CLR 34 at 39 (Brennan ACJ).

46 See *Rowe* (2010) 243 CLR 1 at 15 [12] (French CJ). See also eg *Berrill v Hughes* (1984) 59 ALJR 64 at 66 (Mason J).

47 See eg Amended Statement of Claim at [27] (SCB 18).

48 *Muldowney* (1993) 178 CLR 34 at 40 (Brennan ACJ); cf *Rowe* (2010) 243 CLR 1 at 16 [13], 18 [17] (French CJ), 52 [133] (Gummow and Bell JJ).

49 See eg *Berrill v Hughes* (1984) 59 ALJR 64 at 66 (Mason J); *Re Berrill's Petition* (1976) 134 CLR 470 at 474 (Stephen J).

50 *Rowe* (2010) 243 CLR 1 at 52 [133] (Gummow and Bell JJ).

70. To focus solely on the part played by the roll on polling day (or even in relation to voting more generally) is to take too narrow a view of both the "pivotal" role Parliament has assigned to it, and the electoral process in which it plays that role.

71. Sections 12, 32 and 33 of the Constitution, reinforced by Part XIII of the Act,[51] demonstrate that an election is not a single-day "event", but rather a process that is commenced by the issuance of writs, and concluded by their return. That process includes the steps of nomination of candidates[52] (which may determine the results of the election in the event that no more positions are available than candidates who have nominated[53]), communication between candidates and electors,[54] polling (which may take place in a number of ways and at different times[55]), and scrutiny of votes.[56]

72. By invoking the concept of an "elector" at each of those stages, Parliament has conferred upon the roll a status and purpose far more significant than a mere tool by reference to which a person's right to cast a vote on polling day may be determined. The roll is the means of defining the single class of eligible participants in the process through which the choice by the "people" referred to in ss 7 and 24 of the Constitution is given effect.[57] Were it otherwise, a division would emerge between those entitled to participate in the full range of rights, benefits and responsibilities relating to the electoral process, and those entitled only to vote on polling day. It is a legitimate objective for Parliament to seek to ensure that there is one, coherent, class of persons entitled to participate in all aspects of the electoral process.

73. Once the legitimacy of Parliament's fundamental choice to make a person's qualification as an elector (and thus his or her right to participate in the electoral process commenced by the issuance of writs) depend solely on their inclusion on a "roll" is accepted,[58] it follows that an essential feature of such a roll is that its content be fixed before the first of the steps that make up the electoral process is to occur.

74. If the roll were not to "close", then a radical alteration would be worked upon the electoral system for which the Act provides: a right to participate in each relevant step of the electoral process premised on the fact of enrolment would be replaced with a general right to participate wherever the criteria for enrolment were satisfied. It follows that it is essential that the Act set out when and how the content of the roll against which a person's entitlement to participate in the process will be determined.

75. It is in that context that the definitional role of the impugned provisions emerges clearly. Sections 152(1)(a) and 155 specifically acknowledge the inevitability of the roll "closing", and provide for the date upon which that is to occur. Each of ss 94A(4), 95(4), 96(4), 102(4), 103A(5), 103B(5) and 118(5) then simply recognises the logical corollary of the closing of the rolls, namely, the suspension of changes to the rolls while they are

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51 See also ss 86-90 of the 1902 Electoral Act.

52 Both nominating (s 166(1)(b)(i)) and being nominated (s 163(c)(i)).

53 See s 179 of the Act.

54 See s 90B of the Act.

55 See eg pre-poll voting (s 200DG), postal voting (Part XV) and ordinary voting on polling day (s 245).

56 In relation to the latter, see *Australian Electoral Commission v Johnston* (2013) 251 CLR 463 at 489-90 [79]-[82] (Hayne J).

57 The fact that the "people" exercise their "direct choice" through the class of persons entitled to participate in the process is inevitable, and not problematic: see *Rowe* (2010) 243 CLR 1 at 52 [133] (Gummow and Bell JJ). See also *Evenwel v Abbott, Governor of Texas* 578 US ___ (2016) (United States Supreme Court).

58 Noting there is no challenge to the definition of "elector" in s 4, or to s 93(2), or any other term that confers rights by reference to the concept of "elector" as defined.

"closed". In this way, the impugned provisions may be seen to be integral to the very concept of a "roll", and to share its fundamental purpose.

76. Recognition of the fundamental purposes outlined above, and the centrality of the impugned provisions to the scheme, leads to some of the more specific purposes upon which the Commonwealth relies.

77. By making participation in the electoral process dependent upon membership in the single class of persons defined as electors, by reference to the content of the roll on the date upon which it "closed", the orderly and efficient conduct of elections is advanced. That is because an electoral system of that kind requires a range of processes and procedures (principally the making, investigation, and determination of claims for enrolment) to occur prior to polling day, rather than on or after it. Absent such a system, delays are likely.[59] Furthermore, if the roll as closed were not the definitive statement of a person's right to vote, then the "democratic process which [the electoral system] is designed to serve" would be "expose[d] to risks of dislocation" and the significant benefits of certainty to the electoral system as a whole would be lost.[60]

78. Moreover, it goes without saying that, to enable the use of the roll on polling day, and thus to achieve the beneficial objectives outlined above, other practical steps need to be taken. To take the most obvious example, the roll (or at least the information contained on it) needs to be accessible at each polling place. The Act provides for that to be done by means of the production and distribution of certified lists of voters pursuant to s 208 (as well as any approved lists, pursuant to s 208A). The production and distribution of certified lists is a time consuming task: see SC at [59], SCB 105. In addition to the requirement of "closure" that is inherent in the concept of a roll, therefore, there is a practical need to "close" the rolls to facilitate the timely production and distribution of certified lists before polling day. This is not to suggest, as the plaintiff seeks to do by way of a "straw man" in PS [41], that the certified list, or approved list, supplants the roll. It is simply to recognise that the orderly and efficient conduct of elections on polling day, in a system that relies upon the roll to qualify a person to vote, requires there to be some practical means by which the content of the roll can be ascertained in a timely and efficient manner in the hustle and bustle of a polling station. While a person claiming to vote, whose name cannot be found on a certified list or approved list, may cast a declaration vote, the processes involved in issuing and scrutinising a declaration vote are more complex and time consuming than for an ordinary vote: see SC at [77], [83] and [134] (SCB 109-11 and 124).[61] In those circumstances, ensuring the timely production of the certified and approved lists is a legitimate purpose.

79. The closure of the roll at a point shortly after the electoral process is commenced also serves to advance other legitimate objectives at a point in time prior to the process commencing. Critically, the impugned provisions provide (particularly in the context of no fixed election cycle) a continuing incentive to persons to comply with their legal duty under ss 101(1) and 101(4).[62] In that way, the impugned provisions promote the *ongoing* accuracy of the rolls.

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59 *Rowe* (2010) 243 CLR 1 at 15 [12] (French CJ).

60 *Re Berrill's Petition* (1976) 134 CLR 470 at 474 (Stephen J). See also *Rudolphy v Lightfoot* (1999) 197 CLR 500 at 508 [12] (The Court).

61 The complexity and duration of the preliminary scrutiny process would be increased if it were necessary to determine not just whether persons were qualified as an elector at the time of the preliminary scrutiny but also at the time that they cast their vote.

62 See *Rowe* (2010) 243 CLR 1 at 87-8 [261]-[262] (Hayne J), and 146-7 [481]-[485] (Kiefel J).

80. The ongoing accuracy of the rolls is important, for reasons that include:

80.1. the proper, proportionate, distribution of States and Territories into Divisions on or before the day on which the writs for a general election are issued under Pt IV of the Act (see above at [54]).

80.2. determining whether a political party may be registered under Part XI of the Act (see ss 123(3) and 126(2)(ca)).

80.3. the use of the roll for the purposes of State or Territory elections in accordance with arrangements under s 84 of the Act.

10 80.4. for provision to the persons and organisations prescribed in s 90B(1) (including registered political parties, members of the House and Senators), and s 90B(4) (including Commonwealth law enforcement agencies such as the Australian Federal Police and the Director of Public Prosecutions).

81. Furthermore, the Act as a whole is premised on the ongoing accuracy of the roll (demonstrated, for example, by Part IX (dealing with objections), and the provisions for public inspection: see s 90A).

82. Finally, and most immediately, the provision of the seven day grace period serves the
20 legitimate end of *enhancing* the franchise by providing a last-chance opportunity for persons who have not complied with their obligations under ss 101(1) and 101(4) of the Act to make an application for enrolment or transfer.[63]

No relevant disqualification

83. The view that *any* legislative provision that operates to prevent *any* otherwise eligible person from enrolling at *any* time they choose and thus from voting, is a disqualifying provision is not supported by a majority in *Rowe*. Although Gummow and Bell JJ, and arguably Crennan J, adopted this broad position,[64] the balance of the Court did not. For each of Hayne, Heydon and Kiefel JJ, the impugned provisions were not disqualifying
30 provisions because they did not bar persons from exercising their entitlement to enrol and vote.[65] The plaintiffs were prevented from voting as a result of their own failures to comply with statutory obligations to enrol.[66] For French CJ, an important element of his reasoning that the impugned provisions effected a disqualification was that the provisions diminished existing opportunities to enrol and transfer.[67] His Honour's characterisation of the concept of "disqualification" did not go so far as other members of the majority, and (in the Commonwealth's submission) does not support the proposition that any provision having any kind of impact on a person's ability to enrol and vote is a disqualification in any relevant sense.

40 84. The provisions giving effect to the suspension period do not operate to disqualify electors. Unlike the provisions in *Roach* (and consistently with the reasons of Hayne, Heydon and Kiefel JJ in *Rowe*), the impugned provisions do not operate to disbar any group of electors from voting. What they do is suspend any changes being made to the roll for a short period leading up to polling day, in order to allow for (among other things) the orderly conduct of the election.

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50 63 See eg *Rowe* (2010) 243 CLR 1 at 31-2 [60] (French CJ).
64 *Rowe* (2010) 243 CLR 1 at 58-9 [160] (Gummow and Bell JJ), 119 [381] (Crennan J).
65 *Rowe* (2010) 243 CLR 1 at 77 [225] (Hayne J), 94 [284] (Heydon J), 147 [488] (Kiefel J).
66 *Rowe* (2010) 243 CLR 1 at 77 [225] (Hayne J), 94-5 [285]-[286] (Heydon J), 147 [488]-[489] (Kiefel).
67 *Rowe* (2010) 243 CLR 1 at 38-9 [78].

85. Importantly, any person who is not able to vote on polling day by reason of the suspension provisions could have voted if he or she had either complied with the relevant statutory obligations to enrol or transfer enrolment (or in the case of persons turning 18 or becoming Australian citizens had availed themselves of the statutory mechanisms to enable voting in these exceptional cases[68]). That obligation is not onerous and is complied with by the vast majority of people.[69] This fact, together with the fact that the suspension provisions form part of a long-standing regime to provide for the orderly conduct of elections, mean the impugned provisions are not properly characterised as disqualifying provisions.

No "distortion"

86. The plaintiff's "distortion" argument involves accepting two erroneous assumptions: first, that the Constitution requires a perfect electoral system; and secondly, that a perfect electoral system is judged solely by reference to whether it achieves the single goal of maximising the geographically-correct (PS [28]) franchise, which means (on the plaintiff's argument) that the system prioritises having the greatest number of persons who are entitled to vote actually voting on polling day in the Division they reside in at the time. Anything less, on the plaintiff's argument, effects a "distortion" sufficient to "engage the constitutional limitation on power" (PS [27]).

87. However, the Constitution does not require perfection in this rigid and limiting sense. For example, compulsory voting is not mandated by the Constitution,[70] despite the fact that a system without compulsory enrolment and voting would involve a substantial "distortion" (in the sense used by the plaintiff) created by the significant percentage of electors who would not vote on polling day.[71] Moreover, in affording the Commonwealth Parliament "considerable discretion" in designing the electoral system,[72] the Constitution recognises the need for the Parliament to balance a variety of legitimate ends. There is no foundation in the Constitution for requiring the Parliament to elevate one purpose – maximising the geographically-correct franchise – above all others. Indeed, doing so would lead to undesirable and unworkable outcomes. For example, it would be a "distortion" for the Parliament to require a person to live at an address for a month before being entitled to make a claim for enrolment or transfer of enrolment in respect of that address (as it does in s 99). It would be a "distortion" for the Parliament to permit voters who no longer reside in Australia to enrol and vote (as it does, in ss 94 and 94A). There are a range of priorities and practicalities that must be taken into account in designing an electoral system, none of which can be accommodated by the plaintiff's distortion analysis which falsely inflates a single priority and seeks to make it a constitutional mandate. The plaintiff's erroneous approach has no identifiable support in Australian or US jurisprudence and should be rejected.

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68 As to persons who turn 18, see ss 100, 102 and 221(3)(a). As to persons who are to become Australian citizens, see s 99B. Although s 99(2) prevents a person who has moved to a new Division from transferring their enrolment until they have lived at the new address for a month, persons affected by this provision can still vote.

69 See SC at [24]-[38] (SCB 95-8). See also SC at [18] and [23] (SCB 93, 95).

70 *McGinty* (1996) 186 CLR 140 at 283 (Gummow J); *Roach* (2007) 233 CLR 162 at 173 [5] (Gleeson CJ); *Rowe* (2010) 243 CLR 1 at 70-1 [201]-[203] (Hayne J).

71 Against this possibility it may be observed that there is a relatively low number of claims lodged in the suspension period: compare the table at SC [20] (SCB 94) and SC [117] (SCB 120).

72 *Rowe* (2010) 243 CLR 1 at 22 [29] (French CJ).

Plaintiff has failed to establish absence of a substantial reason

88. The Commonwealth disputes that the validity of the impugned provisions falls to be determined in accordance with the structured process of "proportionality testing" outlined in the joint judgment in *McCloy*. Here (unlike *McCloy*), the starting point is not an identified freedom derived from the Constitution and operating to limit legislative and executive power.[73] Rather, the plaintiff relies on principles derived from *Roach* and *Rowe*, in circumstances where the relevant constitutional provisions upon which those principles are based confer a broad power and requirement on the Commonwealth Parliament in designing the electoral system. There is necessarily a proactive and positive role for the Parliament in establishing and maintaining the electoral system. While it may make sense where the starting point is an identified and generally applying right or freedom to then say that legislation burdening that right or freedom will only be permitted if a prescriptive proportionality test of the *McCloy* kind can be satisfied, such an approach is "constitutionally inappropriate"[74] in the present context.[75] It would be fundamentally inconsistent with the breadth of the powers that the Constitution confers upon the Commonwealth Parliament in relation to the design of the form of representative government to apply at the Commonwealth level, and the electoral system to give effect to it.

89. The plaintiff has failed to demonstrate the absence of a "substantial reason" supporting the impugned provisions. The plaintiff implicitly accepts that, at some point in time, there did exist a "substantial reason" for a suspension period commencing seven days after the issue of writs. The plaintiff contends, however, that such a suspension period has become invalid "as a result of developments in technology and the availability of new resources" (PS [8]). Nowhere, however, does the plaintiff identify what changes in technology or resources have occurred, and when that is said to have happened. The failure to do so exposes one fundamental difficulty with the plaintiff's case.

90. The date on which the suspension period created by the impugned provisions commences is only three days before the earliest date upon which the first step in the electoral process invoking the concept of an "elector" occurs (ie, close of nominations for candidates).[76] When it is recalled that certain steps must be taken before a claim for enrolment or transfer may be accepted, and that it is the practice of the AEC to process all enrolment applications received prior to the close of the rolls within 40 hours of the close,[77] that period of time may be accepted as closely tailored to the date upon which the roll first becomes relevant to the electoral process commenced by issue of the writs.

91. A point of distinction between the present case and *Rowe* may thus be observed immediately: in *Rowe* there was no suggestion that the scheme established by the Act pursuant to which a single class of electors is defined for participation in all relevant steps in the electoral process, would have been adversely affected by retention of the existing suspension period, or advantaged by its lengthening. In short, the electoral system established by the Act can accommodate a delay of seven days from the issuing of writs to the closing of rolls without threatening the nature of the scheme.

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73 See eg *Lange* (1997) 189 CLR 520 at 560 (The Court).

74 See *Roach* (2007) 233 CLR 162 at 178-9 [17] (Gleeson CJ).

75 It has been recognised in other contexts that "proportionality" analyses might vary depending on factors including the purpose of the legislation at issue and the intersection of that legislation with the Constitution: see, eg, *Rowe* (2010) 243 CLR 1 at 139 [455] (and see also at 142 [466]) (Kiefel J); *Plaintiff S156 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 44-5 [34]-[36] (The Court).

76 See s 156 of the Act. See also SC at [49] (SCB 102).

77 SC at [59] (SCB 105).

92. Next, in circumstances where an electoral system based around the use of an electoral roll is not challenged by the plaintiff, and an essential feature of such a system is the selection of a particular date as the date upon which the roll is closed, it must necessarily follow that Parliament will be afforded a wide degree of latitude in the precise date that it chooses, and the way in which it is to be calculated. The requirement that a "substantial reason" be demonstrated, in those circumstances, does not require the Commonwealth to establish that the period chosen by Parliament, *and no other*, is reasonably appropriate and adapted to serve the identified ends. It is, with respect, inconceivable that the Constitution's requirements could be as specific as to identify a particular acceptable number of days, or even a particular event by reference to which the counting must occur (the issue of writs, polling day, or some other event), let alone that the Constitution would mandate a precise enquiry into how that singular day might change over time. The plaintiff's submissions, by describing the Court's holding in *Rowe* as the rejection of "zero days (for enrolments) and three days (for transfers) after the issue of writs" (PS [6]) may appear to suggest otherwise. But it does not follow from the rejection of two numbers (zero and three), that the destiny of this Court is to hear repeated challenges to the suspension period until Parliament lights upon the one acceptable number (cf PS [56]).

93. It is sufficient, therefore, that Parliament's choices as reflected in the Act (ie, counting forward seven days from the date of the issue of writs) fall within the range of options reasonably open to it to advance the purposes identified above under the Constitution. Counting forward from the issue of the writs, instead of backwards from polling day, cannot be said to be irrational or disproportionate in any way when the steps in the election process are each calculated by reference to the date of issue of the writs (cf PS [55]). And the number of days is plainly within the reasonable range, having regard to the time at which nominations occur (as described above), and the considerations outlined below.

94. In that regard, it is important to appreciate that the selection of an appropriate period is not a decision that depends only upon considerations of physical practicality. Parliament is entitled to take into account, and balance, a wide variety of considerations such as:

94.1. whether the only effect of permitting later enrolment will be to allow people whose claims are presently received in the suspension period to enrol or transfer, or whether it would also encourage people who would currently make claims prior to the suspension period to defer making such claims: see eg SC at [149], [163], [183] (SCB 127, 131-2, 134);

94.2. the extent to which permitting later enrolment would weaken or remove the incentive to comply with the obligation under s 101(1) and 101(4), thus lowering the accuracy of the rolls on an ongoing and continuous basis;[78]

94.3. whether a given amount of resources may be more effectively deployed to secure the enrolment of the maximum number of persons by permitting later enrolments, or by maintaining the current cut-off combined with a program of public education: see eg SC at [149], [163], [183] (SCB 127, 131-2, 134);

94.4. whether any technology required to implement later enrolment has been adequately tested, found to be reliable and can be scaled up: see eg SC at [69]-[76] (SCB 107-9);

[78] Cf the experience in Victoria: SC at [154] (SCB 128-9).

94.5. whether permitting later enrolment would divert the attention of AEC officers and employees from other critical tasks in the suspension period, noting the organisational and logistical complexity of conducting an election: see eg SC at [83] (SCB 111), [134] (SCB 124-5) and SCB 142, 153;

94.6. the amount of time that must be allowed to achieve a high degree of certainty that all necessary steps that must be taken prior to polling day to ensure that all objections and claims made prior to the suspension period are dealt with, and a certified list is delivered to each polling place: see eg SC at [59]-[61], [68] (SCB 105, 107);

94.7. the amount of time that is fair and reasonable to provide to people to permit them to remedy their default in failing to comply with their obligations under s 101(1) and 101(4): see eg SCB 155. In this regard, it may be observed that "[i]t would be a curious application of a test of proportionality if a law, otherwise valid, was invalid because Parliament should recognise that people will not fulfil their statutory obligations";[79] and

94.8. the need to avoid delays in declaring the election (SC at [50], SCB 103). If the plaintiff succeeds, it is reasonable to infer there will be a considerable increase in the number of declaration votes as a result of claims for transfer or enrolment being made after the production of certified lists. This could lead to delay in declaring the election, as the scrutiny and counting of declaration votes is a time-consuming process: SC [78], [82]-[85] (SCB 110-1).

95. Furthermore, it must not be overlooked that the original purpose of the seven-day period was to remove the discretion which had previously resided in the Executive not to give advance notice of the calling of an election and closing the rolls.[80]

96. Significantly, the plaintiff fails to confront the risk that removing the suspension period may itself "disenfranchise" a significant class of persons. Without the suspension period, it is reasonable to infer there will be a category of persons who will wait until polling day to enrol or who do not understand there to be any requirement to enrol. There is no evidence before the Court that the AEC has the capability to process enrolment claims on polling day at at polling stations.

97. Finally, the plaintiff's purported identification of two "obvious and compelling alternatives" to the system of which the impugned provisions form a part does not demonstrate the absence of a substantial reason underpinning those provisions.

98. The plaintiff has failed to demonstrate that the two alternatives he has identified would in fact be reasonably practicable. The plaintiff seeks to avoid any real inquiry at all into the precise manner in which his alternative proposals could be made to work, and if so at what cost, by asserting that it is "beyond the judicial function to delve so deeply into the details of hypothetical alternatives" (PS [49]). It is for the plaintiff, however, to establish the existence of a reasonably available alternative.[81]

99. There is a further, particular, reason why this contention of the plaintiff's should not be accepted in relation to the first alternative. In that regard, the plaintiff now appears to accept that this alternative could not "interact with the existing provisions of the Act",

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79 *Rowe* (2010) 243 CLR 1 at 147 [488] (Kiefel J); see also at [314] (Heydon J). Such an application of a test of proportionality would be antithetical to promoting coherence in the law.

80 *Rowe* (2010) 243 CLR 1 at 31-2 [60] (French CJ).

81 See *Rowe* (2010) 243 CLR 1 at 88 [262] (Hayne J), 146-7 [484]-[485] (Kiefel J); *McCloy* (2015) 89 ALJR 857 at 872 [59]-[61] (French CJ, Kiefel, Bell and Keane JJ), 916 [335], 922 [379] (Gordon J).

but contends that "there is no reason why the Act ... could not be amended" (PS [53]). However, the plaintiff, in his particulars to paragraph 24(b) of the Amended Statement of Claim (SCB 16), limited his case to a contention that the first alternative was "reasonably practicable because there are several options already available to the Electoral Commissioner to put this alternative into practice under the Act". The Commonwealth has proceeded on the basis that the plaintiff's case is limited in accordance with his pleading (see Defence, paragraph 24(g)(ii)(4) (SCB 60-1)). The position the plaintiff now takes is a departure from his pleaded and particularised case.

100. The fact that the Special Case does not contain a comprehensive collection of facts relevant to a demonstration of the practicability of the first alternative is thus explicable by the plaintiff's deliberate forensic decision to restrict himself to a case that the first alternative could be implemented within the confines of the Act as it stands.

101. Even putting to one side the fact that the plaintiff now implicitly concedes that the New South Wales and Victorian regimes could not, in fact, be achieved within the confines of the existing Act, those regimes are not a reasonably practicable means of achieving the legitimate purposes identified above.[82] Both of those regimes reflect a choice by their respective legislatures to employ or experiment with a system that substantially modifies the traditional system employed by the Commonwealth and (until recently) by all the States. The new systems involve de-coupling the entitlement to vote from enrolment, and in this way those jurisdictions have determined not to identify a single class of electors who may participate in all stages of the electoral process.

102. In relation to the second alternative, the failure of the plaintiff to put forward any basis upon which it could be inferred that the suspension period would commence on any materially different date to that presently applicable means that the very premise of the plaintiff's case in this regard is not established. No matter what the level of "granularity" at which the plaintiff's proposed alternatives are required to be assessed, the plaintiff must at least provide some basis for concluding that the alternative would involve a lesser burden than the existing law.

103. In any event, by fixing the period by reference to "the minimum period necessary for the Electoral Commissioner, after he has prepared a certified list for pre-poll voting, to prepare and provide the equivalent of a supplementary certified list and/or the equivalent of a Notebook roll for use at polling booths on polling day",[83] the alternative would of necessity create two classes of electors within the one electoral process. It follows that many of the legislative purposes identified above would not be achieved by the second alternative.

104. It should also be noted that the Queensland regime is not, in fact, an example of a "shorter suspension period" regime where the suspension period is calculated backwards from polling day. Under that regime, the roll is closed between five and seven days after the issue of writs,[84] with no amendments to the roll being permitted until after the end of

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82 Under those systems, there is no provision for "election day enrolment", but rather the ability to cast a provisional vote, which will be admitted to scrutiny in certain circumstances. The Victorian regime does not even permit a person to transfer their enrolment, or case a provisional vote on that basis, after the commencement of the suspension period. In relation to Victoria: see ss 29(3), 63(3), and 108 of the *Electoral Act 2002* (Vic) and reg 41 of the *Electoral Regulations 2012* (Vic). In relation to NSW: see s 106 of the *Parliamentary Electorates and Elections Act 1912* (NSW).

83 Amended Statement of Claim, particulars to paragraph [24(b)] (SCB 17-8).

84 *Electoral Act 1992* (Qld) s 84(2).

polling.[85] Even if they are not enrolled, however, a person is entitled to vote (by making a declaration vote[86]) if they are entitled to be enrolled, and have submitted a claim for enrolment prior to 6pm on the day before polling day.[87]

105. As an alternative matter, the Commonwealth submits that, even if the impugned provisions are to be subject to "proportionality testing" in accordance with the plurality judgment in *McCloy*, they would still withstand such scrutiny for the reasons given above:

    105.1. There is plainly a rational connection between each of the impugned provisions, and the suspension period that they establish, and the purposes identified above.[88] That is, the suspension period furthers those purposes.

    105.2. Insofar as the availability of alternative measures is concerned,[89] neither of the two alternatives advanced by the plaintiff constitutes an effective (let alone equally effective) means of achieving the purposes identified above.

    105.3. The balance between any burden created by the impugned provisions, and the advancement of the legitimate objectives identified above, is adequate,[90] and the impugned provisions are thus all reasonably appropriate and adapted to serve a legitimate end.

Severance

106. The question of severance does not arise on the Commonwealth's primary submissions. If any such issue is reached, the Commonwealth will seek to deal with it orally.

PART VII. ESTIMATED HOURS

107. The Commonwealth estimates it requires three hours to present its oral argument.

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85 *Electoral Act 1992* (Qld) s 65(5).
86 *Electoral Act 1992* (Qld) s 115.
87 *Electoral Act 1992* (Qld) s 106(1)(d).
88 *McCloy* (2015) 89 ALJR 857 at 875-6 [80] (French CJ, Kiefel, Bell and Keane JJ).
89 *McCloy* (2015) 89 ALJR 857 at 876 [81] (French CJ, Kiefel, Bell and Keane JJ).
90 *McCloy* (2015) 89 ALJR 857 at 876-7 [87] (French CJ, Kiefel, Bell and Keane JJ).